

Case 201202798: Transport Scotland

Summary of Investigation

Category

Scottish Government and Devolved Administration: transport; ferries

Overview

The complainant (Mr C) raised a number of concerns on behalf of an action group (the Action Group) regarding Transport Scotland's actions in putting the ferry route between Dunoon and Gourock out to tender.

Specific complaints and conclusions

The complaints which have been investigated are that Transport Scotland:

- (a) failed to reasonably consider whether vessels offered by bidders were capable of performing with reasonable reliability (*not upheld*);
- (b) unreasonably omitted to include a contractual clause which ensured that vessels on the route were capable of reasonable reliability in poor weather conditions (*not upheld*);
- (c) gave insufficient consideration, during the investigation and tendering process, to the implications of the route becoming passenger only (*not upheld*); and
- (d) unreasonably failed to include Dunoon Pier in the tender (*not upheld*).

Redress and recommendation

The Ombudsman recommends that Transport Scotland:

- (i) as a matter of urgency, continue to look at measures to reduce weather related cancellations and to increase the reliability of Route 1 for passengers.

Completion date

24 January 2014

Transport Scotland have accepted recommendation and will act on it accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) made the complaint on behalf of an action group (the Action Group) formed following a public meeting on 24 November 2011 some months after Transport Scotland put a town centre to town centre ferry route between Dunoon and Gourock (Route 1) out to tender.

2. The complaints from Mr C which I have investigated are that Transport Scotland:

- (a) failed to reasonably consider whether vessels offered by bidders were capable of performing with reasonable reliability;
- (b) unreasonably omitted to include a contractual clause which ensured that vessels on the route were capable of reasonable reliability in poor weather conditions;
- (c) gave insufficient consideration, during the investigation and tendering process, to the implications of the route becoming passenger only; and
- (d) unreasonably failed to include Dunoon Pier in the tender.

Investigation

3. I considered carefully information provided by Mr C and Transport Scotland. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and Transport Scotland were given an opportunity to comment on a draft of this report.

Background

4. Prior to June 2011, Route 1 between Dunoon and Gourock had an established car and foot passenger service run by a subsidiary company (Company 1) of a larger nationalised company. In 1973, an unsubsidised car and passenger ferry service was introduced on a route from a point north of Dunoon to a landing west of Gourock at McInroy's Point (Route 2). Route 2 was provided by a private sector company (Company 2). The Gourock landing point for Route 1 allows for a direct connection to the rail network.

5. By 2008/09, with four vehicle/passenger vessels deployed, Route 2 accounted for around 88 percent of car traffic, 86 percent of freight traffic and 68 percent of passenger traffic. Route 1 with three leased vessels received a heavy central government subsidy in respect of the passenger element. The

level and equity of that subsidy for Route 1 (and other ferry routes in Scotland) had been referred to, and investigated by, the European Commission.

6. The general legal framework allowing for financial support for the performance of ferry transport services in Scotland originated in the Highlands and Islands Shipping Services Act 1960. This ceased to have effect through Section 45 of the Transport (Scotland) Act 2005. Ferry subsidies are now paid under section 70 of the Transport (Scotland) Act 2001 (as amended). This legal framework was complemented by 'undertakings' by the Secretary of State (now Scottish Ministers) with the agreement of the parent company. Transport Scotland have stated that for Route 1 no contract existed before June 2011 and services were provided by Company 1 a now dormant subsidiary of the parent company.

7. Following visits to Dunoon and Gourock in January 2008, the then Scottish Government Minister for Transport, Infrastructure and Climate Change (Minister 1) was reported as saying that the Scottish Government wanted 'to proceed to deliver in particular a pedestrian service [on Route 1] supported by the public purse'. On 8 February 2008, a meeting was held in Dunoon, where over 200 local residents unanimously demanded a town centre to town centre unrestricted vehicle and passenger service on Route 1 in competition to Route 2.

8. Mr C corresponded by email with Minister 1 concerning a pedestrian only service on Route 1. In response, an officer (Officer 1) in the Maritime State Aids Branch of the Scottish Government referred to Minister 1's visit to Dunoon on 14 January 2008 and confirmed that the Scottish Government remained committed to delivering the best possible outcome for the local communities. Officer 1 stated that the Scottish Government were keen to identify a solution for the Dunoon to Gourock routes within the constraints of European Union law, that would go as far as possible towards meeting the local aspirations of the communities involved and that an announcement about the way forward would be issued as soon as practical.

9. On 28 October 2009, the European Commission issued a decision on state aid to ferry services. This was published, after amendment, on 15 December 2009. The major import of the decision for the present complaint was a requirement that a tendering exercise by the Scottish Government on Route 1 should start by the end of December 2009 (see Annex 3).

10. Following an incident on 22 February 2010, when Mr C was late for work because a passenger ferry on Route 1 could not sail, Mr C emailed Minister 1 again, raising issues of reliability, shore ticketing and current sailing restrictions on Company 1. Following a second email of 21 March 2010, a response was sent on behalf of Minister 1 by an officer in the Scottish Government Transport Directorate Ferries Division (Officer 2). Officer 2 sought to explain the background of the restrictions introduced in 1982 to protect Company 2's commercial interests. He set out the administration's attempts since coming into office in 2007 to tackle the uncertainties over the Dunoon to Gourock service, referred to the European Commission decision, and provided details of the imminent new tendering for a six-year period which would remove existing timetable restrictions.

11. On a further occasion on 30 March 2010, the passenger ferry could not ply and Mr C had to await the arrival of a larger vehicle ferry at Dunoon. He emailed the Transport Directorate expressing concern that the capacity of the vessel being tendered for (175 people) might imply a passenger only vessel only slightly larger than one of the existing vessels and, therefore, unlikely to provide an all-weather service. Mr C made a Freedom of Information request regarding the requirements in the tender for an all-weather vessel. This email request was responded to by Officer 2 on 27 April 2010.

12. In the meantime, four companies had by 17 February 2010 completed pre-qualification questions supplied in respect of the tendering for Route 1 - including Company 2 and a company (Company 3) with the same parent company as Company 1. It had been anticipated that these four companies would be sent tender documents in early to mid-May 2010, with award of the contract by late August to early September 2010. The original draft in August 2010 indicated that a link-span at the breakwater south of the town's wooden pier would be used and that bidders should supply two Class V vessels for service as defined by the Maritime and Coastguard Agency (MCA) to operate in category C local waters. (It was subsequently established that the link-span is in Category D waters necessitating that Class IV vessels be used, although the successful bidder would be free to bring in its own vessel solutions replacing the vessels currently operating on the route.

13. On 2 September 2010, Mr C made a further information request to Transport Scotland. On 27 September 2010, Officer 2 responded to the request

stating that there was an exemption under section 27(1) of the Freedom of Information (Scotland) Act 2002 (the 2002 Act) with regard to providing Mr C with copies of the tender documents. Officer 2 informed Mr C of his right of appeal against his decision. Mr C submitted an appeal on 29 November 2010 on the basis that the ferry tender documents had not been published within 12 weeks of Officer 2's letter of 27 September 2010. That review request was acknowledged on 9 December 2010 and was responded to on 17 December 2010 by Officer 2, who stated that the information requested was exempt under sections 30(c) and 33(2)(b) of the 2002 Act. On 23 December 2010, Mr C emailed an officer in the Transport Directorate stating that he was not satisfied with the reasons provided for not releasing information. In a response of 6 January 2011, Mr C was signposted to the Scottish Information Commissioner.

14. In late 2010, Mr C also wrote to the First Minister and a response was sent on his behalf on 16 December 2010 by a senior officer in the Ferry Policy and Procurement section of the Transport Directorate (Officer 3).

15. On 10 February 2011, Officer 2, now with Transport Scotland, informed Mr C by email that the contract would stipulate that Class IV vessels should be provided. Invitation to tender documents were issued on 18 February 2011 to four interested parties.

16. In response to an email of 28 February 2011 from Mr C to the new Transport Minister (Minister 2), a policy officer in the Ferries Division referred to the MCA classification and confirmed that the contract would allow for a safe reliable vessel fully capable of coping with normal weather conditions. Mr C responded on 28 March 2011 stating that, while all vessels currently held Class IV certificates, there was enormous discrepancy in the reliability of service they provided.

17. Against a European Commission stipulation that the re-tendered service should start by 30 June 2011, three bids had been received by 4 March 2011. It was anticipated that a preferred bidder would be notified on 25 May 2011, with the contract awarded on 7 June 2011 to meet the stipulated start date.

18. The issue of the award of the ferry contract was put to the then Scottish Minister with responsibility for Infrastructure (Minister 3). Minister 3, in turn, posed a number of questions of officers on matters such as redundancies,

comparative usage, the lack of use in the past six years of the link-span provided by Argyll and Bute Council (the Council) at Dunoon and the Council's plans for the historic wooden pier. On 25 May 2011, a press release was issued in respect of the award of the contract to Company 3, the company with the same parent company as Company 1.

19. Company 3 commenced the service using the same vessel previously used by Company 1. Mr C then made further Freedom of Information requests to Transport Scotland and the MCA regarding that vessel and a back-up vessel.

20. On 24 November 2011, the local Community Council in Dunoon, in the light of concern about the new passenger only service on Route 1, organised a public meeting which attracted several hundred attendees. This meeting led to the formation of the Action Group, of which Mr C is a member.

21. On 30 November 2011, Minister 2 and Minister 3 met the Chairman and Chief Executive of Company 3. Company 3 provided the Ministers with assurances, in light of public concerns voiced about the reliability of the service in its first five months of operation, and also undertook to develop an improvement plan. This improvement plan was subsequently published on 22 January 2012, following scrutiny and approval by Scottish Ministers.

22. On 16 December 2011, Mr C submitted a formal complaint on behalf of the Action Group against Transport Scotland's award of the public service contract for Route 1 to Company 3. This was acknowledged on 16 December 2011. In an email of 15 December 2011, Mr C also complained to a local Member of the Scottish Parliament (the MSP) that at that time only a 'half service' was being provided by Company 3 because of maintenance. In comparison, in poor weather, Company 2 was able to continue operating on Route 2 because they deployed bigger boats.

23. On 22 December 2011, Minister 3 provided the MSP with information about the meeting held on 30 November 2011 and the undertakings given by Company 3. On 18 January 2012, Minister 2 responded to the MSP regarding Mr C's email of 15 December 2011. Minister 2 maintained that the technical reliability of Company 3's service had improved but that concerns remained about weather vulnerability. Minister 2 stated that, in that context, additional resources were being sought to support infrastructure improvements to harbours at Dunoon and Gourock.

24. On 20 January 2012, Transport Scotland's Director of Aviation, Maritime Freights and Canals (the Director) responded to the complaint Mr C submitted on behalf of the Action Group. He set out the limitations of the complaints procedures to deal with the matters Mr C had raised. He confirmed that Minister 3 intended to meet with the Action Group in February 2012 to discuss its concerns.

25. In the interim, Mr C made a further email request for information and engaged again with the MSP. The MSP wrote again to Minister 2 on 8 February 2012; and Minister 2 responded to the MSP on 28 February 2012.

26. Mr C in February 2012 pursued issues by email with Transport Scotland regarding his view that Company 2 had a monopoly on carrying vehicles and also about train connections to the Route 1 service. The latter issue was responded to on 13 March 2012.

27. Mr C had by then submitted a complaint by email on 4 March 2012 with an attached 12 page statement regarding Transport Scotland's performance. A further Freedom of Information request was submitted the same day to Transport Scotland. The Director responded on 4 April 2012 to Mr C's complaint of 4 March 2012. On 5 April 2012, responses were provided to Mr C under the Freedom of Information Act and the Environmental Information (Scotland) Regulations 2004.

28. Mr C was not satisfied with the Director's response of 4 April 2012 and wrote further on 25 April 2012. He contended that neither of the vessels provided on Route 1 were capable of providing a reliable service in the weather conditions experienced in local waters. Mr C's letter was acknowledged on 8 May 2012. On 6 May 2012, Mr C also emailed the First Minister again.

29. On 2 July 2012, Mr C supplied to the Chief Executive of Transport Scotland information that he had ingathered from sources (including the MCA) which, he maintained, demonstrated that Transport Scotland had been negligent in the award of the contract to Company 3. On 4 July 2012, he provided supplementary information he had obtained regarding cancellations and the use of the link-span at Dunoon. On 10 July 2012, he provided more information regarding an exemption certificate obtained for the main vessel using Route 1.

30. Consideration of this further information delayed the Chief Executive's response. Prior to providing Mr C with that response, the Chief Executive decided to arrange a conference call involving Mr C, the Director and a Deputy Director. This call took place on 10 August 2012 and Mr C wrote further on 12 August 2012 to the Chief Executive. On 21 August 2012, the Chief Executive sent a final response on behalf of Transport Scotland to Mr C.

31. The Action Group was not satisfied with that response and Mr C complained on its behalf to the SPSO on 1 October 2012.

(a) Transport Scotland failed to reasonably consider whether vessels offered by bidders were capable of performing with reasonable reliability

32. Mr C stated that the Action Group had been formed as a result of public disquiet about the 'appalling ferry service' on Route 1. While he accepted that no ferry service could ever be 100 percent reliable in all weathers, in pursuing the complaint with Transport Scotland he considered that they had been negligent in failing to investigate and to take account of the suitability of vessels when considering bids and in failing to ensure weather reliability was adequately catered for in the contract clauses.

33. In support of Mr C's contention he referred to a 1998 study (see Annex 3) which concluded that large hulls were required to suit waters in the locality; to an incident involving the main vessel in January 2003; and to a statement that he obtained from two qualified mariners with first-hand knowledge of local waters. While Mr C accepted that both vessels deployed by Company 3 were compliant with MCA requirements and were certified to sail in the waters, the mariners were both of the opinion that the vessels deployed by Company 3, despite being Class IV, were not suitable vessels for operating a reliable year round service for the general public on Route 1. The two mariners further pointed out that holding MCA certification did not mean a vessel could operate reliably on the route for which she was certified and that the principal factor affecting a ship's ability to sail in adverse weather was its size and sea keeping capability. They concluded that since both vessels deployed by Company 3 were under 27 metres in length, they were simply too small for reliable operation. Mr C pointed out, in contrast, that the vessels deployed by Company 2 on Route 2 were Class V but were larger and had proven ability to operate in adverse weather.

34. On 4 March 2008 and 26 May 2010 Mr C obtained information from the parent company of Company 1 which demonstrated that the passenger vessel they deployed was seven times and eleven times, respectively, less reliable over stated periods than one of the two larger vehicle ferries deployed on Route 1 prior to 29 June 2011.

35. Transport Scotland, in responding to this element of complaint, stated that the procurement exercise for Route 1 had to be carried out within the terms of the European Commission's decision of October 2009; specifically, that the subsidy should be for a passenger-only service. While, in theory, Transport Scotland could have procured new passenger vessels optimised for the route, Minister 2, in writing to the local Member of Parliament on 8 July 2011 after the commencement of the new contract stated:

'With regard to a suitable vessel, the Scottish Government cannot legally require any operator of the ferry service to use particular vessels. We had to allow bidders the freedom to propose their own vessel solutions for this service. Consequently, if we had procured car ferries for this route, it was likely they would not have been used. These vessels would legally have to be offered for charter by bidders at a full commercial rate. Spending on vessels that might not be used was not something that could be reasonably justified.'

36. Transport Scotland stated that, additionally, no money was allocated in the Ferries Budget for this purpose and the estimated cost of new car ferries at the time was around £15 million. Transport Scotland had, therefore, to require bidders to bring their own vessel solutions. The tender specification required that these were suitable for operation on Route 1 in the local waters as defined by the MCA.

37. Transport Scotland's procurement team also identified a potential risk in seeking to set a higher specification for the vessels: firstly, that this would exclude certain prospective operators who could have challenged the tendering process on the basis that they had legitimate vessels which were being excluded from consideration due to 'over-specification'; and, secondly, that Company 2 operating Route 2 could have challenged the tendering process on the same basis. In assessing the bids on this point, the Transport Scotland tender evaluation panel was supported by maritime technical advisers commissioned specifically for this task. The advice concluded that the reliability of the main passenger vessel deployed on Route 1 was adversely affected from

operating from the old wooden pier at Dunoon and it was anticipated that this would improve from operating from the more sheltered breakwater pier to the south. They pointed out that the fact that this turned out not to be the case did not, in their view, lead to the conclusion that reasonable consideration of the point was not made by the tender evaluation panel.

(a) Conclusion

38. Transport Scotland's procurement team were aware of reliability problems and specifically identified the problem in the passenger vessel negotiating the historic wooden pier at Dunoon. Mr C considers that the tender should have specified vessels capable of providing a reliable service. In this connection, tendering for the deployment of a larger vessel would have been a major factor in improving reliability. In effect, he maintains that requiring a vessel of larger size and capacity than the predicted demand, that is 'over specification', could have anticipated the poor reliability issue.

39. I note Transport Scotland's point that, as the procurement authority, they could not have 'over-specified' with the view of obtaining a more reliable service solution. They maintain that a risk assessment was made of the consequences of 'over-specification'.

40. In that important sense then Transport Scotland considered, but decided against, a possible solution to unreliability through 'over-specification'. That is distinct from not considering the matter at all. On the evidence before me, that decision does not appear to me to have been flawed by administrative shortcoming and I do not consider it to be unreasonable. I do not uphold this complaint.

41. I must observe, however, that the new passenger only service commenced on 30 June 2011 and was subject to much public criticism. Ministers reacted to that public concern initially by meeting with Company 3 and seeking an Improvement Plan and, subsequently, by meeting on 14 February 2012 with the Action Group. Mr C has provided evidence, publicly available, which points to a considerable drop in usage of the Route 1 service, which suggests to me that in the light of the unreliability of the passenger service on Route 1, former users may now be turning to using Route 2, travelling overland, or simply not travelling at all. In light of my observation, I make one recommendation.

(a) *Recommendation*

42. I recommend that Transport Scotland: *Completion date*
- (i) as a matter of urgency, continue to look at measures to reduce weather related cancellations and to increase the reliability of Route 1 for passengers. 24 January 2014

(b) Transport Scotland unreasonably omitted to include a contractual clause which ensured that vessels on the route were capable of reasonable reliability in poor weather conditions

43. On 27 April 2010, the Director responded to Mr C's request for information by informing him that in the forthcoming tendering exercise, the Scottish Government would expect any vessels operating on Route 1 to be fully capable of operating in Category C waters which meant that a Class V vessel would be required and that such requirements 'should ensure a generally robust and reliable service'.

44. It was subsequently established that the link-span on the breakwater at Dunoon was in fact in Category D waters and not Category C waters in winter, and that a Class IV vessel rather than Class V was required to use it.

45. In response to an information request made of the MCA, Mr C learned from an MCA Regional Director on 28 September 2011 that, prior to the tendering process, MCA was informally asked by the Scottish Government's Ferries Division to clarify their categorisation of the Clyde waters and what class of Passenger Certificate a vessel would require to hold for operating a year round service on Route 1. The MCA stated in reply that a Class IV Passenger Certificate would be required for operating in Category D waters and Class V for operating in Category C waters.

46. Mr C accepted that the invitation to tender documents issued on 18 February 2011 had been corrected to specify that vessels deployed should have a Class IV Passenger Certificate but Mr C maintained that it failed to include clauses which would ensure vessels could operate reliably in the weather conditions experienced on Route 1.

47. Transport Scotland informed me that they are responsible for four ferry contracts. They said that whilst each contract is distinct, there are many similarities. Each contract includes targets for reliability and punctuality and

penalties if these targets are not achieved. Each contract includes 'relief events' which exclude certain defined cancellations and delays from the performance management regime and that the most common relief event in all their ferry contracts, is weather. Transport Scotland maintain that there is a strong argument for excluding weather disruption from the performance regime, to ensure that decisions on whether or not to sail are taken solely on safety grounds and without any risk of being influenced by commercial or financial considerations, with the safety of passengers and crew being paramount in all of Transport Scotland's subsidised ferry services. Under international maritime law, decisions on whether or not it is safe to sail are solely a matter for the Master of the vessel. They maintain that they could not risk contradicting that principle through the insertion of a clause in the contract. Transport Scotland also say that the exclusion of such a clause from previous contracts going back over a decade had not proved problematic.

(b) Conclusion

48. One major result of Route 1 changing from a vehicle and passenger ferry service to a passenger only service is that the larger vehicle carrying ferries no longer regularly ply. Possibly because of their gross tonnage and size of hull, they were less susceptible to cancellations in weather where the Master of a smaller craft might have felt it prudent not to sail. Mr C provided documentation he had obtained in 2008 and 2010, which clearly showed that weather cancellations for the passenger vessel when it was operated by Company 1 were seven and eleven times more frequent than with the class of vessels utilised by Company 1 to transport vehicles. Transport Scotland were clearly aware of problems with the vessel previously used negotiating the historic wooden pier at Dunoon, but were advised that the move to using the link-span facility might improve matters. Unfortunately, that proved not to be the case. Mr C provided recent statistics indicating that while non-weather related cancellations relating to the ship and shore facilities were not problematic, weather related cancellations involving both passenger vessels deployed on Route 1 were a matter of note. These statistics indicated that, in the month of March 2013, almost a third of scheduled sailings were subject to weather related cancellation. The exclusion of the latter from contracted liability, meant that while the contracted liability was within one percent of being perfect, in March 2013 the actual reliability was, in truth, considerably less.

49. The complaint before me, however, is that Transport Scotland unreasonably omitted to include a contractual clause which ensured that

vessels on the route were capable of reasonable reliability in poor weather conditions. I cannot conclude, given the rationalisation which they have provided, that Transport Scotland unreasonably excluded a weather conditions liability clause. I do not uphold this complaint.

50. The present contract which commenced on 30 June 2011 is not due to be renewed until 2017. I am aware from consideration of other matters in this complaint that initiatives pursued included the feasibility of employing pontoons at both landing ports and a feasibility study of re-introducing a vehicle ferry service on Route 1 (without public subsidy).

(c) Transport Scotland gave insufficient consideration, during the investigation and tendering process, to the implications of the route becoming passenger only

51. Mr C stated that Ministers had stated publically that they wished to have a vehicle service on Route 1. However, the timescales employed ensured that this was not possible.

52. In Mr C's complaint submission of 4 March 2012 to Transport Scotland, he maintained that Transport Scotland did not conduct research into the impact of Route 1 becoming passenger-only on foot passengers and commuters, vehicle drivers and commuters, tourism, haulage and goods prices, the economy of the Cowal peninsula, the resilience of the wider transport network (for example with the main overland trunk road being subject to closure from landslips) or on the fairness of charges on the only alternative route (Route 2) which would become an essentially unregulated monopoly.

53. Transport Scotland informed me that until 29 June 2011, a ferry service carrying both vehicles and passenger, but with only the passenger element supported by subsidy from the Scottish Government, operated by Company 1 on Route 1. A private sector company, Company 2, operated Route 2 between different terminals and without subsidy. Following complaints, the European Commission investigated the subsidies paid to Company 1, as part of a wider investigation of state aid to Scottish ferries. The Commission concluded, in October 2009, that there was no justification for subsidising the carriage of vehicles on the route - as Company 2 provided an adequate service - but that a subsidy for passengers was compliant with state aid rules. The Scottish Government was given until 30 June 2011 to put a new compliant contract in place following an open tendering exercise. Ministers' stated policy objective is

'there shall be a safe, reliable, frequent commuter ferry service between Dunoon town centre and the rail terminal at Gourock' and 'it is the wish of Scottish Ministers that the ferry service shall carry both vehicles and passengers'. The competition was won by Company 3, with a passenger only service using two passenger vessels which are smaller and have proved less reliable in bad weather than the vehicle carrying vessels they replaced. No tender was received which would have provided a passenger and vehicle service.

54. Transport Scotland maintain that this issue did not form part of Mr C's submissions of 16 December 2011, 4 March 2012, or 25 April 2012 but that it first appeared on 2 July 2012 when Mr C emailed the Chief Executive stating that 'the public could reasonably expect that Transport Scotland had investigated and understood the consequences of the route becoming passenger only'.

55. Although Transport Scotland had to tender for a passenger-only subsidy in line with the European Commission decision, it was Ministers' publicly stated desire for the outcome of the tendering process to be a ferry service that also carried vehicles (on a commercial, unsubsidised basis). Any study of the implications of Route 1 becoming passenger only, prior to the new contract being awarded, might have been interpreted as indicating a presumption that the future contract was going to be passenger only. They said that it would have sent a confusing message to tenderers if Ministers had a publicly stated preference for a vehicle and passenger service on Route 1 but were, in parallel, commissioning an analysis of the service becoming passenger only.

56. Transport Scotland informed me that following a series of complaints from users, Minister 3 set up a Steering Group to oversee improvements to the service, bringing together the local authorities serving Dunoon and Gourock, the Action Group and Transport Scotland. Representatives of the Action Group had attended all meetings to date of the Steering Group and had fully engaged with the Deputy First Minister, who now has the infrastructure portfolio. Transport Scotland informed me that the Steering Group was overseeing a study, commissioned by Transport Scotland, into the feasibility of reintroducing a vehicle ferry service on Route 1, that the Action Group had been represented on the tender evaluation panel for this study, and participated on the project team monitoring and supporting the consultant's work. The feasibility study report was published in June 2013 (see Annex 3).

(c) Conclusion

57. The antecedents of the present situation can be directly traced back to the introduction in 1973 of a new unsubsidised service on Route 2, in direct competition with Company 1's ferry service on Route 1. The service on Route 2 has operated for 40 years and carries substantially more freight, vehicles and passengers. Together with other routes with state subsidy, the subsidy for the service on Route 1 became the subject of complaints investigated by the European Commission, whose findings were published in October 2009. The outcome was that state aid, in the form of subsidy, should not be given for carrying vehicles on Route 1. The invitation to tender documents, however, did not exclude tenderers from offering a service including vehicles but none of the three tenders submitted did.

58. While it is Mr C's opinion that Transport Scotland gave insufficient consideration during the investigation and tendering process to the implications of the route becoming passenger only, I am not of the view that they were required to do so in the 2011 procurement process. On that basis, I do not uphold the complaint.

59. Finally, I note that the feasibility study has now been published and will now fall to be considered by all the parties, including Transport Scotland and the Steering Group on which the Action Group are represented.

(d) Transport Scotland unreasonably failed to include Dunoon pier in the tender

60. The invitation to tender documents made the use of the link-span at the breakwater at Dunoon mandatory and excluded use of the historic wooden pier which was used by the previous vehicle ferries operated by Company 1 on Route 1. Mr C explained that vehicle vessels, built in the 1970s and deployed by Company 1 prior to 29 June 2011, had a 'roll on-roll off' open car deck accessible by stern and side ramp and had used the historic wooden pier. Mr C stated that these vessels could not use the link-span for vehicles and were, therefore, effectively eliminated from the tender. Mr C pointed out that the link-span facility had lain unused for years, after having been constructed at a reputed cost of some £6 million.

61. In responding on 4 April 2012 to Mr C's submission of 4 March 2012, the Director stated that officials of the Council indicated during the procurement

process that there was a long term safety issue with the historic wooden pier. At that time, the Council had indicated that the pier was likely to be demolished and, consequently, the tender obligations should exclude use of the wooden pier at Dunoon. The Director understood that the Council's regeneration proposals had later been revised and that by April 2012 the Council were now seeking to regenerate the waterfront at Dunoon and intended to retain the pier.

62. Transport Scotland informed me that the wooden pier at Dunoon is owned and operated by the Council. Transport Scotland say that the Council made it clear to the procurement team prior to the start of the procurement that the wooden pier would not be available for use under the new contract and that the operator of the Route 1 ferry service would require to use the breakwater pier situated to the south of the historic pier.

(d) Conclusion

63. On the basis that the Council, as owner of the pier, made it clear that the pier had safety issues, was likely to be demolished, and that its use should be excluded from the contract documents, I do not consider the decision to exclude the pier from the tender was unreasonable. I do not uphold the complaint.

64. I am aware, however, that the operational problems which arose after the commencement of the contract on 30 June 2011 led both to the formation of the Action Group on 24 November 2011 and to Ministers seeking an improvement plan from requiring Company 3. Issues also arose with the use of the link-spans not only at Dunoon but also at Gourock. I understand that in January 2012 the Council awarded a pontoon feasibility study to a firm of maritime engineering consultants. The Director's letter, of 4 April 2012, indicated that the options appraisal and costed designs would be shared with members of the Action Group. Mr C confirmed that the Action Group had seen the study report on the pontoons.

65. Transport Scotland has accepted the recommendation and will act on it accordingly. The Ombudsman asks that Transport Scotland notify him when the recommendation has been implemented.

Explanation of abbreviations used

Mr C	the member of an action group making the complaint
the Action Group	an action group formed following a public meeting on 24 November 2011
Route 1	a state subsidised ferry service route between the town centres of Dunoon and Gourock
Company 1	a nationalised ferry company who operated Route 1 up to 29 June 2011
Route 2	an unsubsidised ferry route from Hunter's Quay north of Dunoon to McInroy's Point west of Gourock
Company 2	a private company operating Route 2
Minister 1	the former Scottish Government Minister for Transport Infrastructure and Climate Change
Officer 1	an officer in the Maritime State Aids Branch of the Transport Directorate of the Scottish Government
Officer 2	an officer in the Scottish Government, Transport Directorate, Ferries Division
Company 2	a private ferry company who opened and have operated Route 2 since 1973
Company 3	the ferry company successfully awarded the

	tender for Route 1 from 29 June 2011
MCA	Maritime and Coastguard Agency
the 2002 Act	the Freedom of Information (Scotland) Act 2002
Officer 3	a senior officer in Ferry Policy and Procurement, Transport Directorate, Scottish Government
Minister 2	Scottish Government Transport Minister
Minister 3	Scottish Government Minister formerly with an Infrastructure brief
the Council	Argyll and Bute Council
the MSP	a member of the Scottish Parliament
the Director	a Transport Scotland director

Glossary of terms

Class C, Class D	MCA's categorisation of coastal waters
Class IV, Class V	MCA's categorisation of vessels
link-span	a type of drawbridge used mainly in the operation of moving vehicles on and off a ferry

Relevant Reports

Deloitte & Touche: Options for the Future Of Ferry Services Between Gourock and Dunoon Final Report 1998

The Commission of the European Communities: Commission Decision of 28 October 2009 on the State Aid implemented by the United Kingdom of Great Britain and Northern Ireland for subsidies for maritime transport services in Scotland No C 16/2008 (ex NN105/2005 and NN 35/2007) (Published version December 2009)

Feasibility Study of a Future Passenger and Vehicle Service with the Vehicle Portion being non-Subsidised. Final Report for Transport Scotland in Association with The Maritime Group (International) Limited (June 2013)