By Email

Xxxxx xxxxx

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Dear xx xxxxx

**Appeal Panel legal advice - Pembrolizumab (appeal point 1b.1)**

1. We are writing to respond to the memorandum of advice dated 22 May 2020 from the Appeal Panel’s legal adviser regarding the human rights and equality law aspects of Merck Sharp & Dohme Limited’s (“MSD’s”) appeal (the “Memorandum”). We are grateful to xx xxxxxxx of DAC Beechcroft for a thorough and thoughtful summary of the relevant legal framework and the key questions that the Appeal Panel must address. It was a pleasure to read his well-constructed and elegant advice.
2. We agree with the vast majority of the Memorandum and see no need to provide detailed comments on the advice. Rather, we comment upon aspects of the Memorandum that we consider require elaboration, qualification, or the Appeal Panel’s particular focus.

**Article 2**

1. We welcome the acknowledgement that this appeal engages Article 2 of the European Convention on Human Rights (“Convention”) and that Article 2 requires NICE to carry out a fair and rational balancing exercise between the needs of patients affected by the decision and the community at large (see paras. 13-14 of the Memorandum). NICE must apply a fair and proper process, which is one which considers all of the relevant material (and no irrelevant material) with an open mind, allowing proper engagement with stakeholders as the process requires, and allowing sufficient time for consideration and discussion before a decision is reached. The “intensity” of a rational review depends on its context. The outcome of that exercise must be reasonable. An irrational process is one that does not “add up” or “stack up.”
2. As xx xxxxxxx points out, these requirements reflect the public law principles of procedural fairness and reasonableness under appeal grounds 1a and 2. The key issue that remains to be resolved is what he refers to as a public body’s “margin of appreciation” when taking decisions that concern Article 2 rights. As he points out at para. 12 of the Memorandum, this has not been fully clarified. We provide some thoughts on this issue below and, in doing so, hope we have responded to xx xxxxxxxxx request in para. 7 of the Memorandum for clarification of MSD’s position.
3. Even though the right to life under Article 2 is an absolute right, we accept this does not mean governments should not benefit from a margin of appreciation. The European Court of Human Rights has in recent years applied the “margin of appreciation” concept widely it in its review of almost all Articles in the Convention, including Article 2. The ECHR’s Guide to Article 2[[1]](#footnote-2) acknowledges that states do have a margin of appreciation in their “*choice of means*” to fulfil their positive obligations under Article 2:

“*As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation.”*

1. Therefore, the state does enjoy a “margin of appreciation” in respect of how and by what means it implements measures to achieve its positive obligations to preserve life. This has the effect of narrowing the Appraisal Committee’s margin of appreciation because it requires positive measures to protect life.
2. In response to xx xxxxxxx’s request at para. 7 of the Memorandum, meeting the above requirements clearly requires a particularly painstaking approach, but it also requires positive measures. Suggesting this means that the Appraisal Committee must take a more indulgent view of the evidence, is perhaps a step too far. The approach to reviewing the evidence ought to be reasonable, fair and proper, take appropriate account of the context and consider all relevant information.
3. The Appraisal Committee should also aim for consistency with similar appraisals, such as TA525. English Courts considering how a decision maker’s margin of appreciation in the human rights context is restricted by its previous decisions and conduct appear to have applied the concept of legitimate expectation. For example, a 2011 Supreme Court false imprisonment and deportation case reinforces the decision maker’s obligation to apply its policies consistently:

*“… a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law , 10th ed (2009) p 316. As it is put in De Smith's Judicial Review, 6th ed (2007) at para 12-039*:

“*there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness*.””[[2]](#footnote-3)

1. This has the effect of further narrowing any margin of appreciation and this is core of MSD’s submissions under Article 2.
2. In summary, MSD submits that:
   1. Appraisal Committee D appraised Roche’s product, atezolizumab, in TA525. Pembrolizumab and atezolizumab are very similar technologies with similar evidence bases, including the study designs, their size, the choice of comparators and the way that patients are allocated to the various treatment arms. The primary endpoint in both the key trials was overall survival. However, atezolizumab did not meet its primary end point, while pembrolizumab did. Second, MSD was able to provide the Appraisal Committee with evidence of the duration of this treatment effect approaching five years, while Roche had only between 1 and 2 years.
   2. The more robust, “level one” evidence base from the KEYNOTE-045 clinical trial and the testimony of the clinical community shows that pembrolizumab is the only genuinely life-extending treatment option for this cancer.
   3. The Appraisal Committee ought to have given proper regard to the potentially transformative nature of the technology, the impact on patients of refusing to recommend the product (without proper justification), the views of the clinical community, and the unprecedented quality of the evidence. Yet the same Appraisal Committee D applied a more conservative, negative approach when appraising pembrolizumab than it did for atezolizumab in TA525. That was procedurally unfair and unreasonable in light of the evidence before the Committee; it simply does not add up.
   4. While exercising its “margin of appreciation,” Article 2 required the Committee to take positive measures to preserve life. Yet, the Appraisal Committee appears to have taken the opposite approach by consistently exercising its discretion in a manner that reduce the likelihood that these patients would benefit from a life-extending product.
   5. Even though its evidence base would arguably support it, MSD does not require a more indulgent view of its evidence than the Appraisal Committee took in TA 525. However, the company does have a minimum legitimate expectation of an evidence review that is consistent with Appraisal Committee’s approach in TA525.

**Discrimination**

1. We note, and broadly agree with, the observation that a decision that is objectively unjustified could be overturned under Ground 2 and could also be illegal because it is discriminatory (para. 15 of the Memorandum). We also agree that if a decision cannot be objectively justified, it must follow that the patients affected have had less favourable treatment than patients in other appraisals, where the assessment of the evidence was objectively justified. However, Ground 2 and Ground 1b.1 are not mutually exclusive: the fact that a decision is unreasonable *per se* does not mean that the Appraisal Committee has not also breached of Article 14 and the Equality Act. Whether the decision is discriminatory is, quite rightly, for the Appeal Panel to determine.

**Article 14**

1. The Memorandum correctly identifies that, in order to establish a breach of Article 14, the Appeal Panel must ask itself: (1) whether there is in fact a difference in treatment between this group of patients in this appraisal and another group in other appraisals and what that difference was, and (2) if there is a difference, whether that difference is manifestly without reasonable foundation.
2. MSD’s believes that the interests of patients had been treated differently in this appraisal compared with TA525, particularly in terms of the Appraisal Committee’s approach to reviewing evidence and managing uncertainty. The company’s submissions provide multiple examples why those differences were illogical, unreasonable, unfounded and unfair.

**Equalities: Public Sector Equality Duty (“PSED”)**

1. We agree with all of xx xxxxxxx’s observations on the PSED. The PSED is clearly a process rather than outcome duty. We agree that the duty must be exercised by the decision maker during the decision making process and not after the event, it must be taken seriously, and it must be exercised in substance, rather than being a box-ticking exercise) (para. 26 of the Memorandum).
2. We further agree that it is for the Appeal Panel to establish what account was taken of equality issues during the appraisal, and then form its own view whether the Appraisal Committee had given due regard to:
   1. the need to eliminate discrimination;
   2. advancing equality of opportunity;
   3. removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; and
   4. taking steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it (paras 23 and 26 of the Memorandum).
3. MSD’s submission is that the Appraisal Committee, in the particular circumstances of this case, did not give due regard to these obligations. The company provided a detailed discussion of this issue at pages 6 and 7 of its Response to Scrutiny and it is unnecessary to repeat those points here.

**Section 29(6) of the Equality Act**

1. We note and agree with the distinction between discrimination *arising from a disability* and indirect discrimination. We agree that an improperly conducted appraisal cannot easily be said to be discrimination arising from a disability.
2. Indirect discrimination requires some unpicking. The suggestion (at para. 30 of the Memorandum) that indirect discrimination essentially arises from an over-rigid consistency is not completely clear. It can often be the case that a decision has without proper justification been applied universally, in a way that fails to take into account the disproportionate effects on persons with protected characteristics. Numerous employment and age-related discrimination cases speak to that scenario. However, it is not immediately clear to us why inconsistency could not produce the same unlawful result. For example, in this case, Appraisal Committee D took a decision in TA525 that affected urothelial cancer patients in a particular way (including those who were old or had disabilities in addition to cancer). Faced with a similar product and effectively the same patient population, the Appraisal Committee took a very different approach, which affected patients (especially those who were old or had disabilities in addition to cancer) disproportionately badly. We do not see an obvious legal or conceptual impediment against viewing such inconsistency through the lens of indirect discrimination.

We hope that these submissions will assist the Appeal Panel. Please let us know if NICE or xx xxxxxxx have any additional comments or queries.

Yours sincerely,

**Merck Sharp & Dohme Limited**

1. ECHR’s Guide to Article 2, available at <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf>. [↑](#footnote-ref-2)
2. *R (Lumba) v Secretary of State for the Home Department* [2011] *UKSC* 12, 2011 WL 806813, *per* Lord Dyson at para 26. [↑](#footnote-ref-3)