

LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

Tuesday 8 March 2005

Session 2

£5.00

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LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

9th Meeting 2005, Session 2

CONVENER

*Bristow Muldoon (Livingston) (Lab)

DEPUTY CONVENER

*Bruce Crawford (Mid Scotland and Fife) (SNP)

COMMITTEE MEMBERS

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

*Dr Sylvia Jackson (Stirling) (Lab)

Michael McMahon (Hamilton North and Bellshill) (Lab)

*Paul Martin (Glasgow Springburn) (Lab)

*David Mundell (South of Scotland) (Con)

*Tommy Sheridan (Glasgow) (SSP)

*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Bill Butler (Glasgow Anniesland) (Lab)

Colin Fox (Lothians) (SSP)

Mr Bruce McFee (West of Scotland) (SNP)

Mr Brian Monteith (Mid Scotland and Fife) (Con)

John Farquhar Munro (Ross, Skye and Inverness West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Stephen Boyd (Scottish Trades Union Congress)

John Docherty (Transport and General Workers Union)

Tom Freer (National Union of Marine, Aviation and Shipping Transport Officers)

Tom Kennedy (Transport Salaried Staffs Association)

Ian Macintyre (National Union of Rail, Maritime and Transport Workers)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Alastair Macfie

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Transport Committee

Tuesday 8 March 2005

[THE CONVENER *opened the meeting at 14:03*]

Items in Private

The Convener (Bristow Muldoon): I call to order the ninth meeting in 2005 of the Local Government and Transport Committee. Apologies have been received from Michael McMahon MSP. Before we welcome the witnesses who are here for our main evidence session today, we will deal with item 1, which concerns items in private. I propose to take items 3 and 4 in private. Under item 3, we are to consider the merits of potential witnesses and, under item 4, the names and identities of potential committee advisers. Are we agreed?

Tommy Sheridan (Glasgow) (SSP): I do not object to item 4 being held in private, but I object to our dealing with item 3 in that way.

The Convener: With Tommy Sheridan's opposition to holding item 3 in private being recorded, is it agreed that we hold the two items in private?

Members *indicated agreement.*

Ferry Services (Clyde and Hebrides)

14:04

The Convener: The main item on our agenda today is consideration of the tendering of ferry services in the Clyde and Hebrides. Committee members are aware that the issue has been around for several years. Over recent months, given the major debate in the Parliament and the initial moves by the Executive towards the tendering of the services, the issue has become one of significant importance.

The committee felt that it would be appropriate at this stage in the public debate about the future of the services to hold a short series of evidence-taking sessions in which relevant bodies could give their views on the issue. I am pleased to welcome to the committee today representatives of the Scottish Trades Union Congress. They will give us the STUC perspective on the legal position and the impact that tendering would have on their members.

I welcome to the committee Stephen Boyd, the assistant secretary of the Scottish Trades Union Congress; Ian Macintyre, the regional officer for the National Union of Rail, Maritime and Transport Workers; Tom Kennedy, the negotiations officer for the Transport Salaried Staffs Association; Tom Freer, the workplace representative for the National Union of Marine, Aviation and Shipping Transport Officers; and John Docherty, who represents the Transport and General Workers Union. Do you want to make any introductory remarks before we move to questions from the committee?

Stephen Boyd (Scottish Trades Union Congress): We did not prepare any introductory remarks, convener, as everything that we have to say by way of introduction is contained in our submission. We are happy to move straight to the questioning.

The Convener: That is fine. Members have received the STUC submission, including the document that was forwarded to the committee a couple of days ago. We move straight to questions from the committee.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): Good afternoon, gentlemen, and thank you for coming. I have read your submission and have questions on issues that arise from it. The heading to part 2 asks whether tendering is necessary; you state that you do not accept the Scottish Executive's position that tendering is necessary under the 1992 maritime cabotage regulation and the more recent

Community guidelines on state aid to maritime transport, which replace the previous guidelines. I understand that, unlike the old guidelines, the new guidelines do not mention tendering at all. Is that your understanding?

Stephen Boyd: Yes, it is. At the start of the meeting, I should have said a big thank you to the committee for inviting us today to give evidence on this crucially important issue. I am sorry; it was remiss of me not to do so.

No one on this side of the table is claiming to be an expert on European law. Although we are not experts on any of the regulations that apply to tendering, we have done our best within the limits of our resources to read up on the law and to take as wide as possible a view from interested academics and others to whom we speak on a regular basis about what the regulations will mean for Caledonian MacBrayne services. The fundamental point that we want to make is that the position is unclear and that there is scope for negotiation with Europe on the issue.

Our reading of the regulations, and the reading of the academics who are looking into the subject, is that there is nothing in the 1992 maritime cabotage regulation, the treaty of Rome or the regulations that have recently superseded the 1992 regulation that forces the Executive to tender the lifeline services.

Fergus Ewing: Perhaps I should make it clear that I am referring only to the Clyde and Hebridean services and not to the Dunoon to Gourock service, which is rightly being treated separately—in that case, it has been accepted that tendering is required and I do not disagree with that decision.

The issue seems to have become one of tendering versus not tendering. However, if we step back from the question, a larger issue emerges. The European Union does not exist to enforce compulsory tendering: it recognises that, where essential lifeline services are to be provided, subsidy can be applied. We need to look at the question from that perspective and not simply ask the narrow technical question of whether tendering is required.

My opinion is that tendering is not required. As the Clyde and Hebrides services are essential, the EU will recognise, as it did in the Altmark case, that, just as subsidies are necessary for bus services in Bavaria, subsidy is necessary for ferry services in the west of Scotland. I do not think that anyone disputes that. We are approaching the matter from the wrong perspective if we feel that we need to go cap in hand to the EU to ask its permission to do something else. That is a bit like a football manager asking a referee whether it is all right for him to play a 4-4-2 formation. It is not the EU's job to tell us what to do; it is the Scottish

Executive's job to say, "This is what we propose to do." I believe that a way can be found for that to happen with the help of you gentlemen and many others.

I want to ask specifically about the notion of the operator of last resort, which plays a significant part in the tender rules. Are you concerned that, if CalMac were to lose out in a tender process, a private company coming in might either naively underestimate the cost of operation—the winner's curse syndrome of public procurement—or be opportunistic and move in planning to cut various costs including those relating to the conditions of workers? If, as I expect, you are concerned about that, I would be interested to know the basis of your concerns and the impact that that scenario would have on your members and on the passengers and communities in the islands.

Stephen Boyd: I agree entirely with your opening remarks, Mr Ewing. The problem is that we are now in a profoundly illogical position. The regulations were meant to provide value for money for the taxpayer, but implementing them in too restrictive a way will lead to exactly the opposite happening. The two detailed points that you mentioned are of concern.

Tom Kennedy (Transport Salaried Staffs Association): The Community guidelines on state aid to maritime transport state that there is no evidence that the guidelines are being breached in terms of the objective to ensure that there is no distortion of competition. That is significant and underpins our argument that CalMac should be left alone.

On the point about the operator of last resort, our fear is that, should that situation come about, the operator of last resort would be in a strong position to take advantage of the situation. There would be substantial costs and the Executive would be over a barrel in having to maintain lifeline services. It would place the taxpayer at immense risk.

Fergus Ewing: I understand that the Executive considered the issue over a number of years and that, four years ago, it put forward the view that, if a private operator discontinued a service—whether through liquidation, walking away from the contract, or whatever—the island communities would, in a few days' time, have no food, no medical supplies and no lifeline services other than, in some cases, the plane, which would provide infrequent and expensive services. Do you agree that that is a legitimate concern? Do you know of any way in which that could be addressed within the tendering process?

Tom Kennedy: We have great fears about the level of service. One of the main reasons why we want to maintain Caledonian MacBrayne as it is is

that it provides certainty about the future levels of service and safety. In the scenario that is proposed under the tendering regulations, there would be more uncertainty than certainty. If an operator of last resort came into place, that would create an even higher degree of uncertainty.

Fergus Ewing: I have a final question. I understand that the Executive has tried to square the circle of finding somebody to step in to take over the ferry services if the private operator goes bust or disappears and that its current answer seems to be, "It's not our problem. We're going to set up a vessel-owning company, or vesco. The problem is the vesco's." However, that company does not currently exist and I understand that the Maritime and Coastguard Agency has tight rules—rightly so—about who can run a safe ferry service. Do you have any confidence that the vesco could be an operator of last resort or could provide an operator of last resort? If there is no answer to that question—which there does not seem to be—is not that a compelling reason for not going down the tendering route?

14:15

John Docherty (Transport and General Workers Union): As an islander, I convey our fears about the operator of last resort. On the MCA's strict safety regime and the issuing of a document of compliance for the ferries, we would find it hard to believe that an operator of last resort could come in from nowhere and effectively take over a ferry service within the four days that would be given. I believe that the MCA would take much longer to issue a document of compliance to run the ferries if the operator of last resort came in, especially if that operator was not in the business of running ferries on a daily basis. Therefore, we have concerns about that matter.

Fergus Ewing: Jack McConnell is the operator of last resort for the railways, so perhaps he would step in to solve all the problems.

David Mundell (South of Scotland) (Con): I am grateful for the evidence that has been submitted and particularly for Dr Bennett's view of the legal position. I am confused about why the Executive is not prepared to take a stronger line in relation to legal challenges. We did not get a satisfactory response from the Executive on that matter in the parliamentary debate and that position has been replicated in the letter to the committee from Nicol Stephen, which I do not know whether you have had the chance to see. Subsequent to the parliamentary debate, the minister met European Commission representatives, but very much took the line that the Commission would determine the interpretation of the rules and regulations. As far as I am aware, there is nothing to prevent the

Executive from stating its desired position and holding firmly to it. Is that your view on the basis of the legal information that has been provided to you?

Stephen Boyd: We have not commissioned our own legal evidence for the case. The fact that we have not been made aware of the Executive's legal advice is unfortunate—we have never seen that advice, which has not been widely circulated—and we think that a number of questions remain unanswered.

The problem is that if we go to Brussels and ask for an opinion from the Commission, we will receive a stark answer in legal terms. That is not required—we need robust negotiations. We have good grounds for conducting such negotiations.

We must consider what would happen if the Executive said that it would not go ahead with the tendering exercise. The Commission would be left to justify to the Scottish people why it was forcing the Executive to take such a course of action, but what grounds could it use to justify to the Scottish people that it is imposing tendering? The value-for-money argument could not be used and there would not be an advantage through providing benefits to the workforce and the communities. In our movement and in the academic community, there is growing consensus that there are robust grounds for disputing the Executive's position that the services must be tendered.

I do not know whether members are aware of the University of Edinburgh seminar that will take place on Friday afternoon at the Europa institute in the school of law, which will involve Dr Bennett, Neil Kay and David Edward, who was the British judge who sat in on the Altmark decision. They will discuss the implications of the Altmark decision and the wider European regulations for CalMac tendering. Unfortunately, the level of expertise that will be available at that seminar is not replicated in our delegation today, but it is safe to assume that, broadly speaking, those people are of a similar mind to ours in thinking that the services do not need to be tendered.

David Mundell: The legal expertise is not replicated in the committee, either.

From what you are saying, it is clear that there are still different views. Given the importance of the issue and its potential impact, it should—at the very least—be tested legally and openly through the Commission process. If the Commission is determined to hold its line, it should be required, through the legal process, to demonstrate that it is right.

Tom Kennedy: When we met the minister in the early part of November, we asked him on what basis the Executive could mount a legal challenge to the assertion that it is required under the

regulations to put the services out to tender. The minister's response was that the Executive would have to do nothing—not go out to tender—and then sit back and await action to be taken against it by the Commission. He went on to say that that was not a tenable position from the Executive's point of view. The Executive did not believe that it would be correct to sit back; it believed that there was a legal obligation to comply with the regulations. That is the answer that we have received as regards a legal challenge.

The Community guidelines state that competition should give value for money to the taxpayer and should provide an improved quality of service. However, in our deliberations on why the Executive has felt compelled to act, we have never been able to see how a proposition that is meant to sponsor competition, but that will actually cost the taxpayer more, can comply with the competition regulations.

Stephen Boyd: As David Mundell said, some of the Executive's propositions have yet to be tested in court. The crucial argument states that the Altmark decision does not apply to the maritime cabotage regulation. I understand the argument, but until it has been tested in court I do not think that the Executive can sustain the proposition.

Tom Kennedy: In the debate in Parliament in December, the minister was asked to respond to a point that had been made by Brian Wilson MP. As far as I know, the minister has still not answered that point, which was on a very relevant issue.

Bruce Crawford (Mid Scotland and Fife) (SNP): I find that technical and legal reasons are being used as a convenient fog to hide the real question. Are the services that are provided by CalMac, and the public service obligation of the Government, discriminatory or not? It should surely be for Scottish Executive ministers to say where the services are discriminatory. If they are not discriminatory—according to the treaty of Rome and the cabotage rules—and if they do not distort the market, there is no need for services to be tendered. Is that a reasonable point? Can you also tell us how the services are being run in a non-discriminatory way? We have to get through some of the legal and technical fog and get to the bottom of the arguments.

Tom Kennedy: Everybody in the room will know the history of CalMac and will know that CalMac was not created overnight as a company to provide lifeline services. CalMac's operations have evolved and developed to meet the needs of the community, with public support. CalMac does not have a competitor in doing what it does. It is an operation that has developed organically to provide high-quality lifeline services. That is what exists at the moment. It would be difficult, if not impossible, to replicate an organisation that has

grown to fit the needs of the variety of communities that CalMac serves.

On the first point that you raised, about whether what is happening with the PSO is discriminatory, as I said earlier, the current guidelines state that there is no evidence that that is the case. Further, in the original regulation, there was a provision on justification, which was a process through which Governments could seek to obtain derogation from having to comply with the regulation. We believe that, if the Executive or the European Commission were challenged to spell out what elements would comprise justification, CalMac, as is, could demonstrate that the support that it receives from Government is justifiable and that there should be no requirement to put the business out to tender.

Bruce Crawford: Have you ever asked the minister to tell you where the service is operating in a discriminatory way?

Tom Kennedy: I do not believe that that question has been put to the minister. Our opposition has been framed more in the context that is set out in our submission.

Bruce Crawford: That might be the question that we should all be asking the minister. If the minister cannot prove that the PSO subsidy to CalMac is discriminatory, it ain't against the rules. Do you agree with that?

Tom Kennedy: That is an excellent question, which should be put to the minister. We are finalising our submission to the consultation document and, in advance of doing that, we will quickly ask the minister what his response would be to that question.

Dr Sylvia Jackson (Stirling) (Lab): Paragraph 2.4 of your submission relates to the discussion that Bruce Crawford is outlining. Is it correct that Dr Bennett's research has shown that the cabotage regulation does not have to be applied through tendering? Paragraph 2.4 does not say that in so many words, but is that the position?

Stephen Boyd: Yes, that is my understanding of Dr Bennett's work. However, I would add a slight caveat. I am anxious about drawing conclusions from someone else's work and I strongly recommend that the committee invite Dr Bennett to give evidence.

Dr Jackson: The second part of the paragraph says that Dr Bennett

"believes that it may now be possible to also satisfy the requirements of the EU Cabotage regulation by proving non-discrimination against Community shipping by applying the Altmark conditions also to this legislation."

I understand that your legal opinion is that we could do something similar to what happened with regard to Altmark. Is that correct?

Stephen Boyd: Yes.

Tommy Sheridan: The questions and answers so far have tended to suggest that we have to question the minister. The witnesses have agreed with the members in that regard. The committee and the witnesses are confused by the motivation behind the Executive's suggestion that essential lifeline services should be put out to tender. I hope that the idea of inviting Dr Bennett to the committee next week can be taken on board.

I want to address the evidence that has been submitted about the effect of the tender process on the workforce. Can the witnesses use NorthLink as a compass and make comparisons between that experience and the current situation in relation to the effect of tendering on the workforce and the taxpayer?

14:30

Ian Macintyre (National Union of Rail, Maritime and Transport Workers): When the northern isles services went out to tender, the workforce found itself in not a two-tier but a 10-tier system, with various rates of pay and terms and conditions. NorthLink is an offshore company and if CalMac was forced to go offshore there would be a considerable burden on taxpayers, in that more than £1 million per annum in national insurance revenue would be lost. Comparisons can be made with the NorthLink experience and we have great fears about the workforce's terms and conditions. The effect on the workforce would be serious if the services were put out to tender. Two more companies would be created to run one company, which would create serious problems.

Tom Kennedy: We have concerns that considerable job losses could follow CalMac's services being put out to tender, particularly if CalMac is not the successful bidder. That is a huge fear. For example, my union's membership comes from headquarters and shore-based staff, who would be very vulnerable in a tendering situation. Although the specification that has been issued for the tendering process provides reasonable assurances for crews on ships, there is a great deal of uncertainty for staff who work in the headquarters and the outposts, if for no other reason than that only the crews are specified under the Transfer of Undertakings (Protection of Employment) Regulations. Other staff would be in an extremely vulnerable situation. About 100 shore-based staff work in the Hebridean islands and more than 200 staff work in the CalMac headquarters, where they provide financial, engineering and marketing expertise to the company. All those jobs could be lost if a company that wanted to use its internal resources to provide such services were to put in a successful bid.

John Docherty: I will return to Tommy Sheridan's point about employees. A high percentage of employees in the crews are from the Highlands and Islands and the uncertainty about their income has a knock-on effect on communities throughout the Western Isles, which are already economically fragile because jobs are not plentiful. There would be a real impact on shops, schools and everything that happens in the small villages in the islands. In one village, which has a population of about 100 people, at least 10 people are employed on one route and the impact on the community would be great if 10 jobs were lost because, for example, foreign seamen were brought in. The knock-on effect would be considerable.

Tommy Sheridan: I want to reinforce that point. Are the witnesses saying that the tendering process could lead to the loss of hundreds of jobs and that a knock-on effect of the offshoring of a successful bidding company—à la NorthLink—would be the loss of revenue to the Exchequer? Are you saying that the unions are not scaremongering but that their view is based on the reality of what has happened in the past?

Tom Kennedy: Yes. We must make a reasonable assessment of the implications for our members of any proposal. Our members would not thank us for scaremongering; they expect us to provide them with a realistic outline of what is happening. When my members, who are shore based, look me in the eye and ask me what will happen to their jobs as a result of the tendering process, I am afraid that the best answer that I can give is, "Wait and see, but you should be extremely concerned about your future."

Tommy Sheridan: As trade unionists, you will be aware that the draft invitation to tender says in no uncertain terms that the contract will be awarded for the bid that requires the lowest financial compensation to meet minimum standards. That tells me that the intention is to cut jobs and outlays. I am not aware that your current submissions give the answer to my next question, but I have seen it in past evidence. How much of CalMac's operating costs relates to employees? If cuts in costs were made, would they fall disproportionately on employee costs?

Tom Kennedy: The document refers to the TUPE regulations, but any new operator that wanted to make a profit and to make a competitive bid would consider cutting not only jobs, but the terms and conditions of the new company's employees at some time. That is almost inevitable; it is one of our main fears for staff about the tendering process.

Tom Freer (National Union of Marine, Aviation and Shipping Transport Officers): The draft invitation to tender says that TUPE would

apply, but nothing would prevent a new operator from giving notice that it would change staff pension rights or length of service. Everything would go, as has happened in many other companies—the situation would be no different.

Ian Macintyre: The tendering process is set up so that the only asset would be staff, therefore the only way for a company to cut costs would be by cutting staff. That will be the only saving to make.

Tom Kennedy: The tendering process will be in two stages. In the first stage, a tenderer will have to demonstrate technical competence—that is its starter for 10. After achieving that, it can move on to producing its financial bid for the contract. At that point, jobs in the industry and people's terms and conditions could face dangers, because an operator that has attained technical competence under the tendering regulations—as I understand them—would aggressively reduce costs. If a tenderer attained technical competence and made an aggressive low-priced bid that it felt it could deliver, it would have a substantial basis for challenging the Executive if it awarded the contract to anyone else.

Tommy Sheridan: We are talking about the nature of a service. You are telling me that we are not talking about one fleet of taxis that can be changed for another fleet of taxis that could do the job more quickly. You stress that the only viable way to reduce the financial compensation, to which the invitation to tender refers, is to reduce labour costs.

Tom Kennedy: That is very much the case. Costs will be divided when the vesco is established, which will mean that elements that might enable a company to mitigate its tax liabilities—for example, the depreciation of assets such as vessels—would no longer be available. The operator would almost certainly consider cutting terms and conditions, which would be the only way for it to make a lower bid and to comply with one objective of competition regulations, which is to reduce the burden.

We see no potential for a new company to grow Caledonian MacBrayne's revenue. We are talking about lifeline services, so any such benefits would be on the margins. The costs of providing the service are from paying people to do their jobs. CalMac has no control over other costs on its balance sheet, such as fuel costs.

Tommy Sheridan: The final matter on which I want you to comment is costs to the taxpayer, which you touched on earlier. In the discussions that you have had with the minister, have you been successful in extracting any of those costs? We are talking about the tendering process and setting up two companies where there used to be one, which will involve more layers of

management and bureaucracy. Do you have any figures for that? Would it be fair to say that the overall cost of the exercise could be more than the savings to which it is perceived it could lead?

Tom Kennedy: One of our main frustrations has been our inability to obtain that information. We followed closely the debate that took place on 8 December, in which the minister was pressed by members, including Tommy Sheridan, on the costs that would be involved. However, the Executive has never been prepared to give us any information on that area.

I believe that the Executive has, so far, spent more than £1 million in obtaining special advisers, legal advisers and so on in order to move into the tendering process. "Surely," we say to ourselves, "the minister has information somewhere that can tell us what the costs are." I am quite sure that he has that information. What has he spent £1 million on? Why is he not telling us? Why will he not tell Parliament how much the exercise will cost? I think that the reason is simply that, if he gave an honest assessment and a breakdown of the costs, what he would present to Parliament and to the people of Scotland would be the basis of a substantial justification for not putting CalMac's contract out to tender.

Stephen Boyd: As our written submission says, we have commissioned Jeanette Findlay from the University of Glasgow to research the matter. On the basis of the information that is available to her, she will provide us with an assessment of the savings that might be obtained from tendering, and the likely costs of the process. We have done everything in our power to get her to produce that research, including initially giving her a deadline of next week so that we could use the research to respond to the Executive's consultation exercise. We hope to be able to circulate the research document over the next couple of days; we will ensure that the committee gets a copy as soon as possible.

The Convener: Thank you—that would be useful.

I have a couple of questions. I apologise because the first one might have been covered by one of Tommy Sheridan's earlier questions, but I was consulting the clerk about something else and did not catch the full gist of the response. Employment in many maritime organisations is offshored. If, in the future, either CalMac or a successor organisation were to offshore the jobs, would there be any other impacts on the employment conditions of the people who work for CalMac, aside from the associated financial issues between the organisation and the Exchequer?

Ian Macintyre: There could be, depending on the company. As I said earlier, with NorthLink

Orkney and Shetland Ferries, we ended up with various terms and conditions of pay within the one company because of the offshore situation and the tendering process. When the jobs moved over from P&O, we ended up with various rates of pay within the company. That could happen in this case and the terms and conditions could change quite rapidly.

The Convener: I am really trying to ascertain whether a company is, in such circumstances, still fully covered by United Kingdom employment law.

Tom Kennedy: The answer is broadly that it would be. One of the areas of huge risk to people's rights as employees is pension funds. Most people in Caledonian MacBrayne are members of a pension fund. As you know, the TUPE regulations do not protect pension funds; pension rights are dependent on whatever emerges from the provisions in the tendering document. Pension funds now face huge risks in terms of their viability, and one of the areas of employment conditions that would be under major threat in an outsourcing or tendering situation would be pension entitlements if anything were to happen to the fund. At the end of the day, the organisation that would be liable to make a contribution to cover a shortfall in any of the pension funds would be the operator, so if the operator could not meet its obligations, the fund could be in jeopardy.

14:45

Ian Macintyre: The convener asked whether companies whose employment is offshored are covered by UK law. I am not 100 per cent certain, but I think that that depends on where geographically they go offshore. In various cases in which we have tried to chase down companies through the legal system, we have found that they are not covered. There is a problem.

Tommy Sheridan: The convener has asked a very good question—it may be worth our checking the legal situation. I am fairly sure that the legal determinant for employees is the country in which a company is registered. That is a major problem, especially in the shipping industry. If a company is based in a country where there are very low wage rates, it is allowed to pay those rates to its employees.

The Convener: An important issue has been raised. We may be able to get further clarification from the Scottish Parliament information centre research services. We can also pursue the issue with the minister next week.

John Docherty: The implications of offshoring extend beyond individual employees. Nearly all our members agree that over the six-year period the loss of revenue to the Treasury as a result of

offshoring would be in the region of £7 million. Whichever company takes over will not need to pay national insurance contributions—it is disgusting that the change would produce a £7 million deficit for the Treasury.

Ian Macintyre: In the tendering process, CalMac will be one of the few operators that is not offshore. It is not a level playing field for CalMac, which would need to undercut itself and would be forced to go offshore just to be on a level playing field. The company is at a disadvantage before the tendering starts.

The Convener: In the letter in which he responded to our initial inquiries about the CalMac situation, the Minister for Transport, Nicol Stephen, said:

“the Executive will be guided by 3 key objectives.”

The third of those objectives is to

“protect the interests of our workforce by securing the best possible protection under EU rules and UK employment law for the CalMac workers.”

Have the trade unions received any firmer guidance from the minister or from CalMac on what

“the best possible protection under EU rules and UK employment law”

will mean?

Stephen Boyd: There has been no further guidance from the minister. Colleagues will say whether the same is true of CalMac.

Tom Kennedy: Ultimately, we must look at what the tendering document says. That document mentions the TUPE regulations, which exist to protect terms and conditions, but it is careful to do no more than express a belief on behalf of the Executive that TUPE will apply—it goes no further than that. I return to the point that I made earlier: a considerable number of jobs will be under threat as a result of the tendering process, because no guarantees are offered regarding TUPE.

Ian Macintyre: Our experience with NorthLink was that TUPE did not apply initially. There was a process to determine whether TUPE applied and there was an appeal process. Employees are uncertain about where TUPE will and will not apply.

The Convener: I will ask another question before other members come in. In paragraph 2.1 of your submission, you draw attention to a section in the Community guidelines on state aid to maritime transport, which state:

“Although it is considered appropriate for member States to make maximum use of the laid down procedures, exceptions may be justified, such as in the case of island cabotage involving regular ferry services”.

When members have raised that issue with the Executive in the past, the Executive has said that that applies only on relatively small routes, which have 100,000 or fewer passengers a year. CalMac carries several million passengers a year. Is it your understanding that that flexibility applies only to relatively small passenger routes, or can it be applied to CalMac?

Can you bring to our attention today or in writing in due course—perhaps as a result of your liaison with trade unions in other European countries—how the regulations have been applied in other European countries that have significant ferry services to remote islands?

Tom Kennedy: When we have examined how the European regulations are being applied and have affected business we have also taken a wider interest in whether, in terms of adapting to given circumstances, the regulations are flexible or inflexible. You will know that two or three years ago the French Government handed Alstom—a huge conglomerate French engineering company—a considerable amount of money when it was threatened with bankruptcy. By doing that, the French Government drove a coach and horses through the competition regulations. The Commission eventually dealt with that by revisiting the guidelines and revising them in such a way that what had apparently driven a coach and horses through the guidelines no longer did so.

I will address the interpretation of the regulations that has been handed to the Minister for Transport by Brussels. The Minister for Transport appears to be having discussions with civil servants. As we understand it, he is not putting in a robust challenge: he is not threatening to mount a legal challenge. We believe that, if necessary, it should be possible to revisit the regulations in the same way that the Commission revisited regulations to accommodate Alstom.

The convener mentioned the use of the word “justified”. You are right to say that an express provision in one of the regulations states that if a service carries 100,000 passengers or fewer there can be an exemption, but the overarching provision in the guidelines is that Governments should be able to justify not going out to tender. We cannot think of a better example than Caledonian MacBrayne of an organisation that should be exempted. I refer again to the fact that the revised guidelines that have been issued state that there is “no evidence” that that would be a problem. The Commission has examined the matter and it knows that there is no evidence. I ask you to explore that statement with the Commission and to challenge the minister again to come forward with costs. The committee would then be able to move on; it would have facts on which to base its judgments.

John Docherty: Catherine Stihler asked exactly that question on 15 December, but has had no response. No evidence has been supplied about when exemptions or flexibility in the cabotage regulations have been allowed. We have not heard an answer to her question.

The Convener: It might be useful for the clerks to ascertain whether an answer to that question is imminent or has been given recently. I am aware of the question's having been asked in the European Parliament. It would be useful to see the answer.

Stephen Boyd: I am sorry—we have received an answer. I am happy to circulate the question and the response to members. The response is very much open to interpretation and does not really help to move us along.

The Convener: Lastly, have you had any contacts with trade unions in other parts of Europe about similar circumstances in their countries?

Stephen Boyd: We are not aware of similar circumstances in other European countries. Other European countries have islands, but they do not have peripheral island communities that are served by an organisation like CalMac. I understand that Greece had a derogation from the regulation until 2004, but I am not sure what has happened since then.

Tom Kennedy: We are exploring with our fraternal delegates in other countries whether the application of the cabotage regulation is an issue, which we intend to do through the International Transport Workers Federation. Inquiries are being made in that direction, but I cannot give you any more information at this point.

Margaret Smith (Edinburgh West) (LD): This is the fourth version of my question, because my questions have been asked by others. Paragraph 2.3 of your paper states:

“In addition the Scottish Executive proposals also limit the scope for changing or improving services which is meant to be one of the reasons for competition in the first place.”

Could you expand on that, and on what you see as the key problems in terms of the lack of flexibility for lifeline services?

Stephen Boyd: It refers to the fact that the tender is for a six-year contract and that once the contract is signed there is little scope to change the service specification. No public or private contractor bidding for that service or choosing to run it outwith the tender would find it desirable that they could not be flexible about service provision for such a lengthy time.

Tom Kennedy: An important element in how CalMac operates at the moment is that it engages with communities. In other words, the service that

CalMac provides is in response to feedback from communities, particularly on the islands. The six-year ceiling that has been imposed by the tendering regulations will introduce almost continuous discontinuity between the company and the communities that it serves. As I said, CalMac's services represent the culmination of a long relationship between the company and the communities. That will be destroyed by the tendering process, which will deteriorate the services that are provided.

Margaret Smith: Presumably, mechanisms can be put in place within a contract to provide flexibility, such that if a case were made by the successful tenderer to expand or change services, changes could be made.

Tom Kennedy: I hope that I do not sound too cynical, but if one organisation is driven by the need to provide a service that meets the needs of a community, while another is driven by the profit motive, which one would you choose when seeking to build a long-term relationship that satisfies the needs of a community? What CalMac has achieved is exceptional, but it will be lost if another company comes in, and it will be lost under the processes that have been put in place.

Margaret Smith: I do not disagree with your comments on CalMac, but to some extent what you have said is your assertion. I presume that legally there is nothing to stop flexibility being built in and mechanisms being put in place to allow the contract to respond to changing needs. Common sense suggests that there will be changing needs, so mechanisms will have to be put in place.

John Docherty: My understanding as an employee of CalMac is that, when the specification document is complete, if it says that an island is to have eight sailings a day and the last one is to be at 18:00, that will be it for six years.

Margaret Smith: I need one other point to be clarified because I am quite new to the committee. Your earlier conversation with Tommy Sheridan about the draft invitation to tender focused on cost. However, the minister's letter says that the Executive will be guided by three key objectives, including offering lifeline services, protecting the interests of the workforce and, finally, maintaining

"the level of ferry services to our island communities; to provide the best quality service, not the cheapest".

What is driving the Executive in terms of the tender? Is it to be based on cost or, as the minister says in his letter, is it to be

"the best quality service, not the cheapest"?

15:00

Tom Kennedy: We believe that if the service goes out to tender, the minister will be compelled

to accept the lowest-costed technically competent bid. That will not provide the level or quality of service that has been achieved by Caledonian MacBrayne.

Margaret Smith: You can understand my question. If you are correct, it is strange that the minister has sent a letter that says the opposite of what you are saying.

Tom Kennedy: The minister might be making use of the provision in the tendering regulations that states that the lowest bid might not necessarily be accepted. That is one of the elements of the process. On the other hand, if a technically competent bid claims to provide the same level of service, on what basis would the minister be able to say to a company that has demonstrated technical competence that he is not accepting its bid, but a bid from a company that has made a higher bid? That is the question that we have to answer and that is the uncertainty. Although the minister might have said that to the committee, I think that it is only part of the equation.

Tommy Sheridan: I have a supplementary on that point. Paragraph 2.4.2 of the draft invitation to tender states:

"The evaluation criteria will include emphasis on quality as well as price. Each tender will be the subject of a technical, commercial and financial analysis. The aim of the evaluation is to select the Tender that requires the lowest financial compensation for the provision of the minimum standards."

You have asked whether the minister has told us the opposite of the facts. There is clever use of words, but the draft invitation to tender is clearly talking about the lowest level of financial compensation. That is not about quality; it is about cost.

Ian Macintyre: We also have to take on board what has happened with NorthLink. It is only two years into its contract and the service has had to be retendered. We have to learn from that as well. That gives us great fears.

Fergus Ewing: Paragraph 2.4.9 of the draft invitation to tender says:

"the successful tenderer will be the one who requires the lowest financial compensation."

However, the footnote makes it clear that that would not apply

"in exceptional and duly justified circumstances."

I think that that is because the EU rules on procurement and tendering make specific provision against a suspiciously low bid.

Does the subject that Margaret Smith and Tommy Sheridan raised not highlight a wider problem, which is that Mr Stephen is being

advised by transport officials, when the problems that we are talking about, rather than being to do with transport, are to do with the provision of essential services in a highly complex and regulated way? They relate to the law of procurement and tendering. Do you share my feeling that part of the problem is that, as the Holyrood episode has illustrated, there does not seem to be an over-abundant supply of civil servants who are expert in the true field that governs such matters?

Tom Kennedy: I agree; your analysis is correct. The approach that the Executive has adopted has been to start off on the wrong foot by looking in the wrong areas and by not considering the fact that the services in question are lifeline services that do not in any way infringe the maritime cabotage regulation. There was ample scope for the services not to be covered by that regulation, but the Conservative Government failed to obtain the derogation that it would have been able to obtain, had it sought to do so. We are in the Alice in Wonderland situation of trying to argue against a regulation that should never have been applied in the first place.

Stephen Boyd: I concur with your general point. If you compare and contrast the situation in the UK with that elsewhere in Europe, as a proportion of gross domestic product we give less state aid to manufacturing than do any of the other 15 pre-accession EU states. We are working to identify what the situation in Scotland is.

Following last year's budget, the chancellor announced the Wood review of procurement in the UK. Andy Kerr, who was then the Minister for Finance and Public Services, agreed to implement any of the recommendations that would be applicable to Scotland. A 150-page report was produced that tried to identify whether other European countries were cheating and, if so, what they were doing that we were not. It was unable to find anything that other countries were doing wrong, but it discovered that they are far more creative than Britain when it comes to procurement. We are far too nervous about sticking to the rules. Your general point is right—there is a lack of expertise—but there is also a lack of will to be more creative and imaginative when it comes to public procurement.

Fergus Ewing: There are a few points in relation to the DITT that I want to clarify. I presume that if CalMac lost the tender, it would have nothing else to do and would have no reason to continue to exist. In other words, it would be wound up, would it not?

Tom Kennedy: Yes, it would be.

Fergus Ewing: All the bidders against CalMac know that, so they have an in-built incentive, if you

like, to put in an unrealistically low bid—or a bid that is lower than that which they think CalMac might put in—in the expectation that they will get rid of an incumbent and exterminate the only possible operator of last resort. Is that correct?

Tom Kennedy: That is right.

Fergus Ewing: That would mean that there would be no operator of last resort.

The DITT says:

“VesCo will be responsible for considering these options”—

for providing an operator of last resort function—

“and putting arrangements in place before the new contract begins.”

How on earth will it be able to do that? Where is the other phantom CalMac? Are there any other companies that could fulfil that role? If that provision has to be put in place before the contract begins, but after the tender process has been completed, is there any way in which it could be met, except perhaps by obtaining from Lloyd's of London a bond that would cost £50 million or something, with which a new operator of last resort could be magicked?

John Docherty: As we said earlier, we feel that it would be quite difficult for an operator of last resort to retain a document of compliance for the services. It may be worth while seeking the views of the MCA on its criteria for issuing documents of compliance.

Fergus Ewing: That is a good suggestion, for which I am grateful. I am sure that the committee will follow that and the other helpful suggestions that today's witnesses have made.

My final point is about pensions. I return to the DITT. Paragraph 4.5.1 on pensions, states:

“The Bid should include full details of the proposed pension scheme.”

It does not say, “the pension scheme shall make the following financial provision for the employees” or, “the pension scheme shall provide pension arrangements that are at least as good as those that CalMac employees currently enjoy.” Do you know more than I do from the DITT?

Tom Kennedy: What we do know is that pension fund performance is now an area of considerable risk. If an operator takes all the risk that is associated with providing pensions—as far as we know, all the financial risk will pass to the operator—that will place upon it, on the one hand, the responsibility to maintain the value of the pension fund and, on the other, a huge threat if there is a downturn in the equity markets.

Fergus Ewing: Of course, that could happen at any time.

Tom Freer: The CalMac pension fund is operated under a small deficit—it is not as big as the deficits of some pension funds in the country. The trustees have taken steps to increase contributions to address the deficit. If the company went to tender and a new operator came in, I do not think that it would be concerned in the slightest about addressing the deficit. We would definitely have a higher risk of pension liabilities for older employees.

Fergus Ewing: The risk would apply to all existing employees, because the pension fund would become a closed fund, would it not?

Tom Freer: Yes.

Fergus Ewing: The new operator does not have to provide a pension fund at all, according to the paragraph that I quoted, unless the Executive has information that it has not told us. If the new operator did provide a scheme, CalMac workers who switched to the new company would presumably have a claim against two pension funds. Do you think that there needs to be a considerable tightening up of the provision in the draft invitation to tender so that it is clear that any new arrangements for pensions should be at least as good as those that are enjoyed under the CalMac scheme? Also, do you agree that before we go any further it would be sensible to have a close look at the deficit in the existing scheme and the Executive's position on that?

Tom Kennedy: Yes, we agree with that. You could also invite the minister, when he addresses the committee, to supplement what he told you in his letter about the terms and conditions of employees. You could ask him to be explicit about the extent to which the pension entitlements of employees will be safeguarded. It would be interesting for someone to examine how a tenderer will put together a costed proposal for a pension scheme for CalMac's employees. An organisation that can look five years ahead and come up with a risk-free proposition will be an immensely talented one.

Dr Jackson: I accept what you say about the European context not providing a level playing field and what you say about gold plating and the fact that different countries do things in different ways. Will you clarify the meaning of certain terms in article 4 of the maritime cabotage regulation? I know that you are knowledgeable about the matter but it is quite new to many of us. The regulation states:

"Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners."

Will you explain that? In the context of lifeline services, sustainability and jobs in the area, all of

which are at risk, I ask you to elaborate on and clarify the phrases "imposes public service obligations" and

"a non-discriminatory basis in respect of all Community shipowners."

What do they mean to you, in relation to the matters that we have discussed this afternoon?

15:15

Tom Kennedy: I am no expert on European regulations, but I will give my take on the issue. Article 4 of the regulation means that a Government or local authority cannot give money to a business in a way that distorts competition. That means that a Government cannot subsidise one business to the detriment of another business within the European Community. That may be a simplistic interpretation, but that is how I would answer your question.

A public service obligation is an amount of money that the state gives to an organisation. As I understand it, the non-discriminatory element derives from the common market requirement to sustain competition by creating rules that ensure that, in so far as is possible, competition is not distorted. That means that, if the Government gives taxpayers' money to a business in a way that could have a detrimental effect on another business that does not receive the same support, the Government would be acting in a discriminatory manner.

Dr Jackson: How is the sustainability of an area that depends on those jobs and lifeline services evaluated in terms of article 4?

Tom Kennedy: That is the conundrum that we raised earlier. We do not understand why lifeline services should be subject to the maritime cabotage regulation and to the rigours of artificial mechanisms for determining whether a public service obligation is anti-competitive. We do not believe that lifeline services should be subject to those requirements. Our problem is that, in challenging the tendering process, we need to use the same language as the Executive uses. If we are told that we need to comply with a particular regulation, we need to deal with the detail of that.

John Docherty: In our opening remarks, we mentioned the need to ensure that public service obligations are not discriminatory. However, in this case, there is no discrimination because there is no competition. That brings us back to square one and to the question whether we need to go down the route of putting the services out to tender. The Executive is not being discriminatory if there is no competition in the first place. I think that that is also my colleagues' understanding of the matter.

Dr Jackson: The Executive seems to be saying that, under article 4, we should be in a position that is non-discriminatory, so we need to proceed with a tendering process under article 4. However—

The Convener: I will try to clarify the point, which is a bit difficult, because the author of this additional information paper is not before us. As I understand it, a public service obligation does not impose conditions of access to the routes. A competitor company could choose to compete against CalMac on any of its existing services. Such a company would not be discriminated against because it would not be the subject of a public service obligation.

Dr Jackson: Yes, but accepting that, how do we take on board all the difficult issues that have been identified today that will arise if the tendering process goes ahead? Returning to my earlier question, I think that the unions' case is based to a large extent on the advice of people such as Dr Bennett, who believe that the Executive's decision can reasonably be challenged on the basis of what happens in other places and on the basis of the Altmark decision.

Tom Kennedy: We believe that a sound analysis of the costs involved would show that providing the current level and quality of service through tendering would cost more than it costs at the moment. The Commission's guidelines on competition say that the service should cost less and get better. There is a fundamental contradiction in the present situation, because the Executive cannot close that gap. It is patently obvious that Caledonian MacBrayne gives good value for money, so the Executive should not have to put the services out to tender and should demonstrate and justify that to the Commission. So far, the Executive has not been prepared to do that robustly enough to get a change from the Commission, which is the issue that we are dealing with.

Stephen Boyd: There is a compelling case for the deadline for the consultation exercise on the tender specification to be extended until we have a firm view from Brussels about the situation. The minister has undertaken to come back to the Parliament when he receives a decision. It is difficult for us to respond to the consultation exercise because matters are still up in the air. When we know what the Brussels view is and how the Executive intends to proceed, we can revisit the consultation in the light of that.

Bruce Crawford: I have a small request. Guys, we are back in the fog again. We should ask the minister, and he should ask the European Union, in what way the present situation is discriminatory. I do not think that it can be proved that what is happening is in any way discriminatory. However,

if the minister is not prepared to ask that question, we must start asking a series of questions about what the tender specification will look like. A number of issues have been raised by my colleagues. It would be useful if we received evidence from you by next week on what you would like to be added into the specification. That might relate to pensions, to other conditions of service or to an improved level of service for the island communities, which, as Margaret Smith rightly said, they might expect given the minister's letter. In any case, if all those issues were introduced into the tender specification, CalMac would win the contract anyway.

Stephen Boyd: I am happy to do that. We have to respond to the consultation by next week, anyway.

Bruce Crawford: Let us get rid of the fog and get straight to the question of how this situation is discriminatory.

The Convener: That brings us to the end of our questions. I thank Stephen Boyd, who led the STUC delegation, and his four colleagues, who represented the individual trade unions that are involved with Caledonian MacBrayne.

Fergus Ewing: Before we move on, convener, I would like to make a brief comment on some suggestions that the witnesses have made that I would like to be pursued. It was suggested that we seek further information and that the MCA could provide useful information about the rules under which operators are allowed to operate ferry services. Reference was also made to a number of academics who have made a substantial and, I think, voluntary contribution to the debate, including Paul Bennett and Neil Kay. It would be useful to hear from them, perhaps in written evidence.

It is absolutely clear that the committee needs to hear from someone from the EC energy and transport directorate-general to discuss the cross-currents of claims and counter claims and to remove the fog to which Bruce Crawford referred. We should consider that suggestion and come to a conclusion on it in the light of the minister's evidence next week.

The Convener: I am happy that we seek clarification from the MCA, particularly on the critical issue of the operator of last resort. We will endeavour to get a response, although I am not sure whether we will get it for next week, as time is tight. We will certainly get a response at the earliest opportunity. On the academics that were mentioned, we will seek published papers that are available. Papers may well be produced at the conference that is to take place this Friday, which some members have been invited to attend. Any

published documents that are available at that conference will be circulated to members.

Fergus Ewing: I believe that the conference will be run under the Chatham House rule. I do not think that publicity for the event is being sought or courted.

The Convener: In that case, we will find available published documents to circulate to members.

Tommy Sheridan: I do not want to prolong this part of the meeting, but given the obvious complications and complexities of the issues, perhaps we should invite Dr Bennett to give evidence. It is better to question someone and to get them to explain what they are saying than just to have something written.

The Convener: It would be unrealistic to expect someone to attend next week at such short notice. The minister is coming to speak to the committee next week, and we already have a busy agenda for that meeting. However, I am open minded about taking evidence from other witnesses in the future. We should leave the issue as one for consideration, along with Fergus Ewing's suggestion about inviting a representative of the European Commission. I do not exclude the possibility of inviting Dr Bennett.

Margaret Smith: What is the deadline for the consultation? I have a great deal of sympathy for Tommy Sheridan's suggestion of inviting Dr Bennett to give evidence. I appreciate that a week is short notice, but we could at least ask—he can always say no.

The Convener: Unless we want to break our previous record for the longest meeting, it would not be a good idea to have him next week, because we already have to deal with a Scottish statutory instrument under the affirmative procedure, as well as hear evidence from Amey, BEAR Scotland, local authorities and the minister on the trunk roads contract. The minister will also give evidence on Caledonian MacBrayne. It would not be a good idea to take more evidence next week, but I am open minded about inviting Dr Bennett at some stage.

Fergus Ewing: And packing an overnight bag again.

Margaret Smith: I am sure that you would cope, convener.

It would be good to cross-examine Dr Bennett rather than just to read a submission that is written by an academic on what is a technical and difficult subject. Published papers are often written to be read by technical academics, which we are not. It would be helpful for us to cross-examine and question, so I urge that we try to get Dr Bennett in front of us, rather than rely purely on papers.

The Convener: That brings us to the end of this agenda item. We now move into private.

15:27

Meeting continued in private until 16:25.

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