OPINION OF SENIOR COUNSEL

for

Dr. Christopher Johnstone &
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1. Background:

In or about 2006, Lanarkshire NHS Health Board carried out a tendering exercise in respect of the provision of GP services at Harthill. This caused a great deal of public disquiet in the area, and raised the question of whether a Health Board was permitted to carry out such a tendering exercise, especially when it was open to corporate providers of such services, and, if so permitted, whether it was, indeed, obliged to do so. Questioned in the Scottish Parliament, the then Minister (Andrew Kerr), whilst confirming that the Heath Board was permitted, in terms of the legislation, to carry out a tendering exercise, pointedly refused to answer the question of whether the Health Board was *compelled* to do so.

In the event, the Harthill contract was let to two general practitioners, which rendered the matter perhaps academic in that particular case, though the underlying question has by no means gone away, raising as it does important public policy issues in relation to the model of NHS provision of general practitioner services.

Following a change of administration, and after first having indicated that she did not believe that Health Boards were compelled to open up the provision of GP services to tendering, the minister, Nicola Sturgeon, announced to the BMA Conference on 8th July, 2008, that the Scottish Government was intending to legislate to remove the power of Health Boards to let GP Contracts to bodies corporate.

That, then, resolves matters, or does it?

The purpose of the present Opinion is to explain the legal context in which any such proposed legislation will fit.

2. The Domestic Legislation:

Section 2C of the *National Heath Service (Scotland) Act 1978* (as added by section 1 of the *Primary Medical Services (Scotland) Act 2004*, provides as follows:

> "(1) Every Health Board-
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> (a) must, to the extent that they consider necessary to meet all reasonable requirements, provide or secure the provision of primary medical services as respects their area;
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> .....
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> (2) For the purpose of securing the provision of primary medical services under subsection (1), a Health Board may make such arrangements for the provision of the services as they think fit (and may *in particular make contractual arrangements with any person*)." [Emphasis supplied].

As a matter of law, a person includes a body corporate.

In addition section 17C of the 1978 Act provides:

> "1) A Health Board may make one or more agreements with respect to their area, in accordance with the provisions of regulations under section 17E, under which -
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> (a) personal medical services are provided (otherwise than by the Board); ...."

Section 17J (1) permits a Heath Board to enter into a contract for Primary Medical Services with a contractor, and section 17L specifically provides for the making of contracts with partnerships and companies limited by guarantee.

I am informed that the normal model of provision is under section 2C by means of the nationally negotiated GP contract, section 17C contracts constituting a minority of contracts which have been negotiated outwith the national framework.

Section 2C contracts are governed by the *National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004* and section 17C

contracts by the *National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004*.

It is clear from the terms of the Primary legislation that a Heath Board is not prevented from entering into either a section 2C or a section 17C contract with a body corporate. Indeed, this is followed through by the regulations: Regulation 4 of the *National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004* makes specific provision as to the making of a contract with, respectively, a partnership (Regulation 4 (2)) and a company limited by shares (Regulation 4(3)). In the case of a partnership, at least one partner requires to be a general practitioner, and in the case of a company, at least one share requires to be owned legally and beneficially by a general practitioner. Similar provision is made by section 17L of the Act and by Regulation 3 of the *National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004*.

However, the terms of the primary legislation are permissive, and there is no obligation on Heath Boards to enter into contracts with bodies corporate, nor to invite them to tender for such contracts.

In these circumstances, the short answer on the face of the domestic legislation is that Health Boards may (within the detailed regulations) contract with a body corporate for the provision of primary health services, should they choose to do so, but are not compelled to do so.

For this discretion to be removed, and potential contractors to be restricted to general practitioners would require a change in the primary legislation. Merely to alter the regulations without altering the primary legislation would do no more than create a lacuna.

3. European Law:

(a) Overview:

A contract entered into by a Health Board for the provision of primary health care services is a contract for the supply of public services within the meaning of the *Public Contracts (Scotland) Regulations 2006* and potentially falls to be governed by those regulations.

The Regulations effect the transposition for Scotland of the *Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts and public service contracts.*

The context in which the Directive sits is the provisions of the EC Treaty regarding the free movement of persons, services and capital, in particular, articles 43 and 49, all as the same have been interpreted by the European Court of Justice.

In order to understand how European Law impacts upon the question of the provision of primary care services, it is necessary to consider each of these levels of law in turn, moving from the particular to the general.

(b) Public Contracts (Scotland) Regulations 2006 and Directive 2004/18/EC:

In terms of the regulations, a contract entered into by a Health Board for the provision of primary health care services is a "Part B Services Contract" as specified in category 25 of Part B of Schedule 3 of the Regulations ("Health and Social Services"). Paragraph 5(2) of the Regulations specifies the provisions of the regulations which apply to Part B services contracts; those provisions govern advertising, reporting etc. but do not include the compulsory competitive tendering requirements.

Furthermore, it is likely that most contracts for primary care services may fall below the financial threshold. Originally, regulation 8(4)(d) set this at E 211,000 net of VAT in respect of part B services contracts, but this was amended by Regulation 2(3)(d) of *The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007*, to substitute a reference to the amount currently specified in Article 7(b) of the 2004 Directive. Article 7(b) of the Directive was, in turn, amended by *Commission Regulation (EC) No. 1422/2007*, which lowered the amount (effective from 1st January, 2008) to E 206,000 net of VAT.

The manner of calculation of the value of a contract is specified in Paragraph 8(10) of the 2006 Regulations as follows:

> "(10) For the purposes of paragraph (1), the estimated value of a public services contract which does not indicate a total price is–

(a) the aggregate of the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is fixed for 48 months or less; or

(b) the value of the consideration which the contracting authority expects to be payable in respect of each month of the period multiplied by 48 if the term of the contract is fixed for more than 48 months, or over an indefinite period."

In order to ascertain whether any particular contract falls within the ambit of the Regulations will require some detailed arithmetic in each case.

However, even assuming that a given contract has a value below the threshold and does not fall under the ambit of the Regulations, (or, if it does, it is a Part B services contract so not under the compulsory competitive tendering regime) that is not the end of the matter.

(c) General Obligations under European Law:

Regulation 8(21) of the 2006 Regulations (as amended by regulation 2(4)(c) of *The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2008)* provides as follows:

> "(21) When a contracting authority proposes to award a public contract which has an estimated value for the purpose of paragraph (1) which is below the relevant threshold, or where a proposed public contract is otherwise exempt from the requirement for prior publication of a contract notice, the contracting authority shall, if required by its general Community obligations, for the benefit of any potential economic operator, ensure a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non discrimination and transparency."

The provenance of this provision is recital (2) and recital (46) of the preamble to the 2004 directive.

Recital (2) provides:

> "(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the

> Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community co-ordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These co-ordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty."

and Recital (46) provides, in part:

> "(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".
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> "To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation - established by case-law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders...."

Therefore, the proper analysis is that the Treaty obligations require that there should be no discrimination amongst providers from different member states in the obtaining of public contracts. That obligation affects all public procurement, but, for contracts above a certain level, special provision is made to particularise those general obligations.

This reasoning was made explicit by the court in the case of *Bent Mousten Vestergaard v Spøttrup Boligselskab* (C59/00) [2001] ECR I-9505 at paragraphs 19 - 21:

> "19. To rule on the questions, it should be noted, to begin with, that the Community directives co-ordinating public procurement procedures apply only to contracts whose value exceeds a threshold laid down expressly in each directive. However, the mere fact that the Community legislature considered that the strict special procedures laid down in those directives are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.
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> "20. Although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60).
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> "21. Consequently, notwithstanding the fact that a works contract is below the threshold laid down in Directive 93/37 and thus not within the scope of that directive, the lawfulness of a clause in the contract documents for that contract must be assessed by reference to the fundamental rules of the Treaty, which include the free movement of goods set out in Article 30 of the Treaty."

See also *Commission of the European Communities v French Republic* (Case C-264/03) [2005] ECR I-8831.

The rationale behind this is spelled out in the Opinion of the Advocate General in *SECAP Spa v Commune di Torino* and *Santorso Soc. coop. arl v Commune di Torino* (cases C-147/06 and C-148/06) at paragraphs 23 and 24:

> "23. The setting of a financial threshold above which contracts are subject to public procurement directives is based on a single premise, namely that contracts of small value do not attract operators established outside national borders; such contracts are thus devoid of Community implications. However, that rebuttable presumption is open to evidence to the contrary and therefore, as the Commission argues in its written observations, it must be borne in mind that a contract of small value may be of interest to operators in other

> Member States by reason, for example, of the fact that the place where the contract is to be performed may be close to their own country or because it would be beneficial to their commercial strategy.
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> "24. Accordingly, that quantitative limit clearly serves only as a guideline and it therefore follows that there is nothing to prevent a contract of small value from being of interest in other Member States, giving rise to the factor which triggers the application of Community law and its objectives. Consequently, the procedures for the award of those contracts which, despite their limited interest, have a European dimension, must comply with the principles laid down in the Treaty, subject always to the fact that contracts for values higher than the amounts indicated in the directives must comply with stricter co-ordinating provisions."

Thus, we have it: if a community interest arises, similar principles apply to low-value contracts as higher value ones, even if the way in which those principles are engaged is less prescriptively spelled out.

Given that there are companies within the European Union who have an interest in tendering for the provision of medical services, it would be very brave to try to argue that there is no European dimension.

That said, since the essence of the Treaty freedoms is to prevent discrimination against businesses in other member states, it might be thought that to prevent tendering by companies is not discriminatory in effect: British companies and companies in the other member states are each equally discriminated against; individual British medical practitioners and individual practitioners in other member states are each equally favoured.

However, that argument is unlikely to work.

The leading case is *Manfred Säger v Dennemeyer & Co. Ltd* (C-76-90) [1991] ECR I-04221. That case involved a requirement under German law that only registered patent agents should be allowed to advise on patents. This requirement was found to be contrary to the Treaty provisions.

The core of the court's reasoning is found at paragraph 12:

> "12 It should first be pointed out that Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the

> abolition of any restriction, *even if it applies without distinction to national providers of services and to those of other Member States*, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State *where he lawfully provides similar services."* [Emphasis supplied].

Of course, in that case, the services in question were provided by computer, without the physical presence in Germany of the provider of the services. This is noted in paragraph 13:

> "13 In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services. Such a restriction is all the less permissible where, as in the main proceedings, and unlike the situation governed by the third paragraph of Article 60 of the Treaty, the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided."

However, this appears to be an *a fortiori* analysis ("all the less permissible...") and it is worth considering also the comments of the Advocate General in *Commission of the European Communities v Italian Republic* (C 134/05) [2007] ECR I-06251, a case which concerned the very earthbound services of extrajudicial debt recovery:

> "10. The Commission first calls into question the condition, which the Italian rules attach to pursuit of the activity of extrajudicial debt recovery, that prior administrative authorisation must be obtained from the local police authority, the *Questore*. In so far as that requirement is also imposed on providers of services established in another Member State, without regard to whether they have complied with any obligations laid down by the rules of the country in which they are established for the purpose of protecting the public interest with which the Italian rules are concerned, those rules infringe the freedom to provide services. This is particularly true given that the Italian rules give the *Questore* the power to impose requirements additional to those which they expressly lay down in order to ensure public confidence.

> "11. That complaint and the supporting arguments raised by the Commission are, in my view, entirely well founded.
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> "12. In their defence, the Italian authorities contend, first of all, that the prior authorisation scheme constitutes neither direct nor indirect discrimination against cross-border service providers, since the licence requirement also applies to Italian operators and/or operators established in Italy. However, it is common knowledge that, in keeping with the approach originally adopted with regard to the free movement of goods, the principle of the freedom to provide services has gradually come to be interpreted as prohibiting not only directly or indirectly discriminatory restrictions, but also obstacles applicable without distinction. According to a form of words used since *Säger*, (7) 'Article 59 of the Treaty [now, after amendment, Article 49 EC] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'."

There is, however, a possible escape route. It has always been recognised that:

> "as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives." (The Court's judgement in *Säger* at paragraph 15.)

It will be noted that the bar is set very high. The requirements must be (a) objectively necessary and (b) not disproportionate, all as underscored in the Court's judgement in *Dieter Kraus v Land Baden-Württemberg* (C-19/92) [1993] ECR I-01663.

This can be a very difficult bar to clear. For example, in *Commission of the European Communities v Italian Republic* (C 134/05) the Italian Government failed to justify on those grounds the requirement to obtain prior administrative authorisation from the *Questore*, and, likewise, in *Commission of the European Communities v Italian Republic* (C 260/04) failed to justify as being necessary and proportionate their issuing of horse race betting licenses without prior advertisement:

> "33. In that regard it is for the competent national authorities to show, first, that their legislation addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement relating to the general interest as laid down in the case-law and, second, that that legislation conforms to the principle of proportionality (see, to that effect, Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paragraph 47; Case C-38/03 *Commission v Belgium* [2005], not published in the ECR, paragraph 20, and Case C-255/04 *Commission v France* [2006] ECR I-5251, paragraph 29).
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> "34. Accordingly, it must be stated that the renewal of UNIRE's old licences without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.
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> "35. In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, suffice it to point out that those cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48, and Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 22)."

In all of these circumstances, assuming that the law were changed in manner suggested by the Minister, so as to preclude a company from tendering, such a change would be vulnerable to challenge on the part of a heath services company established in another EU Member State and providing such services in the state of establishment. Indeed, a company established and providing such services in England or Northern Ireland would arguably also be able to mount

such a challenge. In the event of such a challenge, it would be likely that a preclusion of corporate bidders would be judged to be inconsistent with the principles of the Treaties. In consequence, the Scottish Government would require to seek to justify them as objectively necessary to guarantee the protection of the recipient of services and not disproportionate.

I consider this further below.

4. Discussion:

As explained above, the power given under the domestic legislation for Heath Boards to allow companies to tender for the provision of primary health care services could easily be removed by a change in the primary legislation. (For the reasons also explained, it would be insufficient merely to amend the regulations.)

However, that would be a hollow gesture if done without addressing also the terms of the *Public Contracts (Scotland) Regulations 2006*. Unfortunately, it is questionable how far it lies within the power of the Scottish Parliament to make any meaningful changes to those regulations, as they are the vehicle by which *Directive 2004/18/EC* is transposed into Scots domestic law. (I say "meaningful" changes as the Directive, unlike a Regulation, is not of direct effect, and it is not impossible that some minor tweaking might be done in the Scottish regulations, provided that they still effectively transposed the Directive.)

If there were made the sort of change which the Minister has promised, it would be highly likely that, in the event that a contract value was above the threshold, the new scheme would be inconsistent with the provisions of the Directive (though, as explained, not compulsory competitive tendering *per se,* that not applying to Part B contracts). Further, both in that event and in the event that a contract value fell below the threshold, it would be highly likely that the new scheme would be inconsistent with the Treaty obligations.

If the relevant legislative provision were to be found to be inconsistent with Community Law, then, in terms of section 29 (1) (d) of the Scotland Act, it would lie outside the legislative competence of the Parliament and, thus, in terms of section 29 (1) would be "not law". It could therefore be judicially challenged in the Scottish courts, and it would be up to the person seeking to uphold it (probably, but not necessarily, the Scottish Government - the matter might, for example, arise in a challenge by a health services company to a

bidding process conducted by a Heath Board) to seek to justify it as objectively necessary to guarantee the protection of the recipient of services and not disproportionate to achieve that end.

It lies beyond the scope of the present Opinion to consider what arguments might be marshalled in support of that position, though I am constrained to point out that, given the regime which exists (and, presumably, will continue to exist) in England, it might be difficult to justify why a different regime is objectively necessary in another territory of the same member state.

These difficulties would be likely to be compounded were the matter to be referred to the European Court of Justice and the United Kingdom government to intervene.

5. Conclusion:

For the Scottish Government to deliver on its promise may be quite tricky, but, even assuming that it can get the domestic legislative scheme right, there are major difficulties which arise from the interplay between the domestic regime and the EU Procurement Directive.

The devil will be in the detail, and it may be appropriate to wait until the legislative proposals are published before considering how effective those proposals might be.

In the meantime, even if the Scottish Government is not alive to the European dimension, and even if superficially effective legislative changes are made, it will only be a matter of time before some health services company seeks to challenge those changes. It may be that in the meantime effort could be put in to building an objective justification for those changes.

I remain happy to discuss this Opinion (and the legislative proposals when made) with the Memorialists at any time.

THE OPINION OF

Parliament House,
Edinburgh.
8th July, 2008.

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for

Dr. Christopher Johnstone &
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