

## V

(Ogłoszenia)

## PROCEDURY ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

## KOMISJA

## POMOC PAŃSTWA — ZJEDNOCZONE KRÓLESTWO

**Pomoc państwa C 16/08 (ex NN 35/07 i NN 105/05) — Dotacje przyznane CalMac i NorthLink na usługi transportu morskiego w Szkocji**

**Zaproszenie do zgłaszania uwag zgodnie z art. 88 ust. 2 Traktatu WE**

(Tekst mający znaczenie dla EOG)

(2008/C 126/07)

Pismem z dnia 16 kwietnia 2008 r. zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 88 ust. 2 Traktatu WE dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do:

European Commission  
Directorate-General for Energy and Transport  
Directorate A — Unit 2  
B-1049 Bruksela  
Faks: (32-2) 296 41 04

Uwagi te zostaną przekazane Zjednoczonemu Królestwu. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

## TEKST STRESZCZENIA

1. Ministerstwo ds. Szkocji, a po przekazaniu władzy przez rząd centralny władzom lokalnym w 1999 r., rząd szkocki (Scottish Executive) przez kilka lat przyznawał swoim przedsiębiorstwom transportu morskiego CalMac i NorthLink wysokie dotacje oraz zapewniał korzystne warunki finansowe na obsługę połączeń promowych między lądem stałym Szkocji a odpowiednio Hebrydami, Orkadami i Szetlandami, liczącymi łącznie 85 000 mieszkańców. Do 2006 r. NorthLink 1 była spółką zależną CalMac, natomiast NorthLink 2, która przejęła aktywa NorthLink 1, stanowi bezpośrednią własność rządu Szkocji (Scottish Executive).
2. Komisja otrzymała wiele skarg oraz interwencji ze strony zainteresowanych podmiotów dotyczących przypadków niezgodnego z prawem i nieuczciwego przyznania pomocy państwa tym dwóm przedsiębiorstwom państwowym, co spowodowało pogorszenie pozycji rynkowej przedsiębiorstw prywatnych obsługujących wszystkie wymienione trasy lub ich część.

3. Kwota dotacji publicznych jakie otrzymują oba przedsiębiorstwa od rządu szkockiego w związku z obsługą połączeń promowych na wyżej wymienionych trasach wzrasta. Według dostępnych danych kwota środków publicznych przyznawanych rocznie obu przedsiębiorstwom wynosi obecnie ponad 75 mln GBP.
4. W odniesieniu do dotacji przyznanych przedsiębiorstwom *CalMac*, *NorthLink 1* i *NorthLink 2* Komisja wyraża wątpliwość, czy odpowiadają one właściwie zdefiniowanym zobowiązaniom z tytułu świadczenia usług publicznych w rozumieniu przepisów prawa UE oraz kwestionuje zgodność odnośnych rekompensat z zasadami wspólnego rynku.
5. Podsumowując, Komisja wyraża wątpliwości co do zgodności z zasadami wspólnego rynku płatności przyznanych przez szkocki rząd przedsiębiorstwom morskim, przedstawione w tabelach 1 i 3 Decyzji.

#### TEKST PISMA

#### „1. PROCEDURE

1. By letter of 19 December 2003 <sup>(1)</sup>, the UK authorities informed the Commission of the steps that the Scottish Executive intended to take in order to bring Scottish ferry services “into line with [their] understanding of the European rules in relation to maritime State aids”.
2. By letters of 19 April and 30 June 2004 <sup>(2)</sup>, the UK authorities informed the Commission of the intention of the Scottish Executive to put to tender a contract aiming at supporting respectively car and passenger traffic on routes to the Northern Isles and passenger traffic between Gourock and Dunoon.
3. Since then the ferry companies *NorthLink* and *CalMac* were the subject of several letters from Members of the European Parliament and third parties raising questions about possible illegal and incompatible State aid which would have been granted to these two companies. Following these letters, and several complaints by third parties on the same topic, the Commission sent requests of information to the UK authorities to which answers were provided.

#### 2. DETAILED DESCRIPTION OF THE FACTS

4. The *CalMac* and *NorthLink* cases are related. *NorthLink* was a subsidiary of *CalMac* until 2006. Both cases are therefore being examined together in the present Commission Decision.
5. Based on the information given by the UK authorities and by plaintiffs, the Commission is able to establish the following facts.

<sup>(1)</sup> Registered under Reference TREN(2003) A/38572.

<sup>(2)</sup> Registered under References TREN(2004) A/18803 and 26209.

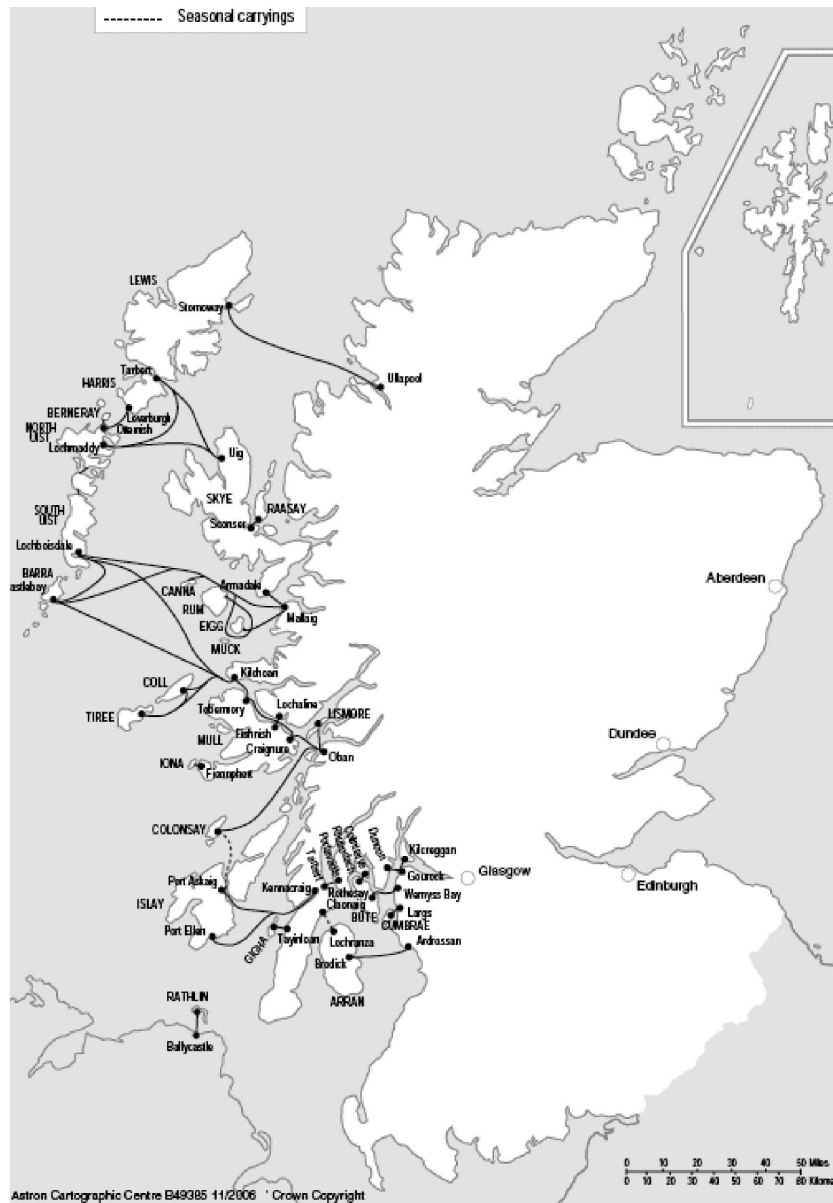
## 2.1. Western Scotland

### 2.1.1. Maritime routes

6. The existing routes in Western Scotland are set out below in Map 1:

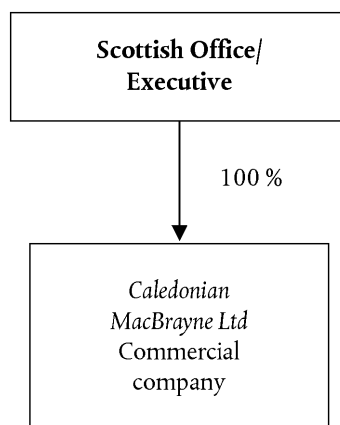
**Map 1**

### Maritime routes operated by CalMac in Western Scotland



2.1.2. *The operators*2.1.2.1. *CalMac*: historical background

7. Between 1990 and 2006 *Caledonian MacBrayne Ltd* had been a ferry company wholly owned by the State under the responsibility of the Secretary of State for Scotland, and, after devolution in 1999, by the Scottish Executive.

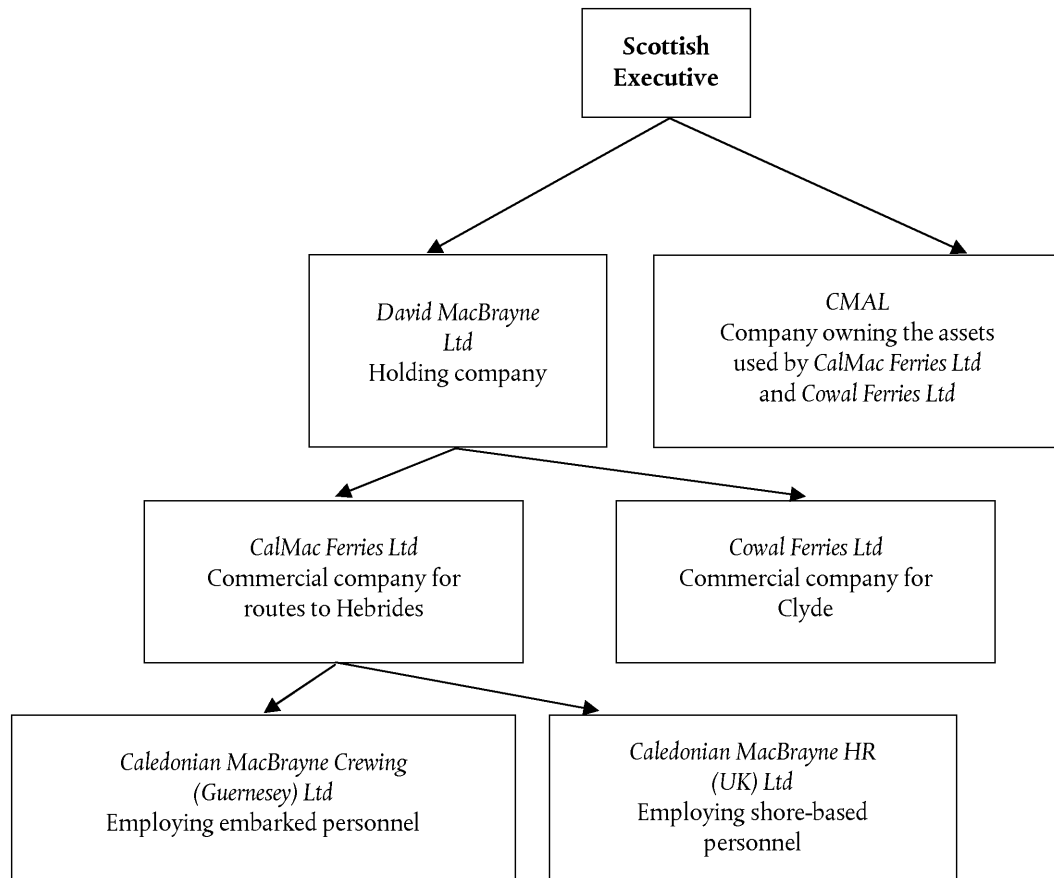
**Chart 1****Pre-2006 structure of ownership (based on the information at the disposal of the Commission)**

Source: European Commission based on information granted by the UK authorities

8. In October 2006 *Caledonian MacBrayne Ltd* was restructured to separate the vessel and shore asset ownership role from the ferry operating role. The new structure is shown in Chart 2 below.
9. The ferry service operations were transferred to two new companies, *CalMac Ferries Ltd* and *Cowal Ferries Ltd*, which were created as two wholly-owned subsidiaries of *David MacBrayne Ltd*. The latter was previously a dormant company 100 %-owned by the Scottish Executive.
10. *CalMac Ferries Ltd* took over the services to the Hebrides, along with two wholly-owned subsidiaries, *Caledonian MacBrayne Crewing (Guernsey) Ltd* and *Caledonian MacBrayne HR (UK) Ltd*, which employ respectively embarked and shore-based personnel.
11. *Cowal Ferries Ltd* took over the services on the Clyde. *Cowal Ferries Ltd* was intended to participate in an upcoming tender on a future public service contract for the route concerned.
12. In parallel, *Caledonian Maritime Assets Ltd* (hereinafter CMAL), retained ownership of the vessels and piers that are used for the operation of the Clyde and Hebrides ferry services.
13. Under the new arrangements, CMAL leases the vessels and piers to the *CalMac Ferries Ltd* and *Cowal Ferries Ltd*. It also owns and operates the port facilities in nearly half of 50 destinations that the latter serve. CMAL is wholly and directly owned by the Scottish Executive.

## Chart 2

## Current structure of ownership (based on the information at the disposal of the Commission)



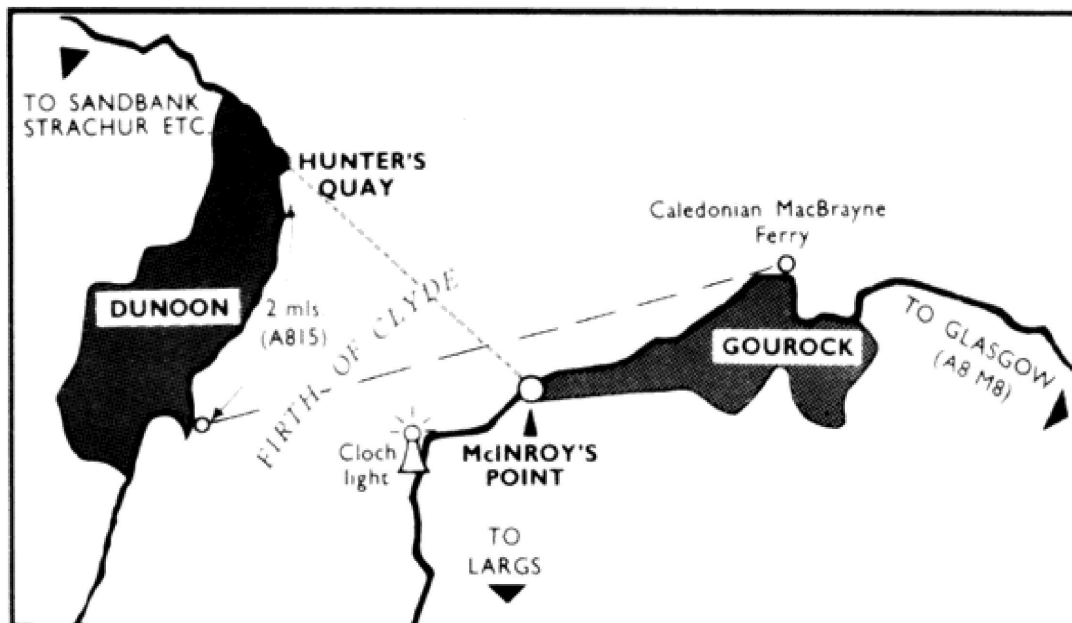
Source: European Commission based on information provided by the UK authorities

14. *CalMac Ferries Ltd* at present charters a fleet of 29 vessels from CMAL to provide passenger, vehicle and shipping services to the islands off the West Coast of Scotland and in the Clyde estuary. Two other vessels are retained on separate charters. The restructuring did not lead to any alteration in ships' livery or branding.
15. The Commission understands that *Cowal Ferries Ltd* also charters its three vessels from CMAL.
16. Furthermore, the Commission understands that, whether for *CalMac Ferries Ltd* or for *Cowal Ferries Ltd*, the restructuring did not lead to any alteration in ships' livery or branding.
17. At this stage of the investigation, the Commission is not in a position to exclude that there may be continuity between *Caledonian MacBrayne Ltd* and the various above-described companies.
18. Therefore, in the following, the term "CalMac" is used to cover, for the period prior to the restructuring, *Caledonian MacBrayne Ltd* and, for the period posterior to the restructuring *CalMac Ferries Ltd*, *Cowal Ferries Ltd*, CMAL, *Caledonian MacBrayne Crewing (Guernesey) Ltd* and *Caledonian MacBrayne HR (UK) Ltd*. This is however without prejudice to the conclusion the Commission may reach on the basis of further information acquired in the course of the present procedure. The Commission notes in particular that CMAL is a separate company from *CalMac Ferries Ltd* and *Cowal Ferries Limited*, with whom it merely shares a common shareholder and has a trading relationship.

19. There are currently 26 routes within the network served by *CalMac*. As regards only *CalMac Ferries Ltd*, in the year ended on 31 March 2006, it transported 5,3 million passengers, 1,1 million cars, 94 000 commercial vehicles and 14 000 coaches on these routes.
20. *CalMac* has virtually no competition on the routes it serves. Its sole competitor, *Western Ferries*, operates only on the Clyde estuary between Gourock, situated on the Upper Firth of Clyde, and Dunoon, located on the Cowal peninsula of Scotland as illustrated on Map 2.

Map 2

## Maritime routes on the Clyde estuary



## 2.1.2.2. Western Ferries

21. *Western Ferries* only operates the route between Gourock and Dunoon.

## 2.1.3. Public Service

## 2.1.3.1. Historical background

22. The general framework for financial support for the Clyde and Hebrides ferry services until September 2007 was provided by contracts named “undertakings” and signed between the Scottish Office/Executive and *CalMac*, under the Highlands and Islands Shipping Services Act 1960, as modified by the Transport (Scotland) Act 2001 and the Transport (Scotland) Act 2005.
23. The most recent undertaking <sup>(3)</sup> between the Scottish Office and *CalMac* (hereinafter “the Undertaking”) was approved by the United Kingdom Parliament in 1995 and signed shortly thereafter. Pursuant to the Undertaking, the Scottish Office/Executive committed to grant subsidies to *CalMac* by way of revenue and/or capital grants for maintaining or improving sea transport services to the Highlands and Islands. This was done to support the so called “approved services” that, in the opinion of the Scottish Office/Executive, were necessary to maintain or improve the economic or social conditions in the Highlands and Islands.

<sup>(3)</sup> This text of this Undertaking is publicly available at the following Internet address: [www.calmac.co.uk/undertakingbysecretaryofstate.pdf](http://www.calmac.co.uk/undertakingbysecretaryofstate.pdf)

24. As mentioned above, in October 2006, *Caledonian MacBrayne Ltd* was restructured. As a result, the 1995 Undertaking lapsed after 30 September 2006, as the company to which it related (*Caledonian MacBrayne Ltd*) was by then no longer involved in the delivery of ferry services.
25. From then until the start in October 2007 of the new contract for Western Scotland, the UK authorities have indicated to the Commission that there was no material change to the approach taken on the issues of regularity, frequencies, capacities and rates since 1 October 2006. The Commission understands that subsidies continued to be provided to *CalMac* based on the provisions of the Highland and Islands Shipping Services Act 1960 relating to the system of Parliamentary undertakings for ferry subsidies as amended Section 70 the Transport (Scotland) Act 2001 and by Section 45 <sup>(4)</sup> the Transport (Scotland) Act 2005 <sup>(5)</sup>.
26. Further to a failed tender on the Clyde route (Gourock-Dunoon) and after various contacts with the Commission, the Scottish Executive published on 14 December 2006 a new invitation to tender <sup>(6)</sup> for a public service contract, which, unlike the preceding one, provided for financial compensation, and covered all routes operated until then by *CalMac*, with the exception of the Gourock-Dunoon route <sup>(7)</sup>.
27. *V-Ships*, who was with *CalMac* one of the two bidders, withdrew from the tender process on 2 February 2007, stating publicly that “with no direct control over the assets themselves, there would be little opportunity for added value via creative management and innovation” <sup>(8)</sup>.
28. The Commission understands that the contract <sup>(9)</sup> was eventually granted to *CalMac* on 20 September 2007 (hereinafter “the 2007 contract”).

#### 2.1.3.2. Routes

29. Prior to the 2007 contract the Undertaking did not specify the routes to be served. The UK authorities indicated that the routes qualifying for financial support were, instead, specified in an annual letter sent to *CalMac* by the Scottish Office/Executive.
30. Based on research into publicly available data on origin and destination of passengers <sup>(10)</sup> as regards the Gourock-Dunoon route on which there is competition between *CalMac* and *Western Ferries*, 9 % of *Western Ferries*’ passengers use bus connections before and/or after the maritime crossing. As regards *CalMac*, whose piers are located near train stations, the ratio is 13,5 % for bus connections and 15,5 % for train connections.

<sup>(4)</sup> “45. Modification of Highlands and Islands Shipping Services Act 1960 and loans for transport-related purposes:

1. The Highlands and Islands Shipping Services Act 1960 (c. 31) (financial and other assistance to those concerned with providing sea transport services for the Highlands and Islands), so far as relating to the provision of that assistance by the Scottish Ministers, ceases to have effect.
2. Nothing in subsection (1) above affects any undertaking given, advance made, contract or other obligation or transaction entered into or action entered upon before that subsection comes into force.
3. Section 70 of the Transport (Scotland) Act 2001 (asp 2) (grants for transport-related purposes) is amended in accordance with subsections (4) to (6) below.
4. In subsection (1), after “grants” there is inserted “or loans”.
5. In subsection (2):
  - (a) after “Grants” there is inserted “and loans”;
  - (b) for “amount” there is substituted “amounts”;
  - (c) after “including” there is inserted “, in the case of grants,”.
6. In subsection (4):
  - (a) after “grants” insert “and loans”;
  - (b) after “grant”, in both places where it occurs, there is inserted “or loan”.

<sup>(5)</sup> The text of this Act is publicly available at the following Internet address:  
<http://www.opsi.gov.uk/legislation/scotland/acts2005/20050012.htm>

<sup>(6)</sup> The text of this invitation to tender is publicly available at the following Internet address:  
<http://www.scotland.gov.uk/Resource/Doc/161181/0043718.pdf>

<sup>(7)</sup> The specifications required that the successful tenderer had to charter the CMAL vessels, formerly owned by *Caledonian MacBrayne Ltd*.

<sup>(8)</sup> Press cutting attached to *NorthLink*’s submission of 14 February 2007.

<sup>(9)</sup> The text of this invitation to tender of the 2007 contract is publicly available at the following Internet address:  
<http://www.scotland.gov.uk/Publications/2006/12/18100005/0>

<sup>(10)</sup> Hitrans report, entitled “Origin and destination of passengers and freight on Strategic Sea Crossings” and available at the following Internet address:  
<http://www.hitrans.org.uk/Documents/documents/FinalReport.pdf>

## 2.1.3.3. Regularity and frequencies

31. According to the information submitted by the UK authorities, service frequencies and timetables reflected, prior to the 2007 contract, the series of approvals, given over the years, by the Scottish Office/Executive. However, the UK authorities have indicated that *CalMac* had some freedom to vary frequencies and timetables where these were requested by users or were otherwise deemed to be appropriate and where the financial implications were minimal. More substantial changes and those with significant financial implications have always been subject to the approval of the Scottish Office/Executive on an *ad hoc* basis. In recent years such approvals have included in 2001 the Ullapool-Stornoway route, in 2003 the Kennacraig-Islay route and in 2005 the Ardrossan-Brodick route.

## 2.1.3.4. Capacities

32. Annual route capacities are a function of vessel characteristics and frequency of service. Prior to the restructuring of *Caledonian MacBrayne Ltd* in October 2006, from the information provided by the UK authorities, new vessels, generally offering larger capacity than the vessel being replaced, had been approved, largely on an *ad hoc* basis, by the Scottish Office/Executive on proposals made by *CalMac* <sup>(11)</sup>.

## 2.1.3.5. Fares

33. According to the UK authorities, until the signature of the September 2007 contract the annual fares increases for all categories of traffic have been proposed by *CalMac* and approved by the Scottish Office/Scottish Executive. In the earlier years of the period of the Undertaking, this approval seems to have been implicit, as fares were increased to bridge the gap between the level of deficit funding set by the Scottish Office and the company's costs. In more recent years, the increases have been explicitly approved by Ministers on an annual basis.
34. In recent years, the pattern of annual increases has largely been to approve general increases, in line with inflation, which apply to all — or virtually all — of the routes. In the earlier years of the period since 1995, there was some restructuring of the fares system and this involved differential annual increases being applied across the network of routes.

## 2.1.4. Grant of public money to CalMac

35. The Commission understands that *CalMac* has received the following payments from the Scottish Office/Executive in relation with the above-mentioned public service obligations.

Table 1

Public money granted by the Scottish Office/Executive to *CalMac* (GBP million) since 1995

Type of funding	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07
Deficit grant	8,282	11,674	10,500	14,436	15,000	19,000	20,404	18,900	25,919	25,100	31,400	34,200
Capital grant — Piers and Harbours	0,906	0,344	0,203	0,806	0,902	0,770	0,300	1,189	0,814	2,545	1,113	2,208
Capital grant — Vessels	3,588	1,460	9,900	7,669	9,269	2,397	0,000	0,000	0,000	0,000	0,000	0,000
Capital loans — Vessels (net of loan re-payments)	3,988	0,511	-0,222	3,449	-0,429	3,366	1,490	6,554	1,964	6,259	5,073	7,660
Total	15,858	13,134	20,400	25,554	24,269	24,763	21,894	26,643	27,883	33,904	37,586	44,068

36. The UK authorities indicated that new vessels were funded until 2002 by Scottish Office/Executive grants (75 %) and loans (25 %). Since 2002, all vessels have been funded on a 100 % loans basis.

<sup>(11)</sup> Eleven vessels have been added to the fleet since 1995.



37. Prior to the 2007 contact the loans advanced to *CalMac* by the Scottish Office/Executive had been set at UK Public Works Loans Board (PWLB) rates. The role of the latter is to provide loan finance to local authorities rather than to publicly-owned companies. The PWLB rates are considered to be determined on market conditions.
38. As regards specifically Gourock-Dunoon, the Commission notes that *CalMac's* revenue per passenger including subsidies on this route is high compared to the non-subsidised fee charged by *CalMac's* competitor, *Western Ferries*. Based on the latest figures available, (subsidies on the Gourock-Dunoon route amounting in 2005 to GBP 2,451 million <sup>(12)</sup> for an annual passenger traffic of 624 000 <sup>(13)</sup>), the average aid per passenger amounted to GBP 4, whereas the current passenger rates for a single ticket stand at GBP 3,40 (subsidised *CalMac*) and at GBP 3,25 (non-subsidised *Western Ferries*). In their letter of 30 July 2007, the UK authorities accepted this point, acknowledging that without aid, the *CalMac* fare for an adult single would reach GBP 7,40 for an adult single but underlined that the route operated by *CalMac* is significantly longer than the route operated by *Western Ferries* and that *Western Ferries* could better fill the decks of its ferries with individual cars.

#### 2.1.5. Northern Isles Maritime routes

39. The Northern Isles comprise two archipelagos: Orkney and Shetland. The total annual maritime passenger traffic amounts to circa 300 000. The Commission does not have exact figures concerning the freight traffic to the Northern Isles.
40. Two maritime networks have to be distinguished: The first one is a short route serving Orkney between Scrabster (Scottish mainland) and Stromness (Orkney), upon the Pentland Firth. The second one is the triangular route between Aberdeen (Scottish mainland), Lerwick (Shetland) and Kirkwall (Orkney).
41. The present Decision does not concern maritime links within Orkney or Shetland, given that the traffic on these routes is less important and that neither *NorthLink*, nor *CalMac* serve the routes within these two archipelagos.

**Table 2**

#### Maritime traffic between the Scottish mainland and the Shetland

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Cars (k)	50	53	58	60	60	61	62	51	40	59	64	67
Commercial vehicles (k)	12	14	15	16	17	17	20	22	16	1	1	1
Passengers (k)	214	220	236	245	239	242	239	208	166	241	289	301
Loose freight (kT)	43,0	52,0	62,0	60,0	52,0	—	47,3	49,9	—	—	—	—
Revenue k GBP	16,17	14,95	15,8	14,48	15	—	15,28	16,66	12,2	28,92	33,44	42,51
Subsidy k GBP	6,519	8,1	8,1	9,412	14,3	11,4	11,5	11,6	11,21	18,52	28,12	22,45

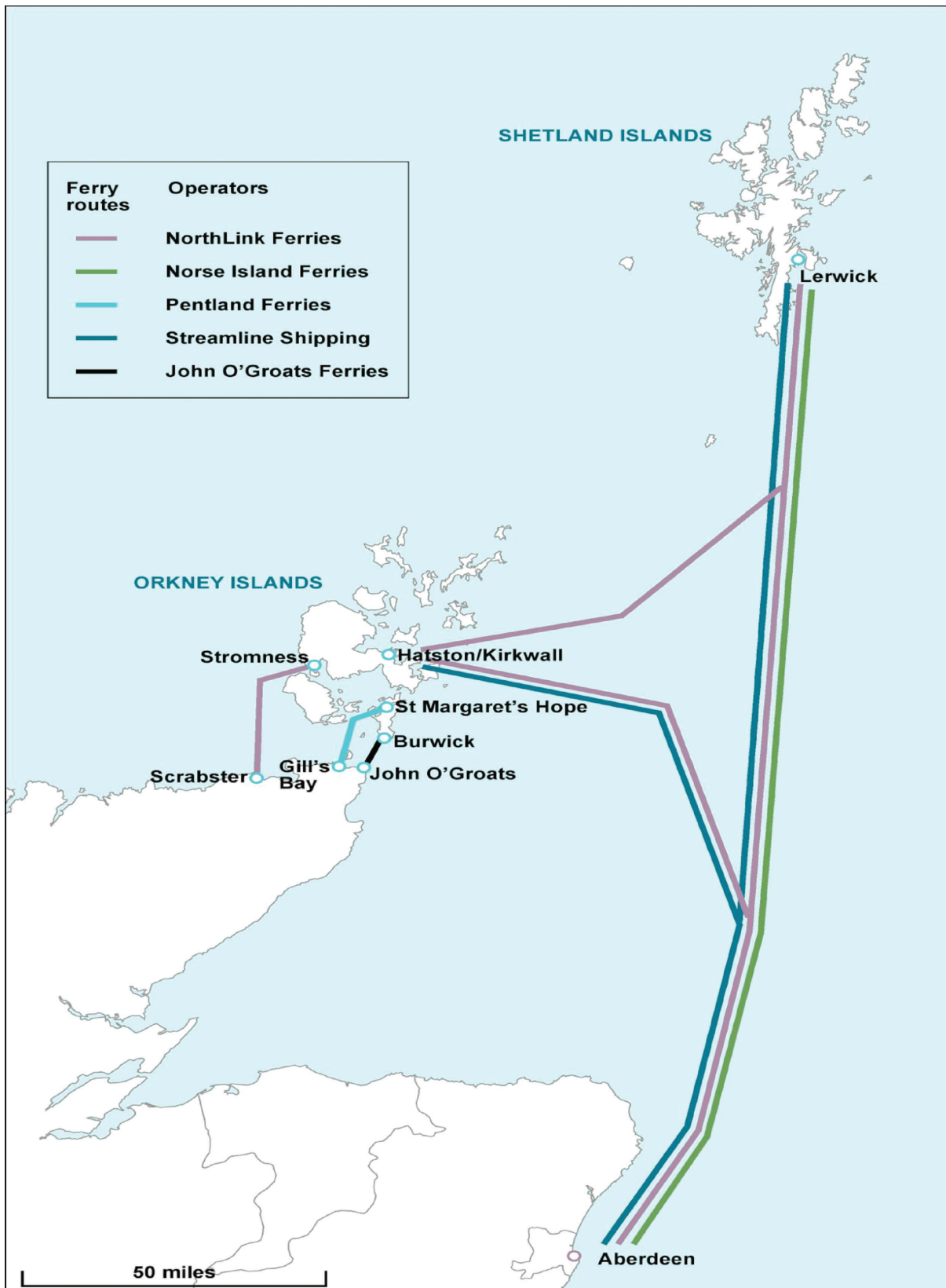
<sup>(12)</sup> Source: 2005-2006 annual report of *CalMac* publicly available at the following Internet address: <http://www.calmac.co.uk/annual-report-2005-2006.pdf>

<sup>(13)</sup> Source: website of *Western Ferries*.

42. The situation on the two routes is illustrated by Map 3 below:

Map 3

The different maritime routes and operators between Scotland, Orkney and Shetland



#### 2.1.6. The operators

43. On the maritime route between Aberdeen, Kirkwall and Lerwick, there are currently two competitors:
- *NorthLink* operates two combined passenger car and freight vessels and two freight and livestock vessels,
  - *Streamline Shipping Group Ltd* operates a containerised freight vessel.
44. *Norse Islands Ferries* is not anymore present on the route but operated one, and at times two, freight-only vessels between September 2002 and June 2003.
45. On the maritime route between North Scotland and Orkney, there are at present three competitors:
- *NorthLink* also operates a combined passenger, car and freight vessel on the shorter Pentland Firth crossing,
  - *Pentland Ferries* began providing a combined passenger, car and freight service across the Pentland Firth in spring 2001,
  - *John O’Groats Ferries* operates a small passenger-only ferry on the Pentland Firth route but in summer only.

##### 2.1.6.1. NorthLink

46. Originally, *NorthLink Orkney* and *Shetland Ferries Ltd* (hereinafter *NorthLink 1*) was a 50 %-50 % joint venture, established in 2000 in Edinburgh between the *Royal Bank of Scotland* (hereafter RBS), one of the leading banks in the UK, and *CalMac*. *NorthLink* is now a new legal entity, fully-owned by the Scottish Executive (hereinafter *NorthLink 2*), which has taken over from *NorthLink 1* all the personnel and assets. Further details on *NorthLink*, notably on the distinction between *NorthLink 1* and *NorthLink 2*, are provided below in Section 2.2.3.4 at paragraph 83.

##### 2.1.6.2. Streamline

47. *Streamline Shipping Group Ltd*, referred to hereafter as *Streamline*, is a family-owned business specialised in logistics in Scotland and also in the rest of the UK. With a workforce of 160 employees, it is active in road haulage, maritime transport, storage and distribution, including a new “home delivery” service.
48. This company started to operate in 1984 a biweekly freight services between Aberdeen, Lerwick and Kirkwall, using chartered freight lift-on lift-off vessels or its owned container ship (*MV Navigia*) capable of transporting 205 EU Treaty <sup>(14)</sup>. In 1987 it also opened container freight services to Orkney <sup>(15)</sup> with a subsidiary, *Orkney Line Limited*.

##### 2.1.6.3. Pentland Ferries

49. *Pentland Ferries* operates a daily ferry service between Gills Bay, in Caithness, Scotland, about 3 miles West of John O’Groats, and St Margaret’s Hope on South Ronaldsay, in Orkney.
50. The company has currently two vessels although only one operates on the route at any time. Both are now due for replacement for the summer season 2008 by a new catamaran ferry.
51. *Pentland Ferries* is a privately owned company, which has operated routes to Orkney only, since the summer of 2001. While not being considered to be a “lifeline” service, this company carries some 80 % of the livestock, dangerous goods cargoes, including aviation fuel, although it receives no subsidy or other financial assistance.

<sup>(14)</sup> Twenty-feet equivalent unit.

<sup>(15)</sup> Source: website of *Streamline Shipping*:  
<http://www.streamlineshippinggroup.com/flash/>

#### 2.1.6.4. John O'Groats Ferries

52. *John O'Groats Ferries* is a company ensuring passenger ferry service from John O'Groats in the Far North of Scotland to Orkney, every day all summer from 1st May to 30 September, with one vessel, *MV Pentland Venture*.

#### 2.1.7. Public service

##### 2.1.7.1. The 1997 public service contract with P&O

53. The Scottish Office launched an open competitive tendering exercise in June 1995 for the Aberdeen-Lerwick and Scrabster-Stromness routes. In March 1997 the then Minister of State for the Scottish Office announced as owner that *CalMac* would not be allowed to bid. <sup>(16)</sup>.
54. The tender led the Scottish Office to choose *P&O*. Pursuant to the contract eventually signed (hereinafter "the 1997 contract"), *P&O* was to be paid a basic annual block grant, subject to "clawback arrangements" aimed at capping possible benefits, should the company's profits exceed forecasts. *P&O* received GBP 55 million from the Scottish authorities over the period 1997-2002 <sup>(17)</sup> for the execution of the contract.
55. Under the contract, the subsidy was limited to passengers, accompanied cars and associated vehicles, such as motorhomes and motorcycles. The level of tariffs for lorries was left to the discretion of the holder of the contract.

##### 2.1.7.2. The 2000 public service contract with *NorthLink*

56. In 1998 the Scottish Executive launched a new tendering process for a public service contract on the routes between Aberdeen, Kirkwall and Lerwick and between Scrabster and Stromness over the 2002-2007 period. As was already the case in the former contract, no exclusive right was granted to the selected bidder. While the service specifications of the tender indicated that operators would be required to provide capacity to carry freight, this element of the service was expected to be operated on a commercial basis, i.e. without subsidy.
57. The invitation to tender <sup>(18)</sup>:
- specified the route configuration and minimum number of sailings required but expected bidders to propose detailed timetables,
  - indicated that the new contract would continue subsidising services for routes between the ports used in the current contract with *P&O* that is to say: Aberdeen, Lerwick, Scrabster and Stromness,
  - stipulated that the services should provide for the carriage of freight, without any subsidy; it was left for bidders to determine the precise level of freight services to be made available, although they should be sufficient to carry at least the levels currently provided by *P&O* plus reasonable estimates of growth,
  - required that freight services must include sufficient appropriate capacity for the carriage of livestock; the service was to be made available all year round, and particularly during the main livestock shipment period of August to October,
  - expected three combined passenger/freight vessels to operate the routes but was open to consider alternative proposals providing that its other service requirements were met; vessel size, carrying capacity and speed were also matters for bidders to consider with a *proviso* that, as a minimum, they matched those of the *P&O* contract,
  - required the successful bidder's pricing plan to be agreed with the Scottish Executive and maximum tariffs to be published. It was expected that initial tariffs would not be set at a level significantly above prevailing rates.

<sup>(16)</sup> Source Report of Audit Scotland of December 2005 on the *NorthLink* ferry services contract. Paragraph 2.20. The text of the reported is available at the following Internet address:

[http://www.audit-scotland.gov.uk/docs/central/2005/nr\\_051222\\_northlink\\_ferry.pdf](http://www.audit-scotland.gov.uk/docs/central/2005/nr_051222_northlink_ferry.pdf)

<sup>(17)</sup> Source Report of Audit Scotland of December 2005 on the *NorthLink* ferry services contract. The text of the reported is available at the following Internet address:

[http://www.audit-scotland.gov.uk/docs/central/2005/nr\\_051222\\_northlink\\_ferry.pdf](http://www.audit-scotland.gov.uk/docs/central/2005/nr_051222_northlink_ferry.pdf)

<sup>(18)</sup> Source Report of Audit Scotland of December 2005 on the *NorthLink* ferry services contract. Paragraph 2.16.

58. In November 1998, thirteen shipping operators expressed an interest in the tender after advertisement in the *Official Journal of the European Communities*. Six ferry operators were short-listed and three ultimately submitted bids in June 1999.
59. The Scottish Executive ruled out one of the three bidders, *SERCO Denholm*, because it considered unacceptable its request to get the possibility to sell its vessels or transfer ongoing leases to the Scottish Executive at the end of the contract, and also because it was the highest bid. The Scottish Executive had then to choose between the respective bids of *P&O* and of *NorthLink*, which had just been set up. The Scottish Executive chose *NorthLink* as the preferred bidder in September 2000.
60. *NorthLink's* bid for basic subsidy of GBP 45,7 million was within the affordability price set for the five-year contract and was GBP 14 million cheaper than the bid of *P&O*. *NorthLink's* costs were higher than *P&O's* but it anticipated generating about GBP 8 million more passenger income and GBP 13 million more from freight surpluses because its traffic growth assumptions were higher. According to the UK authorities, it was also prepared to accept less profit from the contract than *P&O*. The UK authorities have indicated to the Commission that the analysis made by the Scottish Executive on *NorthLink's* bid "suggested that even if no passenger growth were achieved, losses could be contained within *NorthLink's* available working capital" <sup>(19)</sup>.
61. The contract between *NorthLink* and the Scottish Executive was thus signed in December 2000. It had first been anticipated that the new operator would have the time to commission and build new vessels to be ready to start operations in April 2002. Following the contract award in October 2000, *NorthLink* ordered three new passenger/vehicle ferries and acquired a second-hand dedicated freight vessel.
62. However *NorthLink* was only able to start operations on 1 October 2002. Because of this delay, the Scottish Executive prolonged the public service contract operated by *P&O* for 6 months.
63. The contract with *NorthLink* provided for a method to calculate the annual compensation, taking account of inflation, only for obligations imposed on the carriage of passengers and accompanied cars. This would have implied a basic subsidy of GBP 12,0 million in the first year of operation (1 October 2002-30 September 2003) and one of GBP 11,1 million in the second year (i.e. 2003-2004).

#### 2.1.7.3. The 2004 MoA with *NorthLink*

64. The bidding process required bidders to estimate the total cost of providing the services specified (which include a capacity to carry cars) and then to calculate how much revenue would be secured from:
- passengers and cars, reflecting the specified fares and the assessments by the bidder of traffic volumes, and
  - freight traffic, on the basis of their own decisions on commercial rates and their own assessments of volumes, based on the historical statistics provided by the Scottish Executive.
65. While *P&O* provided the service under public service contract over the period between April 1997 and March 2002, it was then the only operator offering a roll on/roll off (ro-ro) service for passengers, cars and freight between the Scottish mainland and the Northern Isles. According to the UK authorities, in preparing its bids, *NorthLink* assumed that it would also enjoy a monopoly on the ro-ro traffic <sup>(20)</sup>.
66. This assumption proved however incorrect. In the run-up to the start of the new contract, there were, according to the UK authorities, new developments which undermined the initial calculations made by *NorthLink*:
- In the spring of 2001 a new operator, *Pentland Ferries*, began services from the Scottish mainland to Orkney and progressively took a substantial share of the Orkney passenger, car and freight market.

<sup>(19)</sup> Letter from the UK authorities of 14 September 2006.

<sup>(20)</sup> By letter of 4 October 2004.

- In July 2002 a consortium of three road hauliers <sup>(21)</sup> announced that they would be part of a new ferry company, *Norse Island Ferries Ltd*, in reaction to the freight fares announced by *NorthLink* in 2001, which they considered too high compared to fares previously offered by *P&O*. In early September 2002 *Norse Island Ferries Ltd* started to offer a daily ro-ro freight service between Shetland and the Scottish mainland and, for the early months of its operation, appeared to be carrying a large proportion of the freight market.
- As from 1 October 2002, *NorthLink* was obliged to temporarily charter in a new vessel due to the failed schedule of the construction of a new pier at Scrabster Harbour. The service specification for the subsidy competition combined with new rules on vessel safety implemented under the Stockholm Agreement <sup>(22)</sup> meant that the new vessels to provide for the specified service were substantially larger than those previously operating the routes. This necessitated significant harbour works at all of the five ports from which the services operate. In four cases, this work was completed by the contract implementation date. However, in the fifth case, construction of a new pier at Scrabster Harbour slipped badly behind schedule. As a result, *NorthLink* was unable to bring the new vessel designed for this route into service until April 2003.
67. Under the contract, the non availability, at the designated ports, of harbour facilities which can accommodate their vessels was a “relief event” that removed any obligation on *NorthLink* to provide the relevant services. In these circumstances, *NorthLink* indicated that it would continue to provide a Scrabster-Stromness crossing only if it were reimbursed for the additional costs involved in laying up their vessel and chartering a smaller substitute vessel capable of using the original port facilities at Scrabster. It was then estimated that the additional costs involved would amount to about GBP 30 000 per week.
68. Following the announcement in 2001 of the new freight service by *Pentland Ferries*, *NorthLink* requested discussions with the Scottish Executive on the impact of this new competition on its financial position. *NorthLink* made available to the Scottish Executive their business model to allow it to examine the impact of the competition on the company’s viability. Based on this model, *NorthLink* was initially projecting a total return over the lifetime of the contract of GBP 14,9 million. The changed circumstances turned this figure into a projected loss of GBP 16,4 million. This raised serious concerns over the solvency of the contractor and its ability to execute the contract. The chief factor in this was the competition from *Norse Island Ferries* as this accounted for over GBP 25,5 million of the GBP 31,3 million negative turnaround in the company’s books.
69. The competition on the Shetland freight market from *Norse Islands Ferries* came to an end in early June 2003, following the decision of the latter to cease to trade. This offered the prospect of *NorthLink* moving back on to a viable basis. The Scottish Executive thus decided to continue to fund *NorthLink* in line with the terms of the contract, believing that the cessation of *Norse Islands Ferries* could be sufficient to allow the contract to run its full term.
70. However, in the summer of 2003, few months after starting operations, *NorthLink* informed the Scottish Executive that it could no longer realistically deliver its contractual obligations over the remainder of the contract period, i.e. to the end of September 2007.
71. The Scottish Executive reviewed the company’s financial position, with the assistance of independent accountants, and concluded that *NorthLink* was heading for insolvency. In view of the threat of insolvency, if additional subsidy were not to be paid, the Scottish Executive took into consideration the risk that, if the company had any formal insolvency proceedings taken against it (which could have been done by a number of creditors), the life line services could have been interrupted.
72. According to the Scottish Executive, the longer term future would be dependent upon the attitude of the receiver appointed to manage the company. The receiver would not be bound by any contractual obligations of the company and would not, therefore, be bound to provide the subsidised service.

<sup>(21)</sup> These three road hauliers between them traditionally handled 80 % of the freight going between Shetland and the Scottish mainland, resorting to ferry services of *P&O Scottish Ferries*.

<sup>(22)</sup> Following two passenger ship disasters in the 1990’s, eight North European States agreed to set a higher standard for ship stability in what has become known as the Stockholm Agreement. The eight States were Denmark, Finland, Germany, Ireland, the Netherlands, Sweden, the United Kingdom, and Norway.

73. On 8 April 2004, the Scottish Executive announced, following contacts with the Commission, its intention to re-tender the service and published a Contract Notice in the *Official Journal of the European Union* relating to such tendering. In parallel to this new tendering procedure, which will be described further below, the Scottish Executive took a number of actions to ensure the continuity of lifeline service in the interim.
74. On 29 September 2004, the Scottish Executive concluded with *NorthLink* revised funding arrangements, through a Minute of Amendment (hereinafter “the MoA”) to the public service contract. This MoA provided for a deficit funding system, ensuring that *NorthLink* could continue the services until the handover of the contract and to the standard specified in its specifications. The MoA also provided that certain assets, leased or owned by *NorthLink*, could be made available on the occasion of the next public tender, on a discretionary basis and at estimated market value, to bidders who would wish to use them in delivering the services within the framework of the future contract. With a view to maintaining budgetary control over that period, the MoA involved measures controlling *NorthLink*’s ability to go beyond the terms of an agreed budget without the approval of the Scottish Executive.
75. In addition, the MoA provided for limited “incentive payments” of around GBP 1,5 to GBP 2 million per year, assuming a range of demanding service performance, cost and revenue targets would be met or exceeded. A first element of the incentive payment would be paid provided a range of punctuality, reliability and other service performance targets were met in full. This element was designed to replace and enhance the system of performance penalties built into the original agreement. A second element would be paid on the delivery of cost savings/revenue gains in comparison to a benchmark budget which the Scottish Executive’s independent accountants would have approved.
76. In August 2005 the Auditor General for Scotland asked Audit Scotland to examine the new public service contract awarded to *NorthLink*. Audit Scotland is a statutory body set up in April 2000 under the Public Finance and Accountability (Scotland) Act 2000 to provide services to the Auditor General. Their mission is to ensure together that the Scottish Executive is held to account for the proper, efficient and effective use of public funds.
77. According to the report published by Audit Scotland <sup>(23)</sup> in December 2005, *NorthLink* received from the Scottish Executive GBP 71 million over the 3 first years of the public service contract, covering the period from October 2002 to end September 2005, to be compared with compensation under the contract limited to GBP 50,7 million. The report gives the following break-down of the GBP 71 million:
- GBP 33,6 million of basic compensation under the original contract,
  - GBP 16,7 million of additional compensation, allegedly allowed under the original contract,
  - GBP 18,2 million of additional funding, and
  - GBP 2,5 million to pay off in one instalment some leases used by *NorthLink*.
78. On the basis of the information given by the UK authorities <sup>(24)</sup>, the Scottish Executive further granted to *NorthLink* GBP 21,6 million between September 2005 and the handover of the contract to its successor on 6 July 2006. In conclusion, for the execution of the contract, *NorthLink* received GBP 97,6 million in total, over a period of just 3 years and 9 months, to be compared with a cost of around GBP 55 million for the former contract with *P&O* over 1997-2002. However, these amounts may be difficult to compare directly, in the light of possible cost differences between both contracts.
79. Based on a table provided later by the UK authorities (see Table 3 below) <sup>(24)</sup>, *NorthLink* appears to have received a little less money (GBP 92,5 million) from the Scottish Executive than announced earlier (GBP 97,6 million <sup>(25)</sup>).

<sup>(23)</sup> The text of the reported is available at the following Internet address:  
[http://www.audit-scotland.gov.uk/docs/central/2005/nr\\_051222\\_northlink\\_ferry.pdf](http://www.audit-scotland.gov.uk/docs/central/2005/nr_051222_northlink_ferry.pdf)

<sup>(24)</sup> By their letter of 30 July 2007.

<sup>(25)</sup> By their letter of 14 September 2006.

Table 3

Public money granted by the Scottish Executive to NorthLink1 over 2002-2006 <sup>(1)</sup>

Category of payment	2002/03	2003/04	2004/05	2005/06	Total
Basic grant	GBP 11 605 168	GBP 10 702 000	GBP 11 257 000	GBP 8 514 000	GBP 42 078 168
Material change — Capital expenditure	GBP 400 000	GBP 400 000	GBP 400 000	GBP 306 000	GBP 1 506 000
Material change — Staff costs	GBP 828 615	GBP 593 016	GBP 583 796	GBP 440 000	GBP 3 645 427
Material change — Harbour dues	GBP 1 758 368	GBP 2 922 588	GBP 2 812 190	GBP 2 100 000	GBP 9 593 146
Material change — Fuel variance					GBP 7 200 000
Scrabster Pier delays	GBP 831 157				GBP 831 157
Lease payments		GBP 2 525 704			GBP 2 525 704
Additional funding					GBP 25 162 799
Total	GBP 18 423 308	GBP 29 350 092	GBP 23 195 000	GBP 21 574 000	GBP 92 542 401

<sup>(1)</sup> Figures relate to years beginning on 1 October. Contract ended on 6 July 2006.

It has not proved possible for the UK authorities to allocate all of the material change figures to individual years and, as a result, the "additional funding" figure (which is calculated as a residual) cannot be allocated by year.

One payment (of GBP 140 000) has been made to *NorthLink 1* since the handover of the contract in July 2006. This represented a balancing item reflecting the return of excess operator return to the Scottish Executive (as provided for by the MoA of 29 September 2004) and the payment by the Scottish Executive of liabilities relating to the transfer of employees from *P&O Scottish Ferries* to *NorthLink Orkney & Shetland Ferries* (as provided for in the contract of December 2000).

2.1.7.4. The 2006 public service contract with *NorthLink 2*

80. In a submission dated 9 March 2004 to the Commission, the UK authorities indicated the intention of the Scottish Executive to re-tender the contract as quickly as possible. The submission envisaged that this process could be completed by November 2005.
81. The new invitation to tender <sup>(26)</sup> provided that the 2005 tariffs and schedule for car and passenger would be maintained and indexed on the Consumer Prices Index. However, unlike the 2000 tender exercise, the invitation to tender introduced public service obligations on freight service and foresaw various requirements:
- tariff requirements: the tariff levels had to be reduced on the Aberdeen/Kirkwall (Hatston)/Lerwick routes in each direction, by 19 % on the Kirkwall to Aberdeen route and 25 % from Shetland on the basis of 2005 freight fares charged by *NorthLink*,
  - capacity and frequency requirements: a comprehensive ro-ro freight service, encompassing livestock and dangerous goods and an additional freight sailing required during the week on the Kirkwall to Aberdeen service.
82. On 8 April 2004, the Scottish Executive publicly announced its intention to re-tender the service and published a Contract Notice in the *Official Journal of the European Union* relating to the tendering of the service. On 27 May 2004, it published a draft service specification for the tender as part of a consultation exercise <sup>(27)</sup>. On 19 July 2005, it announced the issue of an invitation to tender to the three short-listed companies, following which two bids were submitted on 30 November 2005, (the third company withdrew from the process in October 2005). It announced on 9 March 2006, the selection of the preferred bidder, *CalMac*.
83. Subsequently the Scottish Executive established a new company *NorthLink Ferries Ltd* (hereinafter *NorthLink 2*) as a wholly-owned subsidiary of *CalMac* and transferred to that new company the contract won by *CalMac*, which was signed on 6 July 2006 (hereinafter "the 2006 contract"). *NorthLink 2* thus took over the service previously carried out by *NorthLink Orkney & Shetland Ferries Ltd* (hereinafter *NorthLink 1*, in order to differentiate the old entity from the new one). *NorthLink 2* has taken over from *NorthLink 1* personnel and assets, on market conditions according to the UK authorities.

<sup>(26)</sup> A summary of the 2006 invitation to tender is available at the following address on the website of the Scottish Executive:

<http://www.scotland.gov.uk/Resource/Doc/55971/0015831.pdf>

<sup>(27)</sup> Publication of the tender in OJ of 3 September 2005 under Reference S 170/2005-169336.



84. *NorthLink 2* has continued to sail under the *NorthLink Ferries* brand and to operate the same ships on the routes to Orkney and Shetland. The company has continued to operate from offices in Kirkwall, Lerwick and Aberdeen and from the ferry terminals at Scrabster and Stromness <sup>(28)</sup>.
85. The MoA involved the Scottish Executive paying off some leases that *NorthLink 1* had entered into (for a freight vessel, towing vehicles and a ticketing system), with these assets to be made available, on a discretionary basis and at a price based on estimated market value, to bidders participating in the re-tendering process. In addition, *NorthLink 1* owned a number of other items that were relevant to the operation of the contract and these, too, were made available to all bidders on the basis of an estimate of market value. This included information technology hardware, vessel spare parts and equipment, port equipment, office equipment and livestock trailers.
86. In addition, *NorthLink 1* offered its brand to bidders and a value of GBP 350 000 was put on this by the Scottish Executive, reflecting an independent consultant's estimate of the basic cost of re-branding (mainly changing the fleet's livery). In total, *NorthLink 2*, as the newly-appointed operator, bought all of these items from *NorthLink 1* for a sum of GBP 1 554 000. In addition, *NorthLink 2* bought the stocks, such as fuel, catering, held on the vessels at the point of contract handover at the supply prices paid by *NorthLink 1*.
87. According to the UK authorities, all of the assets of *NorthLink 1* that *NorthLink 2* wished were bought by the latter at actual or estimated market prices. In terms of the transmission of debts to *NorthLink 2*, the deficit funding mechanism put in place under the MoA was designed to ensure amongst others that *NorthLink 1* did not get into debt. There were, therefore, according to the UK authorities, no debts in the system to transmit to *NorthLink 2* and that company began operating the contract without any debt inherited from *NorthLink 1*.
88. The cost for delivering the requested public services by *NorthLink 2* proves to be higher in the third public service contract, as shown by the following table summarizing the State resources that it received.

Table 4

Payments made by the Scottish Executive to *NorthLink 2* for 2006/2007 <sup>(1)</sup>

Category of payment	2006/07
Deficit grant	GBP 31,132 million
Funded assets (capital grant)	GBP 1,044 million
Total	GBP 32,176 million

<sup>(1)</sup> Figures relate to period from 6 July 2006-30 June 2007.

89. While an element of revenue risk is still borne by the operator under the public service contract arrangements, the UK authorities informed the Commission that the form of contract put in place in 2006 is robust enough to cope with the type of difficulties that undermined the previous public service contract that ran from October 2002 to July 2006.

Table 5

Traffic and revenue of *NorthLink 1* and *NorthLink 2* <sup>(1)</sup>

Year	2002	2003	2004	2005	2006	2006 <sup>(2)</sup>
Passengers	37 000	241 000	289 000	301 000	126 000	178 000
Cars	10 000	59 000	64 000	67 000	29 000	40 000

<sup>(28)</sup> Source: website of CalMac.

Year	2002	2003	2004	2005	2006	2006 <sup>(2)</sup>
Commercial vehicles	41 000	265 000	266 000	256 000	143 000	143 000
Revenue GBP million	—	15,8	20,3	21,6	14,8	7,0

(1) Notes: Passenger, car and commercial vehicle statistics on a calendar year basis. Revenue on the basis of a 1 October-30 September financial year (e.g. revenue for 2003 relates to 1 October 2002-30 September 2003). *NorthLink 1* contract began on 1 October 2002 and ended on 6 July 2006. Commercial vehicle figures relate to lane metres occupied.

(2) Notes: *NorthLink 2* contract began on 6 July 2006. Passenger, car and commercial vehicle statistics are on a calendar year basis (i.e. 6 July 2006-31 December 2006). Revenue figures are on the basis of a 1 October-30 September financial year (i.e. revenue for 2006 relates to 6 July 2006-30 September 2006).

### 2.1.8. Transport fares

90. The table below shows the fares charged since 2000 by the public service contract operator and by *Streamline*, which provides only lo-lo freight services.

**Table 6**

**Comparison of fares between public service contract operator and *Streamline*, according to *Streamline***

Year	Public service contract operator/per linear metre		<i>Streamline</i> /per linear metre	
	Shetland	Orkney	Shetland	Orkney
2000 ( <i>P&amp;O</i> rates)	GBP 43,70	GBP 37,90	GBP 37,05	GBP 31,62
2002 indicative rates by <i>NorthLink 1</i>	GBP 44,00	GBP 36,00		
2002/2003 ( <i>NorthLink 1</i> rates)	GBP 36,00	GBP 25,50	GBP 33,69	GBP 29,40
2004 ( <i>NorthLink 1</i> rates)	GBP 38,50	GBP 27,50	GBP 34,87	GBP 28,86
2005 ( <i>NorthLink 1</i> rates)	GBP 39,45	GBP 28,20	GBP 33,24	GBP 30,29
2006 ( <i>NorthLink 1</i> rates)	GBP 40,60	GBP 29,00	GBP 40,43	GBP 32,07
July 2006 ( <i>NorthLink 2</i> rates)	GBP 30,60	GBP 23,50	GBP 40,43	GBP 32,07

Source: *Streamline*.

91. Up until October 2002, *P&O* was the unique ro-ro operator. Under the terms of its contract with the Scottish Executive, *P&O* received a subsidy of GBP 11,5 million for the calendar year 2000. This subsidy was not intended to include any subsidy for freight services. As shown in Table 6 above, *Streamline* contends, on the basis of published data that, in 2000, its rates to both Shetland and Orkney were cheaper than those offered by *P&O* <sup>(29)</sup>. However, the Commission notes that such comparisons do not necessarily take into account the operational costs and efficiencies, which may be different between a lo-lo and a ro-ro service.
92. As with the first public service contract with *P&O*, the Scottish Executive provided *NorthLink 1* with compensation for passenger traffic only, excluding in principle any subsidy for freight services.
93. *NorthLink 1* indicated in December 2001 — prior to executing the contract — that it would charge GBP 44,00 and GBP 36,00 per linear metre for trailers to Shetland and Orkney respectively. These rates were justified on the basis that *NorthLink 1* needed to charge a rate that was both commercially sustainable and acceptable to the market. It was also stated that these rates would be fixed for a period of five years. *NorthLink 1* stated that it could not “sustain a situation when we [*NorthLink 1*] carry trailers for free or for very small amounts”. At the same time, *NorthLink 1* emphasised that its freight business was not subsidised.

<sup>(29)</sup> As rates for lo-lo operations are not usually charged per linear metre, *Streamline* has calculated its rates on a per linear metre basis so as to provide a like for like analysis.

94. According to *Streamline*, *NorthLink 1* responded to the competition from *Streamline* and *Norse Island Ferries* by introducing in 2002, at the very beginning of its contract, significant reductions (to GBP 36,00 and GBP 25,50 per linear metre for trailers to Shetland and Orkney respectively) on the charges previously indicated by *NorthLink 1* as being commercially sustainable. *Streamline* and *Norse Island Ferries*, suspect that *NorthLink 1* was providing its freight services at below cost.
95. *NorthLink 1* introduced specific reduced rates in December 2003:
- a special rate for empty trailers,
  - a special flat rate of GBP 200 for non time-sensitive goods travelling between Aberdeen and Kirkwall (the so-called “Sunday Special”), and
  - a commercial traffic rebate scheme providing for discounts of up to 10 % determined according to the level of eligible lane metres shipped per month.
96. Since *NorthLink 2* started in July 2006 to execute the third public service contract, the commercial pressure exerted on *Streamline* has allegedly increased further. According to *Streamline*, the then Minister for Transport, when awarding to *NorthLink 2* the new public service contract, announced that freight rates from Aberdeen to Shetland will be reduced by 25 % and to Orkney by 19 %. This was only possible, according to *Streamline*, thanks to the increased annual subsidy to *NorthLink 2* reaching GBP 31 million.
97. According to *Streamline*, the standard rates charged by *NorthLink 2* are now at GBP 30,60 per linear metre for Shetland and GBP 23,50 per linear metre for Orkney. These rates are to be compared with GBP 40,43 per linear metre for Shetland and GBP 32,07 per linear metre for Orkney charged by *Streamline*. In addition, the empty trailer and “Sunday Special” concessions have allegedly remained in place, with reductions on the rates offered by *NorthLink 2* of up to 73 %.
98. *Streamline* argues that, whilst it has sought in the past to compete by reducing rates, the scale of the reductions afforded to customers by *NorthLink 2* has rendered this strategy no longer possible. *Streamline* estimates that to cover its costs it must charge rates which are equivalent to GBP 36,67 per linear metre. Such a rate is higher than the rates currently offered by *NorthLink 2*.

### 3. PRELIMINARY ASSESSMENT OF THE EXISTENCE OF AID

99. By virtue of Article 87(1) of the EC Treaty “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market”.
100. The criteria laid down in Article 87(1) of the EC Treaty are cumulative. Therefore, in order to determine whether, as is alleged by complainants, the above-described payments to *CalMac*, *NorthLink 1* and/or *NorthLink 2* constitute State aid within the meaning of Article 87(1) of the EC Treaty, it must be established whether the financial support:
- involves a loss of State resources imputable to the State,
  - provides a selective advantage to certain undertakings or the production of certain goods,
  - distorts or threatens to distort competition, and
  - affects trade between Member States.

#### 3.1. Fulfilment of the criteria of Article 87(1) of the EC Treaty

101. The Commission notes that the various payments described in Section 2 have been granted through State resources and are imputable to the Member State. Thus the first criterion is met. In addition, although *NorthLink 1* was half owned by *CalMac* and therefore half publicly owned, the Commission cannot exclude at this stage of its investigation if the lease of vessels thereto may have involved State resources.

102. The relevant payments, as summarized above in Tables 1 and 3, as well as those involved in the new 2007 contract with *CalMac* and the new 2006 contract with *NorthLink 2* concern certain specific undertakings. They are therefore selective. The question of whether these payments involve the grant of an advantage to these specific undertakings will be further examined thereafter in the light of the *Altmark* judgment <sup>(30)</sup>.
103. The market for maritime cabotage routes is fully liberalised since the entry into force of the Maritime Cabotage Regulation <sup>(31)</sup>, that is to say since 1 January 1993. The Commission therefore considers at this stage that, should indeed a selective advantage have been granted to any of the above-mentioned undertakings, it would be liable to distort competition and affect trade between Member States. As such, the third criterion and the fourth criterion for there to be State aid within the meaning of Article 87(1) of the EC Treaty would also be fulfilled.

### 3.2. Applicability of the private market economy investor principle

104. Article 295 of the EC Treaty provides that Community rules are neutral as regards public and private ownership. In accordance with a constant jurisprudence of the European Courts <sup>(32)</sup>, when a Member State grants public money to undertakings, no advantage is present if such Member State's behaviour is consistent with that of a private market economy investor placed in a comparable situation.
105. The Commission considers at this stage that all the grants of public money to *CalMac*, *NorthLink 1* or *NorthLink 2* described in Tables 1 and 3 above are not consistent with the behaviour a private market economy investor would have. The UK authorities have not provided any evidence that might point in that direction and have emphasised the public policy aims motivating these payments. Only concerning loans advanced to *CalMac*, the rate of which has been set at UK Public Works Loans Board (PWLB) rates, the UK authorities were of the opinion that these rates were made on market conditions. The Commission however has doubts as to whether such rates of loans are consistent with those that could have been offered by a private bank to a private company with the same level of debts as the relevant undertakings.

### 3.3. Examination of the relevant payments in relation with the *Altmark* criteria

106. Direct payments to an undertaking without counterpart are usually presumed to confer upon that undertaking an advantage.
107. However, further to the *Altmark* jurisprudence <sup>(32)</sup>, compensation for public service obligations/contracts does not favour the recipient(s) — and thus does not fall within the scope of the prohibition laid down in Article 87 of the EC Treaty — where the four following conditions are cumulatively met:
- the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined (hereinafter “the first *Altmark* criterion”),
  - the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner (hereinafter “the second *Altmark* criterion”),
  - the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (hereinafter “the third *Altmark* criterion”), and

<sup>(30)</sup> Judgment of the Court of Justice of 24 July 2003 in Case C-280/00, *Altmark Trans & Regierungspräsidium Magdeburg* [2003] ECR I-7747.

<sup>(31)</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992).

<sup>(32)</sup> See for example: Case T-296/97 Rec, *Alitalia*, Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*. In Case T-296/97 Rec, *Alitalia*, the Court states that “It must be emphasised that the conduct of a private investor in a market economy is guided by prospects of profitability. The measure was motivated by the desire to keep the jobs and therefore, above all, by considerations pertaining to the applicant's viability and survival rather than by prospects of profitability”.

- where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (hereinafter “the fourth *Altmark* criterion”).

### 3.3.1. Preliminary assessment in the case of CalMac

108. As regards payments made to *CalMac* until the signature of the 2007 contract, the Commission has the following doubts.
- Firstly, the Commission doubts whether the public service obligations imposed on *CalMac* were clearly defined. This question will be further examined in Section 4.2 addressing the compatibility of the measures at stake with the common market.
  - Secondly, the parameters on the basis of which the compensation is calculated do not seem to have been established before the imposition of obligations in an objective and transparent manner. The public authority has determined deficit grants *ex post*, partly on the basis of the deficits sustained by *CalMac*. In addition, capital grants and loans have been linked to the purchase of new vessels but do not seem to have been linked to the execution of the public service obligations.
  - Thirdly, the Commission questions whether the costs borne by *CalMac* have been overcompensated. This is also related to the fact that, in the absence of a clear definition of the relevant public service obligations it is difficult to identify the relevant costs to be compensated.
  - Fourthly, based on the information at the disposal of the Commission, *CalMac* was not chosen in a public procurement procedure. Furthermore, the Commission does not have any indication that the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
  - Fifthly, at this stage of its investigation the Commission cannot establish whether the requirement in the invitation to tender published on 14 December 2006 that any successful bidder had to charter the CMAL vessels may have constituted an advantage to *CalMac* (including CMAL).
109. Therefore the Commission must at this stage conclude that the relevant grants to *CalMac* until signature of the 2007 contract can involve an advantage and, in the light of the above consideration, may thus constitute State aid to *CalMac*, within the meaning of Article 87(1) of the EC Treaty.
110. As regards the 2007 contract, the Commission requests the UK authorities to provide further complementary information to enable it to assess:
- firstly, whether the public service obligations are sufficiently clearly defined in the 2007 contract or otherwise,
  - secondly, whether the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner,
  - thirdly, whether the total compensation is limited to what is necessary to cover the costs incurred in discharging the public service requirements, taking into account the relevant receipts and a reasonable profit for ensuring those requirements, and
  - fourthly, whether the call for tender that led to the conclusion of the 2007 contract can guarantee that the service has been carried out at the lowest overall cost for the Scottish Executive or, alternatively, whether the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those requirements, taking into account the relevant receipts and a reasonable profit for discharging them.

111. As regards notably the fourth question, the Commission notes that some interested parties are of the view that the bundling of all routes, with the exception of the route between Gourock and Dunoon, unduly and significantly restrained competition during the tender, since only *CalMac* was allegedly able to offer a bid covering the entire bundle. In that respect, the UK authorities argue that the bundling reinforces the reactivity of the operator in cases where one or more vessels are suddenly unavailable for service on certain routes. The Commission will need to assess the impact of the bundling on the tender procedure; If it were to conclude that such bundling was not justifiable, then the Commission would consider that the contract has not been awarded through a really open and non-discriminatory public procurement procedure. This would lead to a situation where the public authorities paid a higher compensation for the relevant public service requirements that would otherwise have been the case. In such a situation, the Commission should verify that the costs paid by the public authorities do not exceed the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. Should that not be the case, the Commission would not be able to exclude, on the basis of the *Altmark* case-law, the presence of an advantage. This could lead to a conclusion that State aid is involved, which would then have to be tested for compatibility.
112. At this stage, the Commission is not in a position to respond to all these questions and therefore cannot exclude that grants made to *CalMac* pursuant to the 2007 contract constitute State aid within the meaning of Article 87(1) of the EC Treaty.

### 3.3.2. Preliminary assessment in the case of *NorthLink 1* and *NorthLink 2*

113. The Commission preliminarily considers that the grants made to *NorthLink 1* pursuant to the MoA are unlikely to fulfil the fourth *Altmark* criterion. Firstly, while the 2000 public service contract had been granted to *NorthLink 1* pursuant to an open tender, the additional payments made pursuant to the MoA were not the consequence of the bid selection through the tender in question. Secondly, the level of additional compensation foreseen under the MoA does not appear to have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those requirements. As such, the payments in question likely constitute State aid to *NorthLink 1* within the meaning of Article 87(1) of the EC Treaty.
114. The Commission requests the UK authorities to clarify whether *NorthLink 1* still exists as a legal entity, to indicate any modification in its share capital and, if this company has been liquidated, to provide details on the liquidation procedure. Furthermore, the Commission wishes to ascertain whether or not *NorthLink 2* constitutes a successor company to *NorthLink 1*, thus having indirectly benefited from aid granted to *NorthLink 1* through the MoA and from aid through the transfer of *NorthLink 1* assets at a value below market price and termination of its liabilities. According to the UK authorities, all assets transferred from *NorthLink 1* to *NorthLink 2* were paid by *NorthLink 2* at market price. The Commission requests the UK authorities to provide a detailed justification for this claim, and the supporting data and information. The Commission further wishes to ascertain how the acquisition of the necessary assets, and more generally the establishment of *NorthLink 2* as a company able to provide the relevant services was financed, and whether such investment constitutes State aid.
115. Similarly, as regards the 2006 contract with *NorthLink 2*, the Commission requests the UK authorities to provide further complementary information to enable it to assess:
- firstly, whether the public service obligations are sufficiently clearly defined in the 2006 contract or otherwise,
  - secondly, whether the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner,
  - thirdly, whether such compensation is limited to what is necessary to cover the costs incurred in discharging the public service requirements, taking into account the relevant receipts and a reasonable profit for discharging them, and
  - fourthly, whether the call for tender that led to the conclusion of the 2006 contract can guarantee that the services have been carried out at the lowest overall cost for the Scottish Executive or, alternatively, whether the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging them, taking into account the relevant receipts and a reasonable profit for discharging them.

116. At this stage, the Commission is not in a position to respond to all these questions and therefore cannot exclude that payments made pursuant to the 2006 contract may entail the grant to *NorthLink 2* of State aid within the meaning of Article 87(1) of the EC Treaty

#### 4. DOUBTS ABOUT THE COMPATIBILITY OF THE MEASURES WITH THE COMMON MARKET

##### 4.1. Legal basis

117. By way of preliminary observation, the Commission notes that the aid preliminarily identified in Section 3 of the present Decision would, if confirmed, constitute non degressive operating aid.
118. Such aid could not be considered compatible with Article 87(3)(a) of the EC Treaty or with Article 87(3)(c) of the EC Treaty as regional aid since the Community guidelines on regional aid <sup>(33)</sup> does not provide for the possibility for granting such non degressive operating aid except in outermost regions, as defined by Article 299(2) of the EC Treaty <sup>(34)</sup>. Scotland is not an outermost region listed in that Article.
119. Similarly, none of the possible aid concerned may be authorised as restructuring aid within the meaning of the Community guidelines on State aid for rescue and restructuring firms in difficulty <sup>(35)</sup>. Indeed, no restructuring plan has been notified to the Commission for any of the possible beneficiaries.

<sup>(33)</sup> See paragraphs 79 to 81 of the Community guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006). The text of the Guidelines is available at the following Internet address:

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0304\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0304(02):EN:HTML)

<sup>(34)</sup> “79. Because it is intended to overcome delays and bottlenecks in regional development, except as provided for in paragraphs 80 and 81, operating aid should always be temporary and reduced over time, and should be phased out when the regions concerned achieve real convergence with the wealthier areas of the EU [73].

80. In derogation from the previous paragraph, operating aid which is not both progressively reduced and limited in time may only be authorised:

- in the outermost regions, in so far as it is intended to offset the additional costs arising in the pursuit of economic activity from the factors identified in Article 299(2) of the Treaty, the permanence and combination of which severely restrain the development of such regions (remoteness, insularity, small size, difficult topography and climate, and economic dependence on a few products) [74],

- in the least populated regions, in so far as it is intended to prevent or reduce the continuing depopulation of these regions [75]. The least populated regions represent or belong to regions at NUTS-II level with a population density of 8 inhabitants per km<sup>2</sup> or less and extend to adjacent and contiguous smaller areas meeting the same population density criterion.

81. In addition, in the outermost regions and low population density regions, aid which is not both progressively reduced and limited in time and which is intended partly to offset additional transport costs may be authorized under the following conditions:

- aid may serve only to compensate for the additional cost of transport, taking into account other schemes of assistance to transport. While the amount of aid may be calculated on a representative basis, systematic overcompensation must be avoided,

- aid may be given only in respect of the extra cost of transport of goods produced in the outermost regions and low population density regions inside the national borders of the country concerned. It must not be allowed to become export aid. No aid may be given towards the transport or transmission of the products of businesses without an alternative location (products of the extractive industries, hydroelectric power stations, etc.),

- for the outermost regions only, aid may also cover the cost of transporting primary commodities, raw materials or intermediate products from the place of their production to the place of final processing in the region concerned,

- the aid must be objectively quantifiable in advance, on the basis of an aid-per-passenger or aid-per-ton/kilometer ratio, and there must be an annual report drawn up which, among other things, shows the operation of the ratio or ratios,

- the estimate of additional cost must be based on the most economical form of transport and the shortest route between the place of production or processing and commercial outlets using that form of transport; external costs to the environment should also be taken into account.”.

<sup>(34)</sup> “2. The provisions of this Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands.

However, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

The Council shall, when adopting the relevant measures referred to in the second subparagraph, take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes.

The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies.”.

<sup>(35)</sup> Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004) and previous guidelines.

120. The Commission considers at this preliminary stage that Article 86(2) of the EC Treaty is the appropriate legal basis for assessing the compatibility with the common market of the relevant payments and grants, to the extent they may constitute compensation for public service obligations or payments under public service contracts, provided that they do not affect trade to an extent contrary to the common interest.
121. Article 86(2) of the EC Treaty provides that: “Undertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.”.
122. The Commission adopted on 28 November 2005 Decision 2005/842/EC <sup>(36)</sup> on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. With respect to this Decision, the Commission notes that it applies only as from 19 December 2005 and that its substantial criteria do not appear to be met in the cases under examination for the following reasons:
- The financial grants under examination may fall only within one of the two following exemptible State aid categories as set out in Article (2) of the Decision:
    - “(a) public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million;”;
    - “(c) public service compensation for air or maritime links to islands on which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers;”.
  - The Commission wonders whether or not, for the purpose of applying the Decision, *NorthLink* and *CalMac*, and the various entities that are collectively referred to as *CalMac*, should be treated as one single undertaking, or should be considered separately, or otherwise grouped in a number of undertakings. Depending on the Commission’s conclusion on that point, the grants concerned may or may not fall under category (a) of exemptible State aid. Together *NorthLink* and *Calmac* receive far more than the threshold of 30 million a year.
  - With respect to category (c) of exemptible State aid, the Commission notes that the routes operated by *CalMac* and *NorthLink* taken as a whole concern an annual traffic exceeding the threshold of 300 000 passengers per year. In addition, with respect to *CalMac*, the Commission doubts whether the public service obligations were precisely defined prior to the award of a public service contract in 2007.
123. Furthermore the Commission notes that the Community framework for State aid in the form of public service compensation <sup>(37)</sup> cannot be applied to the present case since transport is excluded from its scope pursuant to its paragraph 3 <sup>(38)</sup>.
124. The Commission considers that, consistently with its practice so far, in order to fall under Article 86(2) of the EC Treaty, a measure must cumulatively meet the following conditions:
- firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking (existence of an act establishing the public service obligations),
  - secondly, the entrustment must relate to a service of general economic interest (existence of a service of general economic interest),
  - thirdly, the measure must be necessary for the performance of the tasks assigned to the undertaking and proportional to that end (absence of overcompensations) and must not affect competition to such an extent as would be contrary to the interests of the Community.

<sup>(36)</sup> OJ L 312, 29.11.2005, p. 67.

<sup>(37)</sup> OJ C 297, 29.11.2005, p. 4. The text is available at the following Internet address:  
[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC1129\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC1129(01):EN:NOT)

<sup>(38)</sup> OJ C 297, 29.11.2005, p. 4. See point 3 thereof: “3. This framework is applicable to public service compensation granted to undertakings in connexion with activities subject to the rules of the EC Treaty, with the exception of the transport sector, and the public service broadcasting sector covered by the Communication from the Commission on the application of State aid rules to public service broadcasting.”.



## 4.2. Compatibility of aid granted to CalMac

### 4.2.1. Existence of an act of entrustment

125. The payments made by the Scottish/Executive permitted under the Undertaking “are for the support of sea transport services provided by [CalMac] which in the opinion of the Secretary of State are necessary to maintain or improve economic or social conditions in the Highlands and Islands and which he may approve for the purposes of advances under this Undertaking (referred to as “approved services”)”<sup>(39)</sup>.
126. Whereas the UK authorities hold that CalMac has been entrusted by the Scottish Office and by its successor, the Scottish Executive, with the task of serving the Western Isles and some mainland-to-mainland connections, the Commission does not have information establishing that the payments preliminary characterised as aid to CalMac until the 2007 contract in fact corresponded to public service obligations that have been clearly entrusted to CalMac beforehand by the public authorities.
127. The Undertaking does not specify what the “approved services” are in practice, in terms of routes, capacities, frequency and fares<sup>(40)</sup>. From the information submitted by the UK authorities, the Commission understands that, in practice, the Scottish Executive used to explicitly approve the characteristics of the service in terms of ports to be served, regularity, continuity and frequency. Capacity to provide the service and tariffs seems to have been explicitly approved whenever it was not a mere consequence of the already approved service characteristics. Fares do not appear to have been systematically approved.
128. In such situations, the Commission has doubts as to whether, through the combination of the Undertaking and the *ex ante* approbation of the service characteristics, CalMac has been entrusted with sufficiently clearly defined public service obligations.
129. In that respect, the Commission has not been provided by the UK authorities with evidence documenting how the system of entrustment was thus functioning, and cannot conclude on the presence of a sufficiently clear act of entrustment of public service obligations without a formal investigation procedure and, in particular, without having given an opportunity to interested third parties to make their views known on that issue.

### 4.2.2. Existence of a service of general economic interest

130. The Commission must here check that the services entrusted to CalMac can be qualified as services of general economic interest.
131. The Commission considers that the services delivered by CalMac pursuant to the Undertaking and to the 2007 contract can correspond to the notion of a service of general economic interest since these services are limited to the transport by sea of passengers and/or freight on maritime routes that may be covered by public service obligations/contracts within the meaning of Article 4 of the Maritime Cabotage Regulation<sup>(41)</sup>.
132. However, as already mentioned, the Commission needs further information as to the way how CalMac was entrusted with the obligation to provide such services of general economic interest.

### 4.2.3. Proportionality of the compensation (absence of overcompensation) and absence of trade distortion that would be contrary to the interest of the Community

133. The Commission wishes to ascertain whether the grants of public money to CalMac as described above in Table 1 more than compensate costs incurred by CalMac in carrying out services of general economic interest. Such assessment cannot be carried out at this stage, not least because, as already mentioned in Section 4.2.1.1 the Commission does not have a clear picture of the public service obligations entrusted to CalMac, let alone of the costs incurred as a result of such obligations.

<sup>(39)</sup> Extract of the Undertaking.

<sup>(40)</sup> The Secretary of State and, after devolution, the Scottish Executive, seem to have had a wide margin of manoeuvre for determining the approved services and the acceptable level of tariffs.

<sup>(41)</sup> That is to say routes between the mainland and an island or between two islands, or as set out in the Commission Communication on the implementation of the Maritime Cabotage Regulation, between two continental ports, where the route onshore is ten times longer than the maritime route. See Commission Communication of December 2003, C(2003) 595.

134. Even assuming that the aid corresponds to a well defined service of general economic interest and is proportionate to its aim, the Commission must ensure that it does not affect trade to such an extent as would be contrary to the interests of the Community. The Commission therefore wishes to obtain, through the opening of the formal investigation procedure, more information on the extent to which the aid to *CalMac* has affected trade.

#### 4.2.4. *Preliminary conclusion*

135. In conclusion, the Commission has doubts as to whether the preliminarily identified aid to *CalMac* constitutes public service compensations that are compatible with the common market.

### 4.3. **Compatibility of aid granted to *NorthLink 1* and *NorthLink 2***

136. As regards aid granted to *NorthLink 2* through possible capital grants to the company or acquisition of assets from *NorthLink 1* at below market rates, the Commission is not able to identify at this stage, notably in the light of the limited information available to it, a suitable basis to establish whether such aid is compatible with the common market.

137. As regards possible aid to *NorthLink 1* granted under the MoA and possible aid granted to *NorthLink 2* under the 2006 contract, the Commission will set out below its preliminary assessment under Article 86(2) of the EC Treaty.

#### 4.3.1. *Existence of an act of entrustment*

138. The Commission considers that the act of entrustment is materialised through the two successive public service contracts awarded to *NorthLink*.

#### 4.3.2. *Existence of a service of general economic interest*

139. The Commission must here check whether the services entrusted to *NorthLink 1* and *NorthLink 2* pursuant to the 2000 and 2006 contracts respectively can be qualified as service of general economic interest within the meaning of Article 86(2) of the EC Treaty.

140. As with *CalMac*, the Commission considers that the services delivered by *NorthLink 1* and *NorthLink 2* pursuant to the 2000 and the 2006 contracts can correspond to the notion of a service of general economic interest since these services are limited to the transport by sea of passengers and/or freight on maritime routes that may be covered by public service obligations/contracts pursuant to Article 4 of the Maritime Cabotage Regulation <sup>(42)</sup>.

141. However, as already mentioned, the Commission needs further information as to the way how *NorthLink 1* and *NorthLink 2* were required to provide such services of general economic interest.

#### 4.3.3. *Proportionality of financial compensation (absence of overcompensation) and absence of trade distortion that would be contrary to the interest of the Community*

142. Whether for the 2000 and 2006 contracts, the Commission has not got sufficient information to establish that overcompensation is excluded. Therefore the Commission doubts whether the aid granted to *NorthLink* is proportionate.

143. Furthermore, as was explained above in relation with *CalMac*, the Commission therefore wishes to obtain, through the opening of the formal investigation procedure, more information on the extent to which the aid to *NorthLink 1* or *NorthLink 2* has affected trade.

<sup>(42)</sup> That is to say routes between the mainland and an island or between two islands, or as set out in the Commission Communication on the implementation of the Maritime Cabotage Regulation, between two continental ports, where the route onshore is ten times longer than the maritime route.

#### 4.3.4. Preliminary conclusion

144. In conclusion, the Commission has doubts as to whether the preliminarily identified aid to *NorthLink 1* and *NorthLine 2* constitute public service compensations that are compatible with the common market.

### 5. DECISION

145. In the light of the above, the Commission decides to open the formal investigation procedure with respect to all financial transactions between the Scottish authorities and *CalMac* (see in particular Table 1 and points 108 to 112) and *NorthLink 1* and *2* (see in particular Table 3 and points 113 to 116). The Commission invites the UK authorities to send without delay a copy of the present Decision to all potential beneficiaries.
146. The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensory effect, and would like to draw attention to Article 14 of the State Aid Procedure Regulation <sup>(43)</sup>, which provides that in case of negative decisions, the Member State shall take all necessary measures to recover the aid from the beneficiaries, including indirect beneficiaries, unless this runs contrary to a general principle of Community law. The same Article provides that the aid to be recovered pursuant to a recovery decision shall include interest which shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing the State Aid Procedure Regulation <sup>(44)</sup>.
147. The Commission warns the UK that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries that are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments on the preliminary findings of the Commission within one month of the date of such publication, and to complement or correct the facts described in the present Decision.”

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<sup>(43)</sup> Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. The text of the Regulation is available at the following Internet address:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999R0659:EN:HTML>

<sup>(44)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1). The text of the Regulation is available at the following Internet address:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0794:EN:HTML>