Neutral Citation Number: [2015] EWHC 3585 (Admin)

Case No: CO/1590/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2015

Before:

THE HONOURABLE MR JUSTICE CRANSTON

- -

Between:

SPEED MEDICAL EXAMINATION SERVICES LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Richard Gordon QC and Gerard Rothschild (instructed by **Group General Counsel, Speed Medical Examination Services Ltd.**) for the **Claimant**
James Eadie QC and Anneli Howard (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 27/10/2015 and 28/10/2015

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Approved Judgment

Mr Justice Cranston:

Introduction

1. In this judicial review the claimant challenges the legality of part of the Government's reforms to the process for handling soft tissue whiplash claims. The reforms include 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"). The claimant contends that the MedCo system is both irrational and also unlawful as being incompatible with national and European competition law.

2. The claimant, Speed Medical, is a medical reporting organisation ("MRO"). MROs arrange for medical reports to be prepared for litigation. A legal adviser provides the MRO with details of a client and the type of expert required. The MRO will liaise both with the client to ascertain availability and to obtain authority to access medical records, and also with a suitable medical expert from its panel to arrange a convenient appointment to examine the client. The MRO checks the report produced by the expert for factual accuracy and compliance with the Civil Procedure Rules. There is a trade association for MROs, the Association of Medical Reporting Organisations ("AMRO"), of which the claimant is a member.

3. The claimant was founded in 1998. By early 2015 it was employing approximately 215 staff and its panel of experts numbered some 15,000 persons. Over the four years before the decision challenged in this judicial review, it had an average annual turnover of some £40 million. In the period January to March 2015, the claimant was providing an average of 9,500 reports per month and appears to have had significantly more than 20 percent of the market. The claimant's evidence is that the introduction of the MedCo system has caused a decline in its business.

4. The defendant is the Secretary of State for Justice ("the Secretary of State"), whose department is the Ministry of Justice, which is responsible for civil justice and for the adoption of the MedCo system.

5. The first interested party is MedCo, a company limited by guarantee registered under the Companies Act 2006. It is self-funding through the fees it charges. The members of MedCo are the major representative bodies in this area – AMRO, the Association of Personal Injury Lawyers, the Motor Accident Solicitors' Society, the Forum of Insurance Lawyers, the Law Society, the Association of British Insurers, the Motor Insurers' Bureau, the British Medical Association and the Chartered Society of Physiotherapy. There is only one class of member and the rights and obligations of members are not transferable. Every member has one vote. Under MedCo's Articles of Association the Secretary of State has observer status on MedCo's Board and all its committees. The person chairing the board must be independent and the first Chair was proposed by the Secretary of State before being appointed by the MedCo Board. A meeting of the MedCo Board on 3 June 2015 received legal advice as to whether MedCo's powers are sufficient for the purposes of bringing into effect the various policy decisions taken by the Ministry of Justice.

6. Considerable expert evidence from economists was available for this claim, three reports from Alix Partners (Matthew Hughes and Matthew Hunt/Rameet Sangha) for

the claimant, and three reports from Dr Majumdar of RBB Economics for the Secretary of State. Both sides accepted that this evidence was of only incidental assistance in deciding the issues in the judicial review. Accordingly, I have been relieved of the burden of evaluating it.

7. There is no need to canvass the lengthy procedural history of this judicial review. Essentially Leggatt J refused permission to apply for judicial review but subsequently, when the application was renewed, another judge ordered a 'rolled-up' hearing to consider both permission and, if permission were to be granted, the judicial review itself.

The whiplash reform programme

8. Since 2012 the Secretary of State has been working on a "Whiplash Reform Programme". That derives from a concern with the increase in whiplash claims while the number of reported road traffic accidents has been declining. Further, there are some figures which show that the number of whiplash claims in Britain is disproportionate to those made in other European countries. There has been a related concern with the impact of this on motor vehicle insurance premiums.

9. In June 2012, a Ministry of Justice paper identified the problem statistically and set out the options: to do nothing, to introduce independent medical panels to assess whiplash injuries; and to increase the small claims fast track limit to deal with such cases at lower cost and more expeditiously. That paper noted the role of MROs in the commissioning of expert medical reports. It also noted that the difficulty inherent in diagnosing a whiplash claim created problems for insurers in contesting it. It added:

> "1.21 There is anecdotal evidence that some existing arrangements for selecting and commissioning medical practitioners and experts, and for paying for their assessments, could generate financial incentives which could be associated with the existence of exaggerated or unmeritorious claims. Furthermore existing clinical governance arrangements suggest that there is scope to improve current levels of feedback and clinical audit and peer review in relation to medical assessment."

Later the paper stated:

> "2.19 It is possible that the financial incentives facing the medical practitioner or expert in relation to their medical assessment may be affected by who commissions and (initially) pays for the assessment, including in relation to whether and how repeat business relationships might develop, and in relation to how particular individual medical practitioners and experts might be selected. The impacts identified in this [paper] are contingent upon the funding model and commissioning and selection arrangements supporting an outcome whereby fewer exaggerated and unmeritorious claims are made.

> 2.20 Whichever variant is chosen the reforms would amount to establishing increased gatekeeping compared to now in relation to who might provide a medical assessment in future, and enhanced standards and quality assurance in relation to the content of medical assessments."

10. That paper led to the December 2012 Ministry of Justice Consultation on *Reducing the Number and Costs of Whiplash Claims*. The Ministerial foreword described Britain as the whiplash capital of the world, stated the figures and referred to the Prime Minister's recognition of the pressing need to tackle the rising cost of insurance premiums. It quoted the insurance industry's estimate that the cost of whiplash claims to the average policy-holder was £90 per year. The Consultation document itself detailed the figures and stated that the Government was identifying options to reduce the number and total cost to the public of fraudulent or exaggerated whiplash claims. It explained the difficulties of diagnosing whiplash injuries. The area was complex and there was a range of options to tackle the problem. In terms of obtaining better medical evidence, the consultation document stated:

> "39. A further concern is that GPs, who frequently build strong relationships with patients and their families over many years, may find it difficult to decline to certify an alleged whiplash injury, even if there may be doubts about the diagnosis. Similarly, doctors who regularly receive work from legal service providers or insurers may be keen to retain a relationship with them.
>
> 40. The Government is consequently consulting on whether a system of independent medical panels, which would assess claims for whiplash injury and give objective, impartial advice to the court, should be established. The Government believes that independence would help address the concerns described above about the current arrangements for the diagnosis of whiplash injuries.
>
> 41. If this proposal were taken forward, there are various options around delivery. Broadly, the two key models for such a system are:
>
> > i. an accreditation scheme. The Government would establish the standards for accrediting providers of medical assessment services and would appoint an organisation by competitive tender to run an accreditation scheme. Individual doctors, groups of doctors or Medical Reporting Organisations could apply for accreditation… and
> >
> > ii. a national call-off contract. The Government would work with interested parties… to develop the criteria for a national framework contract… Medical organisations would be invited to bid to be placed on the list of approved suppliers under the contract,

> possibly on a geographical basis. An independent board, with representatives from the court service, claimants' organisations and insurance companies, might be created…"

11. In July 2013 the House of Commons Transport Select Committee reported on its inquiry into whiplash and the costs of motor insurance. It accepted that fraudulent and exaggerated whiplash claims had contributed to the increase in motor insurance premiums but acknowledged that there were genuine claims, representing real injuries. It expressed surprise that insurers sometimes settled claims without medical evidence, because of the economics of disputing them. The insurance industry had to put its house in order or the Government had to take action. As to medical reports, the committee supported an accreditation scheme for medical practitioners providing reports.

12. In mid-2013, there was an internal report prepared by the Cabinet Office's Implementation Unit. It stated that the personal injury market was a profitable one, with claimants incentivised to make claims, lawyers to back them, and insurance companies to settle them cheaply, rather than challenging them. Doctors too were incentivised to certify whiplash claims with little scrutiny. The report stated:

> "The process for medical assessment is still profoundly flawed with clear conflicts of interest… Action is needed to make the process for [medical] assessment genuinely independent…"

13. On 23 July 2013 four organisations involved in the area – AMRO, the Motor Accident Solicitors' Society, the Forum of Insurance Lawyers, and the Association of British Insurers – wrote to the Secretary of State regarding *Reforming the medical evidence used in RTA claims*. The letter read:

> "Our aim was to put aside differences of view in relation to other areas of the consultation and focus on delivering a medico-legal reporting process for RTA claimants that is more independent, had greater accountability, increased rigour and where the interests of genuine claimants are put at the heart of any new medico-legal reporting system.
>
> The enclosed paper represents the product of these discussions and has the support of the signatories and our respective members. We hope that this provides a potential blueprint as you consider the reforms of the medico-legal reporting system that are urgently required."

The enclosed paper stated that there was much common ground and all sides of industry had agreed to the potential solutions it set out relating to the key issues. The key issues included:

> "a lack of independence when it came to doctors and MROs providing medical evidence."

Other key issues were no central accreditation for doctors or MROs; and a lack of accountability for those providing the reports (no central audit).

14. Among the potential solutions were a new, centrally managed, accreditation scheme and the creation of a new central body called MedCo. It was to be responsible for the audit of data being captured. The document stated:

> "MedCo should be run by a new, independent board with cross industry representation with potential Government involvement (at least around policy issues).
>
> Option to put the creation and running of MedCo out to tender to commercial entities, but equally possible for it to be "not for profit" but with fixed cost infrastructure and full time employees.
>
> MedCo should be self-funding…
>
> MedCo's powers and responsibilities to include: –
>
> > i. Accrediting [doctors] (and possibly MROs) – see criteria below
> >
> > ii. Reviewing / auditing Experts and their evidence / opinions…
>
> The introduction of MedCo with the powers to audit and remove accreditation where necessary would lead to a cultural change in certain expert behaviour and thought process."

A further aspect was the creation of a framework to ensure the independence of doctors and MROs from the claims process itself.

> "Perception that [doctors] are potentially frightened to say what they really think for fear they might not be paid for their work.
>
> Independence of MROs is a related, but separate, topic to the independence of the [doctors] actually writing the medical reports.
>
> There is a perception that MROs linked or owned by solicitors fails any objective independence test."

15. The response of the Ministry of Justice to both the December 2012 Consultation and the Transport Select Committee's July 2013 report was dated October 2013. Entitled *Reducing the number and costs of whiplash claims*, it committed the Government to developing specific proposals in conjunction with "stakeholders" in relation to better medical evidence, i.e., independent specialist medical panels to support better diagnosis of possible whiplash injuries and the giving of objective, impartial advice, including to the court.

> "11. It is likely that once established, only medical reports from accredited examiners would be accepted as evidence in whiplash claims…
>
> 12. We also wish to address the links which may impair the independence of medical examiners, so that they are not paid by those who favour a certain outcome in their diagnosis and so that they do not have other financial interests in the outcome of the claim."

16. Following round table meetings led by Ministers with participation from across the sector, a Core Group of stakeholders was established, which met on 14 occasions between 7 February 2014 and 25 February 2015. In a letter to them dated 2 May 2014 the Minister of State for Justice, Lord Faulks QC, explained the process and the Government's particular concerns. One of these was the imperative for independence in the commissioning and provision of medical reports. At that point what the Ministry of Justice was proposing, the letter explained, was a prohibition, as a preliminary measure, on either party having a financial interest in an intermediary through which a medical report was obtained.

17. The first tranche of "whiplash reforms" came into effect on 1 October 2014 and included fixing the costs of medical reports in whiplash cases, limiting medical evidence to a single report in most such cases and prohibiting a treating physician from also being the reporting expert.

18. Further reforms had been outlined in a letter by Lord Faulks QC to stakeholders on 4 August 2014. One aspect was consulted upon on 4 September 2014 in a document entitled *Consultation on independence in medical reporting and expert accreditation*. The foreword, by Lord Faulks QC, explained that the second phase of the programme focused on the quality of the medical evidence produced in support of whiplash claims. The Government planned to introduce measures which would tackle the commissioning of medical reports to ensure any conflicts of interest were removed from the system and which would also provide for the accreditation of experts.

19. There were three proposals in the Consultation document: independence in the commissioning of reports, accreditation for experts writing reports, and data sharing to fight fraudulent claims. In relation to the first of those, the Consultation document restated the need for medical experts and intermediary organisations through which reports were provided not to have a real or perceived financial interest in the outcome, apart from payment in the ordinary way:

> "The Government has decided to introduce a new system of allocating medical experts to claims which breaks any links between those commissioning medical reports and the medical experts themselves, removing potential conflicts of interest from the system. This will be delivered via a new independent IT hub, the working title for which is 'MedCo'. Anyone commissioning a medical report will go to MedCo and will receive a list of appropriate experts and/or medical reporting organisations ('MROs') from which they may obtain the required medical report. This system will apply to the

> allocation of an accredited expert to produce the initial medical report used in a claim…
>
> Following feedback from stakeholders on independence, we have revised our approach to this issue. There will be filters applied to the MedCo search results to ensure the medical expert or reporting organisation does not have a direct financial link with the commissioning organisation. This will not preclude such organisations from owning medical reporting organisations, which would be available to source work from elsewhere."

20. In October 2014, the Ministry of Justice received documents from the Chair of AMRO, Dr Simon Margolis, who is also chief executive of one of the largest MROs. Dr Margolis was acting in his capacity as a member of the Core Group. The first document contended proposals for arrangements for a 2 Tier random allocation through the central hub. It explained, as background, that currently there were a small number of large MROs, which undertook approximately 70-75 percent of relevant medical reports. The market leader MROs had grown in a free and competitive market as a result of years of investment into their businesses and their growth had been driven by virtue of efficiency, innovative IT and service level compliance. The imposition of an allocation system was highly likely to reduce, rather than increase, efficiency for instructing parties. Any significant decrease in volumes could make the MRO model unsustainable, particularly taking into account the new fixed and reduced fee regime for qualifying medical reports. Random allocation created the potential for an instructing party to be offered a list containing only MROs which were not market leaders.

21. There was an understandable necessity, the document asserted, to ensure that any new system or random allocation was not anti-competitive so it did not prevent new entrants to the market. The option of allocating random allocation slots in proportion to current market share had been dismissed as anti-competitive. The challenge was to deliver random allocation in a competitive market, whilst mitigating the risk that the current, efficient, process for procuring medical evidence did not collapse. The document continued:

> "The suggestion to address all of the above issues is that the Random Allocation ensures that at least one of the MROs offered on any case is an organisation that is recognised as a Market Leader MRO (to be defined). Other MROs would also be offered in each Random Allocation from the group of smaller, less well-known MROs. This would ensure that they can be chosen by (sic) in preference to the Market Leader should the instructing party wish to do so.
>
> …
>
> This model would potentially make the loss of the right to choose their own MRO more palatable to the instructing parties, especially those concerned that Random Allocation will reduce their own operational efficiency.

> The model would present no barriers to entry into the MRO market.
>
> It is assumed all MROs which are part of Random Allocation will be accredited however the requirements could be more onerous for those in the Market Leader group, particularly in relation to the level of financial "bond" and MedCo annual contribution.
>
> …
>
> When selected, a smaller MRO would have the opportunity to demonstrate excellent service and efficiency."

The document concluded that the cornerstone of the proposed system was that it would be underpinned by random allocation of MROs on all cases while mitigating the risk of current efficiencies, which benefitted all stakeholders, being lost. The system could not be described as anti-competitive but would prevent a situation where MROs which have never grown in the current, free market suddenly received a windfall of additional work.

22. Another document, a few days later, with a section headed "2 Tier Random allocation of MROs in practice", reiterated that the proposal would not be anti-competitive but rather a pragmatic approach. The rationale behind the suggested two tier approach was not to fix the market or guarantee volumes. There would always be at least two other MROs offered with the name of one of the leading, national MROs. Therefore, a claimant's lawyer would never be compelled to use the "leading" MRO and would always have a choice.

23. A month later, in mid-November, there was a meeting between the Ministry of Justice and the core stakeholders. The information about the market discussed at the meeting was that there were a handful of leading, national MROs and a few tens of regional MROs. Ratios were therefore discussed in any one random selection of one leading, national MRO to four, five and so on regional MROs.

24. A submission to Ministers just over a week later set out that while an offer of around five MROs was being considered, the evidence base for any decision needed to be improved. Consequently, the Ministry of Justice conducted a survey from 2 December 2014 to 4 January 2015 which produced an estimate of some 210 MROs.

25. On 2 December 2014, the Secretary of State published his response to the September 2014 consultation, including the following conclusions relating to sourcing medical reports:

> "Amendments to the Civil Procedure Rules and the Pre-Action Protocol will ensure that anyone commissioning an initial medical report in support of a whiplash claim must use the new MedCo IT system. This system will provide users with a randomly selected choice of medical experts or MROs whom they may instruct. This selection will be filtered to facilitate a search from locally available experts and MROs and to exclude

> those experts or MROs with a direct financial link with the commissioner…
>
> The system will not operate so as to allocate a share of the available work to a particular MRO or expert – market choice remains an important part of the process…"

26. That day, 2 December 2014, the Secretary of State sent a letter addressed to the MedCo Board, subsequently called the *Letter of entrustment*. It stated that the Government was "looking to MedCo" to deliver its key policy decisions on the allocation of medical experts and accreditation. MedCo would provide users with the facility to search for individual medical experts or MROs, depending on their preference. The search results would allow users a limited choice as to whom to instruct. The position would be reviewed in the new year to ensure that there remained sufficient choice to allow the market to develop and to manage risks around expert capacity. The letter continued:

> "6. The MRO search should operate on the basis of a two-tier model which offers users a choice of MROs based on criteria such as size, capacity, geographical reach and quality of service. However, the model should not operate so as to reinforce the larger MROs' market position or enable them to protect their market share from competition from smaller competitors or new entrants. MedCo should put in place objective criteria to ensure clarity about how MROs are allocated to each tier, not least to ensure transparency about how an MRO may develop and move between tiers."

27. MedCo was recognised in the 78th update to the Civil Procedure Rules in mid-December 2014: Civil Procedure (Amendment No.8) Rules 2014, 2014 SI No. 3299, r.10(a). Changes to the Civil Procedure Rules are made under the Civil Procedure Act 1997 by the Master of Rolls under delegated powers pursuant to Schedule 2, Part 1, section 2(2) of the Constitutional Reform Act 2005 and approved by the Lord Chancellor. The update took effect on 6 April 2015. The words "from an accredited medical expert selected via the MedCo Portal (website at: www.medco.org.uk)" were inserted in Rule 45.19 and in various places in Practice Directions 8B, 16 and 35. The changes did not prescribe how the MedCo Portal would operate, but they assumed its existence. Moreover, changes were made to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents to give effect to the policy of ensuring that anyone commissioning an initial medical report in support of a whiplash claim must use the MedCo IT portal.

28. At a final meeting between the Ministry of Justice and core stakeholders in late February 2015, the available information was that there would be five or six Tier 1 MROs for random allocation through MedCo and around 125 Tier 2 MROs within the regions. The so-called Core Group considered that many MROs were exaggerating their capacity. It doubted whether all the regional MROs could afford the registration fee and considered whether the number of MROs within any given region would be 50 or 60. Against that background, the Ministry of Justice rejected having a random allocation offer including two Tier 1 MROs. Its reasoning is set out in the second

witness statement of Richard Mason, the Deputy Director of Civil Justice in the Ministry of Justice:

> "[H]aving two Tier 1 MROs in the offer would require well over ten Tier 2 MROs in the offer ratio to promote parity of probability between the two tiers and equal opportunities for instructions from solicitors. This would mean a solicitor would be able regularly to choose a given Tier 2 MRO on at least one in five occasions and a Tier 1 MRO on at least one in three. For example, if the offer included two Tier 1 MROs and 12 Tier 2 MROs and 60 Tier 2 MROs operated in the local market, a solicitor firm handling 200 whiplash claims a month might be able to instruct the same Tier 2 MRO on around 40 occasions. Likewise, if there were six Tier 1 MROs, the same Tier 1 MRO could be instructed on around 66 occasions. These frequencies were considered to be too high as they would enable solicitors to build up relationships with experts that would risk undermining the objective of ensuring independent reporting."

29. Shortly after, a submission to Ministers canvassed various different offer ratios of Tier 1 to Tier 2 MROs, ranging from 1:4 and 1:6 to 1:10. The overriding consideration was to ensure that the ratio represented the market, as closely as possible, as the Ministry of Justice understood it to be. The choice was not to be too wide since that would negate the policy objective of ensuring the independence of medical reports. The ratio 1:6 appeared to balance the need for independent reporting against the need for a parity of opportunities between the two tiers.

The Decision

30. On 2 March 2015 the Ministry of Justice issued the decision challenged in this judicial review ("the Decision"). The first part is entitled *Ministry of Justice Decision on proposed search results 'offer'*. It states as the rationale that the Secretary of State was required to make a final decision on the number of MROs which should be presented when legal providers undertake a search through MedCo. The decision needed to include the total number of MROs presented as well as the mix of high volume national MROs and regional MROs. These are described as Tier 1 and Tier 2 MROs respectively. The division of MROs is reflected in AMRO's documents of October 2014 between market leader MROs and others. The Decision then sets out the option of selecting between MROs and individual, independent experts and what has been termed the 'offer ratio' of one Tier 1 MRO and 6 Tier 2 MROs:

> "Ministers have considered the above factors and have agreed that the offer should include:
>
> - one high volume national MRO and six other MROs; or
> - seven medical experts"

The Decision then explains:

> "5. If we were to include fewer than six smaller MROs there is a risk of excessively favouring the high volume, national MROs. To include more than six smaller MROs would likely compromise the independence of medical reporting intended under the MedCo system. It was also felt appropriate that the number of options presented on completion of a directly instructed expert search be the same as that for MROs.
>
> 6. Ministers take the view that this option provides a pragmatic and proportionate response to balancing the need to minimise any undue impact on the market and ensuring the choice of MRO is not so wide as to negate the intended effects of implementing MedCo. This Decision will be reviewed once we have six months worth of data to examine."

31. The second part of the Decision is entitled "*Qualifying criteria for Medical Reporting Organisations*". It sets out the background, including the choice that users would have to search for either an MRO or an independent expert and the resultant choices which would follow:

> "For a search of MROs, the results will include both a high capacity, national MRO with the capability to service high numbers of clients with reports to agreed minimum standards and timeframes, along with a number of regionally based MROs who service a local market. The aim is for this mechanism to maintain consumer choice with sufficient flexibility so as not to prevent MROs from developing their business. There is no intention for there to be barriers restricting growth as a result of the introduction of MedCo, and it is envisaged that those MROs which meet the additional criteria can apply for reclassification following an appropriate audit of their capabilities.
>
> The operation of this system is intended to strike a balance between, on the one hand, avoiding a disproportionate adverse effect on organisations which have established their business over time and, on the other, avoiding entrenching their position and creating barriers to entry that will protect current organisations from competition. The number of MROs to choose from and the number of high capacity, national and regionally based MROs generated by the search have been informed by data received through a pre-registration survey that took place in November and December 2014 via the MedCo website. The [Ministry of Justice] intends to review these numbers when six months of data from the MedCo IT portal is available, with a view to making changes, if appropriate."

32. There are then two tables, as part of the Decision, the first containing the minimum qualifying criteria to be classified as an MRO, Tier 2, and the second containing the additional qualifying criteria to be reclassified as a high volume, national MRO, Tier 1.

Aftermath of the Decision

33. As of 3 June 2015 there were 14 operational Tier 1 MROs and 125 operational Tier 2 MROs. There were about 647 independent experts who could be instructed directly. As of that date, searches for MROs on the MedCo Portal had been carried out on more than 70,000 occasions (approximately 40,000 Tier 1 MROs, 32,000 Tier 2 MROs). In addition, a total of 4524 independent experts had been instructed directly.

34. After the Decision, a number of the larger MROs incorporated new Tier 2 affiliates with similar names to the parent. These obtained instructions via MedCo and then outsource their operations to their parent. The claimant incorporated ten regional Tier 2 MROs in this way and registered them with MedCo on 15 May 2015. The Secretary of State in June 2015 expressed concerns that this practice had the potential to undermine the Government's policy objectives and public confidence in MedCo. It put at risk the chances of existing MROs competing for selection and was also contrary to the policy objective of providing users with a range of seven different, i.e. unconnected, MROs from which to choose.

> "The system was neither designed nor intended to permit this type of behaviour, but the Ministry of Justice is clear that MedCo, through the application of the qualifying criteria, its user agreements and ethics policy, has the requisite tools to address it."

35. In July 2015, the Secretary of State issued a "call for evidence" as part of a review of the MedCo framework. Among its stated objectives was to obtain evidence as to the operation of the MedCo Portal and whether it meets the objective of enhancing the independence of medical reporting; the effectiveness of the qualifying criteria for MROs, to ensure they are robust, well-run organisations with the opportunity to compete at the right level within the MedCo system; and the mix and number of MROs appearing in the search results, in light of the objective of minimising an undue impact on the market whilst ensuring the choice provided is not so wide as to negate the objective of introducing independence. The call for evidence also raised the issue of high volume MROs creating affiliate MROs which, it said, was never part of the policy design. Affiliates, it said, had the potential to put at risk the chances of existing MROs competing for selection, and also ran contrary to the policy objective of providing users with a range of seven different, i.e. unconnected, MROs from which to choose. In addition to seeking written responses, the Ministry of Justice held a "stakeholder engagement workshop" in Manchester on 11 August 2015. Some participants expressed criticism of MedCo.

36. During August 2015 MedCo carried out an audit of Tier 1 MROs, against the criteria set out in the Decision, as a result of which the number is likely to reduce significantly. An audit of Tier 2 MROs began in October 2015, which will be completed in 2016. MedCo is responsible for implementing the policy of accreditation of medical experts, which was announced as Government policy in the 2012 Consultation paper. That is to take effect from 1 January 2016.

The claimant's case in outline

37. The claimant's case is that the Decision of 2 March 2015 introduced a number of systemic design flaws into the MedCo system which mean that it is irrational overall but also limits competition in the market in which the claimant operates, i.e. the market of MROs.

38. The first major design flaw Mr Gordon identified was that effectively the scheme caps the number of times an MRO can access the market. The result of the offer ratio set out in the Decision – one high volume, national MRO (Tier 1) and six other MROs (Tier 2) randomly allocated – is that Tier 1 MROs cannot compete with one another in respect of the custom of any one potential claimant or group of claimants. Over time, with random allocation, a given Tier 1 MRO will never be allowed to trade with more than 1/Nth of the market, where N is the number of Tier 1 MROs. The claimant is a Tier 1 MRO and at the time of the hearing there were fourteen such MROs. Accordingly, after 6 April 2015, when the Decision came into effect, the claimant has not been allowed to trade with more than $1/14^{th}$ of the market. Prior to the Decision, whoever wished to do business with the claimant could do so. Now its opportunity to access the market is limited.

39. Moreover, Mr Gordon added, even if the number of Tier 1 MROs changes, with N becoming smaller, as MROs drop out of the Tier 1 category, for example through MedCo's audit process, and the number of Tier 2 MROs changes, the mix in any one random selection by the MedCo system remains the same, one Tier 1 MRO to six Tier 2 MROs. In fact the total number of Tier 1 and Tier 2 MROs has changed over the figures the Ministry of Justice was working with before the Decision, significantly in the case of Tier 2 MROs, not least with the creation of some 50 affiliates by existing MROs, including the claimant. Yet the mix is fixed in time; it is the essence of the scheme. As Mr Gordon put it, no amount of judgment, trial and error, modelling, or data revision could ever properly regulate the scheme's anti-competitive effects, albeit that these effects may change, indeed are likely to change, from one day, one week or one month to the next.

40. A third major design flaw, Mr Gordon submitted, is that MROs are treated differently from solicitors and other legal advisors. That was quite apart from the conflicts of interest created because some solicitors have large stakes in MROs, which the Decision does not touch. The difference in treatment means that a solicitor's market for services is unaffected by the scheme because solicitors may still be instructed by a client as of right. The market share of solicitors is unaffected, by contrast with the impact of the Decision for MROs' access to the market. If instructed in a whiplash case they are, under the MedCo scheme, required to access the IT hub on behalf of their client so as to choose from a random, but limited, selection of experts. MROs are treated differently and for no discernible reason; certainly not, as Mr Gordon submitted, for any reason which focuses upon the supposed objective of combating fraud. Under the scheme, it is the MROs themselves which are subject to selection via the MedCo IT hub but, once selected, they can choose from any number of experts. As Mr Gordon asked rhetorically: either the Government considers that MROs are 'in on the act' or not but, if it does, why is it necessary to treat them differently from solicitors?

The rationality challenge

41. Mr Gordon placed at the centre of the claimant's challenge its rationality ground. Drawing on Blake J's *obiter dictum* in *R (Limbu)* v. *Secretary of State for the Home Department* [2008] EWHC 2261 (Admin), Mr Gordon contended that the Secretary of State had adopted a policy to achieve a particular purpose, but the policy frustrated that purpose. The purpose stated in the Decision, in the passage quoted above, is to maintain consumer choice, with sufficient flexibility so as not to prevent MROs from developing their business, but with no intention of introducing barriers to growth. Yet in Mr Gordon's submission the Decision achieves the opposite: consumers are not able to choose experts as freely as they could before the MedCo scheme, and Tier 1 MROs like the claimant face a barrier to developing their businesses beyond a certain level. The reality is that the claimant lost business immediately upon the introduction of the MedCo scheme, since its ability to trade with more than 1/14th of the market has been barred.

42. In addition to the major design flaws, Mr Gordon identified other flaws leading, as he put it, to bizarre results. Thus there is the ease of entry for MROs coming into the Tier 2 category. Yet no matter how large (or small) the numbers of MROs in the two categories, the ratio of one Tier 1 MRO to six Tier 2 MROs on each search remains. Mr Gordon underscored the point that hitherto there were no limits on Tier 1 MROs creating affiliates in the Tier 2 category, which indeed the claimant and other Tier 1 MROs had done, with the result that they have been able to attract more business. As Mr Gordon put it, the ratio contained in the Decision had consequently been blown to smithereens. Mr Gordon took me to figures which showed that, after June 2015, newly created affiliates won a large share of business compared with Tier 2 MROs. Affiliates had never been in the contemplation of the Secretary of State, which showed once again how badly designed the scheme was.

43. Moreover, submitted Mr Gordon, the scheme could be subverted since there was no restriction of solicitors, once they had chosen an MRO from the seven presented to them by MedCo, requiring that MRO to instruct a preferred expert. In some cases the MRO might refuse, but not always. Yet that was completely contrary to the Secretary of State's stated intention to address conflicts of interest. The call for evidence in July 2015 demonstrated, in Mr Gordon's submission, just how inadequate was the original design of the system.

44. In my view, the rationality challenge to aspects of the MedCo system does not get off the ground. For those familiar with public policy, the scheme evolved along familiar lines. It began with a general aim, to bear down on increasing motor vehicle insurance premiums and the contribution to this of what seemed to be the number of whiplash claims which were exaggerated or unmeritorious. From 2012 the focus was on the role of expert medical reports in fostering this. This was then followed by the identification of what seemed to be possible contributory causes. Early on, the method whereby medical reports were commissioned and paid for was singled out as a factor to address. That led the Government to explore different tools as to how to ensure more accurate medical reports by reducing the conflicts of interest in the way they were produced. The December 2012 Consultation paper advanced two options, one accrediting MROs and doctors, the other establishing a list of approved suppliers of medical reports with possibly an independent board running the scheme.

Accreditation received support from the House of Commons Transport Select Committee in July 2013.

45. The second option was refined for consultation in September 2014. To break the links between those commissioning medical reports and the doctors preparing them, the Ministry of Justice proposed the establishment of a body called MedCo, an IT hub, whom those commissioning a medical report would approach to obtain a list of MROs or doctors. That then became the policy, with refinements as to how the random list of MROs or doctors available for consultation was to be constructed. It is not surprising that limiting the choice of solicitors in a parallel manner to that for MROs and doctors was not on the agenda, since it is difficult to see what bearing it had on the problem or how it could be effected.

46. In fixing the one Tier 1 to six Tier 2 MRO offer ratio in the Decision, the Ministry of Justice was relying on the figures available to it as to the number of Tier 1 and Tier 2 MROs thought to exist. At a late February 2015 meeting with the core stakeholders, reports suggested that there were five or six Tier 1 MROs and some 50 or 60 Tier 2 MROs in any given geographic locality, producing the 1:6 ratio as explained in Mr Mason's witness statement quoted earlier. As for the criteria for Tier 1 and Tier 2 MROs, the Decision states an intention to maintain consumer choice and retain sufficient flexibility for MROs to develop their business. But that is only part of the story; the following paragraph in the Decision explaining the attempt to strike a balance between ensuring the continuation in business of Tier 1 MROs and allowing new Tier 2 entrants and the transition of MROs from Tier 2 to Tier 1.

47. To my mind, two features stand out in this typically iterative process of public policy-making which makes the threshold for a rationality challenge even harder to surmount in this case. First, there was the extensive consultation with those likely to be affected, including MROs like the claimant. As well as the formal Consultation papers of December 2012 and September 2014, there were the many roundtable meetings, led by Ministers, with representative bodies across the sector, including the MROs' trade association, AMRO.

48. Even more important, given the nature of the challenge, is that the Government received support for its proposals from the major representative bodies whose members are involved with the production and use of medical reports commissioned for whiplash injuries. It may well be that their aim was to head off or modify developments adverse to their members' interests, but the fact is that not only did they respond to the Government's consultations and participate in roundtable meetings, they also took the initiative to suggest how the medico-legal reporting system might be changed to meet the Government's policy objectives. A consensus emerged as to how to tackle the problem.

49. In particular, in the joint letter of July 2013, AMRO, the lawyers' associations and the insurers proposed the establishment of a centrally-managed accreditation scheme and the creation of an independent body called MedCo, with cross-industry representation, which could take steps to ensure the independence of MROs. Then, once the Government adopted the idea of a random allocation of alternative lists of MROs and doctors from whom those desiring a medical report could choose, the Chair of the MROs' trade association, AMRO, acting as a member of the Core Group, became closely involved in designing how random allocation would be implemented, in

particular the number of what became Tier 1 and Tier 2 MROs to be presented for a choice to be made. That is evidenced in particular in the October 2014 documents and in the discussion at the last meeting of the Core Group in February 2015, immediately prior to the Decision.

50. As with any exercise in public policy-making, the outcome in the Decision may not be ideal. The problem may not have been precisely identified and, even if it has been, the solution chosen may not be the most effective or efficient to address it, or the one with fewest undesirable side effects. But given what has been the process of policy formulation it cannot be said to be irrational. Nor does the fact that the policy has adversely affected the claimant's business, if this be the case. The policy does not bar the claimant and other Tier 1 MROs from developing their business. Unless the competition law challenge is successful, the policy cannot be flawed on this ground.

The competition law challenge

51. In addition to the rationality challenge, Mr Gordon advanced the claimant's competition law challenge: the Secretary of State's Decision is unlawful because it will lead to MedCo infringing the prohibition in Part I, Chapter II of the Competition Act 1998 ("the 1998 Act"), and to an infringement of Article 102 and consequently Article 106(1) of the Treaty on the Functioning of the European Union ("TFEU"). In broad outline, the claimant's case is that the design of the MedCo scheme in the Decision is such with its offer ratio and criteria for Tier 1 and Tier 2 MROs that there is no way of controlling its anticompetitive effects. In simple terms these effects for the claimant are the restrictions on its ability to access the market, in particular the bar preventing it from approaching its previous clients, and the barriers to its growth imposed. In legal terms its case is that MedCo is an undertaking in a dominant position, which it is abusing, and for which there is no legal justification.

52. Part I, Chapter II of the 1998 Act includes section 18, which provides as follows:

> "(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in—
>
> > (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> >
> > (b) limiting production, markets or technical development to the prejudice of consumers;
> >
> > (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> >
> > (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary

> obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3)In this section—
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "the United Kingdom" means the United Kingdom or any part of it.
>
> (4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition.""

53. Section 19 then provides that the Chapter II prohibition does not apply in cases excluded as a result of Schedule 3. Schedule 3 includes paragraph 4, which provides:

> "Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking."

Also relevant is paragraph 5:

> "… (2) The Chapter II prohibition does not apply to conduct to the extent to which it is engaged [in] order to comply with a legal requirement.
>
> (3) In this paragraph 'legal requirement' means a requirement –
>
> (a) imposed by or under any enactment in force in the United Kingdom;
>
> (b) imposed by or under the Treaty or the EEA Agreement and having legal effect in the United Kingdom without further enactment; or
>
> (c) imposed by or under the law in force in another Member State and having legal effect in the United Kingdom."

54. Section 60 of the 1998 Act has the purpose of ensuring that questions arising under Part I in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law.

55. As regards EU law, Article 102 TFEU provides:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it

> shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in…
>
> (b) limiting production, markets or technical development to the prejudice of consumers; …"

Article 106 of the TFEU provides:

> "1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

56. The Chapter II prohibition in section 18 of the 1998 Act is in near identical terms to Article 102 TFEU and there is no material difference between them. Consequently, it is convenient to consider the claimant's competition law challenge under domestic and EU law together. This falls under two broad heads: first, that MedCo is in a dominant position in the relevant market and is abusing that dominant position; and secondly, there is no objective justification for this.

(1) Is MedCo dominant in the relevant market and abusing that dominant position?

57. The claimant's case is that MedCo is an undertaking which holds a position of economic strength, the sole and legally mandated gateway to doctors providing medical reports on whiplash injury. In other words it has a monopoly of the upstream market for access to providers of such reports and is free to behave independently of its customers, i.e., solicitors and personal injury claimants. It is plainly dominant, and the fact that its monopoly derives not from its own conduct but by reason of law does not detract from this analysis.

58. Moreover, Mr Gordon contended, MedCo is abusing its dominant position by distorting the structure of the ancillary downstream market for the provision of medical reports and weakening competition in that downstream market. In particular, it is doing that through the offer ratio, which restricts a consumer's choice on any occasion to seven MROs, of which only one is a Tier 1 MRO. Even though pre-MedCo the largest MROs were in great demand, they are now prevented from trading with more than 1/14 of the market given that there are presently 14 Tier 1 MROs. Since MedCo prevents Tier 1 MROs from competing directly against one another,

that has the effect of reducing their market shares, profitability and consequent ability to invest in innovation and service quality.

59. The concepts of dominance and abuse of a dominant position are defined in two seminal cases of the Court of Justice. In *United Brands* v. *Commission* Case 27/76 [1978] ECR 207 it defined dominance as follows:

> "[65] The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

In *Hoffmann-La Roche* v. *Commission* Case 85/76 [1979] ECR 461, the court said of abuse:

> "[91]… The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

60. In *Deutsche Telekom AG* v. *Commission* Case C-280/08P [2010] ECR I-9555, the Court of Justice held that the prohibition also referred to the conduct of a dominant undertaking which, on a market where the degree of competition was already weakened precisely because of its presence,

> "[174]… through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

The court has also held that the prohibition on abuse of dominance is concerned not only with practices which damage consumers directly but also with those which harm the structure of the market: *France Télécom* v. *Commission* Case C-202/07P [2009] ECR I-2369, [105].

61. None of these principles are in dispute but to my mind they do not have any purchase in the circumstances of this case. Essentially I have come to that conclusion from the reasons given by Leggatt J in initially refusing permission to apply for judicial review in this case:

> "… 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."

62. First, MedCo is operating in a different market from the MROs and medical experts. Cases such as *Deutsche Telekom* involved situations where vertically integrated, dominant commercial operators have limited competition in the same market in which they themselves are active. Here there are two markets: an upstream market for the provision of access to medical experts in whiplash claims, and a downstream market where medical experts and MROs compete to provide expert reports for whiplash claims. MedCo is not active in the downstream market: it is not an MRO, it does not provide medical reports, it has no commercial interests in the downstream market and it derives no direct or indirect economic or other advantage from distorting competition.

63. In addressing this point, Mr Gordon relied on the proposition that, whatever its intention, an undertaking which is dominant in one market can commit an abuse by distorting another market in which it is not active. He referred to Case T-128/98 *Aéroports de Paris* v. *Commission* [2000] ECR II-3929, involving an airport authority which was active on the market in management services for Paris airports. Its authorisation was indispensable to those providing in-flight catering services from these airports, although it was not active itself on that market. The General Court held that the airport authority abused its dominant position in the management services market with effects on the in-flight catering services market and that was sufficient for there to be a breach of Article 102 TFEU: see [164]-[165]. The General Court's findings were approved by the Court of Justice: Case C-82/01P *Aéroports de Paris* v. *Commission* [2002] ECR I-9297.

64. Contrast the *ADP case* with Case T-155/04 *SELEX Sistemi Integrati* v. *Commission* [2006] ECR II-4797, where the General Court was concerned with alleged abuse by EuroControl, the European Organisation for the Safety of Air Navigation, in influencing the award of contracts to tenderers through its advisory services to national governments. The General Court dismissed the allegations of abuse.

> "[108] … Since EuroControl is not carrying out any activity on the market for supply of ATM equipment and it does not have any financial or economic interest in that market, it seems that there can be no relationship of competition between it and the applicant or any other undertaking active in the sector. In particular, it is not apparent that EuroControl could have derived any competitive advantage from the fact of being able to influence, by dint of its advisory services offered to the national administrations, the administrations' choice as to their suppliers of ATM equipment in favour of certain undertakings."

The judgment of the General Court was upheld by the Court of Justice on appeal in Case C113/07 P *SELEX* [2009] ECR I-2207.

65. That is the position here. MedCo is a regulator, acting in the public interest, and implementing a policy of the Secretary of State, a regulator which is not itself active nor with any financial or economic interest in the downstream market which it is regulating.

66. Mr Gordon sought to meet this point by reference to *SEL-Imperial Ltd* v. *The British Standards Institution* [2010] EWHC 854 (Ch), [2010] UKCLR 493, which concerned the British Standards Institution, a non-profit organisation established by Royal Charter, which certifies through its Kitemark scheme compliance with its standards but other than charging fees gains no commercial or economic benefit by doing so. After referring to the *SELEX case*, Roth J stated:

> "[66] Moreover, one can consider the hypothetical possibility of a situation where BSI decided that it would restrict the number of repairers, whether generally or by region, to which it would grant a Kitemark in respect of PAS 125. That could clearly result in a severe restriction of competition. It is no answer to say that BSI as a responsible body would never contemplate such action. If an undertaking with market power through its widely recognised approval process were to act in that way, I find it impossible to hold on the current state of the jurisprudence that as a matter of law this could not constitute an abuse just because this was not to the undertaking's economic advantage. It is possible that the above passage in the CFI's *SELEX* judgment points in that direction; or alternatively that observation may be confined to the special facts of that case and not be of universal application. It is notable that apart from that one passage, BSI did not rely on any authority from the extensive jurisprudence on abuse of dominance in support of its proposition."

67. Roth J added that the law under Article 102 is still developing and since he considered that the position was insufficiently clear on the point, he would refrain from expressing any further view. But that is not our case, since we are dealing with a regulatory body implementing the Government's policy. The BSI is not a regulator, nor part of the Government. Just because MedCo is an industry-led company, charging fees, is beside the point.

68. That MedCo performs the public function of regulating medical reports for whiplash claims leads to another point. The MedCo Portal is the avenue mandated in the Civil Procedure Rules for obtaining such medical reports. Certainly MedCo is an independent company and, as Mr Gordon correctly underlined, its directors must exercise independent judgment (Companies Act 2006, section 173) and the so-called *Letter of entrustment* cannot constitute a direction in law. In practice, however, the Secretary of State brokered an arrangement to implement its policy, which attracted support from all the representative bodies in the sector, including the MROs' own trade association, AMRO. These are MedCo's members and provide its directors. The upshot is that MedCo has a position under the Civil Procedure Rules, and it acts in accordance with the Secretary of State's policy. MedCo is in effect complying with the type of legal requirement recognised under Schedule 3 of the 1998 Act. It is a requirement that is ultimately traceable, as explained earlier, to the Civil Procedure

Act 1997. Moreover, it also falls within the type of protection offered by the Court of Justice case law to those whose conduct is required by the national legal framework: see Case C-198/01 *Consorzio Industrie Fiammiferi ("CIF")* v. *Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055, [52]-[54]; see also *VIP Communications Limited* v. *Ofcom* [2009] CAT 28, [19]-[24].

(2) Is there objective justification?

69. Beginning with the proposition drawn from Case T-201/04 *Microsoft* v. *Commission* [2007] ECR II-3601, [688] and *Genzyme Ltd.* v. *OFT* [2004] CAT 4, [576]-[579], that it was for the Secretary of State or MedCo to advance objective justification, Mr Gordon submitted that on the materials available neither had satisfied the tests of necessity (in *Purple Parking Ltd.* v. *Heathrow Airport Ltd.* [2011] UKCLR 492, per Mann J and *Arriva The Shires Ltd.* v. *London Luton Airport Operations Ltd.* [2014] UKCLR 313, per Rose J), or efficiency (in Case C-209/10 *Post Danmark*, ECLI:EU:C:2012:172, [42]), in those aspects of the Decision which allow only one Tier 1 MRO and seven MROs in total to be offered to each claimant seeking a medical report. Mr Gordon's was a three-pronged attack: the Secretary of State had not adduced concrete evidence of the problems requiring this; the solution was based on guesswork as to the impact it might have on competition; and there were less onerous ways of achieving the result sought.

70. As to the first point, Mr Gordon majored on the dearth of evidence that MROs were a cause of any of the problems with whiplash claims which the Secretary of State had identified. The 2012 Consultation paper referred rather to the repercussions of the links between legal service providers and doctors, legal service providers on the Legal Ombudsman's definition not including MROs. On the second point, the offer ratio was not only guesswork, but necessarily so, based as it was on highly speculative modelling assumptions and an ignorance of the competition law issues. There was no evidence of any consideration of the impact on the structure of the market and Tier 1 MROs. The assumption that there were five or six Tier 1 MROs was wildly wrong, given that there were 14.

71. Finally, there was no explanation as to why, for example, the criminal law was not adequate to address any problem of fraud if it existed: cf. Case T-30/89 *Hilti v. Commission* [1991] ECR I-1439, [118]. There were less draconian alternatives to random allocation through MedCo such as declarations of financial links between MROs and solicitors (which already existed), a requirement on solicitors to offer their clients a choice of MRO, or a limit on the number of times a given solicitor could instruct the same expert via the same MRO. All of this meant that the Decision was disproportionately intrusive.

72. In my judgment, even if MedCo has acted in a way which restricts competition, or there is a risk that it will do so, there is objective justification. At the outset, it seems to me artificial for Mr Gordon to isolate the offer ratio and qualifying criteria for Tier 1 and Tier 2 MROs without considering the competition law aspects of the MedCo scheme as a whole. In that larger picture of the whiplash reform programme, MROs were part of the structure of how medical reports were commissioned although not featuring themselves as a major problem to be tackled. It was not only that some MROs were owned by solicitors firms. One of the key issues identified as early as July 2013 by the MROs' own trade association, AMRO, along with the Motor

Accident Solicitors' Society, the Forum of Insurance Lawyers and the Association of British Insurers, was the lack of independence when it came to doctors and MROs providing medical evidence. So MROs were part of the larger problem as conceived by the Ministry of Justice. And that was a problem not best characterised as fraud but as one of conflicts of interest.

73. As to the offer ratio, it emerged, as has been explained, after discussions with the industry, in particular the Chair of MROs' own trade association, AMRO, acting in his capacity as a member of the Core Group. AMRO's October 2014 documents were directly on point. There was the market intelligence and the survey the Ministry of Justice conducted in late 2014 as to the number of Tier 1 and Tier 2 MROs. In other words, guesswork is not an accurate description of the policy process. Certainly it was anticipated that there might be some six Tier 1 MROs, whereas there were 14, but the likely significant reduction in the number of Tier 1 MROs as a result of the audit in the second half of this year, a process built into the Decision, suggests that MROs entered the Tier 1 category when they could not satisfy the requisite criteria. The failure to anticipate Tier 1 MROs creating Tier 2 affiliates, and therefore the larger number of Tier 2 MROs than anticipated, is surprising but does not mean that the scheme is irrationally flawed. Review and audit were built into the Decision and has occurred although cut short, to an extent, by this litigation.

74. Importantly, those engaged in the policy's development were conscious of the competition law implications. The submissions to the Ministry of Justice from the Chair of AMRO in October 2014 addressed directly the competition implications of random allocation. But overall, the two tier offer ratio was considered to be the most appropriate measure to mitigate conflicts of interest, at the same time ensuring that all MROs had an opportunity to be presented in the search results and preserve choice for users. Competition between individual doctors and between large and small MROs was possible, as solicitors were presented with choices of those with whom they had no prior relationship. Under the Decision it was relatively easy for new MROs to enter Tier 2, and with time they might qualify for Tier 1. There were no barriers to shelter Tier 1 MROs from competition and if not up to the mark they might move down to Tier 2. In short, the market was not overly rigid and evolution in the future was possible.

75. Finally, I cannot accept that the MedCo solution was disproportionately intrusive, not least given 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. Indeed, the offer ratio is less draconian than the alternatives advanced in the 2012 Consultation paper, including panels of independent medical experts and a national call-off contract under which MROs would have to bid to be placed on a list of approved suppliers. The Chair of AMRO, in his October document, had raised concerns about the destructive impact on businesses of random allocation without ensuring that at least one Tier 1 MRO was present. As introduced in the Decision, the offer ratio addressed that concern. In this regard I accept the Secretary of State's submission that solicitors' clients had a wider avenue of choice, certainly in theory, than pre-MedCo, if a law firm routinely referred the majority of their whiplash cases to a single MRO. In passing I note that no one would regard criminal law as the sole, or even the best, solution to a conflict of interest problem.

Conclusion

76. In a sense, Mr Gordon had to advance his case of incurable flaws in the MedCo system, since the Decision itself contemplated change through audit and review. These will have an effect on the number of MROs at both Tier 1 and Tier 2 levels, and that is a driver to change the offer ratio as contemplated in the Decision. Moreover, there are the further changes which may be driven by the review. Consequently, I have some sympathy with the Secretary of State's position that this litigation was at the least premature. As I have said, the rationality challenge does not get off the ground. However, the competition law challenge is arguable and its importance is such that a grant of permission is justified, although for the reasons I have given judicial review itself is refused.