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The Scottish Government
Riaghaltas na h-Alba

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Jim Eadie MSP
The Convener
Infrastructure and Capital Investment Committee
The Scottish Parliament
Edinburgh
EH99 1SP

07 July 2015

Dear Mr Eadie,

Public Procurement Reform and Glasgow Prestwick Airport

I undertook to write to you, following my appearance before the Committee on 17 June, to provide the Committee with some additional information on two issues.

Public Procurement Reform

You asked if I could provide you with the details of the 3 rulings to date from the Court of Justice of the European Union on cases concerning a public body's ability to mandate the payment, by contractors, of wages which are higher than the local statutory minimum wages within a public procurement procedure and/or contract. In reaching its decisions, the Court has referred to the Posting of Workers Directive (96/71/EC) and also to compatibility with the provisions of the Treaty on the Functioning of the European Union, specifically article 56 (free movement of services).

The earliest case was that of Laval (C-341/05). In this case, which was considering a matter other than a public procurement exercise, the Court pointed out that the Posting of Workers Directive does not allow a host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection.

In the second case, Ruffert (C346/06), the Court held that a public authority could not stipulate that it would only award a public contract to a contractor on condition that the contractor agreed to pay its employees at least the wage rate prescribed by a collective agreement in force at the place where the contract was to be performed. It held that to do so would not be consistent with the free movement of services enshrined in article 56 of the Treaty on the Function of the European Union. It further held that, in this instance, the collective agreement did not have the necessary characteristics to demonstrate that it had been declared "universally applicable" (something that must be observed by all undertakings

in the geographical area and in the profession or industry concerned), which was required in order to be compatible with article 3 of the Posting of Workers Directive. In Ruffert, the Court noted that the collective agreement applied to public contracts only and, as it did not apply to private contracts as well, it was not "universally applicable".

The third, and most recent, ruling is Bundesdruckerei v Stadt Dortmund (C549/13), dated September 2014. In this case a German public authority set out a condition of tendering that the successful contractor, and its subcontractors, must pay their employees at least the minimum rate of pay that was laid down in a local law. This condition was challenged by a bidder that intended to subcontract the work to a company that was based in another Member State. Unlike the Ruffert case, the Posting of Workers Directive was not considered by the Court in reaching a determination as the intention was to perform the contract by moving the work out of, in this instance, Germany to another Member State, as opposed to moving workers from another Member State into Germany. The Court ruled that imposing, under national legislation, a minimum wage on a subcontractor established in a different Member State in which minimum rates of pay are lower "constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State" and therefore the contract condition to not be compatible with article 56 of the European Treaty.

Importantly, the Bundesdruckerei ruling last September confirmed that the legal obstacle (to mandatory imposition through procurement/public contracts of a higher minimum wage than the statutory national minimum wage) relates to fundamental EU Treaty principles, especially the free movement of services. It would not be within even the European Commission's gift to provide a derogation from compliance with the Treaty. Furthermore, EU law does not place any significant constraints on the UK's approach to the statutory minimum wage. If the UK Government wished, it could set the national minimum wage at a level equivalent to the living wage.

Likewise, EU law does not place any significant constraints on the UK Government's ability, if it wished, to adopt an approach to the statutory minimum wage which recognises national or regional circumstances and priorities. As you will know, this Scottish Government asked the Smith Commission to recommend devolution of responsibility for the national minimum wage to the Scottish Parliament. That was not a position which every party to the Smith Commission supported. Indeed, far from supporting our plea for further devolution in this area, Scottish Labour's submission to the Smith Commission actually described employment law as an "essential reserved" matter. This is an important point to consider in the context of the European Court rulings. In effect, the Court in the Ruffert case said that the State (in whatever administrative form it takes) is entitled to determine what level of protection should be extended to workers and that any bidder for a public contract must comply with those requirements where they apply to its workers. However, once the State has taken a decision regarding minimum standards of protection, it is not then open to individual public bodies to apply arbitrary additional requirements (in the Ruffert case, a requirement that bidders comply with local non-statutory collective agreements).

There is another case on which the Court of Justice of the European Union has been asked to provide a ruling; RegioPost v Stadt Landau, (C-115/14). The Court has been asked whether a public body can only award public contracts to contractors that agree to a condition set for public contracts only (i.e. not including private contracts) to pay a specified rate of pay where there is no existing legal obligation to do so. We await the Court's findings on this issue, but have no reason to expect that it will differ substantially from previous rulings.

Glasgow Prestwick Airport

Air Passenger Duty

Alex Johnstone noted that a reduction or abolition of Air Passenger Duty would boost air travel generally but questioned how such a move would have a specific benefit for Glasgow Prestwick.
The Report *The Impact of Reducing APD on Scotland's Airports* commissioned by Edinburgh Airport and published in March 2015 looks at the potential impact of a 50% cut in APD across all airports. This research shows that a reduction in APD would have the biggest impact at Glasgow Prestwick Airport. The overall positive effect at each airport in 2020 modelled is:

Airport	Increase in passengers per annum
Glasgow Prestwick	345,000
Edinburgh	302,000
Glasgow	201,000
Aberdeen	28,000
Inverness	18,000

The report noted that the biggest gain is seen at Glasgow Prestwick where the ultra low fares offer of Ryanair combined with a heavily price sensitive, leisure focused market results in significant stimulation. Edinburgh and Glasgow make gains but these are not so dramatic in percentage terms because of the more balanced airline portfolios and the more mixed nature of demand – i.e. the mix between business and leisure passengers.

Route Development

David Stewart asked about route development, in particular the UK's Regional Connectivity Fund. Since the Scottish Route Development Fund closed, we have operated a different model to route development in line with European rules. Our approach is to work with airlines to jointly market new services in their early years to help them become sustainable. We also have also supported HIAL to incentivise new routes through reduced airport charges. This approach has helped our airports secure a number of new services over the last 2 years including important new routes to Chicago, New York, Halifax, Doha, and Abu Dhabi. This support is available to all airports in respect of routes which benefit inbound tourism and/or provide enhanced business connectivity

The UK Regional Connectivity fund has limited reach. It is only available to airports with less than 5m passengers and would provide funding for up to 50% of airport charges. We do not see any need to replicate this scheme in Scotland. With the exception of Aberdeen, all of the airports that would be eligible are Government owned. This means we can already support reduced airport charges directly though investment in Prestwick or subsidy to HIAL. Indeed we already used this approach to secure the EasyJet Inverness to Gatwick service. For larger airports which would not be eligible under European rules, we are confident that our joint marketing approach will continue to deliver new routes in the future.

Primary radar renewal

The Committee asked for an update on the renewal of the primary radar. Glasgow Prestwick Airport is in the process of procuring a primary radar windfarm mitigation solution through the OJEU procurement process. The existing radar may not be replaced in the short term as a consequence of this process. It is expected that the contract(s) will be awarded by the end of September 2015

I trust that his provides you with the informaton you sought, but will be happy to provide further detail if necessary.

Kind regards

KEITH BROWN