

Social Clauses, *Rüffert*, and the Equality Bill

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Part 1: Social Clauses

Major issues in 'social' procurement

- ▶ Whether to use procurement as a way of delivering services
- ▶ When procurement is used, how to prevent corruption, discrimination, favouritism, and promote efficient and effective procurement
- ▶ When procurement is used, how to ensure that it is used to deliver the broad social justice agenda of government(s) (linkage)

Problems in the past in using procurement

- ▶ At least three problems with linkage in the past:
- ▶ Is it legal? Need to clarify what you can and can't do legally
- ▶ Is it sensible and do-able? Need to meet civil service resistance/lethargy/fear
- ▶ Is it politically advantageous? Need to tackle political ignorance of the possibilities

More specifically ...

- ▶ What extra value (if any) does such linkage bring, and at what cost?
- ▶ Are such linkages consistent with a view of procurement as an economic instrument of government?
- ▶ What legal limits are placed on the use of such linkages by, e.g. EC procurement directives, EC Treaty?

Part 2:
Rüffert

Rüffert Case: Context

- ▶ One of a group of ECJ ‘posted workers’ cases: *Viking*, *Laval*, and *Luxembourg*, striking a balance between the freedom to provide services and the protection of workers
- ▶ Interpretation of Posted Workers Directive and Article 49 EC

Rüffert Case: Facts

- ▶ Lower Saxony (LS) law: building contracts over €10,000 only awarded to contractors (and subcontractors) who agreed a contract condition.
- ▶ Those employed on the contract would be paid at least at the level of pay applying to the place where the contract was performed.
- ▶ Set out in relevant collective bargaining agreement.
- ▶ Financial penalties for breach, and possible termination.

Rüffert Case: Facts in Outline

- ▶ Contract for building prison awarded to OB – German firm.
- ▶ OB subsequently contracted to PKZ – Polish undertaking with German branch. PKZ brought in Polish workers.
- ▶ Alleged breach by PKZ of contract condition (paying only 47% of minimum wage set out in Collective Agreement).
- ▶ Contract terminated by OB and LS.
- ▶ LS issued penalty notice against OB.
- ▶ OB sued LS for work undertaken to date.
- ▶ Lower court awarded sum to OB, but deducted penalty payment as an offset.
- ▶ OB went into liquidation, but litigation continued in the name of the liquidator (*Rüffert*): was deduction impermissible because the LS law contrary to Article 49EC?

Rüffert Case: Question for the Court

- ▶ Referred to ECJ
- ▶ *“Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed?”*
- ▶ Meanwhile, the BVerfG held that an equivalent provision in a Berlin law was constitutional, without considering the EC issues

Rüffert Case: Place of Directives?

- ▶ In addition to Article 49EC, two Directives possibly relevant
- ▶ Posted Workers Directive (PWD)
- ▶ Procurement Directive 93/37/EEC (public works)
- ▶ Issue is what is the appropriate relationship between these Directives and Article 49EC
- ▶ Begin with the Posted Workers Directive

Rüffert Case: Posted Workers Directive

- ▶ ECJ considers that the PWD is a key to determining the acceptability of the contested LS law under the Treaty.
- ▶ Article 3(1) provides that Member States shall ensure (inter alia) that posted workers shall be guaranteed ‘minimum rates of pay’.
- ▶ These rates to be ‘defined by the national law and/or practice of the Member State to whose territory the worker is posted’.
- ▶ Four alternative ways in which Member States can satisfy this requirement

Rüffert Case: Posted Workers Directive

- ▶ I. Provided for in laws, regulations and/or administrative provisions.
- ▶ Didn't apply in *Rüffert* because the LS law didn't itself set out the wage rates; merely referred to the Collective Agreement.

Rüffert Case: Posted Workers Directive

- ▶ 2. Labour standard included in a collective agreement relating to the building industry that has been declared ‘universally applicable’.
- ▶ Didn’t apply in *Rüffert* because the Collective Agreement wasn’t declared ‘universally applicable’ under the relevant German law.

Rüffert Case: Posted Workers Directive

- ▶ 3. Where no system of declaring collective agreements ‘universal’, labour standards included in collective agreement relating to building industry concluded by most representative union and employer organisation at the national level, and been applied throughout the national territory.
- ▶ 4. Where no system of declaring collective agreements ‘universal’, labour standards included in collective agreement relating to building industry generally applicable to all similar undertakings in the area and industry concerned
- ▶ Didn’t apply in *Rüffert* because (a) there was a system for declaring collective agreements ‘universal’ but it wasn’t used, and (b) in any event agreement not generally applicable because only applied to construction industry covered by public sector construction contracts.

Rüffert Case: Posted Workers Directive

- ▶ Therefore, PWD didn't provide safe harbour unless some other provision applied.
- ▶ Article 3(7): provisions previously considered 'shall not prevent application of terms and conditions of employment which are more favourable to workers'.
- ▶ Didn't apply here because the provision applied only to the home country's (Poland's) laws or collective agreements, or the recruiting company's (PKZ) practices, not the host country's (Germany's) laws or collective agreements
- ▶ Advocate General Bot took opposite view.

Rüffert Case: Justifying prima face breaches of Article 49EC

- ▶ Was the LS law nevertheless able to be justified under Article 49EC directly?
- ▶ Proportionality test:
 - ▶ 1. Is there a *legitimate aim* recognised by Community law?
 - ▶ 2. Is the measure *suitable* for achieving that legitimate aim?
 - ▶ 3. Is the measure *necessary* for achieving that legitimate aim?
- ▶ Only the first two really in issue in *Rüffert*.

Rüffert Case: Justifying prima face breaches of Article 49EC

- ▶ Legitimate aim? LS advanced three principal justifications.
- ▶ (a) that the state measure was justified by the objective of protecting workers – main issue;
- ▶ (b) that the measure was justified by the objective of supporting trade union autonomy through support for collective bargaining
- ▶ (c) that the measure was justified by the objective of ensuring the financial balance of the social security system
- ▶ ECJ accepted the first as *potentially* constituting ‘an overriding requirement justifying such a restriction on the freedom to provide services’.
- ▶ Suitable? ECJ did not accept that the measure was suitable: contested measure applied solely to government contracts in that sector, and the collective agreement was not declared universally applicable.
- ▶ In any event, the rate of pay guaranteed was greater even than that provided for in the national legislation transposing the PWD.

Rüffert Case: the implications?

- ▶ Implications for Greater London Authority's London Living Wage, Olympic Delivery Authority, etc ...
- ▶ Seems possible that the inclusion of *social (and environmental) linkages* beyond the posted workers context may be seen as imposing '*an additional economic burden that may prohibit, impede or render less attractive the provision of ... services in the host Member State*'.
- ▶ If so, then the test of justification adopted in *Rüffert* will also apply beyond the posted workers context, and so the big question that must be faced is:
- ▶ **Is the use of public procurement justified as a delivery mechanism which appropriately limits the coverage of the (social or environmental) condition to only a part of the sector in which the contract operates?**

Rüffert Case: the missing procurement dimension?

- ▶ PWD and the Treaty to be read harmoniously, but ...
- ▶ No reference by the ECJ in *Rüffert* to any part of the large corpus of legislation and case law that constitutes EC procurement law's treatment of social and environmental issues

EC procurement and social issues

- ▶ EC Treaty and Directives dating from 1970s
- ▶ Initial relatively high level of tolerance towards domestic use of procurement linkages
- ▶ From 1980s to mid 1990s: increasingly hostile reception, particularly from Commission
- ▶ From mid 1990s to current: rediscovery of linkages at domestic level; “green procurement”; Corporate Social Responsibility; “equality mainstreaming”; labour standards
- ▶ ECJ approach opens up legal space, paving way for revised legislative approach in 2004
- ▶ EC and ECJ has progressively given greater domestic regulatory space for procurement linkages as a method of enforcement of (Community) social and environmental policy (cf *Buying Social Justice*)

Rüffert Case: the missing procurement dimension?

- ▶ Advocate General Bot does mention the Procurement Directives, specifically rejecting the argument (adopted by the ECJ) that the LS measure could not be justified because it applied only to workers on some public contracts:
- ▶ *‘while it is true that the aim of public procurement is above all to meet an identified administrative need for works, services or supplies, the award of public contracts also authorises the attainment of other public interest requirements, such as environmental policy, or ... social objectives.’*
- ▶ But then he (puzzlingly) rejects the relevance of the Procurement Directives for determining the ‘central issue’: ‘the employment conditions which may, in compliance with Community law, be imposed in the framework of the provision of services.’

Rüffert Case: the missing procurement dimension?

- ▶ Why ‘puzzling’?
- ▶ *Rush Portuguesa* and Article 27(1) 2004 Public Sector Directive on ‘working conditions’: clearly regarded at time time as one of a set of provisions as to how Member States should deal with the posted workers issue
- ▶ Especially when read with Article 55 2004 Public Sector Directive concerning ‘abnormally low tenders’, which assume that such tenders may be rejected
- ▶ Relevant circumstance is compliance with the provisions relating to employment protection and working conditions
- ▶ Are Articles 27 and 55 taken together more sympathetic to the goals and methods of Lower Saxony?

Rüffert Case: the missing procurement dimension?

- ▶ Relevance of Article 26 of the Public Sector Directive regarding additional contract conditions?
- ▶ Incorporates the previous case law of the ECJ going back to *Beentjes*.
- ▶ It would appear that this is the mechanism that LS used in its legislation.
- ▶ Again, referred to by the Advocate General but not the ECJ. Not clear why.

Rüffert Case: the missing procurement dimension?

- ▶ Relevance of ILO Convention 98? Not referred to either by the Advocate General or by the ECJ.
- ▶ States parties to the Convention (including 10 EU member states) are required to include clauses in public contracts
- ▶ Ensuring workers employed wages not less favourable than those established by collective agreement for work of the same character in the industry concerned in the district where the work was performed

Rüffert Case: the missing procurement dimension?

- ▶ Relevance of ‘equal treatment’ principle?
- ▶ Equal treatment principle as applied by the ECJ in other procurement cases (*Storebaelt* case) not restricted to non-discrimination on grounds of nationality.
- ▶ Article 2 Public Sector Directive: ‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

Rüffert Case: the missing procurement dimension?

- ▶ What inequalities are in play?
- ▶ 1. Inequalities between workers in the construction industry employed on public sector contracts and those employed on private contracts (concern of Commission and Court).
- ▶ 2. Inequalities between actual or potential contractors from Germany and Poland. Polish firms disabled by the LS law from taking advantage of comparative advantage based on their lower wage costs (concern of the Court).
- ▶ 3. Inequality between Polish workers working on public sector contracts in LS who (after *Rüffert*) do not receive same wages as German workers on same job (concern of Advocate General).
- ▶ 4. Inequality (after *Rüffert*) between German firms that have to pay higher wage costs than Polish firms bidding for the same future public contracts.

Rüffert Case: the missing procurement dimension?

- ▶ Issue for discussion?
- ▶ What difference would it have made to take the procurement dimension more fully into account?

More discussion...

- ▶ Christopher McCrudden, “The *Rüffert* Case and Public Procurement”, in Marise Cremona (ed.), *Market Integration and Public Services within the EU* (OUP, 2009)

Part 3: Equality Bill

Domestic trajectory of procurement linkages

- ▶ Movement away from CCT and Thatcherite approach 1997-2000
- ▶ New approach mostly under political radar, but significant
- ▶ Too much happening to be comprehensive, focus only on equality issue
- ▶ Prime Minister's Strategy Unit Report 2003
- ▶ CRE-CBI approach, and Code of Practice 2003
- ▶ National Employment Panel report to Chancellor 2003
- ▶ Department of Work and Pensions and Jobcentre Plus requirements 2006
- ▶ GLA approach on Translink, and Olympics contracts

New factor: equality duties

- ▶ Public sector equality duties (race, disability, gender)
- ▶ Requirement to have 'due regard' to the need to promote equality of opportunity
- ▶ When exercising public functions: initial dispute over whether procurement included
- ▶ Guidance from previous equality bodies
- ▶ Some progress in some bodies: GLA, TfL, ODA, West Midlands

Equality duty and procurement: first impressions

- ▶ Different dimensions of equality under-researched
- ▶ Reactive rather than proactive approach to assessment
- ▶ No clear nexus established between projects being undertaken and predicted effect on tackling inequality
- ▶ Equality duty appears to be seen as a subsequent add-on rather than as central
- ▶ Imposition rather than an opportunity
- ▶ Procurement modalities appear to be “off the peg” rather than “bespoke”
- ▶ EHRC research report on ODA

Equality Bill: procurement implications

- ▶ New equality duty (currently Clause 145) replacing existing duties
- ▶ Applies to ‘public authorities’ and those exercising ‘public functions’ (Clause 146, 147)
- ▶ Clauses 149, 150 gives power to impose specific duties on particular public authorities
- ▶ Clause 151 explicitly permits this power to be used ‘in connection with its public procurement functions’.
- ▶ Clause 152 provides that no cause of action is conferred in respect of a failure of a performance of an equality duty.
- ▶ Planned to come into force in April 2011

Equality Bill: Proposals in Consultation Document

- ▶ Proposes three possible requirements:
 - ▶ 1. When setting out equality objectives to include how they will ‘ensure that equality factors are considered as part of their public procurement activities’
 - ▶ 2. “To consider the use of equality-related award criteria where they relate to the subject matter of the contract and are proportionate.’
 - ▶ 3. “To consider incorporating equality-related contract conditions where they relate to the performance of the contract and are proportionate’.

Equality Bill: Some issues for discussion?

- ▶ Assuming Consultation Document proposals are adopted:
 - ▶ 1. How far will there be an attempt to further constrain what public authorities are permitted to do by setting out Guidance in mandatory form?
 - ▶ 2. How far there should/will there be further development of the Pre-Qualification Questionnaire approach?
 - ▶ 3. What exactly does relevance to the ‘subject matter of the contract’ mean?
 - ▶ 4. How consistent will the Government’s preferred approach be with *Rüffert*?