IN THE HIGH COURT OF JUSTICE **Case No: CO/10424/2011**
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

THE QUEEN

on the application of

EVENTECH LIMITED

Claimant

-and-

THE PARKING ADJUDICATOR

Defendant

-and-

(1) LONDON BOROUGH OF CAMDEN

(2) TRANSPORT FOR LONDON

Interested Parties

SECOND INTERESTED PARTY'S SKELETON ARGUMENT

Bundle References: References are to the trial bundle and are in the form [bundle/tab/page]

Time estimate: 2 days (plus 1 day reading), excluding judgment

Recommended reading:

- Skeleton Arguments
- First and Second Witness Statements of John Patrick Griffin (respectively, "**Griffin 1**" [**1/13/149-158**] and "**Griffin 2**" [**1/16/231-241**])
- First and Second Witness Statements of Ben Plowden (respectively, "**Plowden 1**" [**1/14/159-191**] and "**Plowden 2**" [which was not included in the hearing bundle and is therefore attached to this Skeleton Argument])

A. INTRODUCTION

The issue

1. This claim is, in form, a claim for judicial review of a decision to refuse the Claim**a**nt's appeal against two Penalty Charge Notices ("**PCNs**"). But in substance, the issue at stake is the lawfulness of the policy – shared by the Second Interested Party ("**TfL**") and many of the London Borough Councils in their capacities as traffic authorities – of allowing taxis,[1] but not Private Hire Vehicles ("**PHVs**"), to use certain designated bus lanes during the hours when bus lane restrictions are in operation. This policy, which is reflected in legislation, is referred to as "**the bus lane policy**".

2. The Claimant contends that the bus lane policy is discriminatory, as a matter of both EU and domestic law. Specifically, the Claimant alleges that the policy:

    (a) breaches Articles 49 and 56 TFEU (the rights to freedom of establishment and freedom to provide services);

    (b) breaches the EU and domestic-law principles of equal treatment; and

    (c) gives rise to State aid, contrary to Article 107 TFEU.

3. TfL disagrees. Its position is that:

    (a) the free movement rights to which the Claimant refers are not engaged and nor is the general EU principle of equal treatment;

    (b) in any event, the bus lane policy is justified, and is thus neither irrational as a matter of domestic law nor contrary to EU law (were Article 49, Article 56 and/or the general EU principle of equal treatment engaged); and

    (c) the bus lane policy does not give rise to State aid.

The parties

4. The parties in this claim are as follows:

    (a) The Claimant ("**Eventech**") is a wholly-owned subsidiary of Addison Lee plc ("**Addison Lee**") and is the owner and registered keeper of a large number of

[1] Or, as the Claimant prefers to describe them, Black Cabs.

PHVs. These are leased to a number of self-employed drivers who provide PHV services in London under contract with Addison Lee.

(b) The Defendant is the statutory body responsible for hearing appeals against enforcement notices for contravention of the regulations governing (*inter alia*) bus lanes.

(c) The First Interested Party ("**Camden LBC**") is the traffic authority with responsibility for regulating and monitoring the use of the bus lane on Southampton Row in Central London.

(d) The Second Interested Party, TfL, is the statutory body created by s. 154 of the Greater London Authority Act 1999 ("**the 1999 Act**"). TfL's relevant functions are summarised in Detailed Grounds, §§5-8.

B. FACTUAL AND LEGAL BACKGROUND

5. The background has already been summarised in §§6-28 of the Grounds, §§10-46 of the Detailed Grounds and §§8-27 of the Claimant's Skeleton Argument. It is not repeated here. However, TfL makes the following brief additional points:

(a) The Claimant disagrees, in §14 of its skeleton argument, with TfL's statement that there is no restriction on the type of vehicle that may be registered as a PHV. The Claimant points to (i) a 10-year age limit with which PHVs have to comply and (ii) emissions standards that apply to new PHVs. While it is correct to say that there are certain minimum standards with which PHVs (in particular, new PHVs as of April 2012) have to comply, this does not change the fact that any type of vehicle that meets these standards may be licensed as a PHV. As stated in Plowden 1, Table 1, there are currently more than 700 different makes and models of vehicles that are licensed as PHVs in London.

(b) The Claimant speculates, in §22 of its skeleton argument, as to why other London Borough Councils, including Camden LBC, have adopted the bus lane policy, suggesting that it was mainly a desire for consistency with TfL. TfL obviously cannot comment on the motivations of other traffic authorities. Nor, in TfL's submission, is the issue relevant: what matters is whether the bus lane policy is justified, which it is, for the reasons explained below.

C. THE ISSUES IN DISPUTE

6. As explained in §29 of the Claimant's skeleton argument, it is uncontroversial between the parties playing an active part in this claim that the Defendant's decision to decline jurisdiction to consider the validity of the Camden Bus Lanes (No. 1) Traffic Order 1998 was erroneous as a matter of law.

7. Thus the only substantive issue before the Court at the hearing of this claim is the lawfulness of the bus lane policy. TfL's submissions on this issue, set out in section D below, follow the same structure as in its Detailed Grounds:

   (a) Articles 49 and 56 TFEU (the rights to freedom of establishment and freedom to provide services) are not engaged by the bus lane policy.

   (b) In consequence, the principle of equal treatment under EU law is not engaged either.

   (c) The domestic-law irrationality test imposes a very high hurdle.

   (d) The distinction drawn in the bus lane policy as regards access to bus lanes is justified, and is thus (i) clearly not irrational as a matter of domestic law (ii) permitted under EU law if (contrary to TfL's primary position) Articles 49 and 56 TFEU and/or the principle of equal treatment under EU law are engaged.

   (e) Finally, the distinction in question does not constitute State aid within the meaning of Article 107 TFEU.

8. Before making good these submissions, however, it is necessary to address briefly §§32-37 of the Claimant's Skeleton Argument, which makes various claims about the effects of the bus lane policy on PHVs.

D. SUBMISSIONS

D1. *The effects of the bus lane policy on PHVs*

9. The impression that the Claimant seeks to convey, in its Grounds, evidence and Skeleton Argument, is that taxis and PHVs are in close competition. See, for example, §33 of the Claimant's Skeleton Argument: *"Addison Lee competes directly with Black Cab Operators – a fact that TfL does not dispute"*.

10. The reality of the markets in which taxis and PHVs operate is more complicated. As explained in Plowden 1, §§20-25, the two are subject to fundamentally different regulatory regimes:

    (a) The standards imposed on taxis are more far-reaching in several respects than those imposed on PHVs. For example, the vehicles must meet the Conditions of Fitness and the drivers must pass the 'Knowledge of London' examination and the Driving Standards Agency's advanced driving assessment. Taxis are also compellable (up to a prescribed distance/time) and may not charge more than the metered fare (which is regulated by TfL). PHVs are subject to less stringent requirements as regards vehicle type. Their drivers are required to undergo a much less rigorous training programme. They are not required to accept fares; and they are not limited in what they can charge to the fare on the meter.

    (b) Taxis are allowed to take passengers in certain circumstances in which PHVs are not. Specifically, taxis may take customers who hail them from the street (ie ply for hire) and customers at taxi ranks. PHVs, by contrast, are limited to pre-booked journeys.

11. Hence the description of the present situation by the Law Commission as a *"two-tier licensing system"*.[2] In the Law Commission's view, this two-tier system is justified by the *"very different characteristics"* of the pre-booked market and the market for hailing and picking up at ranks.[3] It is the latter market which accounts for the majority of the journeys made by taxis in London: see Plowden 1, §67(a) and BP1/443.

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2 See, eg, Consultation Paper No. 203, §1.40.

3 *Ibid*, §7.37.

12. Thus, while there is competition between taxis and PHVs in relation to the pre-booked market, it must be borne in mind this is only one of the markets in which taxis operate, and is likely to account for a minority of their fares. In considering whether it is appropriate to allow taxis and PHVs access to bus lanes in London, it is appropriate to consider the implications of the fact that taxis also operate in other markets and the importance of bus lane access to the effective functioning of those other markets.

D2. ***Article 49 TFEU: Freedom of establishment***

13. The Claimant's first pleaded ground of challenge (addressed second in the Skeleton Argument) is that the bus lane policy breaches Article 49 TFEU, which provides:

> *"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited ...*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ..."*

14. In its Skeleton Argument, the Claimant puts its case under this provision in two different ways:

    (a) First, it is said that the bus lane policy is *"indirectly discriminatory on grounds of nationality"* because non-UK nationals are more likely to wish to establish themselves as PHV drivers than as taxi drivers (because of the greater training required to qualify as a taxi driver); and such persons are therefore more likely than nationals to be subject to the disadvantages to which the bus lane policy gives rise: see Claimant's Skeleton Argument, §53.

    (b) Secondly, it is said that the bus lane policy *"makes it less attractive for nationals of other Member States to establish themselves in London and provide PHV services because the consequence of that legislation is the imposition of a significant cost to drivers and because they are placed at a competitive disadvantage to the drivers of Black Cabs"*: see §54.

15. The first of these complaints is not pleaded in the Grounds at all. Indeed, in relation to the question of discrimination the Grounds apparently concede that *"the [bus lane] rules*

apply equally to UK nationals": see at §37. TfL has not therefore addressed the question of indirect discrimination in its evidence.

16. In any event, though, the indirect discrimination complaint is a bad one. Even if it were true that non-UK nationals are more likely to seek to establish themselves as PHV drivers than as taxi drivers, that does not render the bus lane policy indirectly discriminatory. Indirectly discriminatory measures are those which *"ostensibly treat the migrant and the national in the same way but in fact disadvantage the migrant"* – as described by Barnard in *The Substantive Law of the EU: the Four Freedoms*[4] at p.299 (the text cited by the Claimant at §57 of its Skeleton Argument).

17. A national measure will satisfy that definition if it makes it more difficult for a non-national to establish himself in, or exercise, a particular trade or profession than a national. That was the position in *R v Secretary of State for Transport ex p. Factortame* [1991] ECR I-3905 (cited by the Claimant at §51 of its Skeleton Argument).

18. The 'Knowledge of London' test for taxi drivers could, in theory, be capable of being such a measure if it could be shown that the test made it more difficult for non-UK nationals than for UK nationals to establish themselves as taxi drivers. But the issue in this claim has nothing to do with the ability of individuals to establish themselves as taxi drivers. It concerns the ability of individuals who are not UK nationals to establish themselves as PHV drivers. The bus lane policy has no effect whatsoever on that.

19. At most, therefore, the argument in §53 of the Claimant's Skeleton Argument (if it were soundly based in fact) would suggest that it is an indirect consequence of the 'Knowledge of London' test that non-UK nationals are more heavily represented among would-be PHV drivers than among would-be taxi drivers. That does not show that the bus lane policy is indirectly discriminatory on grounds of nationality.

20. As to the second reason why Article 49 is said to be engaged in this case, the suggestion is that a Belgian or Polish national, for example, considering coming to London to establish himself as a PHV driver would consider that option *"less attractive"* because of the fact that he would be unable to drive through the bus lanes during the hours when restrictions are operational.

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4 3rd ed (OUP, 2010).

21. The Claimant says (Skeleton Argument, §56) that it does not have to adduce evidence to show that any such driver has in fact ever been deterred, only that the rule is liable to "*hinder or make less attractive*" the exercise of the freedom. That is correct, but – by way of starting point – it is highly relevant to note that the Claimant has not adduced any evidence that nationals of other Member States have in fact been deterred by the bus lane policy from coming to London to establish themselves as PHV drivers/operators (or even, indeed, that the bus lanes policy figures among the considerations taken into account by nationals of other Member States thinking of establishing themselves as PHV drivers/operators in London).

22. Such evidence as there is suggests precisely the opposite. Mr Griffin says in Griffin 1, §11 that *"[a] substantial number of Addison Lee's drivers have come from other EU Member States to live and work in the UK"*. He notes that TfL's data indicate that around 9% of PHV drivers originate from other Member States and estimates that this is also the proportion of AL's drivers who are national of other Member States. In Griffin 2, Mr Griffin states that the of the drivers who have come to Addison Lee's free training and who gave a specific country of origin, about 15% came from countries in the European Economic Area: Griffin 2, §40. The proportion of Londoners who were born in a Member State other than the UK is, as TfL observed in §56 of its Detailed Grounds, less than 8%.[5] There is thus:

    (a) no evidence that nationals of other Member States are disproportionately under-represented among PHV drivers generally or among Addison Lee's drivers (and if anything, such evidence as there is suggests the contrary, in relation to Addison Lee's drivers at least);

    (b) no evidence that anyone considering establishing himself as a PHV driver has ever been deterred from doing so by the regulations governing the use of bus lanes in London; and

    (c) no evidence that any EU national has ever taken into account the bus lane policy when considering whether to establish himself as a PHV driver in London.

[5] This figure is taken from http://data.london.gov.uk/datastore/package/population-country-birth, Annual Population Survey.

23. The case-law of the Court of Justice of the EU ("**CJEU**") does not contain any example of a case in which regulations analogous to those in issue here have been found to engage Article 49. Indeed, an analysis of the case-law shows that measures which do not discriminate directly or indirectly against nationals of other Member States will not generally qualify as a *"restriction"* unless it might deter establishment or affect *"access to the market"* by such persons.

24. In Case C-293/06 *Deutsche Shell GmbH v Finanzamt für Grossunternehmen in Hamburg*,[6] a German company challenged provisions of the German tax code which made it impossible for it to deduct from its corporation tax currency losses incurred in currency transfers incurred in starting up a permanent establishment in Italy. The CJEU held that restrictive effects for the purposes of Article 49 may arise where *"on account of a tax law, a company may be deterred from setting up subsidiary bodies such as permanent establishments in other Member States and from carrying on its activities through such bodies"* (see at [29], emphasis added).

25. In this case, as noted, there is no evidence that anyone has ever been, and no reason to suppose that anyone would be, deterred from establishing himself as a PHV driver on account of the bus lane policy.

26. In Case C-518/06 *Commission v Italy*,[7] the Commission sought to challenge Italian legislation which made it mandatory for providers of motor insurance to provide third-party insurance to all potential customers. The CJEU held as follows:

> *"62. It is settled case law that the term 'restriction' within the meaning of [what are now Articles 49 and 46 TFEU] covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services...*
>
> *63. As regards the question of the circumstances in which a measure applicable without distinction, such as the obligation to contract at issue in the present case, may come within that concept, it should be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory...*

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6 [2008] ECR I-1129.

7 [2009] ECR I-3491.

> *64. By contrast, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade..."* (Emphasis added.)

The CJEU held that the measures in issue did constitute a "restriction" within the meaning of Article 49 because – although it did not deny undertakings established in other Member States the opportunity to enter the market – such undertakings would be *"required to re-think their business policy and strategy, inter alia, by considerably expanding the range of insurance services offered"* (see at [69]). This reduced the ability of such undertakings *"to compete effectively, from the outset, against undertakings established in Italy"* (see at [70]).

27. In this case, there is nothing to suggest that the bus lane policy has required any individual or undertaking established in another EU Member State to *"re-think [his] business policy and strategy"* in order to establish himself as a PHV driver in London.

28. In Case C-400/08 *Commission v Spain*,[8] the CJEU had to consider national legislation governing the establishment of shopping centres in Catalonia. The rules favoured medium-sized (rather than large) retail establishments. The complaint was that most economic operators wishing to set up medium-sized retail establishments were Spanish, whereas operators wishing to set up larger establishments were usually from other Member States. The CJEU held that the measures did constitute a restriction on the freedom of establishment, but only because *"the concept of 'restriction' for the purposes of [what is now Article 49 TFEU] covers measures which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade"* (see at [64], emphasis added). The measures in question did affect *"access to the market"* because they established a system under which undertakings had to obtain a licence to undertake the economic activity in question (see at [65]-[68]).

29. In this case, PHV drivers do, of course, have to have a licence to operate. In that respect they are in a position similar to that of the foreign undertakings in *Commission v Spain*. But they are not complaining about any aspect of the PHV licensing regime. They are not complaining, for example, about restrictions on the type of vehicle that may be used or about the qualifying criteria to become a PHV driver. They are complaining about a

[8] [2011] 2 CMLR 50.

feature of traffic regulations which applies equally to all PHV drivers and which, realistically, has no effect whatsoever on the decision whether to establish oneself as a PHV driver in London.

30. In Case C-565/08 *Commission v Italy*,[9] the CJEU considered a national law imposing maxima on lawyers' fees. The Commission argued that these maxima might render the Italian market for legal services unattractive to professionals established in other Member States. The CJEU again noted that the concept of a restriction, for the purposes of Article 49 or Article 56, included measures which *"restrict access to the market for economic operators from other Member States"* (see at [46]). It held that, for a restriction to be found, it was not enough that other Member States applied different rules or that lawyers established in other Member States were *"not accustomed"* to these maxima (see at [50]). *"By contrast,"* the CJEU held, *"such a restriction exists, in particular, if these lawyers are deprived of the opportunity of gaining access to the market of the host state under conditions of normal and effective competition"* (see at [51], emphasis added). On the facts of the case, the Commission had not demonstrated that *"the system at issue was established in a manner which adversely affects access to the Italian market for the services in question under conditions of normal and effective competition"* (see at [53], emphasis added).

31. Applying that reasoning, the bus lane policy does not deprive anyone of the opportunity of entering the market as a PHV driver. Nationals of other Member States do so all the time under *"conditions of normal and effective competition"* with drivers from other parts of the world and with drivers already established in the UK.

32. In its Skeleton Argument, the Claimant does not take issue with TfL's analysis of the cases as set out above. Rather, at §57, the Claimant suggests that it is not necessary to show that a measure affects access to the market; it is sufficient to show that the measure will *"render the* exercise *of a particular activity less attractive once access has been gained"* (emphasis in original). It cites Barnard, op. cit., at pp.298-303. But the cases mentioned there concern national measures which have the effect of either limiting the circumstances in which a non-national can perform the relevant activity, or preventing him from performing it altogether. Even Case C-168/91 *Konstantinidis*[10] (to

9 [2011] 3 CMLR 1.

10 [1993] ECR I-1191.

which the Claimant refers at §58) was one where the measure in question infringed what is now Article 49 TFEU only to the extent that it exposed the claimant to the risk of a confusion of identity on the part of his potential clients. The measure in issue here, by contrast, does not affect in any way the ability of a licensed PHV driver to practise as such.

D3. ***Article 56: Freedom to provide services***

33. The second plank of the Claimant's case (as pleaded) is based on Article 56 TFEU, which provides:

> *"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."*

34. The Claimant says that the provisions of Article 56 are engaged because:[11]

    (a) Addison Lee has corporate account holders *"established in other EU Member States"*[12] and *"many UK corporate account holders use [it] for employees or visitors arriving from other Member States"*; and

    (b) *"[Addison Lee] provides services to numerous passengers from other Member States who travel to London for business or pleasure"*.

35. If that were right, Article 56 would (presumably) apply to <u>any</u> domestic regulation that impacts on <u>any</u> company, provided only that some of its customers are nationals of other Member States who happen to be visiting the UK.

36. This is not the law.

37. The scope of Article 56 is explained by Barnard, op. cit., pp.357-361. She summarises the three categories of situation in which Article 56 TFEU may apply as follows:

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11 See Skeleton Argument, §43(a).

12 TfL noted, in §69(b) of its Detailed Grounds, that in fact many (if not most) of the companies described by Mr Griffin in his evidence (see Griffin 1, §13 and JPH1/28-30) as *"companies established in other Member States [that] hold corporate accounts with Addison Lee"* appear in fact to be UK limited companies which are subsidiaries of companies based in other Member States. Neither the Claimant's skeleton argument nor Mr Griffin's reply evidence addresses this point.

(a) first, *"the situation where the service provider established in State A holding the nationality of one of the Member States (not necessarily State A) provides services in Member State B and then returns to State A once the activity is completed"* (op. cit., p.357);

(b) second, situations in which the service recipient wishes to travel to the state of the service provider in order to receive those services – a category of situations described by Barnard under the subheading, *"The Freedom to Travel to Receive Services"* (op. cit., p.359); and

(c) third, situations *"where neither the provider nor the recipient of the service travels but the service itself moves (e.g., by telephone, fax, email, the Internet, or cable)"* – in other words, services that themselves cross borders.

38. The present situation falls into none of these categories. In particular:

(a) The bus lane policy does not impede in any respect the ability of any service provider established in another Member State to provide PHV services in the UK: see the points made above in relation to freedom of establishment.

(b) No-one travels to the UK to receive PHV services (not even those of Addison Lee). They buy those services once they are here for another purpose, which – as the Claimant puts it – might be *"business or pleasure"*. In any event, the bus lane policy does not impede in any respect the ability of any person to travel to the UK to receive Addison Lee's services.

(c) Self-evidently, a PHV journey within London does not cross the border between Member States.

39. Taking in turn the three cases relied on by the Claimant to establish the engagement of Article 56 (see Grounds, §§42-44):

(a) Case C-275/92 *Schindler*[13] concerned a challenge to UK legislation which prevented the advertising of lotteries. The English courts referred the question whether legislation that was non-discriminatory on grounds of nationality engaged what is now Art. 56 TFEU. The CJEU's answer was that *"national*

[13] [1994] ECR I-1039.

legislation may fall within the ambit of [what is now Art. 56 TFEU] of the Treaty, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services" (see [43]). This is a case falling within the first of Barnard's three categories.

(b) In Case C-405/98 *Gourmet International,*[14] the question was whether a Swedish law restricting the advertising of alcohol constituted a *"restriction"* on the right to supply advertising space. The answer given by the CJEU was this:

> *"37. ...as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State.*
>
> *38. That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States.*
>
> *39. A measure such as the prohibition on advertising at issue in the proceedings before that court, even if it is non-discriminatory, has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty."*

The reason why the Swedish law engaged Article 56 in that case was because it had a *"particular effect on the cross-border supply of advertising space"*. That was so because of the *"international nature of the advertising market in the category of products to which the prohibition relates"*. Thus this is a case falling within the third of Barnard's categories.

(c) In Case C-224/97 *Ciola,*[15] the owners of land on the shores of Lake Constance (which lies between Germany, Austria and Switzerland) challenged an Austrian law restricting the number of boats that could be owned by non-residents. That case establishes that a person established in one Member State may rely on

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14 [2001] ECR I-1795.

15 [1999] ECR I-2517.

what is now Article 56 against his own state; and that the freedom to provider services includes the freedom of tourists to go to another Member State in order to receive services there without being obstructed by restrictions (see at [11]). But in that case there was, as the AG said at [13]-[15], a true *"cross-border element"* to the services in question. This was, therefore a case falling within the second (and possibly third) of Barnard's categories.

(d) Case C-60/00 *Carpenter* [2002] ECR I-6297, which is cited in §46(d) of the Claimant's Skeleton Argument, does not assist. That was a case where the deportation of the claimant's wife was held to make it impossible for him to carry on his business (because he would have to look after his children). But the business in question was one which involved the provision of services to advertisers established in other Member States, both by travelling to the state in question (Barnard's first category) and by providing *"cross-border services"* without leaving the UK (Barnard's third category). Thus, although *Carpenter* is an interesting example of the extension of the protection of what is now Article 56 TFEU to the wife of a service provider, it does not materially extend the situations in which the service provision itself is of a nature that engages Article 56.

40. In any event, even if the Claimant could establish a sufficient 'cross-border element' to the services it provides, as the extract quoted above from Case C-518/06 *Commission v Italy* shows, the principles which govern the engagement of Articles 49 and 56 TFEU are similar. In each case, it is necessary to show that a person would or might be *"deterred"* from providing the service in question or that there is something which "*affects access to the market"*.

41. The Claimant asserts (Skeleton Argument, §46(b)) that its evidence establishes this. It does not: see the points made at §22 above. As to cross-border relationships with other PHV operators, which are said to be inhibited by the bus lane policy, Mr Griffin relies on a letter from Cardel Limousines (see Griffin 2, §44 and JPG2/209). TfL makes the following points about this letter:

(a) There is no explanation as to why this letter, which is apparently dated 25 May 2011, was not adduced at any time until Mr Griffin's reply evidence, dated 28 May 2012.

(b) The subject line in the letter is *"Use of bus lanes in London"* and the letter begins *"I am happy to confirm ..."* (emphasis added). This suggests that it may have been prompted by a letter or email or telephone call from Addison Lee. But the Claimant has not disclosed anything about the circumstances in which the letter was produced, including the correspondence preceding it.

(c) In the absence of any further explanation or disclosure as above, TfL invites the Court to place no weight on the letter.[16]

(d) In any event, evidence of a relationship with an operator in another Member State does not bring the case within any of the situations in which Article 56 is engaged.

42. For all the reasons set out above, there is nothing to indicate that the bus lane policy has deterred or would deter anyone from providing services and nothing to show that it falls within any of the situations recognised as engaging Article 56.

43. Finally, the case law recognises that a measure which may have some actual or potential effect on the providers or users of cross-border services does not engage Article 56 if the effect in question is *"too uncertain and indirect"*: see, eg, Case C-211/08 *Commission v Spain*[17] at [72]. The facts of that case were of course different from those of this one. But the case is relied on not for its facts but for the proposition it articulates. If (which is denied) the bus lane policy has any actual or potential effect on either Addison Lee's provision of cross-border services or the ability of a tourist to come to London and enjoy pre-booked private passenger transport services without obstruction, the effect is both uncertain and remote; and is insufficient to engage Article 56.

D4. *The Principle of Equal Treatment*

44. The Claimant argues that, even if the substantive Treaty provisions on which it relies (Articles 49 and 56 – as to which see above – and Articles 107-8 – as to which see below) are not infringed, the bus lane policy nevertheless *"comes within the scope of EU law"* so as to engage the EU law principle that comparable situations must not be

[16] Similar considerations apply to the letter from Goldman Sachs dated over 2 years ago, but not exhibited until the injunction application in April 2012.

[17] [2010] ECR I-5267.

treated differently unless the difference is objectively justified (the "**Principle of Equal Treatment**").[18]

45. But there is no case-law suggesting that the Principle of Equal Treatment applies to situations such as this.

46. In Case 260/89 *ERT*,[19] the Principle of Equal Treatment was held to apply when considering a purported justification of rules which were likely to obstruct the freedom to provide services (see at [42]-[43]). *ERT* was, therefore, a case in which the substantive provisions of the Treaty were engaged. Here, for the reasons set out above, and below, they are not.

47. In Case 326/92 *Phil Collins*,[20] the CJEU held that German rules on the protection of copyright were within the scope of Community law, but that was because copyright and related rights had long been regarded as having *"effects on trade in goods and services in the Community"* (see at [27]), which goods and services were themselves regulated by and under Treaty provisions (see at [22]-[26]). Here, the limitations on the use of bus lanes do not have *"effects on trade in goods and services in the Community"*. No parallel can therefore be drawn.

48. The same applies to Case C-71/02 *Karner*,[21] which the Claimant cites at §64 of its Skeleton Argument. *Karner* concerned restrictions in Austrian legislation on advertising. The CJEU found that the restrictions would have engaged a provision of the Treaty but for the fact that they comprised a 'selling arrangement', within the meaning of the judgment in Joined Cases C-267/91 & C-268/91 *Keck and Mithouard*.[22] Moreover, the CJEU noted at [48] of *Karner* that *"according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures"*.

49. By contrast, the bus lane policy does not engage any Treaty Article (and would not do so but for an exemption) and it is not claimed that it engages fundamental rights.

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18 See Grounds §§47-48.

19 [1991] ECR I-2925.

20 [1993] ECR I-5147.

21 [2004] ECR I-3054.

22 [1993] ECR I-6097, at [16]. .

50. Nor does Case C-63/89 *Assurance du Credit v Council and Commission*[23] assist. That case concerned an action by the claimant for damages allegedly arising from the exclusion of export credit insurance operations for the account of or guaranteed by the State from the scope of a Council Directive. Thus EU law was unquestionably engaged. It is this context in which the remarks of the Advocate General ("**AG**") cited in §66 of the Claimant's Skeleton Argument must be viewed.

51. If, contrary to TfL's submissions, the Principle of Equal Treatment applies, it adds nothing to the domestic law of rationality in a case such as the present. That is because questions of traffic regulation are in principle complex and technical ones and, in relation to such questions, EU law applies a low intensity of review: see *R (Mabanaft Ltd) v Secretary of State for Energy and Climate Change*,[24] *per* Arden LJ (with whom Hallett LJ and Blackburne J agreed) at [32]:

> *"In reviewing the legality of the exercise of such discretion, the court must limit itself to examining whether the decision of the Secretary of State discloses a manifest error or constitutes the misuse of powers or there has been a clear disregard of the limits of his discretion. This is because under Community law, where the decision maker in the member state is required to evaluate a complex economic situation - and the same would apply to a complex technical situation as here - the intensity of the review is low. The decision maker will enjoy a large measure of discretion and the court will limit itself to asking where the assessment is manifestly unreasonable. The court will not substitute its judgment for that of the decision maker. For these propositions, see, for example, case C-120/1997* Upjohn Ltd v The Licensing Authority *[1999] ECR 1-223."*

52. The Claimant alleges that *"the application of the principle of equal treatment n this area requires a rigorous degree of scrutiny"* (Skeleton Argument, §69), citing Joined Cases C-402/07 & 432/07 *Sturgeon*.[25] But *Sturgeon* does not grapple with the question whether a decision is in a complex and technical field and what consequences this has for the intensity of review. On the contrary, the issue in *Sturgeon* that the CJEU found to engage the Principle of Equal Treatment – whether passengers whose flights were cancelled and those whose flights were delayed were in a comparable position with

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23 [1991] ECR I-1799.

24 [2009] EWCA Civ 224, [2009] EuLR 799.

25 [2008] ECR I-5237.

respect to the inconvenience and damage suffered – was analytically a straightforward one, which the CJEU resolved in a one-sentence paragraph (see [50]).

D5. ***Irrationality***

53. Insofar as the Claimant relies on the "*domestic law principle of equal treatment*",[26] it is in effect relying on a plea that the distinction between taxis and PHVs drawn by the bus lane policy is irrational in the *Wednesbury* sense. The cases it relies upon do not establish any novel proposition of law. In *R* (*Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England & Wales*,[27] the claim succeeded because the challenged decision involved a distinction that was *Wednesbury* unreasonable: see at [74]. In the light of the very different regulatory structures which apply to taxis and PHVs, and the matters set out below, that is an impossible task in this case.

D6. ***Justification***

(1) The test of justification

54. If the bus lane policy engages Articles 49 or 56 TFEU or the Principle of Equal Treatment, TfL accepts that it is for it to show that the policy is nonetheless objectively justified. This entails demonstrating that the policy is proportionate, in the sense that (i) it serves an objective that is in the general public interest; (ii) it is suitable for attaining that objective; and (iii) it does not go beyond what is required to attain that objective – or, to put it another way, the policy is the least restrictive way of obtaining the objective in question.

55. That said, a Member State has a margin of discretion, not only as to what objectives it pursues and the standard of protection it selects in relation to those objectives but also as to how it attains that standard. The burden of proof on the Member State is not an unduly onerous one and it is legitimate for it to bear in mind, for example, the need for simplicity and clarity.

56. This was emphasised by the Grand Chamber of the CJEU in Case C-110/05 *Commission v Italy (Italian Trailers)*,[28] a case concerning Article 34 TFEU (free movement of

[26] See Grounds, §60.

[27] [2004] EWHC 1447 (Admin).

[28] [2009] ECR I-519.

goods). In *Italian Trailers*, Italy introduced a prohibition on motorcycles towing trailers, which had the effect of leaving trailers specially designed for motorcycles with *"very limited"* use in Italy, thereby hindering access to the Italian market for such trailers: see [55]-[58]. The Italian government sought to justify this ban on the basis of road safety, which is accepted in EU law as a legitimate policy objective.[29] The Grand Chamber's view was as follows:

> *"63. With regard, first, to whether the prohibition laid down in Article 56 of the Highway Code is appropriate, the Italian Republic contends that it introduced the measure because there were no type-approval rules, whether at Community level or national level, to ensure that use of a motorcycle with a trailer was not dangerous. In the absence of such a prohibition, circulation of a combination composed of a motorcycle and an unapproved trailer could be dangerous both for the driver of the vehicle and for other vehicles on the road, because the stability of the combination and its braking capacity would be affected.*
>
> *64. In that regard, it must be held that the prohibition in question is appropriate for the purpose of ensuring road safety.*
>
> *65. With regard, second, to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case-law of the Court referred to in paragraph 61 of the present judgment, in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (see, by analogy, Case C-262/02* Commission v France *[2004] ECR I-6569, paragraph 37, and Case C-141/07* Commission v Germany *[2008] ECR I-0000, paragraph 51).*
>
> *66. In the present case, the Italian Republic contends, without being contradicted on this point by the Commission, that the circulation of a combination composed of a motorcycle and a trailer is a danger to road safety. Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, by analogy, Case C-157/94* Commission v Netherlands *[1997] ECR I-5699, paragraph 58).*

[29] See, eg, Case C-338/09 *Yellow Cab Verkehrsbetriebs GmbH* [2011] 2 CMLR 23.

> *67. Although it is possible, in the present case, to envisage that measures other than the prohibition laid down in Article 56 of the Highway Code could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, such as those mentioned in point 170 of the Advocate General's Opinion, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities."*
>
> (Emphases added)

57. See also the subsequent Case C-400/08 *Commission v Spain*[30] at [75].

58. The Grand Chamber's judgment in *Italian Trailers*, which was handed down on 10 February 2009, postdates the decision in *R (Countryside Alliance and others) v Attorney General*,[31] on which the Claimant relies (see, eg, Skeleton Argument, §78), and was not cited in *Purple Parking Ltd v Heathrow Airport Ltd*[32] (relied on by the Claimant in Skeleton Argument, §§73(g) & 82).

59. Indeed, *Purple Parking* was not a case concerning justification/proportionality in the context of the free movement rights or the Principle of Equal Treatment at all. It concerned the different question whether the conduct of an airport owner with respect to the use of forecourts at airport terminals constituted abuse of a dominant position (contrary to Article 102 TFEU) and, if so, whether that abusive conduct was objectively justified. As can be seen from [181]-[183] of the judgment of Mann J, he found that the subjective views and motivations of the dominant undertaking were relevant to the question of objective justification in cases concerning Article 102 TFEU: this is the context in which the quote at §82 of the Claimant's Skeleton Argument must be read.

60. Moreover, the breadth of the margin of appreciation to be accorded to the decision-maker depends on the circumstances of the case. Where the challenged decision concerns a political, economic or social policy choice that requires complex assessment (for example, Common Agricultural Policy or public health), the margin of appreciation is a wide one: see, eg, Case C-331/88 *R v Minister of Agriculture, Fisheries and Food,*

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30 [2011] 2 CMLR 50.

31 [2008] 1 AC 719.

32 [2011] EWHC 987 (Ch).

ex p FEDESA,[33] *R v Secretary of State for Health, ex p Eastside Cheese*[34] and, more recently, *R (Sinclair Collis Ltd) v Secretary of State for Health*.[35]

61. Finally, with respect to the question of timing, as the Claimant accepts, justification/proportionality are to be considered objectively by the Court, on the basis of the evidence before it. In this regard, it should be borne in mind that in *Italian Trailers*, the Italian government apparently did not put forward any justification or overriding reason in the general public interest during the pre-litigation procedure (see [40]) and appears not to have adduced any specific evidence in support of the proposition that the circulation of trailers towed by motorcycles endangered road safety. Nevertheless, the Grand Chamber accepted the Italian government's justification.

(2) The structure of TfL's argument

62. The Claimant portrays TfL as attempting to justify the bus lane policy on a series of discrete bases: see Claimant's Skeleton Argument, §§84-86. This does not reflect accurately TfL's position.

63. The main purpose of bus lanes to is to give priority to buses during the hours when restrictions operate. A policy of allowing either taxis or PHVs or both to access bus lanes is an exception to this.[36]

64. As explained in Detailed Grounds, §§86-91,[37] it is therefore necessary to consider the question of justification in two stages. The first is the designation of bus lanes. The Detailed Grounds explain, in §§86-88, that this important policy, which promotes the efficient passage of buses and thereby maintains and improves the reliability of the London bus network, is amply justified on environmental grounds.[38]

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33 [1990] ECR I-4023.

34 [1999] 3 CMLR 123, CA.

35 [2012] 2 WLR 304, CA.

36 Bicycles and motorcycles are also allowed to use bus lanes. The decision to allow motor cycles to use them was the result of careful consideration detailed in Plowden 1, §§46-48.

37 See also Plowden 1, in particular §§40-43, 44-45 & 89-91.

38 See also Case C-205/99 *Analir* [2003] ECR I-1271, in which the CJEU accepted that ensuring the adequacy of regular maritime transport services to, from and between islands was a legitimate public interest (at [27]).

65. TfL does not understand the Claimant to take issue with this: indeed, in §89 of its Skeleton Argument, it accepts that *"[t]he improvement in journey times for bus passengers is the reason why bus lanes are there in the first place"*.

66. The next stage is to consider whether there are reasons for allowing other vehicles to have access to the bus lanes during the hours when restrictions operate. This is – as explained by Mr Plowden in his evidence – a complex question requiring judgment and the balancing of different policy considerations. In particular:

    (a) On the one hand, as the Claimant accepts in §89 of its Skeleton Argument, *"allowing more vehicles into bus lanes will to some extent slow down the traffic in those lanes (at least at certain times of day)"*. The more vehicles of a certain type that there are, the greater that slowing-down effect will be if the type in question is allowed into bus lanes.

    (b) On the other hand, there are of course benefits from allowing in other vehicles – not just for the vehicles that have access to the bus lane but also for other vehicles on the road, as traffic in the other lanes becomes less congested.

    (c) Importantly, there are also, for certain types of vehicles (in particular, taxis), wider public benefits associated with allowing vehicles of that type to drive along the left lane.

(3) The disbenefits of allowing in other vehicle types

67. As noted above, the Claimant does not take issue with the proposition that allowing more vehicles into the bus lanes will slow down the buses in those lanes; indeed, it describes this proposition, in §89 of its Skeleton Argument, as *"an obvious one"*. Nor could the Claimant sensibly take issue with the general proposition that the more vehicles one lets into the bus lanes, the more the buses in the lanes will be slowed down.

68. The Claimant does, however, raise two points:

    (a) *First*, it contends that these propositions do not justify different treatment of taxis and PHVs – or, to use the more strident rhetoric in skeleton argument §89, *"blatant (and undisputed) discrimination"* – in terms of access to bus lanes.

(b) *Second*, it makes several complaints about the report, entitled 'Modelling the Impact of Allowing Taxis and Private Hire Vehicles to use the Bus Lanes in Central London' ("**the Report**"), by SKM Colin Buchanan ("**SKMCB**"), an internationally-recognised transport modelling consultancy.

69. As to the first point, this again reflects the mischaracterisation of TfL's position explained in §§62-66 above. The disbenefits to bus passengers and to bus network reliability of allowing other vehicles into bus lanes do not, taken in isolation, justify the bus lane policy. Rather, they explain the context within which the distinction between taxis and PHVs has been drawn and the reason why it is necessary to limit the number of vehicles that are allowed access to the bus lanes.

70. Turning to the second point, there is no need for TfL to justify its position by a quantitative analysis. It would have been, and is, open to TfL to justify its policy on the basis of its own qualitative analysis (informed by its institutional expertise as regulator) of the likely benefits and disbenefits expected under different scenarios. It has adduced the Report to provide something by way of quantitative analysis of the likely effects of allowing PHVs into the bus lanes. As Mr Plowden makes clear in his evidence (Plowden 1, §73), the Report gives at most a partial insight into the impact of allowing taxis and PHVs into bus lanes. TfL does not suggest, and has never sought to suggest, that it is anything more.

71. Thus the Claimant's criticism that the Report was commissioned for the purpose of defending this claim, and was not taken into account in formulating the bus lane policy (Skeleton Argument, §§92-93) goes nowhere: the (self-evident and uncontroversial) propositions set out in §67 above were known and are reflected in the bus lane policy,[39] In any event, it is well established that *ex post facto* evidence is admissible and relevant when considering issues of objective justification under EU law: see, eg, Joined Cases C-4/02 & C-5/02 *Schönheit v Stadt Frankfurt am Main*;[40] see also *Seldon v Clarkson, Wright and Jakes* [2012] ICR 716, *per* Lady Hale at [59]-[60].

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[39] See, for example, TfL's Public Carriage Office document, 'Taxis and Bus Lanes: Policy Guidance' (2007) (at BP1/385), in particular §2, which reads, *"The Mayor has stated that TfL's general policy should be to allow taxis in all bus lanes except where specific safety or bus operational issues made this impractical."* [Emphasis added]

[40] [2003] ECR I-12575.

72. The Claimant complains that the modelling exercise focuses only on one morning peak hour (Skeleton Argument, §96) and suggests that this *"renders the conclusion inherently unreliable, given that the AM peak hour is the one hour of the day when the impact of PHVs in the bus lane has maximum impact on the flow of bus traffic"*, characterising it as a choice to model *"the absolute worst case scenario"*. As to this:

    (a) The point of having bus lanes is to ensure the reliability of the bus network even at peak times – indeed, <u>especially</u> at peak times, as these are the times of day at which the congestion benefits of a highly-used bus service are the greatest. There is no reason why, in seeking to quantify the effects of allowing PHVs into bus lanes, a peak travel hour should not be used.

    (b) In any event, SKMCB's supplementary report ("**the Supplementary Report**"), which reflects SKMCB's comments on the report by Waterman Boreham Limited ("**WB**") commissioned by the Claimant ("**the WB Report**"), explains that it is by no means clear that the morning peak hour modelled in the Report (08:00-09:00) <u>is</u> a *"worst case scenario"*. In fact, levels of congestion are fairly constant throughout the day in central London.[41]

73. As to the criticism that the Report is not based on any empirical study (Skeleton Argument, §§94-95), TfL decided, in the light of published guidance by the Department for Transport, to undertake two trials of the use of motorcycles in bus lanes. TfL could in theory have conducted similar trials for PHVs (in respect of which there has not been any governmental guidance advocating further assessments) but nothing in EU or domestic law obliges it to do so. The Report is the result of a careful modelling exercise using the best available data. It has limitations, as TfL has candidly accepted. But the Claimant's speculation that even better evidence might have been available is not itself a reason to reduce the weight given to the Report.

74. Turning from the general complaints relating to the nature of the Report and the modelling exercise undertaken by SKMCB to specific criticisms of the modelling exercise, the Claimant sets out two alleged problems in §97 of its Skeleton Argument:

    (a) *First*, the Claimant contends that it is inappropriate to use a model (the Central London Highway Assignment Model, or "**CLoHAM**") that takes 2008 as its

[41] See TfL, 'Travel in London, Report 4' (2011) ("**Travel in London 4**"), Table 4.14.

base year, when the exercise involves modelling traffic flows in 2012 (see Skeleton Argument, §97(a) and WB Report, §§3.2-3.4). As SKMCB explains in the Supplemental Report, CLoHAM was developed in 2008-09 on the basis of extensive data from 2008. The analysis underpinning the model could not be re-run using 2012 data. In any event, the available evidence suggests that the performance of the road network in central London has not changed significantly since 2008: see Travel in London 4, Table 4.3.

(b) *Second*, the Claimant contends that the assumption in the Report that PHVs represent 25% of car trips in the Congestion Charging Zone ("**CCZ**") and 2% of trips in the rest of London is flawed (see Skeleton Argument, §97(b) and WB Report, §§3.5-3.12). The criticisms of the 25% figure in the WB Report are addressed in the Supplementary Report. As can be seen there, one of those criticisms concerns the use of a 2011 estimate of PHVs with 2008 base-year traffic data. This point has already been addressed above. The other criticism is based on a misreading of Appendix A to the Report.

75. These two criticisms are the only ones that were identified by WB, which is described by Mr Griffin as *"one of the UK's leading specialists in transport planning"* (Griffin 2, §8) and which was given by Addison Lee a broad instruction to review the Report without any limitation as to the matters that it might look at in the course of that review. Nevertheless, the Claimant, in its Skeleton Argument, advances three further criticisms of the 25% figure, none of which is supported – or even mentioned – by WB, nor indeed even referred to in any evidence adduced by the Claimant. In TfL's submission, the failure of the Claimant's own expert to support these criticisms is telling. In the interests of completeness, though, the new criticisms are addressed briefly below.

(a) The 25% figure is derived by updating the proportion of car-based traffic in the CCZ that was PCO-registered in January 2007. That proportion was, according to data from TfL in Table 19 in Appendix A to the Report, 18%.[42] The Claimant asserts in its Skeleton Argument (§97(b)(1)) that the 18% figure is a flawed starting point, because it includes both taxis and PHVs. This is wrong:

[42] In fact, Table 19 contains an arithmetical error, in that it gives the sum of the number of PHVs starting/finishing in the CCZ as 135,000, whereas in fact it should be 162,000 (= 132,000 + 30,000). This suggests a figure of 21.6%, not 18%, in 2007 – and hence a higher figure than 25% in 2011. If anything, therefore, the figure of 25% understates the proportion of cars in the CCZ that were PHVs in 2011 (instead of overstating it, as the Claimant suggests is the case).

TfL can confirm that the numbers in the 'PCO-registered' column in Table 19 of Appendix A to the Report are for PHVs only, not PHVs and taxis.

(b) In any event, the derivation of the 25% figure is supported by evidence from alternative sources. SKMCB explains, in Appendix A to the Report, that if one takes the percentage of traffic in the CCZ accounted for by taxis in 2007 (20%) and applies the ratio of taxi to PHV trips originating in the City of London/Westminster (namely, 3.4:1[43]), this suggests that PHVs comprised 6% of traffic circulating in the CCZ in 2007. Dividing 6% by the percentage of traffic in the CCZ accounted for by cars and PHVs (33%) gives about 18%, which supports the view that this was a reasonable figure to use for the proportion of car-based traffic in the CCZ in 2007.

(c) The Claimant criticises this reasoning because it applies a ratio for the proportion of trips originating in the CCZ to figures for the total proportion of traffic using the CCZ: see Skeleton Argument, §97(b)(2). But Table 19 suggests that the majority of PHV traffic in the CCZ is traffic that starts or finishes in the CCZ, not 'through' traffic. Thus a ratio based on trip origin should be a reasonable approximation for what is, after all, no more than a cross-check on an estimate.

(d) The Claimant's final new attempt to undermine the 25% figure is its claim (Skeleton Argument, §97(b)(4)) that, given that PHVs have different journey profiles to taxis, it is *"too simplistic"* to use overall data for vehicles entering the CCZ as a basis for modelling traffic during a single morning peak hour. The Claimant cites an extract from the Executive Summary of a survey by GfK NOP conducted for TfL in 2009 in support of this argument. In CLoHAM, all vehicles other than buses are assumed to choose their route on the criterion of minimising the generalised cost of their trip.[44] Thus vehicles permitted to use bus lanes will do so only where it makes their journeys faster. SKMCB created, for the purposes of the Report, a new User Class of PHVs – not out of the dedicated User Class for taxis (UC3) but, rather out of the two User Classes for private cars (UC1 and UC5) (see the Report, §1.4.3). So the simulation by

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43 And not 4:3, contrary to what is suggested in the WB Report, §§3.10-3.11.

44 The phrase 'generalised cost' is used to mean a combination of the time and financial costs (fuel, tolls etc) – in practice, chiefly time.

SKMCB modelled the effect of a proportion of vehicles similar to PHVs using bus lanes when it was beneficial for them to do so, based on the origins and destinations of the trips for private cars in the relevant User Classes. In TfL's submission, this was a sensible course of action: insofar as PHVs cannot ply for hire or be picked up at a taxi rank, the origins and destinations of their trips are more likely to be similar to those of private cars than to those of taxis. Thus the modelling in the Report of the journeys of the User Class of PHVs was based on a reasonable methodology that did not assume that the journey profiles of PHVs are the same as those of taxis.

76. Having attacked the Report on a variety of bases that are not advanced by its own experts, the Claimant then tries minimise its impact by claiming that the Report shows that introducing PHVs into bus lanes *"would have no perceptible impact on traffic flows even in the* worst case scenario *that SKM have modelled"* (Skeleton Argument, §99; emphasis in original).

77. This is simply not a fair characterisation of the findings in the Report. Even looking at all categories of vehicle, Table 17 of the Report makes it clear that total travel time is minimised by having taxis in bus lanes and is higher if taxis and PHVs are both allowed into bus lanes than if neither are allowed. Table 18 of the Report, which summarises the results of the cost-benefit analysis, shows that the benefits of allowing taxis to use bus lanes are higher, both in the CCZ/Inner Ring Road area and across the whole model network, than the benefits of allowing both taxis and PHVs to use bus lanes. Indeed, as SKMCB observes, in the Supplementary Report, "*there is an estimated overall disbenefit in the CCZ and Inner Ring Road of some £525,000 of permitting PHVs and taxis in the bus lanes, when compared to the existing situation"*. (This is, of course, despite bus users' time being valued – in accordance with standard Department for Transport modelling parameters – at less than half that of taxi/PHV users'.)

78. Secondly, the focus of the exercise is not on total travel time across all categories of vehicle but is primarily on the impact on bus users – the object being (as noted above) to quantify the negative impact on bus users of allowing PHVs into the bus lanes. As noted in Plowden 1, §§77-79, when one focuses on the impact on bus users, it is apparent that the disbenefits of scenario 3 are considerably greater than those of scenario 2.

79. Thirdly, as SKMCB points out in the Supplementary Report, the vehicle delay and vehicle speed figures in the Report are averages only. Changes would not be experienced uniformly across the whole area: a *"very small"* change in the average (to quote from §100 of the Claimant's Skeleton Argument) could translate into significant delays at certain locations (eg busy junctions).

80. Finally, it is of course up to a Member State to choose, when it institutes a policy or takes a decision to promote an objective in the general public interest, to what level it wishes to promote that objective: for example, how cautious it wants to be in protecting public health; how stringent it wants road safety standards to be; how low it wants emissions to be. That other levels of protection could have been chosen is irrelevant.

81. In the present case, as explained in the Detailed Grounds and in Plowden 1, the bus network is of critical importance to London's public transport network and its reliability is of paramount importance; bus lanes are, in turn, a critical part of ensuring that reliability; and any change in policy that could jeopardise that reliability therefore poses a risk. It is for the public authority charged by Parliament with making this decision – in this case TfL and the other traffic authorities – to decide what level of risk is an acceptable one.

82. In short, the position is – as common sense would suggest – that allowing taxis into bus lanes produces some disbenefit to bus users but that allowing in taxis and PHVs produces a substantially greater disbenefit to bus users.

(4) The benefits of allowing in taxis and PHVs

83. The wider public benefits associated with enabling taxis to drive through bus lanes are explained in detail in Plowden 1, §67. As Mr Plowden explains:

    (a) Not only are taxis able to ply for hire but hailing from the street comprises a substantial part of their business and is used by hundreds of thousands of passengers a week (see further §11 above). Having access to the left lane enables them to be visible to passengers who might wish to hail them and to pick up such passengers in a convenient, safe and timely fashion. By contrast, PHVs do not operate in the street hailing market and so do not need access to the left lane for this reason.

(b) The requirement to be able to hail safely and conveniently is of particular significance for disabled persons, who may find it more difficult than non-disabled persons to spot taxis and to attract their attention. It is also of particular relevance given the stringent accessibility requirements to which taxis are subject – including the requirement to be able to accommodate a standard-sized wheelchair. By contrast, PHVs, which are not permitted to operate in the street hailing market, are not subject to the same accessibility requirements. Many of them are not accessible to wheelchair users at all: see Plowden 2, §33.

(c) Taxis have a distinctive appearance (which is, in part, a reflection of the fact that there are only two makes of vehicle currently in production that satisfy the Conditions of Fitness), which not only assists TfL's and other enforcement officers in identifying them but also, importantly, enables other road users to distinguish them from ordinary private cars with relative ease. By contrast, as explained in §5(a), there are more than 700 different makes and model of PHV licensed in London, many of which look (but for their signage) like private cars.[45]

84. These are, in TfL's submission, overriding reasons in the general public interest. Thus there are public benefits associated with allowing taxis into bus lanes that are not associated with PHVs, which outweigh the disbenefits to bus users (which are, as explained in the Report, greater for PHVs than for taxis).

85. There are also, as Mr Plowden notes in Plowden 1, §67, further objective points of difference between taxis and PHVs that, while primarily of an economic nature, are nevertheless relevant considerations:

(a) Taxis are, as noted above, subject to a requirement of compellability (ie, they are required to accept fares within specified limits), which curtails the commercial freedom of drivers but benefits the travelling public. By contrast,

[45] The issue of signage is addressed in Plowden 1, §§22, 56 & 67(g) and in Griffin 2, §§11-16. Mr Plowden explains, in Plowden 2, §§10-12, that Mr Griffin is correct to point out that there is a further red route sign on the front windscreens of PHVs but that this does not affect the question whether the general public can distinguish PHVs from regular private cars. Mr Plowden also addresses, in §§13-17 of Plowden 2, the reactions of the PHV trade – and also of Addison Lee – to TfL's proposals and draft designs for new PHV signage.

PHVs are not subject to such a requirement: they are free to refuse fares for any reason or none.

(b) Taxis charge metered fares, the levels of which are regulated by TfL. As Mr Plowden explains in §20 of Plowden 2, those fares are set by TfL on the basis of the operating and running costs of a taxi and are increased only in line with the relevant cost index. Longer journey times translate into higher fares. The same is not true for PHVs.

86. The Claimant's various responses to these public benefits (set out in Skeleton Argument, §§104-120) may be grouped conveniently into five headings:

(a) *First*, the Claimant argues in relation to some of the benefits listed above that they are *ex post facto* justifications, have not been raised previously, have not been mentioned by London Borough Councils, etc: see, eg, Skeleton Argument, §§104 & 118. Given that justification/proportionality is to be assessed by the Court, on what is before it (see §61 above), such timing points are irrelevant. Moreover, as said in §5(b) above (and in Plowden 2, §§25 & 34), TfL is not able to comment on what other traffic authorities may or may not have said in the past.

(b) *Secondly*, the Claimant complains in relation to some of the benefits about a lack of evidence: see, eg, skeleton argument §110 & 119. This is said to be contrary to the requirements of EU law, on the basis of Case C-368/95 *Familiapress*.[46] The answer is that TfL has adduced evidence in support of the public benefits arising from giving taxis access to bus lanes: it has adduced two witness statements from Mr Plowden, who is the Director of Planning for Surface Transport. So by 'no evidence', the Claimant must mean that TfL has not adduced any (or any sufficient) statistical or quantitative evidence to prove the existence of the considerations in question. But there is no general requirement in EU or domestic law for a public authority to adduce statistical evidence in support of the existence of considerations that justify its decisions: whether such evidence is appropriate depends upon the nature of the considerations and the circumstances of the decision. In the case of

[46] [1997] ECR I-3689.

Familiapress, the CJEU took the view that given the nature of the restriction in issue, a study of the Austrian press market was necessary to determine whether the claimed justification (maintenance of press diversity) was justified. In other cases – notably, *Italian Trailers* (which was concerned with road traffic regulation) – no such studies were needed. In the present case, the two considerations that the Claimant says are unsupported by any evidence – namely, the potential for enforcement difficulties if PHVs are allowed to drive through bus lanes and the proposition that compellability may require taxi drivers to accept some fares that they regard as uneconomical – are not matters that require statistical or quantitative evidence because:

(i) It is common sense (or, in any event, a matter that the Court is entitled to accept by way of witness evidence given on behalf of an institutionally expert regulator) that it is easier to distinguish a taxi from a regular private car than to distinguish a PHV. It follows that the risk of confusion among the travelling public must be greater if PHVs were allowed to drive in bus lanes than at present.

(ii) It is, again, common sense (or, in any event, a matter that the Court is entitled to accept by way of witness evidence given on behalf of an institutionally expert regulator) that if a taxi driver is obliged to accept any fare within specified limits, there may be circumstances in which the driver would, but for the obligation, have preferred to decline for economic reasons. If not, there would not be a need for a compellability requirement. To give an illustration, taxis wishing to use the taxi ranks at Heathrow Airport have to journey to Heathrow, pay a fee[47] to enter the 'taxi feeder park' (which gives access to the ranks), and queue to enter the ranks. The reason why taxi drivers are prepared to undertake these steps is presumably that they expect to receive higher fares than in more central parts of London. If a taxi, having driven to Heathrow, incurred the fee and queued to reach the front of a rank, is then picked up by a passenger who wants to take a relatively short journey, the fare may not reflect the total time and

[47] To compensate drivers for having to pay this fee, a 'Heathrow Extra' is charged for trips starting from Heathrow Airport.

resources that the taxi driver has expended, and he or she might – but for the requirement of compellability – have preferred to decline the fare and wait for a passenger wanting a longer journey.

(c) *Thirdly*, the Claimant says that there is no evidence that accessibility for disabled passengers is a *"real issue"*: see Skeleton Argument, §106. Mr Plowden explains, in Plowden 2, §§27-29, why TfL disagrees with this assessment. Mr Plowden points out that, even if only a minority of wheelchair users wish to hail a taxi from the street, they are still entitled to be able to hail conveniently and safely, like any other member of the travelling public. Moreover, TfL would repeat the point made at §§80-81 above that it is for the public authority to decide the standard to which it wishes to promote its objectives. Mr Griffin may consider that the ability of those disabled passengers who wish to hail from the street on a London road with a bus lane is a matter of *"vanishingly small"* relevance (Griffin 2, §30). For TfL, ensuring the transport system in London is accessible to disabled people is a critical priority: see Plowden 1, §§23 & 29-30 for further details of the steps that TfL has taken in this regard. TfL regards the ability of disabled people to hail taxis on the street as an important aspect of this. It would be a strong thing for this Court to disagree.

(d) The Claimant's *fourth* response is to say that the accessibility benefits set out by TfL from allowing taxis to use the bus lanes are, at most, justifications for letting taxis in, not for keeping PHVs out: see Skeleton Argument, §107. This misses the point, explained above, about the need to strike a balance between disbenefits to bus users and the benefits associated with allowing taxis to use them.

(e) The Claimant's *fifth* response is to say, in relation to several of the public benefits set out by TfL, that the same benefits could have been achieved by alternative measures: see Skeleton Argument, §§107, 111-112 & 120 and §102, in which the same argument is made regarding congestion effects on bus users. As to this:

(i) To repeat what has been said above, it is not appropriate to analyse each of the wider public benefits in isolation and consider whether each

could have been achieved in some other way. TfL has had to strike a balance, weighing those benefits against the disbenefits to bus users of having more vehicles in the bus lanes.

(ii) In any event, as the Grand Chamber stated in *Italian Trailers*, a Member State is not obliged to prove that no other measure could achieve the same effect. TfL therefore does not have to show there is no other solution that would have achieved the same degree of delay to bus users and all of the public benefits of allowing taxis into bus lanes.

(iii) Moreover, as explained in Plowden 1, §§95, a more nuanced policy might itself cause enforcement difficulties. A clear regulatory regime that may readily be understood is a benefit in its own right – a point that, again, finds support from the Grand Chamber in *Italian Trailers*.

In any event, the alternatives suggested by the Claimant are inappropriate:

- The suggestion in §102 of prohibiting taxis and PHVs from bus lanes would not have the wider public benefits associated with taxi access.

- The second suggestion in §102 of reserving the bus lane for bus lanes during peak travel hours only ignore the fact that bus lane restrictions are already tailored to be operational only during the hours when according priority to buses is considered necessary.

- The other suggestion in §102 of allowing taxis and PHVs to use bus lanes only when carrying passengers ignores the enforcement difficulties to which this would give rise and would not enable taxis conveniently and safely to be hailed from the street.

- The suggestion in §107 of allowing taxis to enter bus lanes on the same basis as PHVs – ie, to pick up and set down only – does not meet the accessibility points discussed above: passengers (especially disabled passengers) need to be visible to taxi drivers to hail from the street.

- The suggestion in §111 that TfL could achieve its desired enforcement benefits by specifying that any car painted a certain colour could use the bus lane is, with respect, facile.

- The suggestion in §120 of increasing the minimum fare to address disadvantages to which the requirement of compellability may give rise is not in keeping with TfL's policy of raising fares only in line with the running costs of taxis and would raise costs for the travelling public.

87. In conclusion, none of the arguments raised by the Claimant suggests that the bus lane policy is not amply justified. The balance that TfL has struck preserves the main benefits of bus lanes but allows other categories of vehicle to use the bus lanes if there are appropriate policy benefits.

D7. ***Articles 107-108 TFEU: State aid***

88. As explained in the Detailed Grounds, §93, it is TfL's position that the bus lane policy does not comprise State aid because (i) it is not selective, (ii) it is justified by the nature or general scheme of the system of which it forms part and (iii) there is no evidence that the bus lane policy is liable to affect trade between Member States.

(1) The measure is not selective

89. The General Court's recent judgment in Case T-210/02 RENV *British Aggregates Association v Commission*[48] confirms in [47] that the test of the selectivity of a measure is as set out in §93(a) of TfL's Detailed Grounds:

> *"As regards the criterion of the selectivity of the advantage, it is necessary to consider whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC in comparison with other undertakings in a comparable legal and factual situation in the light of the objective pursued by the measure concerned (*Adria-Wien Pipeline*, cited in paragraph 35 above, paragraph 41; see also Case C-172/03* Heiser *[2005] ECR I-1627, paragraph 40; Joined Cases C-182/03 and C-217/03* Belgium and Forum 187 v Commission *[2006] ECR I-5479, paragraph 119; Case C-88/03* Portugal v Commission *[2006] ECR I-7115, paragraph 54; and Joined Cases C-428/06 to C-434/06* UGT-Rioja and Others *[2008] ECR I-6747, paragraph 46)."* [Emphasis added]

90. Starting with the objective of the measure in question in this case, TfL is a statutory body, whose purposes reflect the terms of the relevant statutory provisions. Its overall purpose, reflecting the terms of sections 141 are 154(3) of the Greater London Authority

[48] Judgment of 7 March 2012.

Act 1999, is to promote and encourage safe, integrated, efficient and economic transport facilities and services to, from and within London: see Detailed Grounds, §5. (This broad purpose encompasses a range of specific goals, including reducing congestion and promoting the accessibility of the transport network.)

91. The purpose of designating bus lanes is (as explained in Plowden 1, §39) to ensure and promote bus network reliability – thereby furthering the broad purpose set out above. Furthermore, bus lanes support a variety of specific goals, including the reduction of congestion and the protection of vulnerable road users: see Plowden 1, §§40-43.

92. The purpose of the bus lane policy – which is an exception to the rule giving priority to buses – is to enable some other vehicles to use the bus lanes where (i) there is a public interest reason for them to do so and (ii) allowing them to do so does not impact unacceptably on bus reliability. Again, this furthers the broad purpose in §90 above. There is a public interest reason to allow cycles and motorcycles to use the bus lanes. The same is true of taxis for the reasons set out above. But it is not true of PHVs, which cannot ply for hire. Taxis and PHVs therefore are simply not in a comparable position as regards the objective of the policy.

93. The Claimant asserts, in §131 of its Skeleton Argument, that "*the fact that Black Cabs and PHVs are licensed under different rules has no relevance at all to the principles and objectives of the bus lane legislation*". But the words 'licensed under different rules' miss the point: as explained in §§9-12 above and in §93(d) of the Detailed Grounds, by virtue of operating under fundamentally different regulatory regimes, taxis and PHVs compete but only to a limited extent.

94. Taxis in fact operate in <u>another market</u> that PHVs do not operate in – namely, the market for hailing taxis from the street and picking them up at taxi ranks. That market is different to the market for pre-booked journeys in important respects. These include the flexibility for the travelling public (including disabled passengers) of being able to hail a taxi from any street in London (or at any rank) without having to pre-book a designated time and location, and of being able to go anywhere (up to specified distance/duration limits) unless the driver has a reasonable excuse.[49]

[49] An exemption that is to be construed narrowly and does not include the driver's objections to the journey length or destination.

95. Moreover, the street hailing market and the pre-booked market are not identical in terms of their respective road usage needs and priorities. As TfL has explained, it is particularly important for passengers who hail from the street (including disabled passengers) to be readily visible to taxis from the kerb, and for taxis to be able to reach them swiftly and conveniently.

96. In addition, taxis and PHVs may be distinguished, *qua* road users in London, in terms of the ease with which they can be distinguished not only by enforcement officials but by the general public: see §83(c) above.

97. In the circumstances, TfL submits that the situations of the two types of vehicles clearly may be distinguished and the requirement of selectivity is not made out.

(2) The measure is justified by the nature or general scheme of the system

98. The Claimant accepts, in §132 of its Skeleton Argument, that the question whether the bus lane policy is justified by the nature or general scheme of the bus lane legislation is in substance intertwined with the question of justification.

99. For the reasons set out in the subsection above (§§54-87), it is TfL's position that the distinction drawn in the bus lane policy between taxis and PHVs is amply justified; hence this is a further reason why the policy does not constitute State aid.

(3) The measure is not liable to affect trade between Member States

100. It is important to bear in mind that an effect on trade is not the same as an effect on competition: the two are distinct requirements, both of which must be fulfilled for Article 107 TFEU to be engaged.

101. The Claimant's evidence in this case in relation to the provision of services is largely devoted to seeking to establish the following propositions: (i) it has customers from other Member States; and (ii) some of those customers are put off booking an Addison Lee trip and prefer to use taxis because of the bus lane policy.

102. TfL's criticisms of this evidence may be found earlier in this skeleton argument. But even if the evidence established what the Claimant says it does, at most, it would show that competition within London, between taxis and PHV operators, was liable to be

distorted by the bus lane policy. It would not show that the pattern of trade between the UK and other Member States was altered, or was liable to be altered.

103. See in this regard the judgment of the CJEU in Case 42/82 *Remia v Commission*[50] at [22], which summarises the test, in cases under Articles 101 and 102 TFEU, for an effect on trade between Member States:

> *"... [I]n order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States. ..."* [Emphasis added]

104. Taxi and PHV journeys within London are inherently local and not cross-border in nature. Moreover, taxi services in, eg Madrid or Paris are not substitutes for taxi services in London, nor *vice versa*.

105. In the Irish hospitals case referred to in §134 of the Claimant's skeleton argument,[51] the Commission considered whether operators might, as a result of the aid measure, decide to create facilities in Ireland rather than in another Member State: see Decision, (20). The Commission decided that the measure did not benefit hospitals to such an extent that it would be a reason for operators to do so.

106. Similarly, in the Dutch museum case referred to in §134,[52] the Commission considered whether the decision by the Dutch authorities to waive an amount of debt was likely to generate commercial benefits on an international scale (presumably by attracting tourists from other Member States, who had come, at least in part, specifically to see the museum): see Decision, (17)-(18). The Commission concluded that this was "*very unlikely*", in view of the local nature of demand addressed by the museum.

107. By contrast, in this case, there is nothing in the evidence adduced by the Claimant to suggest that there is a risk of, for example, a person choosing not to travel to London but to travel to Madrid or Paris instead because of the bus lane policy, or even choosing not to undertake a journey in London because of the policy. At its highest, the evidence

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50 [1985] ECR 2545.

51 Case N 543/2001 *Ireland: capital allowances for hospitals* (27 February 2002).

52 Case N 377/2007 *Bataviawerf* (28 November 2007).

suggests a potential risk that once a person is in London, he may choose to undertake his journey by taxi instead of PHV. The consequences of this choice are a purely inter-State matter. The fact that the person may have come from another Member State, or may be an employee of a company headquartered in another Member State, does not alter that position.

108. For the reasons set out above, Article 107 TFEU is of no application because the bus lane policy does not constitute State aid.

E. CONCLUSION

109. For these reasons, TfL submits that this claim should be dismissed.

110. If, contrary to TfL's submissions, the Court finds that it is unlawful to distinguish between taxis and PHVs in relation to access to bus lanes, it would not of course follow that PHVs must be given access to bus lanes. It would remain open to TfL and other traffic authorities to decide to exclude both taxis and PHVs. Because that choice is one properly left to the relevant legislators, it would be inappropriate to "read down" the legislation. Further submissions on the appropriate remedy will be made, if necessary, in the light of the Court's judgment.

MARTIN CHAMBERLAIN

SARAH LOVE

15 June 2012