Rt Hon Chris Grayling MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

07 January 2019

Dear Chris,

Procurement of additional ferry services

As you know the Committee has an ongoing inquiry into Freight and Brexit. I am writing to you with several questions I have about the 3 contracts your Department has let to ferry operators for additional ferry capacity and services as part of no-deal EU Exit contingency planning.

I would be grateful if you could answer the following questions about the purpose of these contracts:

1. Why was it necessary to arrange these contracts using an emergency measure exemption? What are the 'reasons of extreme urgency brought about by events unforeseeable by the contracting authority' the Department has used to justify use of the exemption?
2. How did your Department identify companies that might be able to provide these services? Which companies did it approach? And, how many of them made bids to run these services?
3. What performance measures the Department has included in these contracts?
4. What assessment the Department has made of the availability of spare ferry capacity to meet the demands generated by the three new contracts?
5. How many services are providers required to run under each of the contracts?
6. How often are such services expected to run?
7. What penalty clauses for failure to provide service are included in the contracts?
8. Is anything payable to the contractors if services are not required or cannot be run?
9. What impact assessments has the Department undertaken in respect of these contracts?

10. What key risks has the Department identified in letting these contracts and what mitigations has it put in place if the operators are unable to run some or all of the services they are contracted to operate?

I would also be grateful if you could address the following questions about the ability of Seaborne Freight Ltd to provide the services for which it has been contracted:

11. What due diligence was carried out by the Department in respect of Seaborne Freight Ltd?

12. Did the Department establish the (a) beneficial ownership of company, (b) the company’s solvency, and (c) the company’s credit rating and ability to secure finance as part of its due diligence?

13. What steps did the Department take to establish that the directors of the company had suitable experience and knowledge to run the services?

14. What assessment did the Department make of Seaborne’s ability to agree and fund the contracts it needs with the ports and suppliers of ferries?

15. Seaborne Freight’s website had a few errors. Did the Department, as part of its due diligence, review the information published by the Company on its website and its claims to be running a bookable service?

16. How you have assured yourself that the Department is not paying for a service that the operator planned to run anyway?

17. Has the Department established whether there are RoRo ferries of suitable tonnage available for a Ramsgate to Ostend service?

18. What assessment has the Department made of surface access infrastructure at Ramsgate and its freight handling capacity?

19. Does Ramsgate require any modifications or adaptations for successful RoRo operations? If so, how will these be funded and can such modifications be made by the end of March?

20. What steps is the Government taking to put in place appropriate border and customs checks at Ramsgate?

21. Is the dredging underway at Ramsgate related to the award of this contract? If so, how is this work is being funded?

22. You have justified the award to Seaborne Freight Ltd on the basis that it is support for a start-up British business. Does this raise questions about State Aid?

It is my intention to ask the Committee to publish both this letter and your reply. I look forward to receiving your answers to these questions by Friday 18 January.

Lilian Greenwood MP
Chair of the Transport Committee
Transport Committee
House of Commons 2nd Floor 14 Tothill Street London SW1H 9NB
Tel 020 7219 3266 Twitter @commonstrans Email transcom@parliament.uk Web www.parliament.uk/transcom

Rt Hon Chris Grayling MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

15 January 2019

Dear Chris,

Contracts for additional ferry capacity and services into the UK

Shortly after you announced that you had awarded contracts for ferry operators to provide additional ferry capacity and services into the UK as part of no deal EU Exit contingency planning, my Committee received two submissions to our inquiry into freight and Brexit alleging that you have acted illegally in doing so.

These submissions argue that a no deal Brexit was not unforeseeable and that the Government should therefore not have used emergency powers to award these contracts without a public competition. I enclose copies of the submissions.

Given the seriousness of the allegations, I believe it is important that you and the Department have an opportunity to respond to these. I am therefore inviting you to respond to the arguments made in the two submissions, in addition to the questions about these contracts I raised in my letter of Monday 7 January.

We plan to publish these submissions along with any supplementary evidence we receive from you. This is a pressing matter and I would therefore ask you to provide any response by Thursday 24 January.

You are also welcome to provide any update to any other part of the evidence you have submitted to the Committee on freight and Brexit, as this is now over seven months old.

Yours sincerely,

Lilian Greenwood MP
Chair of the Transport Select Committee
Written evidence submitted by Dr Andrew Watt (FAB0037)

UKExit (‘Brexit’)

‘Ferrygate’

Unlawful contracts for “shipping operations” awarded by the Department of Transport

1st January 2019

This document is intended for publication as Written Evidence to The Transport Select Committee’s inquiry “Freight and Brexit”.

It is copied to the Chairs of the Liaison Committee, Exiting the European Union Committee and the Public Accounts Committee for information and possible action.

I ask that each of the four select committees gives urgent consideration to investigating the concerns expressed in this document.

Executive Summary

1. I use the term “ferrygate” to refer to the matters under consideration in this Written Evidence.

2. On 28th December 2018 information was published in Tenders Electronic Daily, a supplement to the Official Journal of the European Union relating to three contracts awarded by the Department for Transport for “shipping operations”.

3. The contracts were awarded without a public competition of the kind normally required by Directive 2014/24/EU and the Public Contracts Regulations 2015.

4. The analysis presented in this document leads me to conclude that the Department of Transport has awarded contracts in a manner which is contrary to both UK and European Union Law.

5. I reached that conclusion on the basis of an examination of the contracts as published on 28th December 2018, the text of Directive 2014/24/EU and the Public Contracts Regulations 2015.

6. The Public Contracts Regulations 2015 appear to be the United Kingdom legislation intended to implement the requirements of Directive 2014/24/EU.

7. Regulation 32 of the Public Contracts Regulations 2015 provides that a contract may be awarded by negotiation without prior publication i.e. without a public competition, only in situations of “extreme urgency brought about by events unforeseeable by the contracting authority”.

8. The Prime Minister sent a letter of notification dated 29th March 2017 to the President of the European Council.

9. Article 50 of the Treaty on European Union expressly envisages the possibility of the UK leaving the EU without a Withdrawal Agreement. A “No Deal” Brexit has been plainly foreseeable by the Department for Transport as a possible consequence of the Prime Minister’s letter since no later than March 2017.

10. The Department for Transport cannot reasonably claim that the current circumstances are “unforeseeable” so cannot lawfully award the three “ferrygate” contracts.
11. Further, the UK Government can entirely remove the risk to which the contracts are a response by cancelling Brexit.

12. I conclude that the three “ferrygate” contracts awarded by the Department for Transport are unlawful.

Introduction

The UK Government has recently stated that preparations to attempt to mitigate the serious effects of a “No Deal” Brexit are to be stepped up.

The “ferrygate” contracts appear to be one aspect of the UK Government’s actions intended to mitigate the damage to the United Kingdom and its economy to be anticipated in the event of a “No Deal” Brexit in March 2019.

The “ferrygate” contracts

There are three contracts for “shipping operations” awarded by the Department for Transport. Each is published in the Tenders Electronic Daily.

The contracts in question are:


This Written Evidence addresses only the question of whether the three “ferrygate” contracts are lawful or unlawful.

Questions as to whether it is appropriate to award a contract to a company which, according to media reports, owns no ships or whether and to what extent the three awarded contracts may mitigate the anticipated disruption of a “No Deal” Brexit in March 2019 are outside the scope of this Written Evidence.

Are the “ferrygate” contracts lawful?

The primary objective of this Written Evidence is to examine, at least in a preliminary way, whether the contracts awarded by the Department for Transport have been awarded lawfully.

The Public Contracts Regulations 2015

The three “ferrygate” contracts identify The Public Contracts Regulations 2015 as the United Kingdom legislation which applies. Those Regulations implement the requirements of Directive 2014/24/EU.

Regulation 32 of the 2015 Regulations applies to the awarding of a public contract without an open tendering process. The Regulations refer to that process as “use of the negotiated procedure without prior publication”.

For convenience, I reproduce the full text of Paragraphs (1) to (4) of Regulation 32 below.
Use of the negotiated procedure without prior publication

32.—(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

General grounds

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

(a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:

(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,

(ii) competition is absent for technical reasons,

(iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(3) For the purposes of paragraph (2)(a)—

(a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents;

(b) a request to participate shall be considered not to be suitable where the economic operator concerned—

(i) is to be or may be excluded under regulation 57, or

(ii) does not meet the selection criteria.

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

The following aims to convey applicable legal arguments in a form much more concise than would be the case in skeleton arguments before a Court.
It may be seen from Regulation 32(2)(c) that a lawful “use of the negotiated procedure without prior publication” requires that it be “strictly necessary” and that there exist “reasons of extreme urgency brought about by events unforeseeable by the contracting authority”.

In each of the three documents published in the Tenders Electronic Daily, the Department for Transport, in effect, makes the surprising claim that it had not foreseen the possibility of a “No Deal” Brexit in March 2019.

The possibility of a “No Deal” Brexit has been apparent since no later than 29th March 2017 at the time the Prime Minister wrote to President Tusk.

The Department for Transport’s claim that a “No Deal” Brexit is unforeseeable appears to me to be entirely spurious and visibly dishonest.

I conclude that there is no lawful basis for the Department for Transport to award a contract without “prior publication”.

Regulation 32(4) also deserves careful consideration.

There must exist an arguable case that in awarding the contracts the Department for Transport was part of HM Government and that the true “contracting authority” was HM Government.

Following the recent decision of the Court of Justice of the European Union that Brexit may be cancelled by the UK (subject to conditions expressed in the Court’s decision), makes the supposed “extreme urgency” at least arguably attributable to the acts and/or failures to act of the “contracting authority” (should a Court accept that the true “contracting authority” is HM Government).

In other words, if “No Deal” Brexit occurs it may fairly be considered to be “attributable to the contracting authority”, interpreted as HM Government.

There is a further line of legal argument that indicates that HM Government, if it is the “contracting authority” has control.

The United Kingdom has an option to make a referral to the Court of Justice of the European Union using the procedure expressed in Article 218(11) of the Treaty on the Functioning of the European Union.

The UK has, in my understanding, full autonomy to make such an Article 218(11) TFEU Referral to the CJEU which, subject to the view of the Court, may in effect “stop the clock” on the Article 50 TEU process so avoiding any possibility of a “No Deal” Brexit in March 2019.

I set out the reasoning leading me to conclude that an Article 218(11) TFEU Referral to the CJEU is both necessary and possible in Written Evidence dated 25th December 2018 sent jointly to the Liaison Committee and the Exiting the European Union Committee.

A copy of the Written Evidence of 25th December 2018 is being sent to the Transport Committee for information, pending a decision by the Liaison Committee and Exiting the European Union Committee as to whether or not they wish to publish that evidence.

**The need for further evidence**

The analysis that I have presented above convinces me that the three “ferrygate” contracts are unlawful.
IN CONFIDENCE – FOR COMMITTEE USE ONLY

I invite the Transport Committee urgently to consider seeking detailed evidence from the Secretary of State and from subject matter experts, in writing, orally or both in order to establish whether my concerns regarding the status of the three “ferrygate” contracts are justified.

**Urgent Question or Emergency Debate**

This Written Evidence is intended to form part of a select committee inquiry into “ferrygate”, whether as part of the Transport Committee’s “Freight and Brexit” inquiry or otherwise.

Steps towards clarification of the situation may be available to Committee members by other means.

Members of the select committees may wish to consider whether it may be appropriate to ask an Urgent Question or seek an Emergency Debate on this matter on 7th January 2019 or shortly thereafter.

**Letter to the Secretary of State**

The Secretary of State for Transport is the Cabinet Minister responsible for the award of the three “ferrygate” contracts.

Annex 1 to this Written Evidence is a letter of today’s date to the Secretary of State.

**Letter to the Prime Minister**

I referred earlier in this Written Evidence to Written Evidence dated 25th December 2018.

It seems to me that the unlawful award of contracts for “shipping operations” is further evidence of legal mistakes made by the Prime Minister and her Ministers regarding UKExit (“Brexit”).

Should the Secretary of State for Transport decline to consider his position, I invite the Prime Minister to require his resignation.

Annex 2 is a copy of my letter to the Prime Minister of today’s date.

**Complaint to the European Commission**

The preceding part of this document sets out an analysis that leads me to conclude that the “ferrygate” contracts were awarded contrary to UK Law.

There are also questions of compliance with EU Law which may fall to be considered.

In parallel with this Written Evidence I am submitting a formal complaint to the European Commission.

The complaint to the Commission is not included in this Written Evidence.

*January 2019*
To:
Chris Grayling MP, Secretary of State for Transport
[By email, per Alan Devine, Department for Transport]

Dear Secretary of State,

**UKExit (“Brexit”)**

**“Ferrygate”**

**Unlawful award of contracts by the Department for Transport**

I write to you to express grave concern that the recent award by the Department for Transport of three contracts for “shipping operations” may have been unlawful.

The reasoning which leads me to that conclusion is briefly set out in Written Evidence of today’s date sent to the Transport Select Committee.

I ask you, as a matter of urgency, to seek legal advice as to the legal reasoning expressed in the Written Evidence of 1st January 2019.

In the Written Evidence of today’s date, I refer to Written Evidence of 25th December 2018. I enclose a copy for your convenience.

Should the legal advice you receive corroborate my analysis set out in the Written Evidence of 1st January 2019 I ask you to consider your position.

I ask you to copy any reply to this letter to the Transport Select Committee.

Yours sincerely

(Dr) Andrew Watt

Enc.

Written Evidence to the Transport Select Committee, 1st January 2019

Written Evidence to Liaison Committee, 25th December 2018
Annex 2 – Letter to the Prime Minister

[Address Redacted]

[Address Redacted]

[Address Redacted]

1st January 2019

To:

Theresa May MP, Prime Minister

[By email, per Alan Devine, Department for Transport]

Dear Prime Minister,

UKExit (“Brexit”)

“Ferrygate”

Unlawful award of contracts by the Department for Transport

I write to draw to your attention my concern that three contracts for “shipping operations” recently awarded by the Department of Transport may have been awarded unlawfully.

The reasoning which leads me to that conclusion is expressed in Written Evidence of today’s date submitted to the Transport Select Committee. A copy is enclosed for your convenience.

I invite you to consider the concerns expressed regarding the “ferrygate” contracts in the light of the letter to you dated 25th December 2018 in which I draw to your attention other serious concerns about failures by yourself and other Ministers with respect to UKExit (“Brexit”).

You will see that in my letter to Mr. Grayling, I invite the Secretary of State for Transport to consider his position.

Should Mr. Grayling fail to take appropriate action, I invite you to consider whether you should require him to resign.

Yours sincerely

(Dr) Andrew Watt

Enc.

Written Evidence of today’s date to the Transport Select Committee

Letter of today’s date to the Secretary of State for Transport
Written evidence submitted by Dr Albert Sanchez-Graells (FAB0038)

Executive Summary

1. The award of three contracts for ‘additional shipping freight capacity’ in the context of the Government’s ‘No-Deal’ preparations raises important illegality concerns.
2. The Department for Transport justified the award of the three contracts without a prior call for competition on the basis of the ‘extreme urgency’ created by the prospect of a ‘No-Deal’ Brexit.
3. Under reg.32(2)(c) of the Public Contracts Regulations 2015, ‘extreme urgency’ only exists where an unforeseeable event renders impossible the observance of the time-limits laid down for calls for tenders.
4. The award of the three contracts for additional capacity seems likely to be in breach of reg.32(2)(c) of the Public Contracts Regulations 2015, as there was time to comply with the 60 calendar days’ time limit required by alternative, transparent competitive procedures with negotiation.
5. Even if it was accepted that there was no time for alternative competitive procedures due to the specific characteristics of the shipping market, the award to Seaborne Freight (UK) Ltd still raises issues of potential illegality. The Secretary of State for Transport has justified the award as an act of support for a new British start-up business. This fact, coupled with eg the lack of readiness of the port infrastructure from which Seaborn plans to operate, undercuts the rationale of the extreme urgency of the procurement and heightens the likely illegality of the award.
6. All contracts, and Seaborne’s in particular, raise potential risks of illegal State aid that require further investigation.
7. This event indicates that the Government seems intent on pursuing a transport policy—and, possibly, a broader procurement policy—that runs against the core rules of EU law and policy. This is an unwelcome indication of potential roadblocks in the path towards reaching an agreement on a future UK-EU trade deal.
Submission

The purpose of this document is to provide the House of Commons Transport Select Committee with written evidence of the potential illegal award of contracts for ‘additional shipping freight capacity’ in the context of the Government’s ‘No-Deal’ preparations.

Public information about these awards indicates not only that the awards are likely to be illegal under the applicable UK procurement rules and that they can create additional risks of illegal State aid, but also that the Department for Transport may be pursuing a broader industrial policy that undermines the possibility of an orderly Brexit and a functioning future trade relationship with the EU.

These issues should be further investigated by the Transport Committee, as they fall within the remit of the ‘Freight and Brexit’ inquiry and, in particular, concern issues around the ‘the adequacy of steps being taken by … the Government in preparation for the challenges and opportunities of Brexit’.

‘No-Deal’ shipping services contracts

On 28 December 2018, the Department for Transport published in the Tenders Electronic Daily (TED) of the Official Journal of the European Union (OJEU) a contract award notice indicating that it had awarded a contract for ‘additional shipping freight capacity’ in the value of £13.8 mn to Seaborne Freight (UK) Ltd (hereinafter, ‘Seaborne’ or the ‘Seaborne award’).1 Two other contracts for additional shipping freight capacity were awarded to Bretagne Angleterre Irlande SA (valued at £46.6 mn)2 and to DFDS A/S (£47.2 mn)3.

The contract award notices indicate that the three contracts had been awarded under negotiated procedures without publication of a call for competition in the OJEU due to ‘extreme urgency’, and the Department for Transport explained that it relied on this exceptional possibility because ‘A situation of extreme urgency exists in the context of UK-EU roll-on-roll-off ferry capacity by virtue of the UK leaving the EU on 29.3.2019 and the prospect that this exit may be on a no-deal basis’.

Award of contracts under ‘extreme urgency’ exemption from a call for competition

The direct award of contracts under conditions of ‘extreme urgency’ is enabled by reg.32 of the Public Contracts Regulations 2015 (hereinafter, ‘PCR2015’). This is a direct transposition of Art 32 of Directive 2014/24/EU and it must be interpreted in accordance with the case law of the Court of Justice of the European Union (CJEU) on the use of negotiated procedures without prior publication.4

Reg.32(2)(c) PCR2015 allows for the direct award of contracts ‘insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with’ (emphasis added).

This is an extremely limited exception to the obligation to tender the contract under a call for competition for cases where the object of the contract—that is, the emergency services or supplies—needs to be achieved in an immediate or almost immediate manner. This is clear from the CJEU case law, which ‘has made it subject to three cumulative conditions, namely an unforeseeable event, extreme urgency rendering impossible the observance of the time-limits laid down for calls for

tenders, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom’ (emphasis added).\(^5\)

Additionally, it is consolidated CJEU case law that the requirements that control decisions to proceed to the direct award of contracts under this ‘non-procedure’ are subject to a strict assessment of whether the contracting authority ‘acted diligently and whether it could legitimately hold that the conditions [for recourse to this procedure] were in fact satisfied’.\(^6\)

**Potential illegality of all awards under UK procurement law**

The legality of the award of all three contracts under the ‘extreme urgency’ exception can be queried due to the foreseeability of a ‘no-deal’ Brexit and the degree of control that the UK Government exerts over this scenario after the CJEU ruled that it is possible for the UK to unilaterally withdraw its intention to leave the European Union.\(^7\) This seems to fall short of the requirement for the events that trigger the extreme urgency to be beyond the control of the contracting authority.

Additionally, the illegality of the award would more clearly result from the possibility of complying with the time-limits applicable to alternative, transparent competitive procedures with negotiation. Under the current rules, such procedures can be completed in 60 calendar days, which can be reduced to 55 calendar days if tender responses are submitted electronically.\(^8\) Given that the contracts were awarded more than 90 calendar days prior to UK leaving the EU on 29.3.2019, this in itself can deactivate the exemption under reg.32(2)(c) PCR2015.

It could be argued that shipping contracts cannot be implemented immediately and that the Department for Transport had to provide some buffer to providers of emergency shipping capacity, but an assessment of such a claim would require much more details than are publicly available. This particular issue would benefit from further investigation by the Transport Committee, as it affects all three contracts.

**Further illegality of the Seaborne award**

In addition to the issues discussed above, the Seaborne contract raises additional indications of illegality. In this case, even if it is accepted that the Department for Transport had to award the contracts more than 90 calendar days prior to ‘Brexit day’ due to some specificities of the shipping market, there are still important questions to be addressed surrounding the readiness of the awardee of the contract to provide emergency services, and whether this was the basis for the Department for Transport’s award decision.

As mentioned above, it is in the nature of emergency awards that the object of the contract needs to be achieved in an immediate or almost immediate manner. Whether Seaborne would be in a position to do so has been queried in the media. Indeed, not only does the company not currently operate a ferry line, but the infrastructure of the UK port from which it plans to provide the emergency services requires adaptation.\(^9\) Even if the company is reported to have provided reassurances that the dredging

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\(^7\) Judgment of 10 December 2018 in *Wightman and Others*, C-621/18, EU:C:2018:999.


of the port will allow it to be ready by the end of March, the Department for Transport is unavoidably accepting a risk of unavailability of the emergency services if that is not the case. This element of risk is inconsistent with the logic and limited parameters controlling the award of the contract under the ‘extreme urgency’ exception.

Additionally, the Secretary of State for Transport, the Rt Hon Chris Grayling MP, has made public declarations that indicate a different—and illegal—rationale for the Seaborne award. Indeed, in a BBC Radio 4 Today interview, he expressed that he would ‘make no apologies for supporting a new British business’. He further indicated that ‘[Seaborne is] a new start-up business, government is supporting new British business and there is nothing wrong with that’.11

This is a clear indication that the Department for Transport may have illegally decided the Seaborne award as part of a post-Brexit industrial policy. This would breach the requirement for the contracting authority seeking to rely on the ‘extreme urgency’ exemption to act diligently and be in the position to legitimately hold that the conditions for recourse to this procedure were in fact satisfied. This particular issue would also benefit from further investigation by the Transport Committee.

Potential illegality under EU State aid rules

In addition to the likely breaches of the procurement rules discussed above, the contracts also raise a potential breach of EU State aid rules. Some public reports have indicated that the freight companies would retain part of the value of the contracts in case the emergency services are not necessary—ie in case No-Deal Brexit does not take place. Despite some clarifications provided by the Department for Transport, the situation is not clear. According to the BBC,

It was initially understood that the three firms were likely to retain a portion of their award even if their services were no longer needed, due to a Brexit deal being reached with Brussels. The DfT has now clarified that this will not be the case for Seaborne. The BBC understands that French firm Brittany Ferries will be entitled to retain some of the award in case its services are no longer required, as per its contract with the DfT. A spokesperson said: “Seaborne Freight is obliged to meet a number of stringent time-staged requirements to demonstrate that it can provide an effective service, with break clauses in the DfT’s favour if it fails to meet them. "Taxpayer’s money will only be transferred following the provision of an effective service.12

The nature of such an arrangement does not seem to align with the fact that Seaborne relies on ‘City finance’ to launch its operations and that significant upfront costs exist—for example, concerning the dredging of the port. There seems to be a significant lack of clarity of the contractual commitments towards Seaborne and its financiers, and what ‘effective service’ means in this context. Any undue advantage given to Seaborne—as a start-up, or otherwise—triggers a risk of illegal State aid.

More generally, the fact that at least the other two companies could retain part of the value of the contract despite not providing emergency ferry services raises additional State aid risks that require careful assessment.

It must be noted that compliance with EU State aid rules is a requirement of the current draft withdrawal agreement\(^\text{13}\) and that this is likely to remain a requirement for any future UK-EU trade deal. Equivalent constraints would also play a role in case of No-Deal Brexit, although in that scenario that would be channelled under relevant WTO provisions. This particular issue would thus benefit from further investigation by the Transport Committee.

**Final remarks**

The likely illegal award of the contracts for additional shipping freight capacity in breach of UK procurement rules should be a matter of concern for the Commons Transport Select Committee, and further inquiries should be undertaken as soon as possible.

This event indicates that the Government seems intent on pursuing a transport policy—and, possibly, a broader procurement policy—that runs against the core rules of EU law and policy. This is an unwelcome indication of potential roadblocks in the path towards reaching an agreement on a future UK-EU trade deal. The incompatibility of such an event with the close relationship with the EU that Government has declared it will seek also requires additional scrutiny.

**Biographical information**

Dr Albert Sanchez-Graells is a Reader in Economic Law at the University of Bristol Law School, a former Member of the European Commission Stakeholder Expert Group on Public Procurement (2015-18), a Member of the European Procurement Law Group, and a Member of the Procurement Lawyers Association Brexit Working Group. He is a specialist in European economic law, with a main focus on competition law and public procurement. He takes a law and economics approach to his research and is particularly keen on the analysis of the systems of incentives and enforcement mechanisms that law creates or facilitates.


Albert is a regular speaker at international conferences and has been repeatedly invited by the European Court of Auditors and European Commission as an expert academic in public procurement and competition matters. He has also advised the World Bank and other international institutions regarding public procurement reform.

*January 2019*

Thank you for your letters of 7 and 15 January, firstly about Freight and Brexit and secondly containing submissions from Dr Andrew Watt and Dr Albert Sanchez-Graells, who contest the legality of the freight contracts into which we have entered in order to mitigate possible disruption to cross-Channel ro-ro traffic in the event of a no-deal outcome.

Your first letter coincided with my Written Statement of the same date, which answers the majority of the questions you have raised, either in whole or in part.

However, to aid the Committee further in considering this matter, I attach an appendix with reference to your numbered questions. To ensure we responded to your Committee in a timely way, these responses focus on elements that were not given in my Written Statement.

In response to the letter and attachments of 15 January, I would again refer the Committee to the 7 January Written Statement. While the ambition of Government is to ensure an orderly exit from the EU, the Department has been undertaking a range of work to mitigate the impact on the transport sector of a no-deal EU exit. Given the unexpected and unforeseeable limitations on the extent to which the market had to date been able to respond to the risk of no-deal by putting in place contingency plans to prepare for this scenario, the Government completed a procurement process to secure additional freight capacity.

At the same time, the lead times required for acquisition of vessels, planning of fleets, marketing of routes, and necessary works at ports on each end of the routes was limited. The time available for Seaborne to prepare was and is challenging, but this seems a strange basis for arguing that the matter was not, in fact, urgent in this particular case.

I note the detailed points advanced by Dr Watt and by Dr Sanchez-Graells. However, the Department stands by the award of these contracts as a responsible measure to secure capacity in the public interest in conditions of extreme urgency.

Rt Hon Chris Grayling MP
SECRETARY OF STATE FOR TRANSPORT
TRANSPORT COMMITTEE QUESTIONS ON FERRY CAPACITY PROCUREMENT

References to "the WMS" below are to HCWS 1233 of 7 January.

1. See WMS and the Contract Award Notices ("the Notices") published in the Official Journal of the European Union on 28 December 2018. As stated in the Notices:

"A situation of extreme urgency exists in the context of UK-EU roll-on-roll-off ferry capacity by virtue of the UK leaving the EU on 29.3.2019 and the prospect that this exit may be on a no-deal basis. This extreme urgency arises from a combination of events, and the anticipated response to those events of a range of entities, including:

1) The possibility of severe congestion at and around UK ports from 29.3.2019, caused by increased border checks by European Union Member States, and consequently a significant reduction in capacity at ports on the Short Straits. It is anticipated that this could, without further intervention to secure additional ferry capacity, cause delivery of critical goods to be delayed and cause significant wider disruption to the UK economy and to the road network in Kent;

2) The significant lead times that are required to source additional ferry capacity which require action to be taken several months in advance of the capacity being required to be delivered; and

3) Unexpected and unforeseeable limitations on the extent to which the market has to date been able to respond to these circumstances by putting in place contingency plans to deal with this scenario."

2. See WMS.

3. Details of the contracts are commercially sensitive for the time being. However, the essence of the requirements is to make sure that the capacity contracted for is supplied.

4. The Department’s assessment was that the availability of capacity in this particular sector of the shipping market, especially in relation to ferries designed for accompanied HGVs, is particularly tight and that a large proportion of that capacity is controlled by incumbent ferry operators.

5. See WMS.

6. Services will run frequently. The exact number and time of sailings vary as between the different operators and routes.

7. As noted at Q3 above, contractual details are commercially sensitive.

8. As noted at Q3 above, contractual details are commercially sensitive. However, aside from termination and force majeure provisions, the
The essence of the contracts is that contractors are to be paid for capacity they actually provide.

9. See WMS. The Department has assessed the contribution of these contracts to resilience against constricting on the short Strait.

10. Detailed risk assessments and contractual mitigations are commercially sensitive. However, the contracts are designed to safeguard the taxpayer against delivery risks.

11. See WMS. The Department, supported by external advisers, undertook due diligence on Seaborne Freight.

12. Yes. These matters were taken into account in due diligence.

13. Again, these matters were taken into account. As set out in the WMS, the management has extensive experience in the shipping and maritime sector including operation of ferry services.

14. These were significant considerations in agreeing the contract with Seaborne.

15. The posting of the material referred to on Seaborne's public website was clearly a regrettable error, and was rectified once it had been pointed out.

16. The operator was hoping to start a service, but had not hitherto been able to make good its aspirations.

17. Securing vessels is the responsibility of Seaborne Freight.

18. The Department is working closely with Thanet and Seaborne to help ensure that the necessary physical preparations are undertaken.

19. Since scheduled ferries have not operated at Ramsgate since 2013, there is need for some physical works to return the Port to operational capability for such services. Our expectation is that services should commence by April.

20. Border Force has been in discussions with Thanet Council as operator of the Port of Ramsgate, and with Seaborne Freight, on customs, excise and immigration checks over a period of months, and plans are well developed.

21. This contract is separate from that for the dredging which is currently in progress.

22. No. The Government's firm view is that this capacity contract does not confer State Aid.

Department for Transport
January 2019