

## **The Panel's approach to challenges to their Minded to Decision ('MTD')**

As we explained on our website, in accordance with Sir Ross Cranston's recommendations, after we issue an MTD, the Customer and LBG each have the right to review and respond to the MTD. We then consider all the material and submissions before we reach our binding Final Decision ('FD').

As we mentioned in our April 2021 update and the accompanying [video](#) our experience in some early cases we considered was that, after receiving their MTD, Customers sometimes then raised new points and/or produced new information said to make a material difference to our decision. As we have explained previously, this has the dual effect of –

- (a) wasting a substantial amount of work undertaken by us and by our team before the MTD was issued, and
- (b) more importantly, directly impacting on our working schedule thereby delaying our work both on the Customer's FD and on other Customers' cases too.

Like you, we want the Re-Review process completed as quickly as possible. To help us achieve this, we need your co-operation (and that of your advisers, if you have any) to enable us to arrive at a properly informed decision that takes into account at the MTD stage all the issues you consider to be relevant - and not to have issues raised for the first time after we have issued our MTD. As you will know from our recent update we have taken steps (with the appointment of two senior members of our legal team to act as informal 'case managers') to try to ensure that this objective is achieved in future cases.

Against that background, we thought it would be helpful to outline our approach in the future to challenges to MTDs by Customers whose cases have not yet been considered and also to challenges raised by LBG.

### **Challenges by a customer to an MTD**

While remaining firmly committed to the "inbuilt flexibility" of the Re-Review process to ensure overall fairness and whilst we will continue to consider carefully all material points made, our approach will ordinarily be simply to review the MTD, not to commence a fresh analysis of the claim. In particular, after the MTD stage -

1. We will not place significant weight on matters which amount to little more than a repetition or reformulation of a point made before the MTD was issued. As we have highlighted in the MTDs we have issued so far, just because the MTD does not refer to some specific matter that has been raised with us or by us in the Information gathering stage, or to some specific document that may appear in the material with which we have been provided, this does not mean that we have not considered it or that we did not consider it relevant when arriving at our MTD.
2. Where new information is advanced or fresh material is provided that was not known or available to the Customer prior to the MTD, then we will attach more weight to that information or material (though not necessarily conclusive weight because it depends on the nature of the information or material) than information or material that was known about or could have been discovered, raised or provided before the MTD.
3. Crucially, where there is a challenge to our judgment on a particular issue, including where we consider we have made a generous assumption in favour of a Customer, we will only reconsider that judgment if we are persuaded that we overlooked some material information, factor or argument in

arriving at our conclusion. This point will equally apply to LBG in the context of any challenge to an MTD.

### **Challenges by LBG to an MTD**

In reaching our MTD, we will normally have taken into account, where applicable, what was said about the Customer's position at the time of the Customer Review. As Sir Ross Cranston recognised, after the MTD has been issued, LBG will then have the right to comment on it particularly where new information and submissions have been provided by the Customer over and above those made during the Customer Review. Likewise, if LBG raises a new submission or puts forward new information as part of its response to the MTD, we always give the Customer the opportunity to comment on that material. As we state above, Point 3 above will equally apply to any challenge to an MTD by LBG.

### **Expert opinion**

In some FDs issued thus far, we have had to emphasise both to the Customer and to LBG that, unlike a court, our inquisitorial process is not designed or equipped to resolve disputed expert opinion. When a Customer relies on what is claimed to be independent expert opinion, we and our team must then subject that opinion to our own analysis and scrutiny, taking into account whatever additional information on the relevant topic we can obtain in order to reach a considered and balanced view.

Whilst in theory it is open to us to commission our own expert opinion when considering an opinion advanced by a Customer's expert, if we were to do that, LBG would then no doubt say that it also wanted to provide us with an alternative expert opinion and/or the Customer might want to instruct another expert to challenge our expert's opinion or that of LBG's expert and we could then well be confronted with several differing expert views. Leaving aside the difficulty of resolving differences between different experts, doing this would inevitably extend the whole Re-Review process and seriously impact on future cases waiting to be considered. No-one wants that. We have, therefore, discouraged LBG from seeking to rely on any expert opinion in its response to MTDs and have emphasised to Customers the matters referred to above when we evaluate any 'expert' opinion that they seek to advance to support their claim.