



Lawyers for Palestinian Human Rights' briefing to local authorities on pensions investment and public procurement decision-making relating to companies operating in the occupied Palestinian territory and/or Israel



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a legal charity in the UK that works on projects to protect and promote Palestinian human rights. Our trustees include leading human rights lawyers Sir Geoffrey Bindman QC, Tessa Gregory and Michael Mansfield QC.

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INTRODUCTION

1. This briefing provides an analysis of the UK Government's position in relation to: a) local authority pension funds' (**LAPFs**) investment in companies operating in the occupied Palestinian territory and/or Israel (Part I); and, b) local authorities' approach to procurement decisions in relation to the same (Part II). This briefing does not constitute legal advice, and is not a legal opinion.
2. It should be noted that LPHR takes a legal and human rights-based approach to all of its analysis. In accordance with this approach, LPHR's concern is that LAPFs and local authorities should give necessary consideration as to whether any company within a LAPF's portfolio, or a local authority's procurement process, is involved with infringing Palestinian human rights and if so, take appropriate action to responsibly address this.
3. Our analysis in this briefing confirms that LAPFs and local authorities can respectively make decisions to a) divest from, or b) not to invest in, or c) to exclude from participation in a procurement procedure, individual companies on the basis of involvement in human rights violations against Palestinians in the occupied Palestinian territory and/or Israel.
4. This briefing further makes specific recommendations to LAPFs and local authorities on essential actions to be adopted to better protect and promote Palestinian human rights.

Overview of Part I: Investment in companies operating in the occupied Palestinian territory and/or Israel

5. LPHR has reviewed in detail the Department for Communities and Local Government's 'Guidance on Preparing and Maintaining an Investment Strategy Statement' (**Guidance**) that has been issued to assist LAPFs in devising their Investment Strategy Statements pursuant to The Local Government Pension Scheme (Management and investment of Funds) Regulations 2016. We have also considered correspondence with the Minister for Local Government, Marcus Jones MP, on the issue.
6. In addition, we have considered the judicial review in relation to certain provisions of the Guidance which sought to prohibit LAPFs from potentially using pensions policies to pursue boycott, divestment and sanctions (BDS) against foreign nations. As a result of the judgment published in June 2017¹, these sections of the Guidance have been found to be unlawful and accordingly removed from the amended Guidance published in July 2017.

1 Palestine Solidarity Campaign & Lewis v SSCLG [2017] EWHC 1502 (Admin). Available at: <https://www.11kbw.com/wp-content/uploads/17.06.22-R-PSC-Lewis-v-SSCLG-Judgment-Final.pdf>



7. Our resulting position is:

- a. LAPFs should incorporate into their Investment Strategy Statement a policy of necessarily taking into account their international law obligations, and business and human rights responsibilities under the United Nations Guiding Principles and the UK National Action Plan, when making investment or divestment decisions.
- b. In accordance with the above recommended legal and human rights-based policy, LAPFs should, on a case-by-case basis, decide whether or not to divest from, or to invest in, a particular company on the basis of genuine and substantiated concerns about the adverse human rights impacts that are linked to that company's activities.
- c. There is nothing preventing or restricting LAPFs from applying this above recommended policy specifically in the context of the occupied Palestinian territory and/or Israel.

Overview of Part II: Public procurement decisions relating to companies operating in the occupied Palestinian territory and/or Israel

8. LPHR has considered the UK Government's Procurement Policy Note (2016), in tandem with the UK Public Contract Regulations 2015. It has also been in direct written correspondence with the then Minister for the Cabinet Office, Matthew Hancock MP on the issue.

9. Our resulting position is:

- a. Pursuant to the UK Public Contract Regulations 2015, where a contracting authority can demonstrate by appropriate means that a company is guilty of grave professional misconduct (which arguably includes involvement in human rights violations) which renders its integrity questionable, that company may be excluded from participation in a procurement procedure. The February 2016 Procurement Policy Note does not, in our view and as confirmed by the then Minister for the Cabinet Office, alter this legal position.
- b. The UK Parliament Joint Committee on Human Rights has recently recommended that the UK Government makes it mandatory that companies found to be involved in violations of human rights should be excluded from public procurement processes, and so the direction of travel on this issue may be towards greater regulation and enforcement in the future (rather than the current voluntary exclusion process).



PART I

Government guidance in relation to local authority pension funds investing in companies operating in the occupied Palestinian territory and/or Israel

A. Introduction

1. In November 2015, the UK Government issued a public consultation (the ‘Consultation’)² on the draft Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (the ‘Regulations’), to which LPHR submitted a response in February 2016.³ The Government subsequently published its response to the Consultation (the ‘Government Consultation Response’) on 27 September 2016.⁴ Prior to this, on 15 September 2016, the Department for Communities and Local Government issued a ‘Guidance on Preparing and Maintaining an Investment Strategy Statement’, under Regulation 7 of the Regulations (**Guidance**).⁵ The Guidance requires administering authorities to publish new Investment Strategy Statements in accordance with its provisions. The Regulations came into force on 1 November 2016. The Guidance was subsequently amended and re-published in July 2017 as a result of a judicial review judgment that found parts of it to be unlawful.
2. One part of the Guidance that was found to be unlawful involved the extent to which LAPFs can ‘use pensions policies to pursue boycotts, divestment and sanctions against foreign nations’. This is considered in Section B of Part I below.
3. The publication of the Guidance in September 2016 raised again the important issue of how LAPFs can engage on human rights issues relating to companies operating in Israel and the occupied Palestinian territory. LPHR advocates for a legal and human rights-based approach to such decisions, to be carried out on a case by case basis, in accordance with international law obligations and business and human rights responsibilities applicable to LAPFs. LPHR’s analysis and reasoning on these points are set out in Sections C of Part I below.

² The Consultation is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479642/Consultation_on_investment_reform.pdf

³ LPHR’s response is available at:

<http://lphr.org.uk/wp-content/uploads/2016/02/LPHRs-response-to-the-consultation-on-the-local-government-pension-scheme-investment-regulations-February-2016-Final.pdf>

⁴ The Government Response is available

at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555690/Government_response_to_2016_consultation.pdf

⁵ The Guidance is available at: <http://www.lgpsregs.org/images/SecStateGuidance/2016-09ISSGuidance.pdf>



B. Relevant sections of the Guidance found to be unlawful

1. The relevant section of the original Guidance published in September 2016 that was found to be unlawful, and subsequently removed from the July 2017 amended Guidance, states:

‘using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by Government...In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority should not pursue policies that are contrary to UK foreign policy or UK defence policy.’

2. On 17 June 2017, a judicial review in relation to these provisions of the Guidance was granted.⁶ Sir Ross Cranston, sitting as Judge of the High Court, found that the Guidance was unlawful in respect of the above quoted provisions, on the basis that the purposes for which the power to make the Guidance were exercised were not ‘pensions purposes’. Sir Ross Cranston said: “...[I]t is clear from the Secretary of State’s own evidence that the parts of the guidance the claimants challenge were not issued in the interests of the proper administration and management of the local government pension scheme from a pensions perspective, but are a reflection of broader political considerations, including a desire to advance UK foreign and defence policy, to protect UK defence industries and to ensure community cohesion....In issuing the challenged part of the guidance he has acted for an unauthorised purpose and therefore unlawfully.’
3. As mentioned above, the Government has acted on the judgment by publishing an amended Guidance in July 2017 which removes the provisions that were found to be unlawful.

C. Taking a legal and human rights-based approach to investment decisions

1. LPHR is aware of LAPFs possible concerns and objections about pursuing boycott, divestment and sanctions (**‘BDS’**) in relation to companies operating in the occupied Palestinian territory and Israel. LPHR itself does not take a position for or against ‘BDS’, as we exclusively adopt a legal and human rights perspective to human rights concerns affecting Palestinians.

⁶ Palestine Solidarity Campaign & Lewis v SSCLG [2017] EWHC 1502 (Admin). Available at: <https://www.11kbw.com/wp-content/uploads/17.06.22-R-PSC-Lewis-v-SSCLG-Judgment-Final.pdf>



2. LPHR's position, following an analysis of international humanitarian and human rights law, in tandem with the Guidance, is that local authorities should incorporate a legal and human rights-based investment policy into its Investment Strategy Statement that would cover decision-making on companies operating in Israel and/or the occupied Palestinian territory. In accordance with adopting such a policy, necessary consideration should be given as to whether any company within a LAPF's portfolio, or considered for addition to its portfolio, is involved with infringing Palestinian human rights and if so, the appropriate action that should be taken by the LAPF to responsibly address this.
3. In the context of formulating such an investment policy that would protect and promote Palestinian human rights, LPHR notes that the Government Consultation Response stated: *'Provided that the guidance to be published under draft Regulation 7(1) is complied with, **there is nothing in draft regulation 7(2)(e) to prevent an administering authority from taking any non-financial consideration into account**, provided that it is made in the best long term interests of scheme beneficiaries, and does not present any significant risk to the health of the fund.'* [Bolded and underlined by LPHR for emphasis.]
4. Relevant and significant non-financial considerations that may therefore be permissibly taken into account by LAPFs in the context of protecting and promoting Palestinian human rights, include acting compatibly with: international humanitarian and human rights law; the UN Guiding Principles on Business and Human Rights; the OECD Guidelines for Multinational Enterprises; the UK National Action Plan on Business and Human Rights; and the UK's foreign policy position and Overseas Business Risk advice in relation to Israeli illegal settlement activities in the occupied Palestinian territory.
5. LPHR suggests these non-financial considerations are fundamentally relevant for LAPFs to consider when making investment decisions in relation to companies operating in the occupied Palestinian territory and/or Israel. We set out why in the rest of this section below.
6. Israel's settlements in the occupied Palestinian territory have been established in clear violation of international humanitarian law. UN Security Council Resolution 2334⁷, passed on 23 December 2016, reaffirmed the illegality of Israeli settlements. The establishment of illegal settlements and their related infrastructure, which includes the illegal separation barrier, military checkpoints and settler-only bypass roads, also infringe a wide range of basic human rights. These include serious and pervasive infringements against basic human

⁷ [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2334\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2334(2016))



rights to land and housing, equality, the right to water and sanitation, freedom of movement, and the right to education and to health.

7. Illegal settlements further severely impede the Palestinian people from being able to exercise their fundamental right to self-determination. The right to self-determination is a norm of significant status under international law, in that it places a separate and additional legal obligation on all states, including the United Kingdom, to respect and promote this specific right. This fundamental legal obligation encompasses a duty not to recognise as lawful a situation resulting from the violation of the right to self-determination, and a duty not to render aid or assistance to maintain that situation.
8. Significantly, local authorities, as an organ of the state (for analysis on which, see Appendix A), crucially share these legal duties.
9. This overarching international law context therefore makes it entirely justifiable and permissible for local authorities – including LAPFs - to take into account, in their investment decisions, the extent to which businesses are involved with illegal Israeli settlements and their related infrastructure.
10. This analysis entirely aligns with existing UK foreign policy on the issue of Israel's settlements in the occupied Palestinian territory. UK government policy affirms that Israeli settlements in the occupied Palestinian territory are illegal and advises against financial involvement relating to them. In particular, the Foreign and Commonwealth Office has stated in its Overseas Business Risk advice: 'There are...clear risks related to economic and financial activities in the [Israeli] settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities...in Israeli settlements or benefitting Israeli settlements, entail legal and economic risk stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognized as a legitimate part of Israel's territory.'⁸
11. In addition to obligations owed under international law, local authorities – including LAPFs - have responsibilities to adhere to under the UN Guiding Principles on Business and Human Rights ('UNGPs'). The UNGPs, published in 2011, are set out in a landmark document

⁸ The Foreign and Commonwealth Office's 'Overseas Business Risk – Israel' is available at: <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel--3>



authoritatively recognising that states, businesses and civil society have a key role to play in enhancing standards of business respect for human rights.

12. The UK government demonstrated its commitment to the UNGPs when, in September 2013, it published its first National Action Plan on Business and Human Rights (UK National Action Plan). Local authorities, as organs of state under international law, share the same obligations as central government under the UNGPs, and consequently the UK National Action Plan.

13. In specific relation to pension investment decision-making, the UK National Action Plan recognises the link between its central objective of promoting business respect for human rights and the role of pension funds:

“Companies increasingly understand that there is a business case for respect for human rights and that this brings business benefit in various ways by... appealing to institutional investors, including pension funds, who are increasingly taking ethical, including human rights, factors into account in their investment decisions.”⁹

14. In addition, LPHR notes that the UN Office of the High Commissioner for Human Rights has confirmed that the UNGPs also directly apply to institutional investors, regardless of their nexus to the state.¹⁰

15. The importance of LAPFs respecting the UNGPs was reinforced by the Minister for Local Government, Marcus Jones MP, who confirmed by a letter dated 18 November 2016 to Richard Burden MP that a) “the new investment regulations and guidance allow authorities to take into account non-financial factors, such as social, environmental or corporate governance considerations when making investment decisions”, and b) “the regulations **do not affect** administering authorities' ability to implement the United Nations Guiding Principles on Business and Human Rights, and to act in accordance with international law”. [Bolded and underlined by LPHR for emphasis.]

16. The above context demonstrates the imperative for LAPFs to devise, and/or amend, their investment strategies to enable compliance with international law obligations and promotion of business respect for human rights given its obligations under international law, the UNGPs, and its significant role in implementing the UN National Action Plan.

⁹UK National Action Plan, page 6

¹⁰ The Office of the High Commissioner for Human Rights' analysis is available at: <http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>



17. Incorporating this legal and human rights-based investment policy into its Investment Strategy Statement would enable LAPFs to properly consider divesting from or deciding not to invest in particular companies engaged in certain activities that are involved with the infringement of the human rights of Palestinians within the occupied Palestinian territory and/or Israel. This may include, but is not limited to, involvement with illegal settlements and its related infrastructure, including the illegal separation barrier and military checkpoints; and involvement with prisons and detention centres that imprison Palestinians.¹¹ The investment decision would clearly be based on a company being involved with activities linked to human rights violations (of Palestinians) which engages obligations under international law and/or the UNGPs, rather than based on a particular geography.

D. Conclusions relating to LAPFs' Investment Strategy Statements

1. LPHR considers it to be necessary for LAPFs to incorporate into their Investment Strategy Statement a legal and human rights-based policy for their investment decisions. The policy should ensure that LAPFs necessarily take into account their international law obligations, and business and human rights responsibilities under the United Nations Guiding Principles and the UK National Action Plan, when making investment or divestment decisions.
2. In accordance with this above recommended legal and human-rights based policy, LAPFs should, on a case-by-case basis, decide whether or not to divest from, or invest in, a particular company on the basis of genuine and substantiated concerns about the adverse human rights impacts that are linked to that company's activities.
3. LPHR underscores that there is nothing preventing or restricting LAPFs from applying this above recommended policy specifically in the context of the occupied Palestinian territory and/or Israel.
4. As noted in the introduction of this briefing, this briefing does not constitute legal advice and is not a legal opinion; where a LAPF wishes to obtain legal advice on this issue, it should be sought separately.

¹¹The maltreatment of Palestinian children in these facilities— who have been found by UNICEF to suffer from widespread, systematic and institutionalised ill-treatment throughout the military detention process - is a particular concern.



PART II

Government guidance in relation to local authority public procurement decision-making in relation to companies operating in the occupied Palestinian territory and/or Israel

A. Introduction

1. On 17 February 2016, the UK Government issued a Procurement Policy Note (**PPN**) entitled “Ensuring compliance with wider international obligations when letting public contracts”¹². The PPN is a guidance note which applies to all procurements covered by the UK Public Contract Regulations 2015 (**PC Regulations**). Under the PC Regulations, suppliers’ credentials are assessed to establish whether the exclusion grounds set out in the PC Regulations are met. The exclusion grounds provide that suppliers may be excluded if they are guilty of grave professional misconduct or have violated obligations set out in national, EU, and international environmental, social and labour laws. The subsequently published PPN asserts, referring to public bodies, that “boycotts in public procurement are inappropriate, outside where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government”. The text of the PPN is reproduced in full at Appendix B.
2. LPHR has reviewed the PPN in detail. The summary of our analysis below makes two initial points about fundamental omissions in the PPN and the consequences that flow from them for local authorities. It then goes on to show that the PPN did not change the existing legal position under the PC Regulations for local authorities taking public procurement decisions. This importantly means that local authorities are still permitted to take public procurement decisions in accordance with their obligations under international law and their business and human rights responsibilities. This is of particular relevance to the specific context of local authorities taking public procurement decisions in relation to companies that are active in the occupied Palestinian territory.

B. The PPN is silent on Israel and the occupied Palestinian territory

1. The PPN notably does not refer to any specific country and it is not specifically about procuring from Israel or the illegal settlements in the occupied Palestinian territory. Its accompanying press release¹³ does however suggest that boycott and divestment initiatives specifically against Israeli companies would not be in compliance with the WTO Government Procurement Agreement on the ground of discrimination on the basis of nationality.

12 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500811/PPN_on_wider_international_obligations.pdf

13 <https://www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts>



2. LPHR notes in this regard that a company's nationality is indeed not a permissible consideration for a local authority when assessing whether or not it should procure the services of a company. Rather, in the specific context of the occupied Palestinian territory, the relevant and permissible consideration is whether that company, regardless of its nationality, is involved with activities in the occupied Palestinian territory which violate Palestinian human rights and/or international humanitarian law.
- C. The PPN does not refer to the specific relevance of the UNGPs and international law duties
1. Despite the fact that the PPN claims to set out “contracting authorities’ international obligations when letting public contracts”, it omits specific reference to the United Nations Guiding Principles on Business and Human Rights and international humanitarian law and human rights law considerations which are particularly relevant to Israel’s occupation of the occupied Palestinian territory.
 2. Various sources of international law make clear that local authorities are organs of the state and are therefore required to comply with the UNGPs (see Appendix A below). The UN Human Rights Council Advisory Committee has also stated: *“Local authorities are obliged to comply, within their local competencies, with their duties stemming from the international human rights obligations of the State. Local authorities are actually those who are to translate national human rights strategies and policies into practical applications.”* This excerpt is particularly relevant to local authorities' role in implementing the UNGPs through observing the UK's National Action Plan for Business and Human Rights.
 3. The PPN’s lack of reference to relevant international humanitarian and human rights law obligations is a notable omission because companies engaged in activities that infringe human rights or otherwise in violations of international humanitarian law, may be guilty of “grave professional misconduct”. This legal concept under the PC Regulations has specific relevance to local authorities' lawful discretion to determine which companies are permitted to enter into a public procurement procedure (explained further at Section E below).
- D. The PPN has not changed the existing legal position on public procurement decision-making
1. It is important to note that the UK Government has confirmed that the PPN has not changed or superseded the existing legal framework, including the PC Regulations, pertaining to public procurement decision-making. The then Minister for the Cabinet Office, Matthew Hancock MP, explained in his reply dated 20 April to a letter from LPHR, that the PPN: “[I]s new guidance on existing policy which has been in place for many years under successive governments.”¹⁴

14 Letter is available on request to LPHR.



2. Notably, the UK Parliament Joint Committee on Human Rights (**Joint Committee**) has recently recommended that the “Government should exclude companies that have not undertaken appropriate and effective human rights due diligence from all public sector contracts, **including contracts with local authorities**, which could be over a specified threshold” (emphasis added by LPHR).¹⁵ Proving the strength of the Joint Committee’s views on this matter, it further recommended that “Companies that have been found to have been responsible for abuses, either by the courts or by the National Contact Point, or where a settlement indicates that there have been human rights abuses, should also be excluded from public sector contracts for a defined and meaningful period.” On the latter point, the Joint Committee on Human Rights specifically referred to LPHR’s criticism of G4S having been awarded a contract to run a Government-funded discrimination helpline following the UK National Contact Point’s findings against it in relation to breaches of human rights in the occupied Palestinian territory, as a result of a complaint first brought by LPHR in 2013.¹⁶

E. Conclusion: Local authorities must continue to adhere to the Public Contract Regulations 2015

1. Local authorities, as public bodies, are legally obliged to adhere to the PC Regulations. Of particular relevance to the application of the PPN is Regulation 57, (8) (c) of the PC Regulations, which provides that where a contracting authority can demonstrate by appropriate means that a company is guilty of grave professional misconduct which renders its integrity questionable, that company may be excluded from participation in a procurement procedure. There are two notable aspects to this exclusion provision under the PC Regulations. First, the concept of grave professional misconduct – although not defined in the PC Regulations - arguably includes a company’s involvement in human rights violations and/or serious violations of international humanitarian law. Second, the discretionary nature of this exclusion provision accordingly means that the commission of grave professional misconduct does not necessarily lead to a mandatory exclusion from a local authority’s public procurement process (although we note from the Joint Committee’s report referred to above that this position may change in time).
2. Regulation 57 of the PC Regulations also includes what it describes as a ‘self-cleaning’ provision. This provides a process that allows a company to provide evidence to the local authority to show that it is taking sufficient measures to demonstrate its reliability despite the existence of a relevant ground for exclusion. This provision demonstrates that public procurement law requires due process at the heart of any exclusion decision by a local authority, and underscores the thrust of the PPN that potential exclusion decisions by a

¹⁵ Joint Committee on Human Rights, ‘Human Rights and Business 2017: Promoting responsibility and ensuring accountability’ 29 March 2017. See

<https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

¹⁶ For information relating to LPHR’s complaint against G4S, please see: <http://lphr.org.uk/latest-news/g4s-continues-misrepresent-uk-watchdogs-decision-company-breached-human-rights-obligations-despite-reprimanded-disappointing-behaviour/>



local authority should only be made on a case-by-case basis. LPHR strongly advises that local authorities follow the requirements of the PC Regulations when deciding whether or not to exclude a company on the grounds that it is guilty of grave professional misconduct due to involvement in human rights violations/serious violations of international law in the occupied Palestinian territory. The obligations of local authorities to respect international law and business and human rights responsibilities should also be taken into account by a local authority when making this assessment. Finally, and importantly, LPHR recommends that a decision should be taken on a case-by-case basis after obtaining formal legal advice, where considered necessary.



CONCLUSION

1. LAPFs should incorporate into their Investment Strategy Statement a legal and human rights-based investment policy. The policy should ensure that LAPFs necessarily take into account their international law obligations, and business and human rights responsibilities under the UNGPs and the UK National Action Plan, when making investment or divestment decisions.
2. In accordance with the above recommended legal and human-rights based policy, LAPFs should, on a case-by-case basis, decide whether or not to divest from, or to invest in, a particular company on the basis of genuine and substantiated concerns about the adverse human rights impacts that are linked to that company's activities.
3. LAPFs are not prevented or restricted from applying this above recommended investment policy specifically in the context of the occupied Palestinian territory and/or Israel..
4. Pursuant to the UK Public Contract Regulations 2015, where a contracting authority can demonstrate by appropriate means that a company is guilty of grave professional misconduct (which arguably includes involvement in human rights violations) which renders its integrity questionable, that company may be excluded from participation in a procurement procedure. The February 2016 Procurement Policy Note does not, in our view and as confirmed by the then Minister for the Cabinet Office, alter this legal position.
5. Should you have any questions concerning this briefing, or if you would like to discuss its conclusions further, please contact LPHR's director, Tareq Shrourou, at: lpnr@live.co.uk

Tareq Shrourou, Claire Jeffery



Appendix A

(All emphasis added)

International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Chapter 2, Commentary

“...[T]he conduct of certain institutions performing public functions and exercising public powers...is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.”

...

Article 4 “(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the state. (2) An organ includes any person or entity, which has that status in accordance with the internal law of the State.”

Commentary

...

“(6) ...[T]he reference to a State organ in article 4 is intended in the most general sense....It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level...’

...

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units...’

...

(12) The term “person or entity” is used in article 4...in a broad sense to include any natural or legal person, including...[any] other body exercising public authority, etc. The term “entity” is used in a similar sense...”

...



Role of local government in the promotion and protection of human rights – Final report of the United Nations Human Rights Advisory Committee (A/HRC/30/49) (2015)

...

(17) As a matter of international law, the State is one single entity, regardless of its unitary or federal nature and internal administrative division. In this regard, only the State as a whole is bound by obligations stemming from international treaties to which it is a party. Thus by becoming a party to an international human rights treaty, a State assumes obligations to respect, protect and fulfil human rights...Furthermore, a State appearing before an international human rights complaints mechanism cannot defend itself by claiming that the alleged violation was committed by a local authority.

(21) It is the central government which has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play...[T]he central government might need to take necessary measures at the local level, in particular, to establish procedures and controls in order to ensure that the State's human rights obligations are implemented. Local authorities are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State. Local authorities are actually those who are to translate national human rights strategies and policies into practical applications....Institutionalized cooperation on human rights between the central and local governments can have a positive impact on the level of implementation of the international human rights obligations of the State.' ...

(27) Human rights duties of local government follow the classical tripartite typology of States' human rights obligations, namely, the duty to respect, the duty to protect, and the duty to fulfil. The duty to respect means that local officials must not violate human rights through their own actions. ...

(34)...Every person in charge of the local government must be aware of the obligations imposed by human rights. Often this awareness lacks a well-founded knowledge about the content and the scope of human rights. As a result, many local governments fail to understand and incorporate human rights into local policy and practice.' ...



Appendix B

Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts

Information Note 01/16

17th February 2016

Issue

1. This PPN sets out contracting authorities' international obligations when letting public contracts. It makes clear that boycotts in public procurement are inappropriate, outside where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government.

Dissemination and Scope

2. This PPN is directly applicable to all contracting authorities, including Central Government, Executive Agencies, Non Departmental Public Bodies, wider public sector, local authorities and NHS bodies. Please circulate this document (for information) within your organisation, including where relevant to Executive Agencies and Non Departmental Public Bodies and other contracting authorities for which you are responsible, drawing it to the attention of those with a purchasing role.

Advice

3. The UK has a longstanding and widely accepted policy that applies to all public contracts, of ensuring value for money in public procurement, as set out in HMT's Managing Public Money[1]. Value for money is defined as securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought. That definition has recently been updated to make clearer that the key factor is whole life cost, not necessarily the lowest purchase price.
4. Further, wider policy objectives (such as economic or employment-related considerations) can be pursued through the procurement process where they are linked to the subject-matter of the contract. The new Public Contract Regulations (PCR) 2015 also provide flexibility for authorities to take account of wider matters in the procurement process, such as social and environmental factors. Contracting authorities may apply these flexibilities where relevant, ensuring always that all suppliers are treated equally and without discrimination.
5. The UK's regime of procurement rules (the PCR 2015), derives largely from the EU procurement directives and the WTO Government Procurement Agreement (GPA) - an international market access agreement. These rules impose a legal obligation on public authorities when awarding contracts above certain thresholds to treat EU and GPA[2] suppliers equally, and not discriminate by, amongst other things, favouring national



suppliers. There are remedies available through the courts for breaches of these rules, such as damages, fines and ineffectiveness (contract cancellation). The European Commission can also bring legal proceedings against the UK Government for alleged breaches of EU law by a UK contracting authority. This can lead to formal action being required to rectify the breach, and substantial fines against the Government. The Government will always involve the relevant contracting authority in these proceedings.

6. Suppliers from "third countries" (which are neither part of the EU, nor the GPA or other international free-trade agreements with the EU) do not enjoy access to our remedies system if they are discriminated against. However, third country suppliers could, potentially, offer the best value for money outcome, so the UK Government expects that its authorities will deal with bids from such third countries in the same way as EU or GPA countries.
7. Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government. There are wider national and international consequences from imposing such local level boycotts. They can damage integration and community cohesion within the United Kingdom, hinder Britain's export trade, and harm foreign relations to the detriment of Britain's economic and international security. As highlighted earlier, it can also be unlawful and lead to severe penalties against the contracting authority and the Government.

Contact

8. Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk (telephone 0345 410 2222, email info@crowncommercial.gov.uk)

[1] See Annex 4.6 of Managing Public Money for the full VFM definition

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454191/Managing_Public_Money_AA_v2_-jan15.pdf

[2] The current signatories to the GPA are: Armenia, Aruba, Canada, the EU, Iceland, Israel, Japan, Hong Kong, China, Liechtenstein, Montenegro, New Zealand, Norway, Singapore, South Korea, Switzerland, Chinese Taipei, and the US.