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14 July 2017

Dear Policy Team,

Consultation on Procurement Regulation in Wales

In the light of the referendum decision to leave the EU in particular, we would like to add the following comments to the response made by the Higher Education Purchasing Consortium for Wales (HEPCW) to the Welsh Government's consultation on procurement regulation as published on 5 April 2016.¹

Universities in Wales currently play a full and active part in the public procurement agenda, and wish to continue to do so. However, the proposals raise particular issues for universities that will need to be addressed to avoid unintended consequences. If the Welsh Government proceeds with its plans to place new legal requirements on the Welsh Public Sector, it should in our view exclude universities at this stage.

The response from HEPCW, which you have already received, highlights a number of concerns about the potential proposals in relation to their potential application to universities in Wales which we are sure will be considered very carefully. The Welsh Government must in particular ensure that it does not jeopardise the successful procurement arrangements that are already in the HE sector, or undermine the operation of UK wide policies and initiatives within the higher education sector.

The consultation refers in particular to the new powers designated to the Welsh Ministers in August 2015 under the European Communities Act 1972. As we read it, this appears to confer powers and duties in relation to the implementation of EU directives on procurement but doesn't devolve public procurement policy more generally. A question for the Welsh Government to consider further is whether this is really implementing EU policy, or going beyond it – potentially placing unnecessary burdens on Welsh public authorities, which in itself would be counter to the objectives of the EU legislation. There must also surely be a question about the timing of any proposals seeking to rely on powers under the EC Act 1972 and supplement the EU legislation in the light of the UK referendum Brexit decision.

¹ See [here](#).

Universities have in the past been treated as public sector for purposes of implementing EU procurement legislation but the current position is less clear. This has been challenged previously and appears to hinge in particular on whether a university receives 50% or more public finance or not, and what is counted as public finance. In 2000, for instance, the European Court of Justice held that Cambridge University was subject to the procurement rules. However, the funding arrangements in both England and Wales have changed significantly since then and, as appears to be the view of BIS,² this may no longer be the case and remains untested in the European courts. On the other hand, the Higher Education Funding Council for Wales (HEFCW) falls unequivocally within the scope of the legislation.

As highlighted in other contexts, for purposes of national accounting universities in Wales are classified by the Office of National Statistics (ONS) as Non-profit institutions serving households (NPISH), i.e. they are not part of the public sector. An increase in the legal duties and control of universities policies/activities, could place that classification at risk as we have stressed in a number of other contexts. A reclassification of universities as public sector would have very serious consequences for both universities and the Welsh Government. We know that the Welsh Government has previously taken steps to avoid similar issues for instance in relation to public sector workforce planning legislation on account of this, and we would welcome this again. Particular care needs to be taken at this time, given that the ONS is currently reviewing the status of higher education in both Wales and other parts of the UK.

Universities are also charities subject to the regulation by the Charity Commission. This requires that universities act independently of the government in the pursuit of their charitable objectives, as we understand it. Legislation that increases the government control either individually or taken cumulatively (given the extent of existing regulation of the sector already) has the potential to place the charitable status or the fulfilment of charitable obligations at risk which would threaten their continued operation and existence. Again, we know that this is also an issue that the Welsh Government takes very seriously, and led to amendment of the HE (Wales) Act 2015 for instance to avoid issues in this respect.

In particular, we note the proposal that there should be a legal duty to either apply or have regard to guidance issued by the Welsh Ministers in relation to collective agreements regarding environmental, social and/or labour law (p.24, Q23). This appears to extend well beyond the scope of procurement policy objectives and could have major implications for employment law as it applies to higher education in Wales. This in particular appears to potentially conflict with institutions charitable obligations/NPISH status – and to have a potentially far wider application than can be justified on the grounds of procurement policy. We are also aware that the precise delineation of the Welsh Assembly's legislative competence on employment law for sectors in devolved areas is complicated as recent case law has confirmed, and the Wales Bill currently progressing through the UK Parliament is in the process of redrawing and clarifying the boundaries.

² See e.g. BIS White Paper 'Students at the Heart of the System' 2011 p.35, para 2.4.11

Continuing to work with the Welsh Government on a voluntary basis, as at present, would help to avoid these issues.

Yours sincerely

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