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Special issue: Competitive tendering and Scottish lifeline ferry services

Introduction:

In early June 2016, an ESRC-funded workshop took place at the University of Glasgow to consider the use of competitive tendering for public services and some of the *unintended consequences* which arise from its use. The workshop was attended by academic economists and lawyers, policymakers and trades unionists from Scotland and elsewhere in Europe and specifically focussed on the Scottish ferry industry.¹

The discussions which took place that day focused on the use of competitive tendering for the provision of 'lifeline' ferry services in Scotland and centred round the following questions:

- What are the conditions required to ensure competitive tendering for lifeline services will provide an efficient service?
- Does tendering lead to a more sustainable service both economically and environmentally?
- In the context of lifeline services, what are the comparative advantages of competitive tendering over monopoly provision combined with adequate regulation?
- What are the unintended consequences of competitive tendering on local communities reliant on the provision of lifeline services? Does EU competition law adequately account for situations in which competitive tendering has unintended consequences on local communities such as loss of employment and strategic capacity?
- Can enhanced local community involvement alleviate the limitations of monopoly provision by ensuring the long-term sustainability of service provision?
- How can 'effectiveness' be measured from the perspective of local communities and the affected workforce?
- What are the existing templates of permitted negotiated agreements in EU law that account for the unintended consequences of competitive tendering?

This special issue continues and develops that discussion in the light of the Brexit vote of 23rd June 2016 and the decision taken by the Scottish Government in February 2017 to delay the Gourock-Dunoon ferry tender and extend the Northern Isles contract² for a year

¹ http://www.gla.ac.uk/schools/business/newsandevents/events/archive/headline_460370_en.html

² <http://www.orcadian.co.uk/north-isles-ferry-tender-reviewed/>

while investigating whether or not existing EU rules would allow the Government to take the entire service 'in-house' and thereby dispense with the need to tender it in future. The anticipated changes in the policy and legal landscape mean that some of the matters discussed here relate to interim arrangements or are conditional on certain states of the world coming to pass. There is no certainty as to when the necessity to comply with EU regulations regarding State Aid will cease and, in any event, the recently-updated Public Procurement regime, which will then apply, is currently modelled on EU regulations. Therefore, it may be some considerable time before the way that lifeline ferry services in Scotland are provided and financed will change. Notwithstanding this, there is a necessity to continue the discussion between academics, policymakers, trades unionists and other citizen stakeholders in preparation for a time when change becomes possible.

Given the nature of the *unintended consequences* discussed here, it is clear that this discussion – and the wider public procurement debate – falls squarely within the terms of the Scottish Government's Economic Strategy, in particular, *inclusive growth*, one of the Four Priorities. The impact of ferries - and the arrangements for their provision and financing - on fragile island economies; the employment impacts – both in terms of numbers and in terms of quality of employment opportunities – on these same economies as well as the mainland; the environmental sustainability of ferries and the way in which tendering can cut across this vital policy objective; are all necessary considerations within the over-arching theme of *inclusive growth* i.e. promoting both growth and greater equality.

In this Special Issue, Irish lawyer, John Temple Lang, a former Director in the EU's Competition Directorate outlines the 'space' within the existing regulations that allow these factors to be taken into account. Patricia Findlay, the leading expert on *fair work* in Scotland discusses the levers which procurement creates for government to encourage firms to adopt *fair work* practices. Nishatabbas Rehmatulla, of University College London's Energy Institute, an expert on environmental issues relating to shipping, discusses the potential inconsistencies between competitive tendering and environmental concerns, while economist, Neil Kay, a long-time commentator on the Scottish ferry scene highlights a possible existing infringement of EU competition law in relation to the self-financing of Scottish ports. Finally, academic lawyer, Dania Thomas and I set out the range of possibilities in terms of the statutory framework for ferry provision as we move into the uncharted waters of a post-Brexit Britain.

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