24 May 2018

Dear Convener

NORTHERN ISLES FERRY SERVICES

I made a statement to the Scottish Parliament earlier today announcing my decision to tender the next Northern Isles Ferry Services contract.

There were two factors that informed my decision: the views of the local community and a recent letter from the European Commission about our future ability to satisfy the State aid rules in the event of a direct award to an in-house operator – a copy of this letter is enclosed for your reference.

I announced my decision today to allow sufficient time to complete what will be a high-value and complex tender procedure before the existing contract ends in October 2019. My decision will reassure the local communities and business who rely on the services for their social and economic sustainability of the steps we are taking as a government to safeguard the continued delivery of these vital lifeline ferry services.

I would be grateful if you could pass a copy of this letter and enclosures, which is a letter from the European Commission and a press release, to members of the Rural Economy and Connectivity Committee.

Best Wishes,

HUMZA YOUSAF
Dear Mr Yousaf,

Please find enclosed, a reply to your letter of 24 January 2018.

Yours sincerely,

B-1049 Brussels/Belgium
Subject: Direct award to an in-house operator for the provision of ferry services in Scotland - Your letter of 24 January 2018 requesting a meeting to discuss compliance with State aid rules

Dear Mr Yousaf,

Thank you for your letter of 24 January 2018 to Commissioner Bulc. In this letter you refer to the review of the future procurement of ferry services in Scotland and request a meeting to discuss how a direct award to a publicly-owned "in-house operator" for the provision of these services could satisfy the fourth Altmark criterion.

As already discussed in the meeting of 28 April 2017 between representatives of the Scottish Government and of the European Commission, satisfying the fourth Altmark criterion without an open tender procedure would be significantly challenging. Furthermore, all four Altmark criteria will need to be met cumulatively, in order for the envisaged direct award to be free of aid. In this regard, I would like to point your attention to the recent judgment of 1 March 2017 of the General Court in case T-454/13 SNCM v Commission concerning the first Altmark criterion.¹ In this judgment, the Court found that the Maritime Cabotage Regulation² limits the discretion of Member States in defining public service obligations in the case of services of general economic interest. For a maritime company to be entrusted with the operation of services of general economic interest, the service in question must meet a real public service


need, attested to by the shortage of regular transport services in a situation of free competition. Furthermore, the scope of that service must be necessary and proportionate to that need. The judgment confirms the validity of the three-step test of manifest error used by the Commission in its decision\(^3\) to demonstrate that those principles have been complied with. In particular, where the Member State has the choice between a public service obligation scheme open to all operators and a public service delegation entrusted to one or few operators only, it must opt for the solution that will least distort the freedoms necessary to the good functioning of the internal market. These considerations, and the need to demonstrate the existence of a market failure, would also be relevant in the case of a planned direct award to an in-house operator of the maritime transport services to the Scottish Islands.

While DG COMP and DG MOVE would certainly be willing to meet with your officials, in order to have a meaningful meeting, we would need to first receive detailed proposals as to how the Scottish Government is planning to address these issues.

Without this information, we fear that another meeting at this stage would not add much to the theoretical exchanges that we have already had with the Scottish authorities.

Kindly note the requested discussion could not in any event prejudge the outcome of a substantive assessment under State aid rules of a direct award to an "in-house operator" for the provision of ferry services in Scotland. Furthermore, it will be without prejudice to compliance with the Teckal exception\(^4\) to public procurement rules and with the Maritime Cabotage Regulation.

Yours sincerely,

Contact persons:

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Northern Isles ferry contract

Tender to be launched for next operator

The next contract to operate the Northern Isles ferry Services network will be awarded through a fair, open and transparent procurement process.

The decision to put the contract out to tender was taken following extensive consultation with key local stakeholders, consideration of value for money issues and further correspondence from the European Commission on the possibility of making a direct contract award to an in-house provider.

The procurement process will get underway in June, with a view to making the award in Summer 2019.

Minister for Transport and the Islands Humza Yousaf said:

“We have always said we would take the views of the local community into account when it came to the procurement of the next Northern Isles Ferry Services contract. Through the consultation process, it’s become clear that the preference of the local communities is for this contract to be put out to tender, rather than a direct award to an in-house operator.

"In addition, the latest correspondence from the European Commission means satisfying European Law for a direct award will take us beyond the currently extended Northern Isles contract.

“As a result, we will start the tender process next month in order to allow enough time to complete this high value and complex procurement, ensuring that communities and businesses have the certainty they need. Delaying this any further would put the continued delivery of ferry services at risk, something I am not prepared to do.

“The decision to tender the Northern Isles contract does not change my position on the future approach to be taken for the next Clyde and Hebrides contract. I remain minded to make direct award to CalMac if we can satisfy all the necessary criteria.”

Ends.