IN THE COURT OF APPEAL Case No: 2012/1936

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
THE HON. MR JUSTICE BURTON

B E T W E E N:

EVENTECH LIMITED

Appellant

-v-

(1) TRANSPORT FOR LONDON
(2) THE PARKING ADJUDICATOR
(3) LONDON BOROUGH OF CAMDEN

Respondents

CONSOLIDATED SKELETON ARGUMENT FOR TRANSPORT FOR LONDON

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*Bundle references are to the Appeal Bundle in the form **[bundle/tab]** unless otherwise noted.*

*References to paragraphs in the Judgment of Burton J are in the form **[Jt para x]***

SUGGESTED READING

Judgment of Burton J **[1/6]**
Original skeleton arguments of Claimant and TfL **[1/3 and 11]**
Consolidated skeleton arguments of Claimant and TfL **[1/12 and [13]]**

INTRODUCTION AND SUMMARY

Background and the central point before this Court

1. The claim giving rise to this appeal arises from penalty charge notices ("PCNs") issued by the London Borough of Camden ("Camden") in respect of two private hire vehicles ("PHVs", known colloquially as "minicabs") registered to the Claimant. The

PCNs were issued because the minicabs concerned had been using bus lanes during the hours when those lanes were operational.

2. Camden, like other local authorities in London and like Transport for London ("TfL") itself,[1] allow hackney carriages (known colloquially as "taxis" or "black cabs"), but not minicabs, to use most bus lanes. Taxis are subject to different and more onerous statutory regulation than minicabs; and taxis, but not minicabs, may lawfully "ply for hire" (ie pick up fares on the street which have not been pre-booked). It is TfL's policy to allow taxis – but not minicabs – to use bus lanes where this does not impact on safety or impact unreasonably on the primary purpose of bus lanes – which is to give priority to buses ("the Policy").

3. Eventech, which is an associated company of the PHV operator Addison Lee plc ("Addison Lee"), argued below – and, with the permission of Arden LJ, argues here – that the distinction drawn by the Policy between taxis and minicabs contravenes European Union law and that, as a result, the PCNs must be set aside. In particular, Eventech says that the distinction contravenes:
    a. Article 56 of the Treaty on the Functioning of the European Union ("TFEU"), which guarantees the free movement of services;
    b. the principle of equal treatment, one of the fundamental principles of EU law; and
    c. Article 105 TFEU, which governs state aid.

4. Eventech had argued before Burton J that the distinction also contravened Article 49 TFEU, which guarantees the freedom of establishment (on the basis that it would act as a deterrent to EU citizens thinking of coming to the UK to establish themselves as minicab drivers). That argument is not pursued on appeal.

5. Eventech had also argued below that the Policy was irrational at common law. That argument, too, is not pursued on appeal. This appeal therefore proceeds on the basis that, as a matter of domestic law, the Policy is rational (and, indeed, lawful in all other respects). It is worth pausing briefly to consider the implications of this position. By abandoning its rationality challenge, Eventech accepts that the Policy:

[1] On some roads, traffic regulation is the responsibility of the London boroughs; on other, more major roads, it is TfL which is the traffic authority responsible for traffic regulation.

- is *"within the range of reasonable decisions open to [TfL]"*;[2]
- is not based on a *"material misunderstanding of the true facts"* or *"failure to have regard to the proper factual situation"*;[3]
- is not vitiated by any *"error of reasoning which robs the decision of logic"* such that it does not *"add up"*;[4]
- is not vitiated, in particular, by inconsistency (it being a *"cardinal principle of public administration that all persons in a similar position should be treated similarly"*[5]);

but, on the contrary:

- is *"rationally connected"* to those objectives of TfL that it is designed to further;[6]
- is supported by *"objective evidence ...capable of sustaining [TfL's] decision"*;[7] and
- is supported by reasons that are *"proper, adequate and intelligible"*.[8]

6. Thus one can distil the central point before this Court into a single question: Is the Policy, <u>despite</u> meeting the requirements of common-law rationality, still unlawful because it falls foul of some more demanding requirement imposed by EU law?

7. Burton J found that it was not. He accepted Eventech's argument that EU law applied to the Policy and its argument as to the appropriate test of proportionality, holding that the most stringent (and therefore least deferential) of the possible tests of proportionality applied.[9] But, even applying that test to the facts of the present case, he found the Policy to be justified.

8. Eventech now invites this Court to overturn that finding. TfL's position is that it was open to Burton J was entitled to reach that finding, and that it falls comfortably within the *"bounds within which reasonable disagreement is possible"*[10]. To the

[2] *Boddington v British Transport Police* [1999] 2 AC 143 at 175, *per* Lord Steyn.
[3] *R (Ali) v Secretary of State for the Home Department* [2007] EWHC 1983 (Admin) at [24] and [26].
[4] *R v Parliamentary Commissioner for Administration, ex p Balchin (No.1)* [1998] 1 PLR 1, 13.
[5] *R (Cheung) v Hertfordshire County Council*, The Times (4 April 1998), as cited in *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) at [74].
[6] *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 at 1415, *per* Dyson LJ (as he then was).
[7] *R (MD (Gambia)) v Secretary of State for the Home Department* [2011] EWCA Civ 121 at [25], *per* Elias LJ.
[8] *R v Brent London Borough Council, ex p Baruwa* (1997) 29 HLR 915 at 929, *per* Schiemann LJ.
[9] Now that permission has been granted. TfL appeals against both of these conclusions.
[10] *Todd v Adams (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509, 2 Lloyd's Rep 293 at 319-20, *per* Mance LJ (as he then was). See also *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR

extent that it is necessary to say so, the finding was also correct. Eventech's claim must therefore fail.

TfL's submissions summarised

9. TfL's submissions on the various separate issues before this Court may be summarised as follows:
    a. Free movement of services and transport: Burton J was correct to hold that Article 56 TFEU (free movement of services) cannot apply to this case because transport regulation falls within the material scope of the Transport Chapter of the TFEU (Article 58 TFEU);
    b. Free movement of services and remoteness: Even if (which is denied) Article 56 could apply, any free movement effects are too "uncertain or indirect" to amount to a restriction;
    c. Equal treatment: Burton J was wrong to hold that the principle of "equal treatment" applied to a case such as this which is otherwise outside the scope of EU law;
    d. Proportionality:
        i. On any fair reading of the judgment, Burton J in fact applied the stringent test for proportionality derived from the case law on free movement of services and contended for by Eventech;
        ii. In fact, he should have applied a different and less stringent test for proportionality;
        iii. But, even if Burton J was correct to apply the stringent proportionality test contended for by Eventech, he was entitled (or, to the extent that is necessary so to contend, correct) to find the Policy proportionate. Moreover, Burton J's conclusions are further supported by the evidence before him in the witness statements of Mr Plowden and SKM Report;[11]

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577 at [17]; and *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2001] UKHL 23, 1 WLR 1325 at [46], *per* Lord Mance. In the context of the European Convention on Human Rights, the Court of Appeal has held that the assessment of proportionality is a matter of "judgment" or "evaluation". Short of perversity, the appellate courts are not entitled to substitute their judgment for that of the first-instance tribunal on such questions where the latter's judgment is exercised on a legally correct basis, taking into account relevant factors: see *PE (Peru) v Secretary of State for the Home Department* [2011] EWCA Civ 274 at [11] and [24]-[25], *per* Hooper LJ, and [27]-[29], *per* Sedley LJ.

[11] **[2/20]** and **[2/21]**.

e. State Aid: Eventech should not be permitted to advance before this Court an argument which it did not run below. But, in any event, the State aid challenge should fail because:
    i. the Policy does not distort or threaten to distort competition by favouring certain undertakings (the "selectivity requirement");
    ii. the Policy is not liable to distort competition or affect trade between member states.

10. TfL submits that it is neither necessary nor appropriate to refer any question to the Court of Justice because:
    a. In the light of Burton J's conclusion that the Policy was justified even applying the test of proportionality for which Eventech contended, none of the questions of EU law could be determinative of the case. Even if they were all resolved in Eventech's favour, its claim would still fail.
    b. In any event, Eventech's arguments on freedom to provide services, equal treatment and State aid are insufficiently soundly based to warrant a reference in this case.

FACTUAL AND LEGAL BACKGROUND

TfL and the Policy

11. TfL is a statutory corporation created by s. 154 of the Greater London Authority Act 1999 ("the 1999 Act"). TfL has a duty under s. 154(3) of the 1999 Act to exercise its functions to facilitate the Greater London Authority's ("GLA's") discharge of its general transport duty.

12. As noted by Burton J **[Jt para 3]**, under s.141 of the 1999 Act, TfL is under a duty to develop and implement policies "*for the promotion of safe, integrated, efficient and economic transport facilities and services to, from and within Greater London*."

13. TfL has a power, under para 32 of Sch. 11 to the 1999 Act, to do "*all things which in its opinion are necessary or expedient to facilitate the discharge by it of any of its functions*."

14. Under s. 121A(1A) of the Road Traffic Regulation Act 1984 ("the 1984 Act"), TfL is the traffic authority for all GLA roads. GLA roads (sometimes called "red routes") are defined in ss. 329(1) and 14D of the Highways Act 1980. GLA roads include some 126 km of bus lanes and carry approximately one third of London's traffic: see Plowden para 15 **[2/20].**

15. As traffic authority, TfL is empowered under s. 6 of the 1984 Act to make orders for controlling or regulating vehicular and other traffic on the roads for which it is the traffic authority. TfL has made a large number of such traffic regulation orders ("TROs") designating certain traffic lanes as bus lanes.

16. The effect of these TROs is that only those vehicles which are prescribed may use the designated bus lanes. The TROs designate the vehicle types that are allowed to use the bus lane in question.

17. Although GLA roads account for approximately 5% of London's roads, they account for 38% of London's bus lanes **[Jt para 3]**.

Taxis

18. TfL is also responsible for the licensing of hackney carriages in London pursuant to s. 253 of and Sch. 20 to the 1999 Act, consolidating the power initially adopted under the London Cab Order 1934, made under the Metropolitan Public Carriage Act 1869 ("the 1869 Act").

19. "Taxi" and "hackney carriage" are used interchangeably. "Taxi" is used in the Equality Act 2010. It is defined in s. 173(1) of that Act as a vehicle licensed under s. 37 of the Town Police Clauses Act 1947 or s. 6 of the 1869 Act. These are vehicles which can ply for hire**.** "Taxi" is defined in the relevant TRO by reference to reg. 4 of the Traffic Signs Regulations and General Directions 2002 ("the 2002 Regulations"),[12] which use the same definition for "taxi" as the Equality Act 2010.

[12] SI No. 2002/3113.

20. As noted by Burton J, the regulatory regime which applies to taxis has the following features:

    a. Only taxis may "ply for hire" **[Jt paras 9, 12(i)]**. In other words, they can be "hailed" on the street or picked up at ranks. In a survey before the judge (which was relied on by Eventech) **[3/30],** 52% of journeys resulted from street hailings **[Jt para 13**]; 34% were picked up in ranks **[Jt para 50(i)]**; only 8% were pre-booked **[Jt para 9]**;

    b. Under the existing licensing regime, London taxi vehicles must comply with certain detailed "conditions of fitness" ("CoF") **[Jt para 11, 12(iii); w/s Plowden 2/20]**. Only two vehicle types currently being manufactured comply with the existing CoF, which contain various requirements including a "turning circle" requirement that most vehicles cannot meet. Taxis are required to have a characteristic, illuminated "TAXI" sign;

    c. Taxis are bound by the "cab rank" rule. Where a taxi at a rank or on the street accepts a passenger the taxi must take the passenger anywhere they wish to go within a prescribed distance or journey time **[Jt para 12(ii)**];[13]

    d. Under the CoF, and the Equality Act 2010, taxis must be accessible by a standard size wheelchair [**Jt para 12(v)**];

    e. The fares of taxis are strictly regulated and must not exceed that shown by the taxi meter **[Jt para 12(iv)].** TfL has the statutory power to set maximum fares under the 1869 Act;

    f. Before being licensed, taxi drivers must undertake the "Knowledge of London" examination, which can take between two and four years to prepare for ("the Knowledge"). They must also pass the Driving Standards Agency Advanced Driving Assessment [**Jt para 12(vi)**];

    g. There are approximately 23,000 taxis licensed by TfL **[Jt para 11].**

Minicabs

21. TfL is also responsible for the licensing of minicabs under the Private Hire Vehicles (London) Act 1998, as amended by s. 254 of and Sch 22 to the 1999 Act. As to these:

    a. Minicabs are <u>not</u> "taxis" for the purpose of the 2002 Regulations, 1869 Act or licensing legislation or under the Equality Act 2010 **[Jt para 10]**;

[13] Currently taxis are "compellable" to transport a passenger within a 12 mile radius (or 20 miles if the pick up is from Heathrow Airport) or a journey lasting up to 1 hour.

b. Minicabs may not ply for hire in London and may only be pre booked through an operating centre specified in the licence **[Jt para 10]**;

c. Minicabs are not subject to the "cab rank" rule **[Jt para 12(ii)]**. They can refuse to take fares if they wish;

d. Minicabs are not subject to the CoF and may be of almost any design. Burton J noted that *"there are some 700 different makes and models of vehicles presently licensed"* **[Jt para 12(iii)]**;

e. The rates charged by minicabs are not regulated by statute. Rates for Eventech's journeys are calculated and quoted in advance by reference to the distance to be travelled irrespective of the journey's duration, but this is not the only way minicabs may charge **[Jt para 12(iv)]**;

f. Minicabs need not be wheelchair accessible under the Equality Act **[Jt para 12(v)]** and the vast majority are not;

g. Minicab drivers need not pass the Knowledge of London, which generally takes taxi drivers between 2 and 4 years **[Jt para 12(vi)].** Instead, they take a test the training for which generally takes about one day: Plowden, para. 22 **[2/20]**.[14]

h. On the figures available to the court, there were approximately 50,000 minicabs and 60,000 minicab drivers licensed by TfL **[Jt para 11]**.[15]

The Policy

22. A bus lane policy has been in place since before TfL came into existence under the 1999 Act. The relevant part of the TfL Public Carriage Office Taxi and Bus Lanes Policy 2007 is set out at **Jt para 13**. It establishes a policy to:

> "*allow for taxis in all bus lanes unless their inclusion would cause significant delay to buses or would materially worsen the safety of road users including pedestrians and taking account of the effects on safety of excluding taxis from the bus lane*."

23. The Policy Guidance states as follows **[3/29]**:

> "*1. Taxi access to bus lanes reflects the recognition in the Mayor's Transport Strategy that taxis are a "vital part of London's integrated transport network, fulfilling demands that cannot be met by the bus, train or tube."*

[14] Minicab drivers have to pass a general topographical test of London, training for which generally takes about a day: see Plowden, **[2/20]** para. 22.

[15] More recent figures from Travel in London Report 5 (based on 2012 data) indicate that there are 54,000 licensed minicabs and 64,500 licensed minicab drivers.

2. 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.

3. This policy applies for the purposes of taxis driving in bus lanes as through routes and entering bus lanes to pick up and set down. "Pick up" and "set down" mean that there is an intended passenger waiting at the kerbside or that an existing passenger wishes to be set down."

24. At first instance TfL relied on a report prepared by transport modelling consultancy SKM Colin Buchanan ("the SKM report") **[2/21]** to provide a partial insight into the traffic modelling of the bus lanes. As noted by the Judge, although the written submissions of Eventech criticised certain features of this report, counsel for Eventech took "*the sensible advocate's course of putting her submissions for the Claimant primarily on the basis of TfL's own report…[the Claimant's critique] did not, in the event, feature in the hearing*." **[Jt para 15]**.

25. According to the SKM report **[Jt para 50(i)]**, travel time increases for bus passengers during the morning peak hour (8.00-9.00am) by 266 person hours as a result of allowing taxis in bus lanes, but by 431 person hours if minicabs are also included. These figures are averages across central London; the differential in these figures will be greater in those locations which are most congested.

Procedural history

26. As explained in para 1 above, this challenge arose in the context of two PCNs issued by Camden. The PCNs in question were issued on 13 and 20 October 2010, in respect of Addison Lee drivers driving in the bus lane on Southampton Row.[16] The bus lane on Southampton Row is designated under the Camden Bus Lanes (No 1) Traffic Order 2008 ("the Camden Order"). Under the Camden Order buses, Dial a Ride Busses, pedal cycles and "taxis" are permitted to drive in the bus lanes. "Taxi" is defined, in the Camden Order, by reference to the 2002 Regulations. As explained in para 17(a) above, the definition in the 2002 Regulations does not include minicabs.

27. The Claimant challenged the PCNs before the Parking Adjudicator **[1/16].**

[16]Eventech has not contested that its vehicles used the bus lane on those occasions: see eg para. 24 of its Skeleton before Burton J **[1/18].**

28. On 16 August 2011 the Parking Adjudicator held that he had no jurisdiction to consider the validity of the Camden Order **[1/21].** It was agreed below that, as an "emanation of the state", he was entitled (and indeed obliged) to do so.

29. The Claimant applied for judicial review of the Parking Adjudicator's decision. Permission was granted by Michael Kent QC, sitting as a deputy judge of the Administrative Court, on 2 March 2012 **[1/13].**

30. On 16 April 2012, having learned that Mr Griffin of Eventech had instructed Addison Lee drivers to drive in the bus lanes, TfL applied for an interim injunction. The injunction was granted by Eder J on 26 April 2012 until determination of the judicial review proceedings at first instance.

31. The claim for judicial review was heard substantively before Burton J from 19 to 21 June 2012. On 11 July 2012, Burton J dismissed the claim and ordered Eventech to pay TfL's costs **[1/14 and 15].**

A. FREE MOVEMENT OF SERVICES AND TRANSPORT

32. Burton J considered these arguments at **Jt paras 25-28** and held at **para 54** that Article 58 TFEU precluded the application of Article 56 TFEU in this case. He was right so to hold.

33. The first paragraph of Article 56 TFEU 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. Article 58(1) provides:

> *"Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport."*

35. Title VI of the TFEU (relating to Transport) commences at Article 90 TFEU. It provides:

> *"The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy."*

36. As explained by the Court of Justice of the European Union ("CJEU"/"the European Court") in *Yellow Cab Verkehrsbetrich GmbH v Landeshauptmann von Wien* ("the *Yellow Cab* case"),[17] at para 29:

> "*it is to be stressed that free movement of services in the transport sector is not governed by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article* 58 (1) TFEU."

37. Article 91 TFEU sets out the legislative powers of the EU. Legislation adopted under the Transport Title includes regulations for air transport, water transport, trains, road safety,[18] driving licences,[19] coach and bus travel.[20] The Commission has produced a number of action plans in the transport sector including an *Action Plan on Urban Mobility* (COM(2009) 490 final), but it has not legislated in respect of taxis or minicabs.

38. In *Yellow Cab*, a German company bid to run a fixed route tourist bus service in Vienna. There is EU legislation regulating international bus and coach transport under Title VI: see Regulation (EC) 1370/2007.[21] However, the bus service proposed by Yellow Cab was to be limited to Austrian territory, and would not have fallen within this Regulation (para 31-32). The Court of Justice held that Article 58(1) precluded the application of Article 56 TFEU because the challenge related to the field of transport. The only free movement challenge Yellow Cab could bring was one based on Article 49 TFEU (free movement of establishment). (Eventech relied on this provision before Burton J but has rightly abandoned such reliance.).

39. As Advocate General Villazon explained:
    a. The "transport sector" is one "*in which the task of developing the freedom to provide services is entrusted, in accordance with Article 58 TFEU to secondary legislation on common transport policy*" (para 19);
    b. "*In the absence of a special sectoral provision in the field of transport, it is settled case law that Article 56 TFEU is not to be used as a parameter to*

[17] [2011] 2 CMLR 23
[18] Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (working time of drivers in haulage).
[19] Council Directive 91/439/EEC of 29 July 1991 on driving licences.
[20] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road.
[21] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road

determine the extent to which European Union law opposes a national measure in the light of the narrow leeway granted by the Court of Justice in the field…" (para 20: emphasis added);

c. In the *Yellow Cab* case, there was no such "*special sectoral provision*" which applied to Yellow Cab's proposed service. "*Consequently, in the absence of a special legal provision which, for a situation such as this, expounds the freedom to provide services in the field of transport policy, it is impossible to assess the requirements laid down in the Austrian legislation in the light of Article 56 TFEU*" (para 23, emphasis added).

40. Therefore, TfL submits that Burton J was correct to conclude at para 54 (and by reference to paras 25-27) that:
    a. the Policy is a measure which concerns transport;
    b. there is no EU "specific sectoral provision" relating either to which vehicles may travel in urban bus lanes or the regulation of taxis and minicabs; and
    c. therefore, Article 56 TFEU cannot apply to the Policy.

41. Eventech's original skeleton argument raised five arguments which, so it said, led to the contrary conclusion. Three of those arguments[22] have been dropped from its consolidated skeleton argument. Neither of the remaining two is well founded.

42. The absence of EU taxi regulation: Eventech seeks (Consolidated Skeleton paras 24-27) to distinguish the *Yellow Cab* case. It says that Article 58(1) cannot apply in present circumstances because there is no legislation under the Common Transport Policy governing taxis or minicabs and so, if Article 56(1) is disapplied, then *"there is a lacuna in the scope of EU law"* (Consolidated Skeleton para 23). But that simply begs the question. It is clear from Article 58(1) that a decision has been made to disapply Article 56(1) within "the field of transport". So there is no "lacuna" in the sense used by Eventech but, rather, an intentional limitation on the scope of the free movement of services provisions in the Treaty, so that the role of promoting free movement in the field of transport falls instead to the EU legislator.

[22] Namely, (i) that a national measure providing that taxis were prohibited from offering service to EU nationals would be unimpeachable under EU law; (ii) that Article 58 allegedly applied only to "*(public) transport services which were traditionally State operated"*; and (iii) that, where there is no indication that the EU legislature intends to adopt legislation relating to particular transport services "*it follows that such services must fall within Article 56 TFEU*" (the argument said to derive support from Case C-18/90 *Pinaud* [1991] ECR I-5279).

43. As an alternative gloss on the same point, Eventech suggests that Article 56(1) must still apply because *"where no* lex specialis *of any sort exists in relation to a particular transport activity, the* lex generalis *should prevail"* (Consolidated Skeleton para 24). This ignores the plain language of Article 58(1), which disapplies Article 56(1) within "the transport sector" (see judgment, para. 29, set out in relevant part at para 32 above) and not merely within those parts of the transport sector as are currently subject to legislation under the Common Transport Policy. The case law is clear. Article 56 does not apply.

44. *Regione Sardegna*,[23] *Commission v Ireland*[24] and *ANAV v Comune di Bari*:[25] Eventech relies on these three cases as showing (Consolidated Skeleton para 28) that "*the European Court has applied Article 56 TFEU to transport services in cases where there have been no implementing measures under Articles 90 and 91 TFEU*" But in none of these cases did the CJEU analyse whether the services in question were, indeed, services "in the field of transport" within the meaning of Article 58(1). On the contrary, it is apparent from the judgments of the CJEU in the cases in question that insofar as the freedom to provide services under Article 56 was engaged, it was not because of the effects of the national measures in question on transport services:

    a. *Regione Sardegna* concerned a tax on stopovers. The tax engaged the freedom to provide services under Article 56 because it affected retail and other services used by passengers during their stopover: see the Advocate General's Opinion, at paras 32-37 and, esp, fn 21. Exactly the same approach was adopted by the Court at paras 24-26.
    b. *Commission v Ireland* concerned ambulance services. But:
        i. neither the Advocate General nor the European Court considered whether the services in question were services "in the field of transport" within Article 58;
        ii. in the judgment the service in question is described not as a transport service, but as a "mobile emergency medical service": see judgment at para. 19;

[23] Case C-169/08 *Presidente del Consiglio de Ministri v Regione Sardegna* [2009] ECR I-10821
[24] Case C-432/03 *Commission v Ireland* [2007] ECR I -11353, [2008] 2 C.M.L.R. 4
[25] Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari* [2006] ECR I-3303.

iii. that is consistent with the idea that the service was not primarily a transport service at all – but primarily a medical one. The service that minicabs provide is, by contrast, a service in the field of transport – and nothing else.

c. *ANAV v Comune di Bari* concerned the award of a public service concession, the service in question being a public transport one. The municipality of Bari, having initiated a public call for tenders for the service contract for public transport in the municipality, then abandoned the tendering procedure and awarded the contract in question directly to a company which it wholly owned and controlled: see judgment at paras 8-11. It was this conduct on the part of the municipality in awarding the service contract, <u>not</u> the transport service itself, that was the subject of the reference to the European Court, as the wording of the question referred to that court makes quite plain:

> *"Is the part of paragraph 5 of Article 113 of Legislative Decree No 267/2000, as amended by Article 14 of Decree Law No 269/2003, that sets no limit on the freedom of a public authority to choose between the different methods of awarding a contract for the provision of a public service and, in particular, between an award as a result of a public and open tendering procedure and direct award to a company wholly controlled by the authority, compatible with Community law and, in particular, with the obligations to ensure transparency and freedom of competition pursuant to Articles [49 TFEU], [56 TFEU] and [106 TFEU]?"*

There was no consideration, in either the European Court's judgment or the Advocate General's Opinion, of whether the services in question were services "in the field of transport" within Article 58.

45. Finally, Eventech now suggests (Consolidated Skeleton, para 32) that this Court may wish to refer the Article 58 TFEU point to the European Court. In TfL's submission, in view of the plain language of Article 58(1) and the *Yellow Cab* case, no reference is required: the point is *acte clair* in TfL's favour.

B. ANY RESTRICTION ON FREEDOM TO PROVIDE SERVICES IS TOO UNCERTAIN AND INDIRECT

46. If (which is denied) Article 56 TFEU could, in principle, apply to transport sector policies, TfL submits that the Policy at issue here would nevertheless be too uncertain and indirect to amount to a restriction. Burton J considered TfL's arguments at **Jt para 24(i) and (iii)** but did not reach any conclusions on them, in light of his conclusions on Article 58.[26]

47. There is no "de minimis" exception to the free movement of services. However it has long been established that the effect of the impugned restriction must not be too "uncertain and indirect".[27]

48. The three cases on which Eventech apparently now relies, to establish the engagement of Article 56, are considered in turn below:[28]

    (a) In *Gourmet International*,[29] the question was whether a Swedish law restricting the advertising of alcohol constitutes 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*

[26] Contrary to what is suggested in Consolidated Skeleton para 34, TfL's arguments were not *"rejected"* by Burton J.
[27] See eg Case C- 211/08 *Commission v Spain* [2010] ECR I 5267, para 72. See also Barnard, Free Movement p357-361 for an analysis of the situations where there will be a restriction of the free movement of services.
[28] A fourth case, Case C-275/92 *Schindler* [1994] ECR I-1039, was relied on by Eventech below but is not referred to in its consolidated skeleton argument. TfL's comments on *Schindler* may be found in para [XREF] of its original skeleton argument **[1/11]**.
[29] Case C-405/98 [2001] ECR I-1795.

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"*. But this is a case involving the provision of minicab services in London. The transport service in question is plainly not one which crosses borders.

(b) In *Ciola*,[30] 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 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 para 11). But in that case there was, as the Advocate General said at paras 13-15, a true *"cross-border element"* to the services in question.

(c) *Carpenter*[31] 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.

49. Eventech rejects the suggestion that the service in this case lacks the requisite *"cross-border element"*. One of the reasons that it gives is that operators in other Member States allegedly *""subcontract" services from Addison Lee by purchasing them remotely"* (Consolidated Skeleton para 38). But the evidence on which Eventech

[30] Case C-224/97 [1999] ECR I-2517.

[31] Case C-60/00 [2002] ECR I-6297.

seeks to rely regarding relationships with operators in other Member States (as discussed further in para 51 below) is not sufficient to establish any kind of subcontracting or quasi-subcontracting relationship.

50. Even if Eventech could establish a sufficient *"cross-border element"* to the services it provides, *"the concept of restriction covers measures …which affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade"*: C-518/06 *Commission v Italy* [2009] ECR I-3491 (at para 64; emphasis added).

51. The evidence suggesting that the Policy impedes Eventech's access to the market in the manner required by the authorities was slight. It consisted of a letter from a director of a French Limousine company called Cardel Limousines **[2/22].** 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 Eventech did not disclose anything about the circumstances in which the letter was produced, including the correspondence preceding it. The letter was supported by a witness statement from its author, handed up during the course of the hearing, which cast no further useful light on what its author had been told or the circumstances in which it had been procured. As Burton J noted at **[Jt para 21],** TfL invited him to place no weight on either the letter or the statement. It was right to do so.

C. EQUAL TREATMENT

52. Having concluded that Articles 56 (free movement of services) and 49 (establishment) were not engaged in the present case, Burton J concluded that "*if Article 56 does not apply, but only because of the effect of Article 58, then the 'void' would be filled by reference to the principle of Equal Treatment*"' **[Jt para 39].**

53. It is submitted that this conclusion was wrong in law:
    a. As set out above, Article 58 does not create a "void"; it leaves to the EU legislator the task of promoting free movement in the field of transport;

b. The legislative powers in Title VI of the TFEU preserve the EU's ability to legislate to promote free movement in that sector, while Article 58 TFEU ensures that the "one size fits all" free movement of services provisions in Article 56 do not apply. The free movement provisions in Article 56 cannot be used as a "parameter" in the field of transport;
c. This is consistent with the reasoning in *Yellow Cab* and the *Pinaud* case referred to in fn 22 above.

54. Burton J noted that "*it is odd that this [the principle of equal treatment] was not stated in Yellow Cab*" [**Jt para 39**]. TfL submit that it was not "odd" because to have applied the principle of equal treatment would have been contrary to the rationale of Article 58 and Title VI TFEU.

55. Burton J correctly accepted TfL's submissions that *ERT*[32] and *Phil Collins*[33] were cases which, in any event, fell within the scope of the free movement provisions of EU (services and goods) **[Jt para 38].** However, he also accepted Eventech's arguments that *Herbert Karner Industrie Aktionen GmbH v Troostwijk GmbH ("Karner")*[34] showed that the principle of equal treatment could apply even to situations not falling within the ambit of any other Treaty provision or community legislation **[Jt para 38]**.

56. *Karner* does not show this. It was a case concerning misleading advertising. Some aspects of that had been harmonised by a Directive: see *Karner* at para 31. And, more importantly, the Directive in question allowed Member States to adopt more extensive consumer protection measures than were provided for in it. So *Karner* was a case where the Member State was acting pursuant to a permission (or derogation) contained in a piece of Community legislation. That is why it was appropriate to apply fundamental rights (there, the right to freedom of expression) as general principles of EU law. Contrast *Bartsch v Bosch und Siemens Hausgeräte (BSH) Alteredsfürsorge GmbH*.[35] There, the European Court considered whether the general principle of equal treatment on grounds of age applied to a case which pre-dated the specific EU anti-discrimination legislation prohibiting age discrimination in

[32] Case C-260/89 [1991] ECR I-2925.
[33] Joined Cases C-92 & 326/92 [1993] ECR I-5147.
[34] Case C-71/02 [2004] ECR I-3035.
[35] Case C-427/06 [2009] 1 CMLR 5.

employment.[36] The Court held that it did not, because the fundamental principle of EU law "*is not mandatory where the allegedly discriminatory treatment contains no link with Community law*" (para 25). Fundamental principles of EU law (including the principle of equal treatment) apply to situations within the scope of EU law. They do not expand the material scope of EU law to situations where it does not otherwise apply.

57. Eventech suggests in its consolidated skeleton argument (Consolidated Skeleton paras 73-75) three reasons why the Policy falls within the scope of EU law:
    a. First, it is said that the Policy *"falls within the* scope *of the State aid rules of the Treaty ...and is also a restriction on the provision of services that either engages Article 56 ...or at the very least would have engaged Article 56 but for the provisions of Article 58"* (Consolidated Skeleton para 73). For the reasons set out elsewhere in this skeleton argument, TfL disagrees.
    b. Second, it is said that, even if TfL (and Burton J) are right about Article 58, that still means that the situation is "within" the scope of EU law, because it is *"*within *the scope of Article 58, and* within *the scope of Title VI of the TFEU relating to transport"* (Consolidated Skeleton para 74). That is a nonsensical proposition. By this logic, if the TFEU contained an exclusionary article stating, *"All of the provisions in this Treaty are disapplied from all measures in area X"*, a measure in area X would nevertheless be "within the scope of EU law" because it was referred to in the exclusionary article.
    c. Finally, it is said that this case falls within the scope of Article 61 TFEU (Consolidated Skeleton para 75). However:
        i. Article 61, like Article 56, is contained within Chapter 3 of Title IV of the TFEU (relating to Free Movement of Persons, Services and Capital). As explained in subsection A above, the effect of Article 58(1) is that in the field of transport, freedom to provide service is not governed by Chapter 3 of Title IV but, instead, by the provisions of Title VI. Hence Article 61 does not govern transport services.
        ii. It is apparent from the wording of Article 61 TFEU (set out in Consolidated Skeleton para 75) that it is simply a transitional provision, which was intended to prohibit the Member States from

[36] Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16

discriminating between service providers on grounds of nationality or residency until all limitations on the freedom to provide services had been abolished. There is no reason to think the article was intended to expand the ambit of the free movement provisions so as to bring within the scope of EU law even situations with zero cross-border element, which would not otherwise have engaged Title IV TFEU at all.

iii. Eventech does not contend that the Policy infringes Article 61 but that it *"plainly falls within the* scope *of Article 61"* (Consolidated Skeleton, fn 39). In other words, Article 61 is not actually engaged but could theoretically be engaged if the Policy discriminated on the grounds of nationality or residence (which it does not). That cannot be enough to bring the Policy within the scope of Article 61 and EU law. On that reasoning, any national measure relating to the freedom to provide services would be "within the scope of EU law", including measures with no cross-border element, because all such measures could in theory have been caught by the Article 61 prohibition.

D. PROPORTIONALITY

58. There are three questions, which are addressed below in turn:
    a. What test of proportionality did the Judge apply?
    b. Did the Judge apply the correct test?
    c. Is the Policy objectively justified?

What test of proportionality did the Judge apply?

59. Eventech's case on this point is an ambitious one.

60. Eventech does not dispute that Burton J accepted its submission as to the appropriate test for objective justification in the context of the free movement provisions, namely, that set out in *Gebhard*[37] **[Jt para 41]**.

61. Eventech does not contend that Burton J misunderstood the *Gebhard* test. Burton J noted, in **Jt para 41**, that under the test any restrictions "*must be applied in a non*

[37] Case C-55/94 *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at para 37.

discriminatory manner; ...must be justified by imperative requirements in the general interest; ...must be suitable for securing the attainment of the objective which they pursue; and ...must not go beyond what is necessary in order to attain it."

62. Nor can Eventech realistically dispute that Burton J also had the *Gebhard* test in mind when setting out his conclusions on proportionality: see **Jt para 63**, the last paragraph in the section of the judgment dealing with justification (*"Therefore, addressing the requirements for justification, the four conditions in **Gebhard**, set out in paragraph 41 above, are plainly satisfied"* (emphasis added)).

63. However, notwithstanding that the Judge identified what Eventech regards as the correct test at the outset, understood what that test comprised and referred back to that test in the very paragraph in which he stated his conclusions on proportionality, Eventech's case is that he *"did not follow the analytical framework required of him"*. (Consolidated Skeleton para 48) Indeed, in its Grounds of Appeal and original skeleton argument, Eventech went further still, contending that in truth Burton J did not apply any proportionality test but instead considered only whether the distinction between taxis and PHVs was "*arbitrary*."[38]

64. If correct, this would have been (to borrow the language of Lord Dyson MR in the recent Court of Appeal judgment in *Othman v Secretary of State for the Home Department*[39]) a surprising mistake for Burton J to make, particularly in such a central part of his reasoning.

65. In TfL's submission, it is clear that no such mistake was made. Burton J applied the *Gebhard* test (the strictest proportionality test advocated by Eventech) before finding, not only that the Policy was not arbitrary, but also that it fulfilled that test. He made that finding after having set out the factual proportionality case put forward by each party **[Jt paras 50-53]** and analysed the respective cases carefully **[Jt paras 57-63]**.

[38] See Grounds of Appeal para 4 **[1/2]** and Original Skeleton paras 38-40 **[1/3]**.
[39] [2013] EWCA Civ 227, at [42].

66. "*Arbitrary,*" the word focussed on by Eventech's appeal grounds, was used in **Jt para 60.** It was a direct quotation from Eventech's skeleton argument (para 89).[40] The full passage from para 60 reads:

> "*the conclusion she [counsel for Eventech] invites the reader to draw is based upon the suggestion that what is sought to be justified is an 'arbitrary selection of permitted vehicles by TfL.' I am entirely satisfied that it is not arbitrary*."

So what Burton J was doing was rejecting a submission that had been made to him, not formulating a legal test.

67. If there were any doubt, it is dispelled by the passage which follows, in which Burton J:

a. considered the legal and practical differences between taxis and PHVs **[Jt para 60(i)]**;
b. considered the importance to the general public, as well as to disabled people, of the ability of taxis to use the bus lanes when plying for hire **[Jt para 60(i)]**;
c. considered whether it would be possible to legislate to preclude taxis from using a bus lane when carrying a pre booked passenger (it would not) **[Jt para 60(ii)]**; and
d. concluded that, if PHVs were to be permitted to drive in bus lanes "*then I cannot see any further stopping point, any further rational distinction between them and the other vehicles …It would be the 'thin end of the wedge,' but one of some importance because it would immediately jeopardise the priority for buses in the bus lanes*" **[Jt para 60iii)]**; and
e. concluded, in relation to the alternative solutions proposed by Eventech for permitting PHVs to use the bus lanes, that "*none of them are viable***" [Jt para 62]**; and
f. expressly confirmed that he considered that he would have reached the same conclusion without giving TfL the benefit of a margin of appreciation **[Jt para 61]**.

[40] C's skeleton para 89 "*What is far from obvious is why that proposition should justify an arbitrary selection of permitted vehicles by TfL, with the effect of causing blatant (and undisputed) discrimination between two categories of transport operators...*"

68. In its consolidated skeleton argument, Eventech criticises the analysis in **Jt para 60** in two respects.

69. *Irrelevance of the 'thin end of the wedge'*: Eventech contends that *"an integral component of the Judge's reasoning was the "thin end of the wedge" argument"* and that that argument is irrelevant, as *"[t]he question is ...exclusively whether minicabs should be excluded"*, as they compete with taxis (Consolidated Skeleton, para 50).

70. That may well be the question from Eventech's perspective. But for TfL, as the entity responsible for developing transport policies for Greater London and for controlling vehicular traffic on its major roads, the question is not simply, "Should minicabs be excluded from bus lanes?" Rather, it is, for each different type of vehicle, "Given that every extra vehicle which uses the bus lanes during the hours of restriction will slow down traffic in those lanes (thus undermining the primary purpose of bus lanes – namely, to promote the efficient passage of buses),[41] is there a good reason to allow this particular type of vehicle into the bus lanes?"

71. As Burton J found, there is such a good reason in the case of taxis – namely, the need for them to be visible (particularly to disabled passengers) so as to be hailed from the street – and there is no such good reason in the case of minicabs **[Jt para 60(i)]**. If minicabs were to be allowed into the bus lanes in the absence of any good reason for their presence, TfL would then have no reason for not allowing in other vehicles **[Jt paras 50(ii) and 60(iii)]**.

72. Thus, far from being *"wholly irrelevant"* (Consolidated Skeleton para 50), the fact that there is a reason to allow taxis into the bus lanes that does not apply to minicabs is highly relevant in explaining why TfL decided to draw the line where it did.

73. One further observation on this point: Eventech implies that the only relevant competition is that between minicabs and taxis and that all other vehicles are irrelevant to this competitive dynamic: see, eg, Consolidated Skeleton para 50 and, in particular, the comment at para 14, *"Neither Black Cabs nor minicabs compete with juggernauts"*. In fact, while it may suit Eventech's forensic purposes to focus on heavy goods vehicles, the full list of other vehicles that Burton J listed at **Jt para**

[41] A common-sense proposition which Eventech accepted below: see para 89 of its skeleton argument **[1/19]**.

50(ii) – *"chauffeured cars ...hire cars, Car Club vehicles, delivery vehicles, heavy goods vehicles and all private cars"* – illustrates that there is not such a clear-cut distinction but, rather, a continuum within which different vehicle types compete to different degrees. The driver of a chauffeured car, for example, might well argue that he is in competition with both taxis and minicabs.

74. *Failure to consider adequately the question of actual necessity*: Eventech complains (Consolidated Skeleton para 51) that the Judge did not address whether the exclusion of minicabs from bus lanes *"is actually necessary in order to meet 'imperative' requirements in the general interest"*. Eventech devotes the next four paragraphs of its consolidated skeleton argument (Consolidated Skeleton paras 52-55) to the question whether the evidence establishes that it is *"actually necessary"* for taxis to use bus lanes, followed by a further three paragraphs on whether the evidence establishes that it is *"actually necessary"* to exclude minicabs from bus lanes.

75. The evidence is considered further in paras 86-91 below. In essence, however, TfL observes that it is *"actually necessary"* to allow taxis to access bus lanes to enable them safely and efficiently to perform their function of plying for hire. The fact that there are other areas of the road where taxis cannot lawfully stop to collect passengers and that there are some bus lanes that neither taxis nor minicabs are permitted to use (Consolidated Skeleton paras 53-54) does not prove otherwise. All it shows is that the need of taxis for access to bus lanes must be weighed against – and is sometimes 'trumped' by – other needs, such as keeping pedestrian crossings clear and enabling buses to circulate efficiently at certain particularly busy roads and junctions in central London. In any event, what TfL has to show is necessary is the measure in question, ie, the Policy. Thus the question is whether TfL needed to draw the line on bus lane usage where it decided to draw it – namely, with taxis (along with vehicles such as Dial a Rides and pedal bicycles) on one side and all other vehicles (including minicabs) on the other. As Burton J found, it is necessary to draw the line where TfL draws it because there is a good reason for taxis to use bus lanes and no such good reason for minicabs. If the line were shifted to allow minicabs into bus lanes, there would be no logical reason why not to allow in other vehicles (chauffeured cars, hire cars, etc) too and therefore the important benefits of bus lanes would be eroded.

Did the Judge apply the correct test?

76. TfL notes that Burton J correctly accepted that "*if I needed to consider the 'margin of appreciation' of TfL I would conclude their Bus Lane Policy fell within it.*" **[Jt para 61]** Nevertheless, Burton J made clear that he considered that the same strict proportionality test which applies under the free movement provisions would also apply if the case fell to be analysed under the rubric of the principle of equal treatment **[Jt para 60(i)]**. The Judge also rejected TfL's submissions that it ought to be permitted a wide margin of appreciation because the Policy concerned a complex economic or technical question **[Jt para 61(ii)]**.

77. Insofar as it is necessary to do so, TfL submits that Burton J ought to have accepted its argument that a less stringent test of justification than that set out in *Gebhart* applies.

78. If (contrary to TfL's submissions on free movement of service) Article 56 applies, the correct test is set out by the CJEU in *Commission v Italy (Italian Trailers)*,[42] in which it considered the road transport justifications for an Italian ban on motorcycles towing trailers **[Jt para 48(i)]**:[43]

> *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).*
>
> *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*

[42] Case C-110/05 [2009] ECR I-519.
[43] See also *Commission v Spain* [2011] 2 CMLR 50 para 75 **[Jt para 48(ii)]**.

understood and applied by drivers and easily managed and supervised by the competent authorities. Emphasis added)

79. In fact Burton J held correctly that the other options put forward by Eventech were not viable **[Jt para 62].** But**,** applying the approach set out in the *Italian Trailers* case, he did not have to go this far.

80. If (contrary to TfL's submission) the principle of equal treatment applies, the correct test is that set out in *Société Arcelor Atlantique et Lorraine*:[44]
    a. "*A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment*;" (para 47);
    b. There is a "*broad discretion*" where "*action involves political, economic and social choices and where …called on to undertake complex assessments and evaluations"* (para 57);
    c. The discretion "*must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives*." (para 59; emphasis added).

81. Furthermore, as the CJEU held in *Unitymark and North Sea Fishermen's Organisation*[45] at para 63:

> "*the fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory inasmuch as it seeks a comprehensive solution to a problem of general public importance."*

82. Laws J (as he then was) explored the nature of the EU approach in *R v Ministry of Agriculture, Fisheries and Food ex p First City Trading Ltd*, at para 68:[46]

> *"…There must, however, remain a difference between the approach of the court in arriving at a judicial decision on the question whether a measure is objectively justified and that of the primary decision-maker himself in deciding upon the measure in the first place. Within the diverse contexts in which the principle of equality may be called in question, there will no doubt always be*

[44] Case C-127/07 [2008] ECR I-9895. For the avoidance of doubt, TfL rejects Eventech's suggestion (Consolidation Skeleton paras 78-79) that the proportionality test in *Société Arcelor Atlantique et Lorraine* is the same as that in *Gebhart*, such that it is *"immaterial"* which test the Court applies.
[45] Case C-535/03 [2006] ECR I-2689.
[46] [1997] 1 CMLR 250. See also *Partridge Farms Limited Secretary of State for Environment Food and Rural Affairs* [2009] EWCA Civ 284 at 61-70 and 89.

a range of options factually open to the decision-maker. It is not the court's task to decide what it would have done had it been the decision-maker, who (certainly in the case of elected Government) enjoys a political authority, and carries a political responsibility, with which the court is not endowed. The court's task is to decide whether the measure in fact adopted falls within the range of options legally open to the decision-maker. In the nature of things it is highly unlikely that only one of the choices available to him will pass the test of objective justification: and the Court has no business to give effect to any preference for one possible measure over another when both lie within proper legal limits. In this sense it may be said that the decision-maker indeed enjoys a margin of appreciation." (Emphasis added.)

83. Similarly, in *Mabanaft Limited v Secretary of State for Energy*[47] Arden LJ explained at paras 32 and 48 as follows:

> *"32. …It follows under Community law that the court must allow the Secretary of State a large measure of discretion in choosing an appropriate method. 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.*
> …
> *48…In any assessment of proportionality in a technical field, the court must allow a proper margin of discretion to the decision maker, because of the complexity of the assessment he is called upon to make in this field…."*

84. Here:

a. The Policy relates to rules of the road which affect traffic distribution, congestion and emissions in one of Europe's busiest cities; such questions inevitably are complex ones and involve technical, economic analysis;

b. TfL is entitled to a wide margin of appreciation in seeking a comprehensive solution to encouraging the safe, integrated, efficient and economic transport facilities and services to, from and within Greater London;

c. Under this margin of discretion TfL need not show that all other options for securing its objectives would be inappropriate;

[47] [2009] EWCA (Civ) 224.

d. Furthermore the Policy furthers the EU aim of non-discrimination and disability access; specifically protecting the access of people with mobility and sight disabilities to public transport and ply for hire taxis.

85. According to Eventech (Consolidated Skeleton para 81), *"[t]he suggestion that the decision whether or not to allow minicabs into bus lanes requires complex economic or technical assessment is nonsense"*. That is because, to Eventech, the choice is a *"simple binary [one]: whether to allow minicabs to use the bus lanes alongside Black Cabs, or to exclude them."* (Consolidated Skeleton para 81(a)). As already discussed in para 70 above, while Eventech views the issues from a narrow 'minicabs versus taxis' perspective, in fact the issues before TfL range far more widely.

Is the Policy proportionate?

86. TfL submit that Burton J was correct to conclude that the Policy was proportionate for the reasons set out at **Jt paras 57-64.**

87. In addition to those reasons accepted by Burton J, TfL relies on its submissions summarised by the Judge **[Jt para 50 and 53]**.[48]

88. There are approximately 5.8 million bus journeys every weekday. As noted in Burton J's summary of TfL's submissions below, TfL seeks to balance the needs of all the different road users **[Jt para 50(i)].** The first witness statement of Mr Plowden **[2/20]** recorded these balancing considerations:

> "*TfL locates bus lanes where congestion would otherwise increase bus journey times and/or reduce reliability. This applies both to the overall decision where to concentrate bus lanes (in central and inner London, where congestion is most acute) and to the decision where to locate individual lanes (eg at particular junctions).*
>
> *Bus lanes are also particularly useful because they offer protection to vulnerable road users, ie cyclists and motorcyclists….these categories of user are permitted to use the bus lanes during the hours of operation of the restrictions, offering them protected road space during the busiest and most congested times of the day.*

[48] Contrary to what Eventech seeks to suggest now (Consolidated Skeleton para 11), those submissions have remained unchanged throughout these proceedings.

Finally bus lanes are widely supported in London. TfL's customer research report on Bus Priority Schemes …indicated that 83% of the public support bus priority schemes."

89. On figures available to the court below, there were approximately 50,000 minicabs and 60,000 minicab drivers licensed in London; as compared with 23,000 taxis. There is, therefore, bound to be an increase in congestion if minicabs were to be permitted to drive in the bus lanes:
    a. Permitting minicabs to drive in the bus lanes would increase the volume of vehicles by up to 50,000;
    b. According to the SKM report **[2/21]** the increase in travel time in the morning peak hour of 8.00-9.00am is 266 person hours if taxis are permitted in the bus lanes, and would rise to 431 person hours if minicabs were also permitted.
    c. An increase in vehicle volume in the bus lanes could have, not only a congesting effect, but could also affect road safety for motorcyclists and cyclists**.**

90. As observed in fn 41 above, Eventech accepted below that *"[t]he proposition that allowing more vehicles into bus lanes will to some extent slow down the traffic in those lanes (at least at certain times of day) is an obvious one."* **[1/19]** Notwithstanding this acceptance (and Eventech's decision, before the court below, to take the SKM report at face value), Eventech now seeks, in Consolidated Skeleton para 64, to backtrack. As well as reopening criticisms of the SKM report on which its counsel had abandoned reliance in oral argument, Eventech now claims that the common-sense proposition in the paragraph above is *"crude and unquantified speculation"* (Consolidated Skeleton para 64(d)).

91. The basis on which Eventech makes this claim is the arithmetic undertaken in Consolidated Skeleton paras 64(b) and (c), which – so Eventech contends – shows that the figures in the SKM report translate into very small increases in average travel times. But even if this is so, Eventech's criticism misses the point. As Mr Plowden pointed out, and Burton J accepted **[Jt para 50(i)]**, <u>average</u> figures conceal a range: an average increase in travel time of less than 2.5 seconds per bus journey may mean that very many bus journeys (for example, the millions that take place on quieter roads with no bus lane restrictions) are unaffected by the inclusion of minicabs in bus lanes but other bus journeys on major roads are delayed substantially.

E. STATE AID

92. TfL submits that Burton J was correct to conclude that the Policy does not confer an unlawful state aid on the drivers of London Taxis for the reasons analysed in his judgment **[Jt paras 65-75]**, for the reasons set out in TfL's submissions before him **[Jt pars 68-70 and 73-74]** and by way of response to Eventech's new arguments raised here for the first time, as set out below.

93. Eventech complains that Burton J:
    a. misapplied the "Selectivity requirement"; and
    b. should have concluded that the Policy has sufficient effect on inter state trade.

Selectivity

94. Eventech's arguments on the "selectivity" requirement are different from those argued in front of Burton J. In para 132 of Eventech's skeleton argument before Burton J Eventech argued that *"TfL's second argument on selectivity is that the advantage to Black Cab drivers is justified by the nature or general scheme of the bus lane legislation. Again, that argument stands or falls with TfL's claimed justifications for the legislation …above"* (emphasis added). So, as Eventech's counsel confirmed in argument, it was submitting that – if the Policy was justified for the purposes of Article 56 and/or the principle of equal treatment – it was "justified by the general nature of the bus lane legislation" so as to fall outside the prohibition on State aid.

95. Eventech now apparently seeks to resile from this concession. It should not be permitted to do so. But in any event, the concession was well made.

96. Eventech now argues (see Consolidated Skeleton fn 42) that a "clear statement" of the two stage test for selectivity is set out in the judgment of the General Court in *British Aggregates Association v Commission*[49] at paras 47-48. But:
    a. The formulation in para 47 of the CJEU's judgment in *British Aggregates* is identical to that in para. 71 of the judgment in *Heiser v Finanzamt Innsbruck*,[50] reproduced by Burton J at **Jt para 71**.

[49] T 210 /02 RENV 7 March 2012 [2012] ECR 0000.

b. The formulation in para 48 of the CJEU's judgment in *British Aggregates* is also reflected in the passages cited by Burton J from the judgments of *Portugal v Commission*, C279/08 *Commission v Netherlands* and *Adria-Wien Pipeline v Wieterstorfer&PettauerZementwerke*[51] [**Jt paras 72 and 73**].

97. Applying the principles from these cases Burton J correctly held at **Jt para 75** that:
    a. Taxis and minicabs are not in a comparable legal or factual situation in the light of the objective pursued by the measure concerned. Note that this is consistent also with **Jt para 63**; and
    b. It is *"exactly in accordance with the nature and general scheme of the Bus Lane Policy… to allow into the bus lanes those vehicles which can ply for hire and exclude those that cannot."*

Prima facie not selective

98. On the question whether the measure is *prima facie* selective, Eventech argues (Consolidated Skeleton para 99) that *"[i]n the present case, the reference scheme is the bus lane legislation as a whole*" – as opposed to (as it was put in Original Skeleton para 70) *"the specific policy at issue"*. But as to this:
    a. It is plain that Burton J had regard to this at **Jt para 74**, where he referred to TfL's statutory function in s. 141 of the 1999 Act of "*promoting and encouraging safe, integrated, efficient and economic transport facilities and services to, from and within London*."
    b. At **Jt paras 3, 8-12 and 50(ii)**, Burton J had considered the features of the legislative licensing scheme which distinguished between the taxis and minicabs.

99. In analysing the justification Burton J had already considered **[Jt paras 50, 53 and 58-63]** the arguments of TfL that the nature of the Policy pursued the statutory purpose of s. 141 of the 1999 Act by:
    a. reducing congestion;

[50][2005] ECR I-1627.
[51][2001] ECR I8365.

b. promoting the efficient passage of buses and thus maintaining and improving the reliability of the London bus network;
c. protecting vulnerable road users;
d. providing an integrated transport system which the public supports;
e. enabling taxis to ply for hire;
f. ensuring access by disabled and mobility impaired people;
g. rationally distinguishing between different types of road users so as to achieve an enforceable scheme.

100. TfL submits that Burton J's judgment was correct to conclude that, in light of these features, and the different functions of taxis and minicabs, that they are not *prima facie* in a comparable legal or factual situation.

101. As to Eventech's argument at para 99 of its Consolidated Skeleton:
a. It is not correct to suggest that the only purpose of the legislative scheme is the reduction of traffic in bus lanes. TfL must fulfil its principal statutory purpose of "*promoting and encouraging safe, integrated, efficient and economic transport facilities and services to, from and within London*." TfL's purposes are not limited to bus passengers.
b. It is inherent in the current regulatory arrangements applicable to taxis and minicabs (not challenged here) that taxis must be available to be hailed from, and therefore to be accessible to, the pavement but the same does not apply to minicabs;
c. Even if (which is denied) the correct analysis were to consider that the principal legislative purpose of TfL in the Policy is to reduce traffic in bus lanes, it does not follow that *"Black Cabs are plainly comparable to minicabs."*

102. Eventech complains (Consolidated Skeleton para 100) that both Burton J and TfL confuse the "objective" of the scheme with the reasons for differentiating between taxis and minicabs. In substance, Eventech's complaint is simply that Burton J (rightly) agreed with TfL that the purpose of the legislative scheme is wider than simply reducing traffic in bus lanes to speed up bus journeys.

Justification in accordance with the nature and general scheme of the Policy

103. The basic or guiding principles of TfL's system must, on any view, be governed by TfL's statutory purpose, which is that of "*promoting and encouraging safe, integrated, efficient and economic transport facilities and services to, from and within London*."

104. The basic or guiding principles: Eventech argues in Consolidated Skeleton para 105 that "*[a]llowing Black Cabs but not minicabs into the bus lane ...has nothing to do with the inherent basic or guiding principles of the bus lane legislation but pursues "extrinsic" objectives – namely ...objectives connected with Black Cabs plying for hire.*" As with the arguments on proportionality and selectivity, this reflects an unduly narrow approach to the basic or guiding principles of TfL's system, by presuming that the basic or guiding principles of the bus lane legislation are to do with buses only.

105. Eventech's argument also does not reflect properly the reason why TfL decided to draw the line where it did in terms of which vehicles can and cannot use the bus lanes. In deciding to allow taxis into bus lanes, TfL (lawfully) had regard to the legislative framework for taxis which grants taxis, but not minicabs, the right to ply for hire, accessing customers from the pavement next to bus lanes. But that does not mean that TfL's purpose was to *"pursue an 'extrinsic' objective"*.[52] TfL's purpose was to pursue its statutory objectives (see para 99 above), which include considering the needs of, and promoting the safety of, all road users.

106. Intensity of proportionality review: In para 109 Eventech submits that, in order to escape granting an unlawful state aid, TfL must (and cannot) show that it is "*actually necessary*" to allow taxis to drive in bus lanes. This is a flawed approach:

a. Firstly, Burton J held on the facts of this case that the other options put forward by Eventech were not viable [**Jt para 62**]. It follows that it is *"actually necessary"* to allow taxis to access bus lanes to enable them safely and efficiently to perform their function of plying for hire.

[52] Eventech does not state what *""extrinsic" objectives"* it believes the Policy to pursue; presumably they are ones of, somehow, promoting the ability of taxis to ply for hire.

b. If the phrase *"actually necessary"* is intended to connote some stronger requirement that this, there is no warrant in the case law for it.

c. Thirdly, as set out above in relation to free movement and equal treatment, TfL should not be required to show that each potential alternative would be impossible. Furthermore, TfL should be afforded a wide margin of appreciation in determining complex issues of traffic flow, including the question which vehicles should be permitted to drive where and when.

Inter-state trade

107. Eventech criticise Burton J's judgment for holding that an actual "effect" on inter state trade needs to be shown.

108. But Burton J cited the correct formulation of the test as set out by the Court of Justice in *Remia BV v EC Commission*[53] at 22 **[Jt para 68]**:

> "*… the Court would point out that, as it has consistently held, in 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 … between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States*." (Emphasis added.)

109. This is the test to be applied in the context of State aid, not the "market access" test for engagement of the free movement provisions set out in *Gebhard.*

110. It is true that Advocate General Kokott suggested in her Opinion in *Regione Sardegna*[54] (at para 148) that, because a tax provision fell to be considered under the provisions on free movement of services, it would therefore have a sufficient effect on inter state trade for the purposes of the State aid provisions. But:

a. This part of AG Kokott's opinion is not adopted in the judgment of the CJEU;

b. That case concerned a potential free movement impact on service providers. In this case, as Burton J correctly held, there is no potential free movement effect on minicab providers.

[53] [1987] 1 CMLR 1 (a case concerning what is now Article 101 TFEU).
[54] See fn 23 above.

111. In the two Commission cases that Eventech cited in its original skeleton argument,[55] the Commission asked whether the undertaking in receipt of aid was (or was potentially) engaging in trade on the European market. In both cases the undertakings were not. It is clear from the language of the analysis in these cases that the Commission was not applying the free movement "market access" test, but is instead applying the *Remia* test.

112. In this case, it is very difficult to see why the operation of a Policy governing use of London bus lanes has an influence between Member States such as might prejudice the realisation of the aim of the single market. It is perhaps not surprising that in *GEMO SA* [2003] ECR I-13769 Advocate General Jacobs cited taxi services as one of those economic sectors where aid would not affect trade between Member States (see para 145 of his Opinion).

113. Eventech now seeks to buttress its case by citing three further Commission cases, namely, *UK Green Bus Fund*,[56] *Maltese bus operators*[57] and *London cable car*.[58] None of these concerned a factually analogous situation. The *UK Green Bus Fund* and *Maltese bus operators* decisions related to nation-wide funding/financial assistance schemes.[59] *London cable car* concerned a subsidy for the building of a new piece of transport infrastructure that filled a *"gap in the transport network"* (Decision para 44). The Commission was thus concerned that the subsidy of the cable car might affect negatively the provision of alternative means of transport by operators from other Member States. By contrast:

a. the Policy is a local measure, within London, concerning the use of existing transport infrastructure; and
b. Burton J concluded that the Policy did not deter individuals in other Member States from coming to the UK to become minicab drivers in London contrary to Article 49 TFEU – a conclusion which Eventech does not challenge in this appeal.

[55] Decision N 543/2001 *Ireland capital allowance for hospitals (*27 February 2002) paras 18-20 and Decision Case N 377/2007*Batiawerf* (28 November 2007) paras 17-18.
[56] Case N 517/2009, para 43.
[57] Case NN 53/2006, para 62.
[58] Case SA.34056, paras 42-46.
[59] Which supported, respectively, the introduction of low-carbon buses across England and the Maltese association comprising the owners of buses used for scheduled bus services in Malta.

IS THERE A NEED FOR A REFERENCE TO THE COURT OF JUSTICE?

114. TfL submits that it is neither appropriate nor necessary for this Court to refer a question to the CJEU under Article 267 TFEU, as requested by Eventech.

115. In Case C-283/81 *CILFIT Srl v Ministrodella Sanita*,[60] the CJEU held that the following principles apply when a national court is considering referring a question to it:

> *[9] ...the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of [what is now Article 267 TFEU]. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.*
>
> *[10] Secondly, it follows from the relationship between paragraphs (2) and (3) of [what is now Article 267 TFEU] that the courts or tribunals referred to in paragraph (3) have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.*
>
> *[11] If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, [what is now Article 267 TFEU] imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.*
>
> *…*
>
> *[14] The same effect, as regards the limits set to the obligation laid down by paragraph (3) of [what is now Article 267 TFEU], may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.*
>
> *[15] However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in paragraph (3) of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.*

[60] [1983] 1 CMLR 472

[16] Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member-States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it." (emphasis added)

116. TfL submits that a reference to the CJEU is neither necessary nor appropriate:

a. First, applying *CILFIT* para 10, it is not relevant to the determination of the case. Burton J held, even applying the strictest proportionality test which Eventech argued for under Article 56 TFEU, that the Policy was proportionate. If, as TfL submits, he was entitled to do so, that is an end of the matter. None of the questions of EU law which Eventech raises can assist it.

b. Secondly, applying *CILFIT* para 14 to Eventech's arguments under Article 56 (free movement of services), the CJEU has already considered the material scope of Article 58 in the case of *Yellow Cab*.[61] It is *acte clair*.

c. Thirdly, in relation to the questions on Article 107 TFEU, (i) on Eventech's own case, there has been a recent "clear formulation" of the two stage test for selectivity and (ii) Eventech has already conceded that if the Policy is justified for the purposes of Article 56 and/or the principle of equal treatment, it falls outside the prohibition on State aid.

CONCLUSION

117. For these reasons TfL submits that Eventech's appeal should be dismissed.

MARTIN CHAMBERLAIN QC

SARAH LOVE

16 April 2013

[61] See fn 17 above.