SUBMISSION FROM THOMPSONS SOLICITORS

Payment of a Living Wage in Public Procurement Contracts in Scotland

Introduction

1. I have been asked to consider various legal issues arising under UK and EU law from the possible inclusion in public procurement contracts in Scotland of a contract performance clause requiring the payment of a "*living wage*", in order to brief Patrick McGuire of Thompsons prior to him giving Evidence to the Local Government and Regeneration Committee of the Scottish Parliament. I shall address each of the issues I have been asked to consider, in the order set out in my Instructions, followed by my conclusions.

(i) Whether it would be possible, under the current EU public procurement regime as set out in Directives 2004/18/EC and 2004/17/EC, to incorporate payment of the living wage as a contract performance clause in all public procurement contracts in Scotland.

2. In brief, my advice regarding the first question is that it would be possible, under the current EU public procurement regime as set out in Directives 2004/18/EC (the "*Public Sector Directive")* and 2004/17/EC (the "*Utilities Directive*"), to incorporate payment of the living wage as a contract performance clause in public procurement contracts in Scotland, subject to certain conditions.

3. I understand the term "*contract performance clause*" in my Instructions to refer to the provisions in Article 26 of the Public Sector Directive (and, with minor differences Article 38 of the Utilities Directive), which provides for the inclusion of additional contract conditions ("*Conditions for performance of contracts*") that go beyond the subject matter of the contract:

   > *"Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations."*

4. The recitals in the Public Sector Directive (again with minor differences in the Utilities Directive) set out some further indications of the intention behind Article 26. Recital 33 of the Directive provides:

   > *"Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the*

> *employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation."*

5. Taking advantage of the provisions of Article 26 has certain important implications. The use of contract conditions focuses attention on the stage *after* the contract has been awarded. It does not attempt, for example, to exclude potential contractors on the basis of their previous activities. Instead, it requires that whoever is awarded the contract must comply with certain conditions in carrying out the contract once it is awarded.

6. Unlike those contract conditions that may be taken into account in the context of the award of the contract, which are linked directly to the subject matter of the contract, these additional contract conditions may not be taken into account in the award of the contract because they are not necessarily related to the subject matter of the contract, except in the limited circumstances permitted by the ECJ in *Commission of the European Communities v French Republic, Case C-225/98, 26 September 2000*, i.e. where two or more tenders are equal and compliance with the additional performance condition is used as a tie-break. (In Northern Ireland, the approach has been adopted of making the social issue part of the subject matter of the contract, with obvious advantages in terms of its legality, but I note that this approach has not been raised in my Instructions.)

7. There are several particular issues that arise, affecting the use of this approach to require payment of the living wage as a contract performance clause. The first is the issue that arises from the use of the term "*conditions <u>relating to</u> the <u>performance</u> of the contract*". The issue that arises is what "*relating to*" means in this context, and in particular whether it limits the ability of contracting authorities to include social considerations. A crucially different issue arises in the interpretation of award criteria where the term used is "*criteria <u>linked to the subject-matter</u> of the public contract in question*". This latter term appears to require a somewhat closer nexus between the "*criteria*" and the "*subject-matter of the contract*" than the nexus required between "*conditions*" and "*performance of the contract*". The Recitals seem to bear this out, stating that "*Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents*", concentrating on transparency and discrimination as limits, rather than emphasizing any particular degree of nexus between "*conditions*" and the "*subject-matter of the contract*".

8. A contract condition would not, however, relate to the “*performance”* of the contract if it required, for example, that the contractor provide a living wage on *another* contract. The provision requires, therefore, a clear view of what “*the contract”* in question is, and in particular its boundaries. Article 26 refers, after all, to “*special”* conditions, thus implying that the provision provides for conditions that might not ordinarily be included, and might not therefore relate to the “*subject matter”* of the contract, narrowly defined.

9. A second possible limit that appears from a close reading of the Recitals, but not the relevant Articles, relates to the use of contract conditions to require contractors to abide by legal obligations that would apply to them in any event, because they are in generally applicable legislation. This issue arises because the recitals specify that two of the possible contract conditions are relevant where they have not already been made obligatory under domestic law (“*to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation”*). Is it contrary to the Directives to include contract conditions that require compliance with domestic legislation in performing the contract? Or did the drafters of the recitals simply assume that contracting authorities would choose to use such contract conditions only where there was no generally applicable legislation?

10. In the absence of any other indication in the drafting of the directives that the former is the preferable interpretation, the latter appears both more desirable from the perspective of leaving contracting authorities more scope for implementing the principle of equal treatment, and more sensible from a policy perspective in allowing contracting authorities to choose when using contract conditions might be a useful additional basis for enforcing already existing legal requirements. In any event, my Instructions do not indicate that there is already general legislation providing for a living wage, and so the issue raised by the Recitals is probably irrelevant, although it may be useful to clarify the relationship between the minimum wage and the living wage in this context.

11. Third, the provision in Article 26 that permits contract conditions “*provided that these are compatible with Community law”* is of importance. As the Recitals state, direct and indirect discrimination must be avoided, in the sense that the choice of contract conditions must not be such as to disadvantage unfairly potential contractors from another state. It is of importance, therefore, for any living wage scheme to be compatible with the EU internal market Treaty requirements, and the Posted Workers Directive. Both these issues are considered below, paragraphs 18-35.

12. The requirement of *compatibility with Community law* is also important because it sets the parameters of the type of contract condition that is acceptable beyond compatibility with EU internal market requirements. Thus, for example, although the Recital gives as an example a contract condition

regarding the "*employment of people experiencing particular difficulty in achieving integration"*, the type of condition that would be permissible under Community law could not include a condition that required contractors to employ 20 per cent of the workforce working on the contract on the basis of racial origin, because that would be contrary to the Race Discrimination Directive. The compatibility of the living wage scheme with the Race Discrimination Directive is considered below, at paragraphs 36-46.

(ii) If so, whether such a policy could be achieved by amending section 39 of the Public Contracts (Scotland) Regulations 2006 to include a requirement that all contracting authorities stipulate payment of the living wage as a condition for performance of the contract.

13. Section 39 ("*Conditions for performance of contracts*") of the Public Contracts (Scotland) Regulations 2006 ("the Regulations") provides as follows:

> *(1) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law and are indicated in–*
>
> *(a) the contract notice and the contract documents; or*
>
> *(b) the contract documents.*
>
> *(2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.*

14. It is clear that this Section was intended to implement Article 26 of the Public Sector Directive, and will be interpreted as such. So far as relevant, therefore, Recital 33 should be taken into account in the interpretation of Section 39.

15. In my view, Section 39 *empowers* contracting authorities in Scotland to incorporate living wage conditions, subject to the caveats set out above. The main feature of Section 39 is that it gives *discretion* to contracting authorities to stipulate conditions. It does not *require* them to do so. Nor does it specify *which* conditions should be specified.

16. I have not been instructed to consider whether such an amendment would be, in general, within the powers of the Scottish Parliament, and have not done so. Nor have I been instructed to consider whether any agreements between the Government of Scotland and the Government of the United Kingdom may affect any such proposed amendment, and I have not done so. Nor have I been instructed to consider whether other methods of achieving these objectives are available, without legislation, and I have not done so.

17. Leaving aside these issues, to the extent that it is regarded as desirable to require contracting authorities to specify living wage conditions in

procurement contracts, then an amendment to Section 39 setting out such a requirement would be a legally possible way of achieving this. As I suggest later, the requirements of the Posted Workers Directive may be satisfied by such an amendment, provided it follows a particular form.

(iii)Whether such a policy could be successfully challenged under Directive 96/71/EC regarding the posting of workers in the framework of the provision of services and Article 56 TFEU (ex Article 49 EC) given the judgment of the Court in Case C-346/06, Rüffert v Land Niedersachsen, 3 April 2008 and any possible defences to such a challenge.

Posted Workers Directive

18. It is convenient to consider first the issues concerning Directive 96/71/EC ("the Posted Workers Directive"). The Directive applies (Article 1)

    "*to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers … to the territory of a Member State.*"

    "*Posting*" arises when, according to Article 1(3)(a), undertakings engaged in the transnational provision of services,

    "*post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting.*"

19. It is likely that the proposed living wage scheme would apply to posted workers, among others. In this situations, under Article 3(1), Member States "*shall ensure that, whatever the law applicable to the employment relationship, the undertakings … guarantee workers posted to their territory the terms and conditions of employment*" covering a set of matters provided for in the Directive:

    "(a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination."

20. The Directive provides that the minimum rates of pay referred to in paragraph 1(c) are "*defined by the national law and/or practice of the Member State to whose territory the worker is posted*." In the *Rüffert* case, and in the context of the issue considered in this opinion, the relevant provision is (c) concerning "*minimum rates of pay*."

21. There are several different ways in which Member States may satisfy the requirement ("*shall ensure*") that workers are to be guaranteed protection of these labour standards. One method is for the labour standards to be provided for in laws, regulations and/or administrative provisions. These standards must be applied by the host state to posted workers.

22. There was considerable debate when the Posted Workers Directive was being drafted over how far beyond this provision the Directive should go, involving, in particular, the issue of whether "*labour standards derived from collective agreements should be included and, if so, standards derived from which sorts of collective agreements*," Paul Davies, Posted Workers: Single Market or Protection of National Labour Law Systems?, 34 *Common Market Law Review* (1997) 571, at 580. The result of this debate was that collective agreements were specifically included as a source of legal obligation, but only in the context of the building industry, which was the case in *Rüffert*. In its consideration of the Posted Workers Directive, the *Rüffert* case primarily concerned these additional ways of complying relating to collective agreements in the building industry.

23. My understanding is that the scheme proposed in Scotland would apply beyond the building industry, and that these additional methods of complying with the Posted Workers Directive would not be sufficient to provide protection for the breadth of the proposal envisaged. To be protected under the Posted Workers Directive, therefore, the living wage will need to be provided through "*laws, regulations and/or administrative provisions*".

24. The proposal that Section 39 would be amended to require a living wage to be provided in government contracts would, in principle, satisfy this requirement, but it would have to do so with some specificity. It would not be sufficient, for example, for the living wage to be specified by referring to some other source, such as a collective agreement. The ECJ held in the *Rüffert* case that the Lower Saxony law did satisfy this requirement, because that provision did not itself set out the wages rates but merely referred to the collective agreement. It would be necessary, therefore, for any amendment to Section 39 to specify the applicable wage rate itself (or, more likely, empower secondary legislation to do so).

Article 56 TFEU (ex Article 49 EC)

25. Even assuming that the Posted Workers Directive was satisfied in this way, the issue arises as to whether there could be a challenge directly under the Treaty provisions governing the internal market. *Rüffert* raises the more general issue of the application of Article 56 TFEU (ex Article 49 EC) to the inclusion of social requirements in procurement beyond the context of posted workers. It is arguable that if the test applicable to procurement linkages in general is the same as that applied in *Rüffert*, i.e. whether such measures impose "*an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State*" (para 57 of *Rüffert*), or even if the narrower test of whether the measure is directly or indirectly discriminatory on grounds of nationality is applied, such linkages may constitute a restriction within the meaning of Article 56 TFEU.

26. In *Rüffert*, the prima facie breach of Article 49 EC was largely assumed by all the parties, and there was little, if any, empirical evidence substantiating the allegedly deleterious effect of the law on out of state (particularly Polish) contractors. I have no Instructions whether there any empirical assessment has been made of the possible effect of a Scottish living wage requirement on out-of-Scotland contractors. It would be useful for a study to be conducted so that any potential problems in this respect may be addressed and, if possible, mitigated.

27. I shall assume, purely for the purposes of this opinion that there is "*an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.*" It would then be necessary to argue that the measure was nevertheless justified. The Court in previous cases adopted a three-part test that it applied to the question of justification. Of this three-part test, only the first two are significantly in issue in *Rüffert*.

   (1) First, are the reasons advanced by the Member State capable of constituting "*overriding requirements relating to the public interest"*, *Arblade*, et al, Joined cases C-369/96 and C-376/96, [1999] ECR I-8453, paras 33 and 34, or "*imperative requirements in the general interest" Reinhard Gebhard* v. *Consiglio dell"Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, [1995] ECR I-4165.

   (2) The second issue in the justification process involves asking whether there is a nexus between the objective of the measure adopted and the actual achievement of the objective in practice; "*[measures adopted] must be suitable for securing the attainment of the objective which they pursue*" *Gebhard*, above, para 37. See also Case C-19/92, *Kraus* v *Land Baden-Wuerttemberg* [1993] ECR I-1663, para 32.

   (3) The third issue in justification is whether the objective sought could be accomplished by less restrictive means: "*they must not go beyond what is necessary in order to attain it.*" *Gebhard*, above, para 37. See also Case

C-19/92, *Kraus* v. *Land Baden-Wuerttemberg*, [1993] ECR I-1663, para 32. The Court in *Rüffert* does not consider this issue in any detail.

28. Turning to the first issue, the reasons advanced for the measures adopted, Lower Saxony advanced three principal justifications in *Rüffert*. First, it was argued that the state measure was justified by the objective of protecting workers. In *Michel Guiot and Climatic SA*, Case C-272/94, [1996] ECR I-1905, the Court held that

    "*the public interest relating to the social protection of workers in the construction industry may … because of the conditions specific to that sector, constitute an overriding requirement justifying such a restriction on the freedom to provide services*" (at para 16).

    Second, it was argued that the measure was justified by the objective of supporting union autonomy through support for collective bargaining. Third, it was argued that the measure was justified by the objective of ensuring the financial balance of the social security system, which would be damaged if reduced contributions were to be paid into the system because of reduced wages being paid to workers contributing to that system.

29. Of these, the Court clearly regarded the first as the principal justification. I shall assume that the first objective, of protecting workers, is considered to be the main objective in the context of the living wage requirement. It would be important for the objective of the measure adopted to be precisely defined and recorded.

30. The main question the Court was confronted with in *Rüffert* was the second issue in the justification test, whether the provisions in issue in fact protected the interests of the posted workers. The test set out in *Finalarte Sociedade de Construção Civil Ld*, Joined Cases C-49/98, C-50/98 to C-54/98 and C-68/98 to C-71/98, [2001] ECR I-7831 was whether, "*viewed objectively, the rules in question in the main proceedings promote the protection of posted workers*" (at para 41). To do this

    "*it is necessary to check whether those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted*" (at para 42).

    Do the legal requirements "*in fact pursue the public interest objective of protecting workers employed by providers of services established outside Germany*" (at para 49)?

31. The ECJ held in *Rüffert* that the relationship between the contested measure and ensuring the objective of protecting workers was not convincing. The contested measure applied to only part of the construction sector falling within the geographical area, since the legislation applied solely to government contracts in that sector, and the collective agreement was not declared universally applicable. The Member State had not shown why this limitation

to government contracts was "*necessary"*. And, in any event, the rate of pay guaranteed was greater even than that provided for in the *national* legislation transposing the Posted Workers Directive. For the same reasons, the Court was unwilling to accept that the measure was justified by the objective of supporting union autonomy. And no convincing evidence was presented on the financial issues involved to support the social security argument.

32. The approach adopted by the ECJ in *Rüffert* thus raises significant issues in the future for the approach to justification under Article 56 TFEU in the context of contract performance conditions. There are several ways of addressing the challenge that *Rüffert* poses in this context.

33. One approach is to seek to attach more weight to the employment protection issues involved, for example by arguing that the matter of the living wage is a matter of human rights protection, as well as a measure protecting workers" interests. In the past, when the Court identifies the interests involved in the balancing process as involving questions of "*human dignity"*, the Court appears to be more willing to accord them greater weight, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*. The legislature should make it clear, therefore, that it regards the issue of the living wage as a matter of "*human dignity*".

34. More importantly, however, it will be necessary to make clear the reasons why the *procurement* approach has been adopted, thus limiting the coverage of a living wage requirement to a particular subset of employees, rather than legislating that all employers in Scotland should provide a living wage for all employees. Making this clear would help address the principal issue identified by the Court in *Rüffert*.

35. Finally, an important clarification will be necessary concerning the level at which the living wage is set. Why is this rate of pay chosen, as opposed to some other rate? In this context, it will be vitally important to avoid any sense that the rate chosen was intended to, or was known to, exclude or make more difficult the participation, of non-UK contractors.

(iv)Whether such a policy could be successfully challenged under article 14 of Directive 2000/43/EC (the "Race Discrimination" Directive) given that people of Scottish and English nationality are considered to be separate racial groups (see BBC Scotland v Souster [2001] IRLR 150) and any possible defences to such a challenge.

36. Article 14 of the Race Discrimination Directive provides:

> *"Member States shall take the necessary measures to ensure that:*
>
> > *(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;*

> *(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers" and employers" organisations, are or may be declared, null and void or are amended."*

37. Article 2(1) of the Race Discrimination Directive provides that

> *"For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin."*

38. There is no definition provided in the Race Discrimination Directive on the meaning of "*racial or ethnic origin*", and there has been no relevant interpretation by the Court of Justice of the European Union (CJEU) of the meaning of these terms, so far as I am aware.

39. It is likely that the Court would take the position that, although the meaning of these terms in EU law will be affected by the interpretation of these terms in the national law of the Member States, the meaning of these terms in the Directive is ultimately a matter of EU law, and that these terms have an autonomous meaning within EU law. The Directive specifically provides that domestic law may have a wider scope than the Directive.

40. For the CJEU to extend the terms "*racial or ethnic origin*" in the Directive to include "*national origins*" would, in my view, be unlikely, but not impossible. On the one hand, it may be argued that the European Court of Human Rights has interpreted the term ethic origins in Article 14 of the European Convention on Human Rights to include aspects of nationality within its definition, see, e.g. *Timishev v. Russia*, nos. 55762/00 and 55974/00, ECHR 2005-XII.

41. On the other hand, in arriving at the view that it would be unlikely, there are several considerations that the Court would be likely to take into account. It would be relevant that the issue of nationality and national origins would be seen as already the subject matter of an extensive body of EU law, which forms the core of EU internal market law, and which would be the relevant body of law to consider in this context, rather than extending the Race Discrimination Directive.

42. Although it was held in *BBC Scotland v Souster* [2001] IRLR 150 that a person may be unlawfully discriminated against, under domestic UK law, on the grounds of that he or she is English, that decision was based on the extended definition included in the Race Relations Act 1976. That Act contains provisions against discrimination on "*racial grounds".* In section 3(1)

"*racial grounds*" is defined as "*any of the following grounds, namely colour, race, nationality or ethnic or national origin"*.

43. Article 3(2) of the Race Discrimination Directive specifically provides, however, that the Directive "*does not cover difference of treatment based on nationality*". Nor do the terms "*racial or ethnic origin*" in the Directive specifically include the term "*national origin*".

44. It would also be relevant that in other EU law contexts in which the term "*race or ethnic origins*" is found, and the intention is also to include "*national origins*", this is specifically provided for. Article 21(1) of the EU Charter of Fundamental Rights, for example, provides that

> *"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."*

45. My advice, therefore, is that, although the matter is not beyond doubt, the Directive would probably not be interpreted to cover discrimination between the English and the Scots, whatever the position under domestic law, although a more extensive investigation of how the Directive has been implemented at the national level in the different Member States would help to clarify this issue.

46. Even assuming, contrary to the view I have expressed, that the term "*racial or ethnic origins*" includes "*national origins*" for the purposes of the Racial Discrimination Directive, such that discrimination between the English and the Scots would be covered, the issue would be likely to arise, at most, as one of alleged indirect discrimination. To establish a case of indirect discrimination would require evidence of adverse impact. Whether such adverse impact could be established would depend on the facts advanced, and I have no instructions on what these might be. There would also be the issue of justification to be considered, which would involve similar considerations to those on proportionality considered previously.

(v) Whether there are any other facets of UK and/or EU law which counsel thinks may pose a challenge to the introduction of such a policy.

47. The issues discussed above address the principal issues that appear to me to arise from the information that I have been provided in my Instructions. I have identified above several issues that I have not been asked to address that may be relevant. In addition, there are issues surrounding the procurement powers of local authorities in Scotland that I have not been asked to consider.

48. Finally, in my initial Instructions I was not asked to consider any implications of the public sector equality duties under the Equalities Act 2010 for the issue of the living wage in public procurement. In conference, it was suggested that it may be useful if I address this issue briefly.

49. Section 149 of the Equalities Act 2010 provides that: “A public authority must, in the exercise of its functions, have due regard to the need to … advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it”. The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. Having “due regard” involves having due regard, “in particular, to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic”. The “function” of public authorities includes the procurement function. Section 149 has been brought into effect in Scotland and is relevant for the issue of a living wage in Scottish public procurement. If it can be shown that some of those who would benefit from the introduction of a living wage in public procurement are those with “protected characteristics”, then the introduction of a living wage may be seen as partly justified by the duty on Scottish public authorities to comply with a legal duty under section 149.

50. For the sake of completeness, I should add that, in addition to the general duties set out in Section 149, the Equality Act 2010 empowers Ministers of the Crown, Welsh Ministers and Scottish Ministers, by regulation after consulting the Equality and Human Rights Commission, to impose more specific duties on the specified public authorities for the purpose of enabling the “better performance” by the authority of its general duties. Section 155 provides that these regulations may require a public authority to “consider such matters as may be specified from time to time”. The Act explicitly provides that the specific duties may impose duties “in connection with” its “public procurement functions” on a public authority that is a contracting authority within the meaning of Directive 2004/18/EC. A “public procurement function” means a function the exercise of which is regulated by Directive.

51. In its August 2010 consultation document on the public sector equality duties (Government Equalities Office, 2010, para 5.21), the Coalition Government indicated its scepticism about the specific procurement duty, stating: “We do not believe it is necessary to impose burdensome additional processes on public bodies telling them how to conduct their procurement activity: they will be judged on the outcomes that they deliver.” In its response to the consultation (Government Equalities Office, 2011, 18), the Coalition Government concluded that it would not include any specific duties for procurement for English public authorities, and simply to leave it public authorities to apply the general duty to procurement without further elaboration, as was the case prior to the 2010 Act. The general duties were brought into force from April 2011.

52. When the UK Government decided not to bring these specific procurement duties in section 155 into effect, the Scottish Government, mindful of the value of a level playing field, took the same decision. However, when the Welsh Assembly Government decided to operationalise these procurement duties, the Scottish Government decided to look again at procurement and to seek views on whether similar duties might be effective in Scotland (Scottish Government, 2011). This consultation was due to end in November 2011. The outcome of that consultation and the decision of Scottish ministers on whether and how to operationalize section 155 may also have an impact on the issue of a living wage in procurement.

Conclusions

53. My conclusions are:

(1) It would be possible, under the current EU public procurement regime as set out in Directives 2004/18/EC (the "*Public Sector Directive")* and 2004/17/EC (the "*Utilities Directive*"), to incorporate payment of the living wage as a contract performance clause in all public procurement contracts in Scotland, subject to certain conditions.

(2) To the extent that it is regarded as desirable for contracting authorities to be required to specify living wage conditions in procurement contracts, then an amendment to Section 39 of the Regulations setting out such a requirement would be a legally possible way of achieving this.

(3) To be protected under the Posted Workers Directive, the living wage will need to be provided through "*laws, regulations and/or administrative provisions*". A suitable amendment to Section 39 should meet the requirements of the Posted Workers Directive in this respect.

(4) If the living wage requirements constitute a restriction within the meaning of Article 56 TFEU, then the issue of justification arises. Assuming that the measure is seen by its supporters to be justified by the objective of protecting workers, the main issue would be whether the provisions in issue in fact protected the interests of workers, and whether the measure was "*necessary*" to do so.

(5) In this context, the legislature should make it clear that it regards the issue of the living wage as a matter of "*human dignity*".

(6) In this context, the legislature should also make clear the reasons why the procurement approach has been adopted, as opposed to legislating that all employers in Scotland should provide a living wage for all employees.

(7) It would also be important to explain why the level at which the living wage was set was chosen, and in particular that no element of protectionism was present in the decision.

(8) Although the matter is not beyond doubt, the Race Discrimination Directive would probably not be interpreted to cover discrimination between the English and the Scots, whatever the position under domestic law.

(9) The public sector equality duties in the Equality Act 2010 may support further the legal basis for introducing a living wage in public procurement.

54. I should add that I have not, of course, been supplied with any detailed scheme for implementing a living wage as a performance condition in Scottish public procurement contracts. As will, I hope, appear obvious, whether or not such a scheme is at risk of successful challenge under EU law will depend substantially on the detail of the methods chosen and how they are implemented in practice. I would be delighted to consider any further issues that arise in the future.

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