

European Public Services Briefings 2

The Impact of European Union Competition Policy on Public Transport Policy and Provision in the UK

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In the last thirty years public transport services throughout Europe have been subjected to various sorts of privatisation. Reforms introducing competition and market rules into public transport have challenged the public service ethos that these services operate under. The role of successive UK governments in these reforms is well understood and documented. However the role of EU law, policy and institutions in this area is not. The EU, and in particular the European Commission, have had a considerable impact on public policy choices concerning public transport in EU member states since the early 1990s. Those in the UK who seek to redirect public transport policy away from privatisation and toward truly 'public' alternatives need to be aware that EU policy will also need to be challenged if not radically adapted. At the very least, it must be accepted that a full understanding of the EU's role is necessary.

1. Introduction

Since the 1950s market integration has overwhelmingly been the method of choice by European institutions to advance European Integration. Since the 1985 Single European Act the European Commission has quietly used its considerable powers to push through liberalisation reforms into various welfare and public services provided by Member States including public utilities and network industries.

This has occurred to an advanced level in the telecommunications, postal, energy and transport sectors as part of the EU's Single Market and Trans-European Networks (TENs) programmes. The effect of the EU's liberalisation agenda has been considerable and has ushered in tendering processes and quasi-privatisation in many public transport services on the continent.

The problems of privatisation have presented themselves in various ways. Problems of moral hazard, degraded labour relations and poor value for money are rife. The negative effect it's had on the quality of service has been considerable in most cases. However, awareness and recognition of the EU's role in advancing this process of liberalisation in the UK has nonetheless been poor; not least as the privatising agendas that successive UK governments have pursued since the 1980s have obscured a view that would offer greater scrutiny of the liberalising impetus coming from the EU.

The extent of public transport liberalisation throughout the EU has been considerable. Below EU law and policy is outlined in regards to its effect upon national transport policy and provision. The central purpose is to demonstrate the barrier the EU poses to recasting public transport policy around public means and public ends.

¹ Edited in March 2015 in light a potential re-tendering of some of Scotland's ferry network which features heavily in

2. Outline

A general outline of EU competition law concerning public transport is provided followed observations made about how EU law would affect key modes of public transport. The main example of how the EU imposed liberalisation reforms in the UK comes from *Scotland's 'life-line' ferry services*. Here a tendering process was introduced at the end the 1990s. On the face of things it doesn't look as if the EU has had much impact on public *bus and rail services* in the UK as these were subject to different privatisation reforms in Britain long before the EU started intervening in this area. However, the relationship between EU law and bus and rail services is also assessed in asking the question how EU law would affect *future* public policy choices seeking to reform these.

3. EU law and the Provision of Public Transport

- *The EU treaty is conflicted by its different provisions. It also includes some lofty phrases which indicate support for the role of public and social services as a pillar of the 'European Social Model'*
- *EU Competition law is applied to public sector activity principally through EU 'State Aid' rules and by the 'prior authorisation' procedure used to regulate public funding of such activity. The European Commission is the lead enforcer of these rules.*
- *Regulation and directive text in the field of transport have possessed an increasing bias toward tendering.*
- *European Court of Justice decisions have largely underlined and consolidated this pro-market, pro-tendering bias.*

Newcomers to EU law must first accept certain rules-of-thumb. First, the complexity of what the Treaty and directives state and how institutions like the Court of Justice and European Commission interpret these make for a very muddled picture. Second, it must be understood that a black-and-white reading of EU treaty will not paint the true picture of how EU law has been enforced and therefore of the direction of EU law and policy.

3.1. The EU Treaty and EU Institutions

The rationale for EU intervention into any domestic realm of policy or industry under competition law provisions in the treaty is to prevent distortions in trade between EU member states. So the obvious question is "how can my local bus service effect with trade between EU member states?" It is a fair question. The 'trade' aspect is introduced through the issue the ownership of your local bus service and those opportunities of service providers from abroad to be allowed to run that bus service.

EU institutions, and in particular the European Commission, define any 'effect on intra-community trade' very broadly so that as much as possible can be seen to effect economic relations between member states so as to be caught by EU rules.

Understanding EU law requires two things:

One: The Treaty has conflicting principles in its provisions. Someone reading it could feasibly believe it to enshrine both the principles of unfettered free-markets *and* the protection of social services and social rights simultaneously. However, those provisions concerning the latter are

ambiguous and vague in their wording. The provisions outlining EU competition policy however are not. They are specific, tightly worded and clear with little to indicate that there is room for manoeuvre outside of these rules in regards to state intervention in public service provision.

Second: Both the European Commission and the European Court of Justice interpret the Treaty so as to maximise the market-opening opportunities to further European integration. The Commission performs its role often just below the surface using informal means as much as the formal means (outlined later) to enforce EU law.

In the new ratified Lisbon Treaty the competition policy provisions occupy articles 101 to 109 with the State Aid articles, as those relevant to public transport and other public services, occupying articles 106 and 107.

There is in fact a single Treaty article dedicated to the role of public transport in EU member states.

Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 93, the EU Treaty

The wording of this gives the impression that state intervention in public transportation is acceptable and makes no intimation or mention of obligations toward tendering and privatisation.

3.2. The Commission and the regulation of ‘Services of General Interest’

What approach do the EU institutions take on the basic principle of state intervention? In black and white terms the notion of state intervention is in principle accepted in EU law and by EU Institutions. In practice such intervention is controlled restrictively through the ‘prior authorisation procedure’ and State Aid rules. This means member states must inform the Commission of its intention to fund most government services. Many are excluded from this, like housing, but most, like public transport, are not.

Those ‘public services’, as commonly described here in the UK, are termed *Services of General Interest* in EU parlance. Within SGI there are two other concepts: *Services of General Economic interest* (SGEI) is used to define those marketable, general interest services. The term *Social Services of General Interest* (SSGI) is used to define those social welfare services associated with the welfare state. Despite some very clear social goals associated with transport services they are nonetheless (and curiously) defined as marketable SGEI (‘economic’) and therefore subject to EU competition rules.

In an attempt to calm fears of the erosion of the goals and functions of public service provision, the Commission devised a framework within which the objectives of liberalisation and public service provision could be met. SGEI could be provided through tendering and through the use *Public Service Contracts* containing *Public Service Obligations (PSO)* within the broader SGI framework.

These have been introduced into the UK only recently courtesy of its obligations under EU law. The first example being the Universal Service Obligation defined legally in Postal Services Act 2000 (which outlined liberalisation plans for the Royal Mail as demanded by EU law). They are also used in the tendering contracts that trains operate under.

The principles and definitions of SGI, SGEI and SSGI and have not been outlined clearly by the Commission. Even after the Court of Justice demanded it to do so and assisted with some suggestions in the 2003 *Altmark* case. It is alleged by some that the Commission had deliberately left some ambiguity in the framework's definition so as no clear wall was put up to prevent 'market creep' and further liberalisation due to the presence of any particular marketable aspect of the service.

In a 2007 communication, a key method of the Commission to publicly communicate its thinking on any topical area of EU policy, the Commission did attempt to define the term SGEI albeit liberally. This so that those services considered 'economic' in nature would basically include many aspects of what are essentially *public* services. This confirmed the fears of many that the Commission was determined to force liberalisation into all public services that could be defined as having any kind of marketable feature.

3.3 *The European Court of Justice, the Altmark decision and the role of PSOs*

This decision made by the ECJ in 2003 was triggered by a German dispute involving alleged State Aid to a bus company in Germany². This case is central to understanding how EU law affects the regulation of *all* transport services in the EU. In this decision the Court made clear its preference for the use of tendering procedures so as to reconcile the public service role of bus services with the goals behind EU competition law.

The Court issued four criteria:

PSOs be present and clearly defined in a Public Service Contract; the subsidy to said service must also clearly defined by the PSOs; and must not exceed what is necessary. The fourth criterion makes the Courts pro-tendering view clear. If PSOs are not pursued through the use of a 'public procurement procedure' (tendering) a detailed analysis of costs of a hypothetical well run and typical service must be calculated to demonstrate that subsidy or aid doesn't breach EU rules. This framework has been used by the Commission in State Aid Investigations and Decisions since³.

The bias toward liberalisation-through-tendering outlined in primary EU law above is also evident in secondary legislation regulating to the three modes of public transport featured below.

3.4 *Conclusions*

Despite this liberalisation bias shown by European institutions they have endeavoured to find remedies such as PSOs to ensure that social and public service goals can be honoured. PSOs are a double-edged sword. PSOs also provide a means of keeping tabs on subsidy provided to these services and a way of restricting their use on the part of the Commission.

It is perfectly possible for a public transport service to be put under the control of a public sector company through a tendering procedure⁴. This would include, as demanded under EU law, a Public Service Contract with some PSO's (either within the contract or in relevant legislation) clearly defining its goals and the defining any subsidy to ensure these.

² *Altmark* case 280/00. July, 2003.

³ See section on Scotland's ferry network.

⁴ *ANAV* case 410/04. July, 2006.

4. Train and Bus service privatisation and EU rules

4.1. Background into Bus and Train service privatisation in the UK

Train and bus services are dealt with together here. Bus services in the UK outside of London do not conform to the same tendering form of liberalisation as seen with the Country's train network (those within London do however). Bus privatisation went further than the trains where private companies bought services without any tendering procedure and with scant regulation from local or national government. Within London a tendering system is in operation.

In the 1990s *British Rail* was fragmented into regional service blocs and a division of labour was imposed in regards to services and infrastructure. This meant that stations and railways were owned by one company (now *Network Rail*) and separate companies operated the on-rail train services. The Strategic Rail Authority was established to perform the role of a rail regulator.

The extent of liberalisation in the UK bus and train sectors is as advanced as in any EU member state. Unlike other member states however, who embarked upon liberalisation reforms to comply with EU law, the drive for this came from within the UK courtesy of successive governments from 1979 to the present day.

4.2. European Regulation governing Rail and Road Public Transport and its enforcement

The recent 2007 Regulation 1370/2007 replaced a 1991 Directive⁵ in governing road and rail-road transport in the EU. This also follows the principles laid down by the Court of Justice's *Altmark* decision. This outlined a very strong incentive toward compulsory competitive tendering in these areas. Again, in line with the *Altmark* criteria if a 'public procurement procedure' is used then criteria 1 and 2 are almost certainly likely to be met.

the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators.

Paragraph 7. regulation 1370/2007.

The regulation does however state that public companies can still provide local public transport provision although they must be done through tendering. However in practice the Commission tries to steer national authorities away from this option so as to provide an open process so that private operators have the best chance of winning bids.

The Commission has done this primarily through informal means. This includes advice provided to and pressure in private exerted upon member state governments when embarking upon liberalisation reforms in complying with EU law. This informal process is as important as the more formal methods of the Commission in making sure its interpretation of EU law wins the day. This is demonstrated by the Scottish ferry network example below.

On this issue of incumbent, previously monopolistic, public sector operators the regulation outlines EU rules in regards to the *granting of exclusive rights*. The text again makes clear that

⁵ EC Directive 1191/96

these must be awarded through “fair and competitive procedures”⁶ in line with Commission ambitions. In many cases, like a railway line, the notion of inherent monopoly is clear. Moves to fragment services previously owned by one operator can distort this picture at the cost of many problems of the collective action and coordination type that we have seen, often tragically, here in the UK.

Long contracts or franchises are not permitted by the Regulation because they are deemed to undermine competition⁷. This presents a fundamental economic problem of incentive with the tendering process. A contract for tender that is too long and the advantages of competition on optimal performance are minimized during the middle of the contract. A tender that is too short and the incentive to invest in improvements in, new rolling stock for example, is greatly minimized. The European Commission, as the 2007 regulations outlines, favours and enforces the use of short contract tendering.

There are also economic problems relating to moral hazard in the tendering process as has been demonstrated by the recent example of the London-to-Scotland East Coast rail franchise. National Express, having won the contract to operate the route from 2007, ran into trouble in 2009 due to its inability to fulfil its obligations. National Express sought to renegotiate its contract with the government and looked for some assistance so as to fulfil its obligations up to the end of the contract in 2015. The government, keen to avoid bailing out franchises so they can continue operating thus creating a moral hazard problem, rejected this and kicked National Express off the route.

4.3 Conclusions on the role of EU law in the UK’s Rail and Bus Services

The obvious conclusion from the above is that EU law and policy has not had much of an impact upon the provision of public rail and bus services in the UK. Although EU law has not created these arrangements above in Britain the current state of EU law consolidates this and deems the UK experience as one of best (or ‘near best’) practice. The principal conclusion that should therefore be taken is that any reform that seeks to move away from the tendering model will require some sort of reform of competition law in regards to public transport first.

Again the EU’s liberalisation preferences have followed a very British model but are amended by one particular European legal quirk: legally defined Public Service Obligations (PSOs). Such legally defined objectives for a particular service are usually based on social criteria rather than economic ones and can be used in a variety of ways to ensure that a) services of a social nature can be maintained and b) that subsidy or aid-in-kind to maintain the running of services can be compatible with EU State Aid rules.

However, despite the role many believe PSOs provide in ensuring social objectives are reconciled with competition there are still many problems of contract length, moral hazard and investment which still remain as demonstrated above on Britain’s rail network. Moreover, as mentioned earlier in regards to the declaration of subsidy and aid, PSOs also represent bureaucratic burdens on authorities who wish to use subsidy to aid public service provision.

⁶ Paragraph 6, *Reg. 1370/2007*.

⁷ Paragraph 15, *Reg. 1370/2007*.

5. Scottish 'Lifeline' Ferry Services

The above case of public train and bus services is one where the obstacles of EU policy to progressive and truly *public* alternatives to privatisation will only become apparent once public policy choices in this direction are made. Below is perhaps the best UK example where a publicly owned transport service *has* actually been changed and shifted away from a public ownership model toward the privatisation-tendering model because of EU diktat.

- *Scotland's 'lifeline' ferry services provide a vital link between the country's mainland and remote island communities. These are currently provided for the most part by publicly owned operators.*
- *The vast majority of these are not profitable and require significant amount of subsidy from the Scottish Government.*
- *In the late 1990s, shortly after the reconvening of the Scottish Parliament, the Scottish Government embarked upon a reform of Scotland's ferry network to conform to EU obligations.*
- *The tendering system that has been imposed has been plagued by numerous problems due to poor implementation, irreconcilable problems with the tendering process and nearly ten years of heavy pressure by the Commission to verify subsidies provided to public sector operators.*
- *The case of Scottish ferry network liberalisation is a perfect example of the problems of an EU imposed tendering process on essential and unprofitable public transport services.*

5.1. Background to Scotland's ferry network

Scotland's Islands number nearly 800 and include some of the most remote communities in the United Kingdom. Ferry services connecting these islands, which include the Inner and Outer Hebrides to the west and Orkney and Shetland to the north, have been operation in some form or another since 1851.

Caledonian MacBrayne (thereafter 'Calmac') is the largest publicly owned company responsible for all 'lifeline' ferry services in Scotland either under its own name or under that of a subsidiary company. These 'lifeline' services are essential for the many remote communities to remain socially and economically viable and epitomise the principle of an unprofitable public service that is provided for public need. *Calmac* does not make anything close to commercial profit. In fact government subsidy equates to roughly a third of its operational budget⁸.

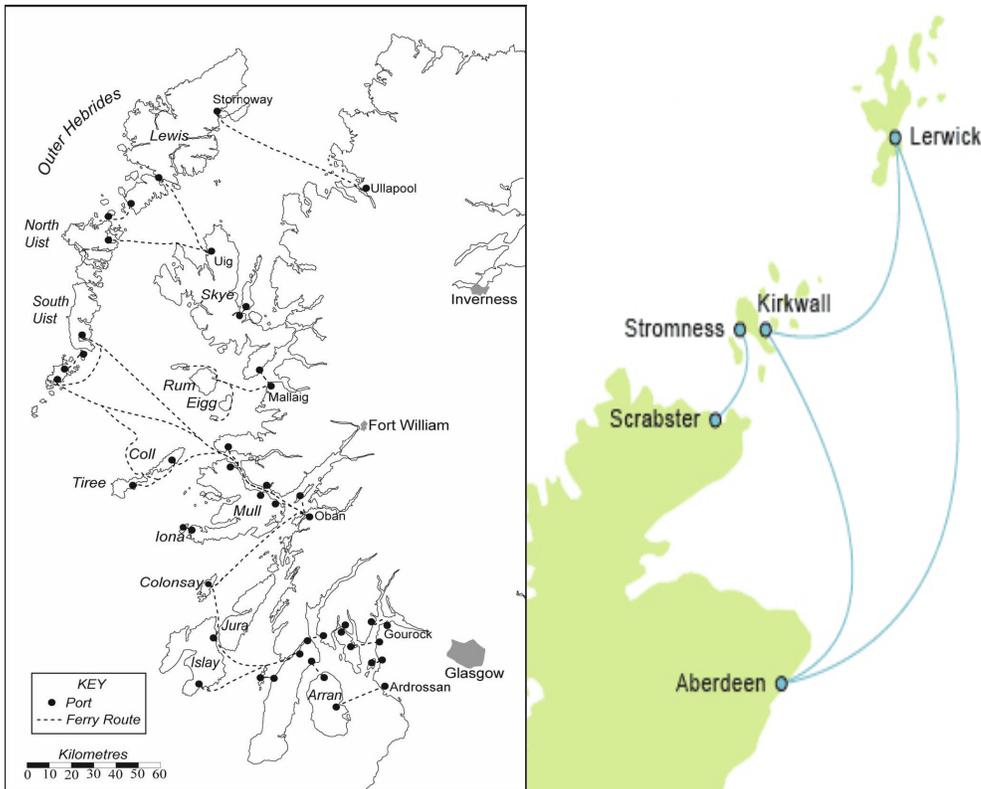
Despite this the European Commission has, since the 1990s, determined to impose competitive arrangements upon ferry services in the EU as it has done in other areas of public transport and public services throughout the EU.

In the late 1990's the newly convened Scottish Government, under pressure from the European Commission, set in motion a number of steps to introduce tendering to Scotland's ferry network. The role of civil servants in the new Scottish government and the Commission in the push toward tendering has been central. Transport ministers from the late 1990s to the current day (the current SNP administration have been undertaking a much criticised 'Ferries Review') have had their brief often dominated by the ferries question and have been accused of being led by the nose by their civil servants pursuing their own agendas seeking kudos in Brussels.

⁸ P. Bennett (2006). 'Competing for the Island lifeline: European Law, State Aid and Regional Public Services'. *Regional Studies*. Vol. 40.8, pp.953-966.

Where ever the truth lies in the heated political climate in Holyrood that comes with this subject one thing is for certain: alternatives to tendering were not seriously considered and the pro-tendering Commission view was not challenged.

The reforms the Scottish government undertook entailed a similar division of labour seen with in rail privatisation in regards to the ownership of particular assets. Caledonian Macbrayne Assets Ltd (CMAL) was charged with the ownership of ports, general infrastructure and the ferries themselves (unlike with *Railtrack/Network Rail* who do not own the mobile unit in question) with separate companies operating the routes.



Ferry routes on the west of Scotland operated by Caledonian Macbrayne and the North and North East by Northlink ferries.

The make-up of the network since has left *Calmac* plying routes on the western part of country and the services to Orkney and Shetland Islands to the North of the Scotland are operated by *Northlink*, a subsidiary of *Calmac*. *Cowal Ferries*, also a subsidiary of *Calmac*, plies the only profitable route on the western side of Scotland: the Gourock to Dunoon line on the Clyde estuary.

This route, which connects the Argyll peninsula to the Renfrewshire coast, from where one can get a train to Glasgow, is at the centre of the controversy over the EU’s involvement in the tendering process introduced in Scotland. This is due to its profitability and the presence of the profitable private operator *Western Ferries*.

Western has publicly resisted competition on this route and since 2000 have frequently complained to the Commission about the competition of the subsidised, *Calmac*-owned route *Cowal Ferries* has provided.

Crucially PSO's, the central defining tool mandating the obligations of operators to the islands needs and the justification for subsidy, were not defined properly by Scottish authorities in drawing up the first generation of public service contracts. This latter point, as elaborated below, was a crucial error that will further undermine the 'lifeline' network.

5.2. EU Law on 'Maritime Cabotage' and Commission imposed tendering

The main piece of secondary legislation concerning 'maritime cabotage' is the 1992 Directive number 3577/92. This directive is weighed down by the same principles of competition and free movement as seen earlier with the pieces of legislation concerning rail and bus transport.

It wasn't until 1998 however that the European Commission opened infringement proceedings concerning aid provided to ferry services outlined by the directive. It first targeted at the Spanish ferry company *Transmediterranea*, a public company that runs services to the Canary and Balearic Islands and to Spanish Moroccan principalities Ceuta and Melilla. A similar case emerged a year later in 1999 with Italy's *Tirrenia di Navigazione*. In parallel with the profitable Gourock-Dunoon route on the west of Scotland there were plenty of private operators on the multitude of routes along the Italian, Sardinian and Sicilian coasts who had concerns about the subsidy *Tirrenia* received. In both cases the European Commission demanded that a tendering procedure be used in order for subsidy to be verified.

In the examples above PSOs were placed to outline the obligations expected of these ferry services. In Scotland recently, not a country with a tradition of using such legal tools, PSOs were conspicuously absent or poorly drafted. It was around this same time that the Commission took aim at Scotland's network of ferry routes.

Despite pushing the Scottish authorities down its chosen reform route the Commission has not been happy with the process of reform undertaken in Scotland culminating in its formal investigation launched in April 2008. The conclusions from this, delivered in October 2009 look set to make the problems that have beset Scotland's post-2000 ferry network worse.

5.3. The Commission's State Aid investigation into Scotland's 'lifeline' Ferry services

After numerous complaints from *Western Ferries* and other parties the Commission launched an investigation in April 2008 into the subsidy provided to *Calmac* and *Northlink* by the Scottish government. The Commission produced its formal decision in October 2009. It was hoped that the result would settle the issue around how Scotland's 'lifeline' ferry services can be provided within the framework of EU law.

The Commission in fact its formal decision did in fact decide that there was *no* State Aid violation by Scottish authorities and companies. This is far from the end of the story however. As ever the devil is in the detail of the Commission's decision of 2009.

The crucial detail was the formulation of PSOs in regards to the routes. The Scottish government committed a serious error in refusing to formulate a PSOs in the tender and contract for these services. The Commission importantly cited this in regards to the Gourock - Dunoon route by

stating the PSOs were not adequately defined, therefore any subsidy to operator *Cowal ferries* breached EU rules⁹.

The Commission was well within its rights, based on the poorly defined PSOs for these services, to demand that *Calmac* and *Northlink* repay received subsidies. This would have been disastrous, given the enormous hole this would blow into *Calmac's* financial operations. Additionally, given the politically sensitive nature of these lifeline services in Scotland, the Commission was not likely to risk infuriating the Scottish and UK governments by doing this. This failing by Scottish Government over PSOs however did give the Commission a stick with which to wield in order to push for further liberalisation of Scotland's ferry network.

At this the realm of politics rather than law helps explain the deeply muddled outcome that resulted. The Commission has never been happy with how the tendering was carried out for the profitable Gourock-Dunoon route and the award to the publicly owned subsidiary *Cowal Ferries*. The Commission therefore sought a deal with UK authorities where this route would be subject to a new tendering procedure in 2010 and ready for 2011 in exchange for the rather kind decision it gave above this State Aid case.

The deal reached included Cowal ferries operating a passenger only, not car 'roll-on-roll-off (RORO)' ferry service, which itself made the contract much less viable for Cowal to operate and simply handed a greater and un-earned slice of the Gourock-Dunoon market share to Western Ferries.

5.4. Conclusions: Why does a non-profitable, essential public transport service need competition'?

The fundamental problem with the European Commission's tendering bias is does not accept that a public company like *Calmac* should maintain its limited profitable services to at least partially offset its losses elsewhere. Taking the Gourock-Dunoon route away from *Calmac*, leaving it only an unprofitable rump will simply require more subsidy. In an abstract legal sense of course *Cowal* could seek to use a better-defined set of PSOs, but we must all expect the Commission to distrust this outcome and to test it, probably at the behest of private operators.

The lessons from this are numerous. Firstly: if you're going to accept a tendering process for a given public transport network authorities must adopt a detailed set of PSOs and create a regulatory body to oversee every element of infrastructure and provision (not pretending for a second that the *Railtrack* or *Network Rail* models are examples of best practice).

However this does not resolve other serious problems. This includes issues arising from the short length of contracts. EU rules offer no protections for safety concerns related to the commissioning and use of appropriate vessels. If *CMAL* has commissioned a new vessel to be used for a particular route a new private operator can still use a less appropriate, or even unsafe, alternative vessel (the safety record on Scotland's record has historically been excellent).

Moreover, with many *Calmac* vessels in need of replacement, specific requirements for these means there are risks with vessels that need to be bought but a) won't be or worse b) a contract will be breached as the company refuses to purchase or rent the only vessel available. Problems of investment in new vessels and in appropriate vessels have been prominent in this and

⁹ This admission does make its 'positive' formal decision of no violation of State Aid rules rather bizarre. Furthermore its not as if the PSO on *any* of the routes were well defined; not just with Gourock - Dunoon. However this reconciled by the deal made with Scottish authorities outlined below.

underline the very serious questions posed about the appropriateness of a tendering regime that, with the trains in the UK also, separates the procurement of maintenance of assets and their in-service use.

This creates another poor incentive problem similar above that seen with the trains: part of rationale for privatisation and introducing competition into public utilities and services was to introduce private investment. But the incentives present in the tendering process here are pointing to older, inappropriate assets being used either through rent or purchase. A change in EU rules demanding that only CMAL vessels are used might aid this, but would likely make a bid for a service unattractive. This reason alone is why the Commission is unlikely to countenance such a change. Again the problems of tendering in areas of public transport often cannot be squared, and the universal service in question suffers.

It is hard to reconcile the way EU law is enforced by the Commission here in the case of Scotland's ferries in light of what is said in article 93 of the Treaty recited above. The Commission has enforced EU rules here without serious consideration of EU imposed tendering on the "discharge of certain obligations inherent in the concept of a public service".

6. Conclusion and Future Options

The example of the trains points a rather hypothetical point that EU law will only truly have an effect on UK rail and bus policy once policy decisions are made in a non-liberalisation direction. The example of Scotland's ferry network should make clear the impact that EU law has on public transport provision and crucially its role in undermining universal public service in transport.

Options within the framework of UK and EU law to preserve truly public transport services and networks are thin on the ground. What is available however should be explored. Firstly, it's worth mentioning the role that PSOs can play in defining and protecting public service goals and the funding of these within a privatisation framework. More lessons from continental Europe, where there is more experience of these, should be taken if tendering is persevered with.

Additionally, as a matter of choice within a tendering process, national level public companies should clearly be entrusted to perform these PSOs in the area transport, and public authorities entrusted to craft them.

Additional recourse to defending publicly owned and provided transport services on this front is provided, perhaps oddly considering its *Altmark* ruling, by the European Court of Justice. In the *ANAV*¹⁰ case of 2006 the Court decided in favour of a public company being awarded a contract for municipal transport services in Italy under certain conditions including the use of a tendering procedure. Despite the Courts habit of inconsistency in applying EU law (hence the reference to *Altmark*) there are earlier cases which confirm the reasoning it took in *ANAV*. This is worth noting for colleagues in Scotland who seek to challenge the EU Commission's view in regards to any future contract awards to publicly owned companies and subsidiaries. However, some clarity as to the Courts application of the *ANAV* decision to ferry services would be useful, but this needs to come in the form of new litigation. If a *Calmac* case ever reaches the ECJ (it seems inconceivable that it won't happen one day) the *ANAV* case should provide part of the basis of a defence of a PSO for 'lifeline services'.

It is argued here that the ethos of competition and that of public service provision cannot be satisfactorily reconciled in the case of public transport if not in all areas of public services. There

¹⁰ Case C-410/04. *ANAV vs Bari and AMTAB Servizio*.

are too many problems however which just cannot be ironed out. It is clear that the prospect of full public control outside of a tendering framework is virtually impossible under EU law. Therefore those who seek reform toward some form of public control need to recognise this accept that reform of EU law needs to happen first.

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Key

EU - European Union

SGI - Services of General Interest

SGEI - Services of General Economic Interest

SSGI - Services of Social General Interest

PSO - Public Service Obligations

Calmac - Caledonian MacBrayne

CMAL - Caledonian MacBrayne Assets Ltd.

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