SUBMISSION FROM PATRICK MCGUIRE, THOMPSONS SOLICITORS

1. Introduction to public procurement in Scotland

The current public procurement regime in Scotland is governed by the Public Contracts (Scotland) Regulations 2006. This legislation is derived in large part from European Union law, which has a specific framework for the regulation of public procurement. The framework is rooted in the principles contained in the Treaty on the Functioning of the European Union (TFEU), including non-discrimination (all tenderers should have the same chance to win the contract); transparency (award criteria and requirements should be made clear); proportionality (the requirements should reflect the needs of the contract) and mutual recognition (technical standards and qualifications from other Member States should be given equal validity). These principles are designed to facilitate the internal market in public procurement in the EU. However, the European Union is becoming increasingly active in promoting socially responsible public procurement (SRPP) and in encouraging contracting authorities to take account of social considerations, such as payment of the living wage, in public procurement.

2. The EU public procurement framework

The EU legislation regarding public procurement is contained primarily in Directive 2004/18/EC1 (‘the Directive’), with corresponding provisions in Directive 2004/17/EC2. The Directives guarantee transparent and non-discriminatory procedures to enable public purchases to be made in a way which ensures equal access to and fair competition for public contracts within the EU.

Under the Directive, there is a specific procedure to be followed with regards to the public procurement process. The different stages include: setting the technical specifications; the selection of bidders (including a selection and award stage); and the setting out of the contract performance clauses. Both the technical specifications and the award criteria used must be linked to the subject matter of the contract. Payment of the living wage either as a technical specification or as an award criterion would not be considered to be linked to the subject matter of the contract and so could not be included at this stage.

However, payment of the living wage could be included as a contract performance clause. These are obligations setting out how the contract is to be performed and must be accepted by the successful tenderer. Article 26 of the Directive specifically

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notes that: “The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”. The contract performance clause could contain a stipulation that all workers on the contract are paid a living wage provided that: (a) the condition applied only to that contract and not to all workers employed by the successful tenderer; (b) the condition was set out in the call for tenders; and (c) that the condition complied with EU law.

One possibility would therefore be for s39 of the Public Contracts (Scotland) Regulations 2006 (regarding conditions for performance of contracts) to be amended to include a requirement that all contracting authorities stipulate payment of the living wage as a condition for performance of the contract.

3. Potential legal challenges

Although the Directive is broadly supportive of the inclusion of social considerations such as payment of the living wage within the public procurement process, it is the requirement that such a condition comply with EU law generally which may cause problems.

A legal challenge was brought to the Court of Justice in a public procurement contract in the case of Ruffert on the basis of Directive 96/71/EC. The case concerned the failure of the contracting authority to adhere to the wage set by a collective agreement. The Court of Justice held that the agreement had not been set in accordance with the procedure in the Directive and so was incompatible with EU law. The case shows that any policy introducing payment of the living wage in public procurement contracts would have to ensure compliance with this Directive.

Should such a challenge be brought under this Directive, it is worth noting the EU’s commitment to improving the working conditions of employees, as set out in article 153 of the TFEU and article 31 of the European Charter on Fundamental Rights. Article 4 of the Council of Europe’s European Social Charter also specifically protects the right to fair remuneration. The European Union’s SRPP agenda has a strong focus on the principle of ‘decent work’, which includes the right to a decent pay and it is important to recognise the broader emphasis within the European public procurement regime on the protection of workers’ rights.

A further consideration for a possible legal challenge would be under article 14 of the Race Discrimination Directive 2000/43/EC. Such a challenge could be brought, for example, by a UK company who could face a situation where it would be obliged to pay workers on a public procurement contract in Scotland the living wage but workers on a similar contract in England only the minimum wage. This could constitute indirect discrimination, which can however be justified if pursued for a legitimate aim by appropriate and necessary means.

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3 Case C-346/06 Dirk Ruffert v Land Niedersachsen
4 Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
Finally, it must be kept in mind that employment law is a reserved matter under the Scotland Act 1998 and that any policy introducing the living wage in public procurement contracts in Scotland could not change UK employment law or the employment tribunal system in any way without legislating on a reserved matter. The practical outcome would be that employees on a public procurement contract would have no individual remedy under the employment tribunal system for non-payment of the living wage. The only remedy would be for the contracting authority itself to bring a breach of contract action against the contractor.

4. The future of SRPP in the EU

There is a clear move within the EU towards increasing the inclusion of social considerations within public procurement contracts and the European Commission is currently carrying out a public consultation regarding the modernisation of EU public procurement policy. The European Commission has stated that\textsuperscript{5}: “Combining economic competitiveness and social justice in this way is at the heart of the European model of development. Playing an active part in promoting decent work forms an integral part of the European Social Agenda and of the EU’s efforts to promote its values and share its experience and its integrated model of integrated economic and social development.” The introduction of the living wage in public procurement contracts in Scotland would feed directly into the SRPP agenda currently being promoted by the EU.

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\textsuperscript{5} COM(2006) 249, 24 May 2006, p.2