



EUROPEAN COMMISSION

Cabinet of Commissioner Michel Barnier  
Head of Cabinet

Brussels, 07.05.2012  
GR/aa Ares(2012)189990

Your Excellency, *Dear Tom*

Please find attached a letter from Commissioner Michel Barnier.

I should be grateful if you would arrange for its onward transmission to Mr Alex Neil, MSP.

Yours faithfully,

Olivier GUERSENT

H.E Jon CUNLIFFE  
Ambassador and Permanent Representative  
of the United Kingdom to the EU  
10 avenue d'Auderghem  
1040 Brussels

MICHEL BARNIER

*Membre de la Commission européenne*

Brussels, 07.05.2012  
GR/aa – Ares (2011) 189990

Dear Mr Neil, *Oh Alex.*

Thank you for your letters of 7 December 2011 and 16 February 2012 regarding several public procurement issues of particular relevance to Scotland. I apologize for the late reply.

In your letter of 7 December 2011, you have asked the Commission's legal point of view on the possibility of requiring contractors, as part of the public procurement process, to pay their staff involved in delivering the public contract a 'living wage', higher than the minimum wage. By your letter of February 2012, you raise certain concerns regarding the concept of 'value for money' in public procurement, as well as the current thresholds of application of the public procurement directives and invite the Commission to reconsider these aspects during the negotiation of the recent legislative proposals<sup>1</sup> for the modernisation of the current public procurement directives.

First of all, as regards your question on the 'living wage', I would like to point out that the current EU public procurement rules allow contracting authorities to take into account social considerations in the award criteria and contract performance clauses of a public contract, provided certain conditions are met.<sup>2</sup> In general, social considerations must comply with the Treaty's principles (transparency, equal treatment etc) and with any other EU law that may be relevant.

If social considerations are taken into account in the award criteria, they must be linked to the subject matter of the contract, i.e. to the supply, services, works which are the object of the contract. If they are included in the contract performance clauses, they must be linked to the performance of the contract, i.e. to the tasks necessary for the delivery/provision/execution of the supplies/services/works of the contract.

Alex NEIL MSP  
Cabinet Secretary for Infrastructure  
and Capital Investment  
Scottish Parliament  
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<sup>1</sup> Proposal for a Directive on public procurement/\* COM/2011/0896 final - 2011/0438 (COD) and Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors/\* COM/2011/0895 final - 2011/0439 (COD);l

<sup>2</sup> For additional details on these conditions, please see the sections "award criteria" and "contract performance clauses" of the Guide: "*Buying social: A Guide to taking account of social considerations in public procurement*": [http://ec.europa.eu/internal\\_market/publicprocurement/other\\_aspects/index\\_en.htm#social](http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#social) ;

A requirement regarding the payment of a 'living wage' would in practice most probably be linked to the tasks necessary for the performance of the contract, and therefore be used as a contract performance clause. Such clause would have to be non-discriminatory and known in advance by all candidates for transparency reasons.

In terms of other relevant EU legislation, it would have to comply inter alia with the Posting of Workers Directive<sup>3</sup>. The 'living wage' to staff involved in the performance of the contract would have to be set in accordance with one of the procedures laid down by Article 3 of Directive. It was the non-compliance with this requirement which led the Court of Justice to its decision in the Rüffert case<sup>4</sup> to which you refer in your letter. In addition, the Court held in the Laval case<sup>5</sup> that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for minimum protection provided for by the Directive. A 'living wage' set at a higher level than the UK's minimum wage is unlikely to meet this requirement.

Secondly, as regards your suggestion for the interpretation of the concept of 'value for money' in the award criteria, the possibility already exists in the procurement procedures to take into account various social considerations. Guidance can be found in the Commission's 2010 publication "Buying social – a guide to taking account of social considerations in public procurement". To further support the Europe 2020 strategy objectives, the Commission proposes the introduction of a life-cycle cost concept, which will encourage public authorities to consider the full life-cycle of products in their purchasing decisions. The life-cycle cost will include internal costs and monetised external environmental costs. Contracting authorities may take into account criteria linked to the production process of the goods or services to be purchased.

In addition, contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics. This should enable authorities to make the most appropriate procurement choices for their communities, people and businesses. However, I do not believe that measures that would amount to affording an outright advantage to local tenderers and would thus discriminate against others irrespective of the merits and value of their offer would serve the objective of best value for taxpayers' money.

Thirdly, as regards your suggestion to increase the thresholds for publication of tenders, I believe that the application of the Directives has so far ensured a level playing field in the public procurement sector and thereby contributed to the reinforcement of the Single Market, creating multiple cross-border business opportunities in the public sector for companies from all Member States. Increasing the thresholds would lead to fewer public procurement procedures falling within the scope of the Directives. The procedures below the increased thresholds would be subject only to national rules, which are divergent and might not always ensure the same degree of transparency and non-discrimination provided for by EU law.

Moreover, the current thresholds are linked to the EU's international commitments, in particular under the WTO Agreement on Government Procurement. Increasing the thresholds would be a breach of our international obligations.

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<sup>3</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services;

<sup>4</sup> Case C-346/06;

<sup>5</sup> The Court held in the Laval case that the "*level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.*" (point 80 of the Laval judgment).

Lastly, the proposed rules introduce several provisions aiming to facilitate access by SMEs to public contracts. For example, contracting authorities must accept self-declarations at the selection stage; annual turnover requirements may not exceed three times the estimated contract value, and contracting authorities are encouraged to split contracts into lots to allow more bidders to participate - if they do not, they must specifically explain why.

I hope this helps answering your concerns. I look forward to meeting with you to discuss these issues further as well as any other public procurement issues of particular relevance to Scotland.

Yours sincerely, 



Michel BARNIER

Copy: - Rt Hon Francis Maude MP, Minister for the Cabinet Office and Paymaster General  
- Sir Jon Cunliffe, Permanent Representative of the UK to the EU