IN THE COURT OF JUSTICE
OF THE EUROPEAN UNION

CASE C-518/13

THE QUEEN
on the application of
EVENTECH LIMITED

Appellant

v

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

Respondents

WRITTEN OBSERVATIONS ON BEHALF OF TRANSPORT FOR LONDON

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Introduction and background

1 Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, Transport for London ("TfL") submits the following written observations in respect of the questions referred for a preliminary ruling in accordance with Article 267 TFEU by the order of the Court of Appeal of England & Wales.

2 The questions concern whether a policy of allowing Black Cabs[1] to drive in bus lanes at certain times of the day on particular days of the week ("the Policy") gives rise to State aid within the meaning of Article 107(1) TFEU such that it should have been notified to the Commission under Article 108 TFEU.

3 The relevant facts and the domestic legislative background are set out in the Order for reference.

4 It is an important part of the background to this case that the questions being referred formed only a small part of Eventech's case before the domestic courts. Its grounds for impugning TfL's Policy were (1) breach of the freedom of establishment (Article 49 TFEU); (2) breach of the freedom to provide services (Article 56 TFEU); (3) breach of the principle of equal treatment (one of the fundamental principles of EU law); (4) irrationality (as a matter of domestic law); and (5) unlawful State aid.

5 At first instance (in the Administrative Court), all five of these grounds were rejected by Mr Justice Burton. He held that the Policy in question had no effect on the freedom of establishment; that the freedom to provide services was not engaged in respect of services in the transport sector (because of Article 58 TFEU); that in any event the Policy was proportionate, even applying the standard imposed in cases where the freedom to provide services is engaged; that the Policy did not, therefore, infringe the principle of equal treatment and was not irrational as a matter of domestic law; and that the Policy did not constitute a State aid. The questions referred by the Court of Appeal concerns the last of these issues only.

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[1] "Black Cabs" is the colloquial name for hackney carriages, which are licensed subject to the conditions in the London Cab Order 1934 (as amended), adopted pursuant to the Metropolitan Public Carriage Act 1869.

6 It follows that the Court should proceed on the assumption that the Policy at issue has been found by the national courts – thus far – to be consistent with the requirement of the TFEU and with EU law generally in every other respect. In particular, it has been found to meet not only the domestic-law requirement of rationality but also the requirements of proportionality applicable to measures which engage the freedom to provide services and the freedom of establishment. Eventech chose not to appeal against Mr Justice Burton's finding that the Policy did not engage the freedom of establishment and was rational for the purposes of domestic law.

Transport for London

7 TfL is a statutory body established by section 154 of the Greater London Authority Act 1999 ("the 1999 Act"). By s. 154(3)(b) of the 1999 Act, TfL is required to exercise its functions to facilitate the discharge, by the Greater London Authority ("GLA"), of the general transport duty in section 141 of the 1999 Act, namely to secure the provision of "...safe, integrated, efficient and economic transport facilities and services to, from and within Greater London."

8 TfL also has other specific responsibilities under the 1999 Act, including responsibility for securing the provision of public passenger transport services (including bus services pursuant to section 181 of the 1999 Act) to, from or within Greater London; and has a duty under section 16 of the Traffic Management Act 2004 to manage the road network for which it is responsible with a view to securing "the expeditious movement of traffic".

The regulations designating the bus lanes

9 The use of bus lanes is governed by Traffic Regulation Orders ("TROs"), under powers conferred by section 6 of the Road Traffic Regulation Act 1984 ("the 1984 Act"), set out in the Order for Reference at [12]. Section 6 empowers the traffic authority for a road in Greater London to make orders for controlling or regulating vehicular and other traffic on that road. In its role as traffic authority for all GLA roads (but not all roads in Greater London, some of which are the responsibility of other local authorities), TfL has made a large number of TROs designating certain traffic lanes as bus lanes, covering a total of 126km of TfL-controlled bus lanes in total.

10 Those TROs have the effect of restricting the use of the designated bus lanes to prescribed vehicles only. For some of these bus lanes, Black Cabs are permitted whilst minicabs[2] are not; in others (eg, contraflow lanes where buses travel against the main direction of traffic flow), neither Black Cabs nor minicabs are permitted.

11 The Camden Bus Lanes (No. 1) Traffic Order 2008 ("the Camden Order"), breach of which gave rise to the underlying claim, was also made under section 6 of the 1984 Act and is consistent with the policy reflected in most TROs made by TfL.

Distinction between Black Cabs and minicabs

12 As set out in the Order for Reference, Black Cabs and minicabs are subject to different regulatory regimes. The judgment of Mr Justice Burton (at first instance, in the Administrative Court) summarises "the material differences between mini-cabs and black cabs" at [12]:

> "A Law Commission Consultation Paper issued earlier this year (No 203) described the "two-tier licensing system" justified by "the very different characteristics" of the pre-booked market and the market for hailing and picking up at ranks:
>
> i) ... only black cabs can 'ply for hire' [ie, pick up passengers from the street or from taxi ranks] without pre-booking.
>
> ii) Black cabs are subject to "compellability", dating from the London Hackney Carriage Acts 1831 and 1853, which requires that where a black cab at a rank or in the street accepts a passenger, the taxi must take the passenger anywhere that he wishes to go, within a prescribed distance or up to a prescribed journey time. There is no such 'cab rank' obligation on a minicab.
>
> iii) Black cabs are instantly recognised by reason of their shape and size and the illuminated TAXI sign. This is because they must comply with the Conditions of Fitness ("CoF"), which contain a number of standards (including the requirement for the illuminated sign). Currently only two vehicle makes comply with the CoF. Minicabs can be of any colour and any

[2] "Minicabs" is the colloquial name for private hire vehicles, which are licensed under the Private Hire Vehicles (London) Act 1998.

design: there are some 700 different makes and models of vehicles presently licensed.

iv) The fares of black cabs are strictly regulated and can only be charged by reference to a taxi meter. Minicabs are free to charge their own fares and are not metered...the fare to be paid is quoted when the minicab is booked, irrespective of the duration of the journey, while black cab fares will of course vary depending upon the length of time that the journey takes.

v) Black cabs are required to be adapted for wheelchair access. There are no accessibility requirements for minicabs.

vi) Before being licensed, black cab drivers must undertake the "Knowledge of London" examination process, which can take two to four years to prepare for ("the Knowledge"). Minicab drivers must before licensing undertake a topographical test, which generally takes a day...Black cab drivers must pass the Driving Standards Agency Advanced Driving Assessment: there is no similar requirement for minicab drivers."[3]

13 The first of the differences listed by Mr Justice Burton, namely that Black Cabs but not minicabs can 'ply for hire', gives rise to significant differences between the business models of the two types of vehicle. Whereas minicabs are 100% reliant on pre-booked passengers, pre-bookings constitute only a small minority of Black Cabs' business. As Mr Justice Burton indicated in [9] and [13] of his judgment, a 2009 survey indicates that only 8% of Black Cab journeys are pre-booked, 52% result from passengers hailing them from the street and the vast majority of the remainder of journeys result from being picked up at taxi ranks.[4]

Relevant EU legislation

14 Article 107(1) TFEU provides:

> "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall in so far as it affects trade between Member States, be incompatible with the common market."

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3 *Eventech Ltd v The Parking Adjudicator* [2012] EWHC 1903 (Admin); [2012] ACD 106.

4 Minicabs cannot pick up passengers from taxi ranks.

15 Article 108(3) TFEU provides:

> "The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

16 It is well established that a measure will give rise to State aid only if the following four conditions are satisfied:

(a) the measure confers an economic advantage;

(b) the advantage is granted through State resources and is imputable to the State;

(c) the measure favours certain undertakings or the production of certain goods (also known as the "selectivity" requirement); and

(d) the measure is liable to distort competition and affect trade between Member States.

17 The questions referred to the Court concern (i) state resources; (ii) selectivity and (iii) effect on trade between Member States. These issues will be dealt with in turn.

Question 1: State resources

18 The first question referred to the Court, which concerns the application of the State resources condition to the Policy, is as follows:

> "Does making a bus lane on a public road available to Black Cabs but not minicabs, during the hours of operation of that bus lane, involve the use of "State resources" within the meaning of Article 107(1) TFEU, in the circumstances of the present case?"

The need for an effect on State resources

19 It is well-established that a measure comprising State aid must be financed through State resources. In *PreussenElektra*, the Court stated:

"The Case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of [Article 107(1) TFEU]. The distinction made in that provision between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State...

In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either.

In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of [Article 107(1) TFEU].

That conclusion cannot be undermined by the fact ... that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State..."[5]

[Emphases added]

(1) There must be some form of financial burden on the State

20 For a benefit to be granted through State resources, an essential condition is that it has an effect on State resources. As Advocate-General Capotorti put it in *Openbaar Ministerie of the Kingdom of the Netherlands v van Tiggele*:[6] "for a measure which has the effect of favouring certain undertakings to constitute an aid it must entail a financial burden for the State."

5 Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099 at [58]-[62].

6 Case 82/77 [1978] ECR 25, Advocate-General's Opinion at [8].

21 The financial burden on the State need not take the form of a direct transfer of funds. It can consist of an actual or potential loss of State resources (eg, by the State forgoing revenues that it would otherwise have collected[7] or choosing to forgo the possibility of collecting revenues[8]). Nevertheless, at least some form of burden has to be identified.

(2) The overall revenue effect of the measure is not decisive

22 The requirement that there is a public financial burden is not undermined by the fact that the overall effect of some measures held to amount to State aid may be revenue-neutral. For instance, in relation to 'feed in tariff' schemes in the field of energy, whereby certain undertakings are subsidised by funds generated through the imposition of a levy, the State's financial position is entirely neutral but the benefit is deemed to be granted through State resources because the levy is imposed by the State and collected by a fund established and controlled by the State.[9] There is a financial burden on the State in such cases because the revenues garnered by the levy are forgone (insofar as they are spent on the subsidised price instead of being conserved).

23 Indeed, the existence of State aid is not negated by a consequential increase in the State's overall resources. As explained by Advocate-General Léger in *Belgium and Forum 187*:

> "... Forum 187 argues that the scheme at issue does not satisfy the second condition, since it increased the tax revenues of that Member State. The latter received more than EUR 500 million a year from the tax revenue and social security contributions from the coordination centres. There was therefore no transfer of State resources.
>
> That argument cannot be accepted. For the condition that the aid must be financed through State resources to be satisfied, it is sufficient that the measure should receive actual support, directly or indirectly, from the public budget. The waiver, by the Member State concerned, of the right to levy a tax in whole or in part which places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid, even if, at the same time, the scheme in question generates tax revenues for that State, by reason, inter alia, of the taxation of profits earned by the companies benefitting from the aid and salaries paid by those undertakings to their employees. The material factor in

7 Case C-387/92 *Banco Exterior de España* [1994] ECR I-877.
8 Case C-279/08 *P Commission v Netherlands (Emissions trading scheme)* [2011] ECR I-7671.
9 See, eg, Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497 at [66]-[70].

considering that condition is the public nature of the resource and not the question whether the measure at issue ultimately does, or does not, represent a charge for the budget of the Member State concerned."[10]

24 Thus the concern is not with the overall effect of a particular measure on the budget of the Member State concerned. Rather, it is whether, viewing the measure in more granular terms, the aid component (ie, that which confers a benefit) has a negative effect on State resources.

(3) An incidental financial burden does not suffice

25 A loss of State resources that is merely incidental does not suffice in this regard. In *Sloman Neptun*,[11] for example, the Court considered legislation that provided that contracts of employment concluded by shipping companies with seamen who were nationals of non-member countries and had no permanent residence in Germany could be subjected to working conditions and rates of pay that differed from those generally applicable in Germany to German nationals. One of the practical effects of this was that non-nationals could be paid less, so the amount of social security contributions received by the State from their employers was reduced. The Commission's argument was that the measure was financed from State resources, there being a loss of tax revenue as a result of the reduced level of rates of pay. The Court rejected this argument:[12]

> "The system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State or the abovementioned bodies, but only to alter in favour of shipping undertakings the framework within which contractual relations are formed between those undertakings and their employees. The consequences arising from this, in so far as they relate to the difference in the basis for the calculation of social security contributions, mentioned by the national court, and to the potential loss of tax revenue because of the low rates of pay, referred to by the Commission, are inherent in the system and are not a means of granting a particular advantage to the undertakings concerned.
>
> It follows that a system such as that applicable to the ISR is not a State aid within the meaning of Article 92(1) of the EEC Treaty."

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10 Cases C-182 & 217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, Advocate-General's Opinion at [307]-[308]. See also the Judgment at [127]-[129].

11 Case C-72 & 73/91 *Sloman Neptun* [1993] ECR I-887.

12 At [21]-[22].

26 A similar issue arose in *Ecotrade*,[13] which concerned a 'special administration' insolvency procedure that was applicable to large undertakings, which allows them to continue trading in circumstances in which such trading would not be allowed if the usual insolvency rules were applied. Advocate-General Fennelly rejected the Commission's argument that losses sustained by private creditors under a 'special administration' regime could qualify as aid because of the resultant loss in tax receipts to the State. He concluded: "This is simply too remote a connection with the State's disposal of its resources to amount to aid."[14] The Court agreed:

> "Contrary to the view taken by the Commission, the possible loss of tax revenue for the State as a result of the application of the system of special administration, on account of the absolute prohibition on individual actions for enforcement and the suspension of interest on all debts owed by the undertaking in question, and the correlated reduction in creditors' profits, does not in itself justify treating that system as aid. That consequence is an inherent feature of any statutory system laying down a framework for relations between an insolvent undertaking and the general body of creditors, and the existence of an additional financial burden borne directly or indirectly by the public authorities as a means of granting a particular advantage to the undertakings concerned may not automatically be inferred therefrom (see, to that effect, *Sloman Neptun* ... paragraph 21)."[15]

Application to the Policy

27 Applying the foregoing propositions of law to the Policy, in TfL's submission, the Policy in question does not "receive actual support, directly or indirectly, from the public budget" (to quote Advocate-General Léger); there is no public financial burden and thus no aid.

28 However, Eventech argues that the Policy involves two sources of public financial burden:

(a) the Policy involves access to a State asset, ie, the bus lanes; and

(b) Black Cabs are exempted from the requirement to pay fines for driving in the bus lanes.

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13 Case C-200/97 *Ecotrade* [1998] ECR I-7907.

14 See *Ecotrade*, above, Advocate-General's Opinion at [24].

15 *Ibid*, Judgment at [36]. However, the Court found that other features of the 'special administration' system could give rise to State aid.

29 Both of these arguments are addressed below.

(1) Access to a State asset

30 As a preliminary point, TfL observes that the fact that the Policy regulates the use of particular State infrastructure is not sufficient to show that any benefit conferred on Black Cabs is 'granted through State resources' within the meaning of Article 107(1) TFEU. As discussed above, the critical question is whether there is a negative effect on the public budget. Whereas providing and maintaining roads entails a burden on public finances, a measure regulating which vehicles may use particular lanes at particular times does not.

31 It is unsurprising, therefore, that Commission decisions and judgments of the European Courts relating to State aid in the field of infrastructure generally concern infrastructure funding. In such cases, the cause for concern is apparent: close scrutiny of a particular measure is required to determine whether substantial sums of State funds are directly or indirectly benefiting certain undertakings in comparison to others.

32 Where the construction of State infrastructure is found to be of benefit to the economy in general, it does not fall within the concept of State aid.[16] This is normally the case where the infrastructure is State-owned and managed by the State as part of exercising its public authority. As the Commission explained in the *Coràs lompair Eirann* decision, in such cases "the construction of a transport infrastructure by public authorities does not constitute an economic activity".[17] Hence most land transport infrastructure financing and construction (eg, roads constructed and maintained by the public authorities and inland waterway channels) does not fall within Article 107(1) TFEU.

33 Whether the infrastructure in question is for the benefit of the economy in general is determined by a distinction between 'public' infrastructure and 'user-specific'

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16 See Koeing C and Haratsch A, 'The Logic of Infrastructure Funding under EC State Aid Control', EStAL 3/2004, p. 393. This article was cited by the Commission in Case N 478/2004 *State guarantee for capital borrowings by Coràs lompair Eirann (CIÉ) for infrastructure investment* (7 June 2005).

17 Decision in Case N 478/2004 *State guarantee for capital borrowings by Coràs lompair Eirann (CIÉ) for infrastructure investment* (7 June 2005).

infrastructure.[18] In relation to 'public' infrastructure, the Commission has consistently held that "no State aid within the meaning of Article [107(1) TFEU] is present at the user's level where transport infrastructure is open to all potential users on equal and non-discriminatory terms".[19] This is to be contrasted with 'user-specific' infrastructure, namely, infrastructure that is constructed with a particular end-user in mind or actually favours a particular end-user. For instance, in case of *Kimberley Clark Industries*[20] an industrial park was created near a river, which specifically favoured a manufacturer of paper products by providing the necessary water supply as well as waste water treatment.

34 Even where it is open to all users on equal and non-discriminatory terms, infrastructure financing and construction is considered an economic activity where the construction is "not dissociable" from the commercial operation of the infrastructure in question.[21] In the *Leipzig-Halle Airport* case, the Commission argued that the investment costs of the facilities used by an airport operator are investment costs which a commercial undertaking must normally bear.[22] It is clear why that is an advantage granted directly or indirectly through State resources: by meeting the costs that the undertaking in question should have had to bear, the State has forgone resources.

35 Even if State aid may in principle arise in a case involving the use of pre-existing infrastructure, rather than the funding of new infrastructure, it remains necessary to identify an advantage that is "granted through State resources". The most obvious way in which a public financial burden could arise in such circumstances is by the State conferring on a particular undertaking, without any charge, an advantage with real market value, and thereby forgoing resources.[23]

36 The present case concerns State-owned and managed roads that are generally available to all potential users on an open, non-discriminatory basis. Eventech's argument is that the

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18 See in this regard Kekelekis M, 'Recent Developments in Infrastructure Funder under EC State Aid Control', EstAL 3/2011, p. 433, at p. 436, where the author cites Commission Communication "*Reinforcing Quality Service in Sea Ports: A Key for European Transport*" COM (2001) 35 final of 1 February 2001, which makes this distinction.

19 Decision in Case N 110/2008 (10 December 2008) at [80].

20 Case C 20/94 (NN 27/94) *Kimberley Clark Industries* [1994] OJ C170/8.

21 See, eg, Case C-288/11 P *Mitteldeutsche Flughafen v Commission* (judgment of 19 December 2012).

22 *Ibid.*

23 This is analogous to the analysis of State resources in the *Emission trading scheme* case, above, fn 8. In that case, it was held that the State had forgone resources because the tradable emissions permits had market value and so they should not have been given away without a charge.

measure permitting Black Cabs, but not minicabs, to drive in a bus lane during its hours when bus lane restrictions are operational constitutes discriminatory access to a State asset, such that the infrastructure in question can no longer be described as open to all potential users on equal and non-discriminatory terms, ie, it is not 'public' infrastructure.

37 This argument implies that State aid potentially arises if there is any deviation from a position of complete neutrality between all undertakings in relation to any aspect of the use of the publicly funded infrastructure in question.

38 Such an extreme position is not borne out by the authorities. On the contrary, the present case is very far from the situations in which infrastructure has been held to be 'user-specific':

(a) The starting point in assessing whether the infrastructure is 'general' (such that its construction does not fall within the concept of State aid) is to consider what, in this case, the relevant infrastructure actually is. Eventech suggests that the infrastructure comprises individual bus lanes. This is unrealistic: a bus lane is not a piece of infrastructure in its own right but is simply a designation of a lane (or part of a lane) of a road, the road as a whole being the relevant infrastructure.[24]

(b) The relevant roads in TfL's case are GLA roads (as defined and designated under the Highways Act 1980). TfL is both the highway authority and the traffic authority for all of the GLA roads. These roads extend to 580km and are, very broadly speaking, the most important roads in Greater London: see the Order for Reference at [11].

(c) The GLA roads comprise a major transport network that was constructed and is maintained for the general benefit of the economy.[25] They are public roads, which are available to all potential users on an open, non-discriminatory basis (subject to ordinary traffic regulations). There is, for example, no road – or even stretch of road – that is open to Black Cabs and not minicabs.

(d) On the face of it, therefore, the infrastructure in this case is clearly 'general': it is provided for the benefit of the economy in general, as a responsibility of the State, and there is access to it for all users.

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24 See, in this regard, the language of the decision in N 110/2008 *JadeWeserPort* (10 December 2008) at [50]: "However, this principle only applies to the construction of general infrastructures by Member States open to all users (e.g. a public street)..." (emphasis added).

25 See the usage statistics in [3] of the judgment of Mr Justice Burton.

(e) The next question is whether the effect of the Policy is such that it changes this position. The Policy means that, for a proportion of the GLA roads (just over 20%), there are certain hours of the day on certain days of the week during which buses and Black Cabs can drive down a particular lane of the road but minicabs can enter that lane only for more limited purposes.[26] Minicabs still have open access to the roads in question; it is simply a question of the circumstances in which they can drive in one of the lanes.

(f) But this is not a sufficient disparity in treatment, in terms of access to infrastructure, to render the construction and maintenance of the GLA roads by the State an economic activity so that the Policy is thereby brought within the scope of Article 107(1) TFEU.

39 Indeed, Eventech's position must presumably be that every measure imposing any restrictions on the usage of a particular lane of a public road, during particular hours, comprises a breach of the principle of open access and so renders the State construction and maintenance of the road in question an 'economic activity' for the purposes of State aid law. If that were correct, one would expect a very wide range of traffic regulation measures to fall within the category of State aids that must be notified to the Commission under Article 108 TFEU.

40 For example, the following measures could in principle be notifiable:

(a) the designation of bus lanes (even those that taxis were not permitted to use);

(b) the designation of tram lanes;

(c) the designation of cycle lanes;

(d) the designation of certain lanes as high occupancy vehicle ('carpool') lanes; and

(e) any restriction on the ability of heavy goods vehicles to use certain lanes.

41 The striking disparity between the number of traffic regulation measures that there must have been, across the EU, that fall within the list above and the dearth of Commission decisions concerning such measures highlights the unrealistic nature of Eventech's argument.

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[26] Namely, to pick up or set down pre-booked passengers.

(2) Exemption from the requirement to pay a fine

42 In principle, the waiver of a charge which would otherwise have fallen due to the State is capable of constituting State aid. In *Piaggio SpA*, the Court held:

> "... placing an undertaking under special administration entails extension of the prohibition and suspension of all individual actions for enforcement to tax debts and penalties, interest and increases for belated payment of corporation tax, release from the obligation to pay fines and pecuniary penalties in the case of failure to pay social security contributions...
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> Those advantages, conferred by the national legislature, could also entail an additional burden for the public authorities in the form of a State guarantee, a de facto waiver of public debts, exemption from the obligation to pay fines or other pecuniary penalties, or a reduced rate of tax. It could be otherwise only if it were established that placing the undertaking under special administration and allowing it to continue trading did not in fact entail or should not entail an additional burden on the State, compared to the situation that would have arisen had the ordinary insolvency provisions been applied."[27]
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> [Emphases added]

43 This case was relied on in *Emissions trading scheme*, in which the Court held that the Netherlands' decision to create tradable emissions permits and then issue them to certain undertakings (but not to others) free of charge involved the use of State resources. One of the reasons the Court gave in support of this finding was that:

> "... the measure in question confers on the undertakings concerned the right to purchase emission credits on the market, before the end of the year, the emission ceiling limits being annual. Such a conclusion means that certain undertakings, before the checking by the national authorities of compliance with the applicable ceiling, grant themselves the right to purchase the missing allowances and, consequently, to avoid exceeding the emission standard and therefore having to pay a fine."[28]
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> [Emphasis added]

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27 Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA* [1999] ECR I-3735 at [41]-[42].

28 *Op cit*, fn. 8 above, at [94].

44 The Court explained why there was an effect on State resources in that case, whereas there had not been in *PreussenElektra*, in the following way:

> "With regard to the arguments concerning *PreussenElektra*, the General Court correctly distinguished that judgment from the present case. According to that judgment, legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of [Article 107(1) TFEU].
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> The Court considered, in that judgment, that even if the financial burden arising from the obligation to purchase at minimum prices was likely to have negative repercussions on the economic results of the undertakings subject to that obligation and entail a diminution in tax receipts for the State, that consequence was an inherent feature of such a legislative provision and could not be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State.
>
> On the contrary, in the present case, as the Advocate General stated in point 92 of his Opinion, that foregoing of resources cannot be considered as 'inherent' in any instrument designed to regulate emissions of atmospheric pollutants by an emission allowance trading scheme. Where it has recourse to those instruments, the State has in principle a choice between allocating those allowances free of charge or selling or auctioning them. Furthermore, in the present case there is a sufficiently direct connection between the measure in question and the loss of revenue, a link which did not exist between the imposition of the obligation to purchase and the possible diminution in tax receipts at issue in the case which led to the judgment in *PreussenElektra*. The facts of the two cases are therefore not comparable and the solution adopted by the Court in *PreussenElektra* thus cannot be applied to the present case."[29]
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> [Emphases added]

45 In relation to the above cases, TfL observes:

(a) The measure in *Piaggio SpA* was a direct exemption from paying fines that continued to be incurred. Similarly, in the *Emissions trading scheme* case, the entities in question would continue to be subject to the law establishing a ceiling for emissions.

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[29] *Ibid*, at [109]-[111].

The tradable allowance, like the suspension of enforcement actions in *Piaggio SpA*, is a mechanism by which the entities would be able to avoid paying the fine for exceeding that ceiling. In contrast, the Policy has the effect that Black Cabs are not engaging in an illegal activity when driving in the bus lanes, with the consequence that they are not liable to the criminal and civil enforcement systems for road traffic contraventions.

(b) The measure in *Emissions trading scheme* was distinguished from *PreussenElektra* on the basis that "foregoing of resources cannot be considered as 'inherent' in any instrument designed to regulate emissions of atmospheric pollutants by an emission allowance trading scheme" because the State had the choice to sell or auction the instruments in question. In contrast, it is inherent in a system to regulate which vehicles can lawfully use the designated lanes that those which are permitted to use the designated lanes are not sanctioned (by the imposition of a fine) as a result of doing so.

(c) Crucially, the test set out in *Piaggio SpA* required the effect of the measure to be "compared to the situation that would have arisen had the ordinary insolvency provisions been applied". In *Emissions trading scheme*, but for the ability to buy emissions allowances, the companies who were given the allowances might instead have paid fines. It is clear from the Advocate-General's discussion at [77] that the decision whether or not to pay a fine was an economic one. Similarly, in *Netherlands v Commission*,[30] where a levy became payable if certain emissions levels were exceeded, it was conceivable that an undertaking would opt to pay the levy in question rather than reduce its emissions.

(d) In contrast to the fine that would be imposed in *Emissions trading scheme* and the levy imposed in *Commission v Netherlands*, the fine imposed for illegally driving in bus lanes during their hours of operation would be incurred on every occasion that the vehicle in question enters a bus lane, which could be several times in one journey. It follows that one could not seriously suggest that, but for the measure in question, Black Cabs would have been faced with an economic decision whether to avoid using the bus lanes or continue to use them and pay the ensuing fines. To do the latter would be wholly uneconomic.

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30 Case C-159/01 *Kingdom of the Netherlands v Commission* [2004] ECR I-4461.

(e) This point is illustrated by the facts of the present case. When, in the course of the domestic proceedings, the Chairman of Addison Lee issued a notice to Addison Lee's drivers advising those drivers that they were entitled to use London bus lanes marked for use by Black Cabs and offering to indemnify them in respect of any fines or other liabilities incurred for doing so, TfL successfully obtained an injunction to restrain a breach of the criminal law.[31]

(f) It follows that, compared to the situation in which Black Cabs are prevented from driving in bus lanes, in which case they would simply not use them, the State cannot be said to have foregone resources such that the Policy amounts to State aid.

Conclusions in relation to Question 1

46 Despite the broad range of circumstances in which an advantage is said to be granted directly or indirectly through State resources, it is nevertheless essential that the measure in question imposes a public financial burden. The importance of this requirement is reflected in Advocate-General Jacob's warning against extending too far the boundaries to the scope of application of Article 107(1).[32] It is inappropriate to use the State aid provisions of the TFEU to inquire into the complex task undertaken by Member States in controlling and regulating traffic on State owned and operated roads on the basis that this task may give rise to some incidental distortion in competition.[33]

47 For the reasons set out above, the measure in question does not impose a public financial burden. TfL therefore submits that the answer to the first question should be as follows:

> "Making a bus lane on a public road available to Black Cabs (but not to minicabs) for driving in during its hours of operation does not involve the use of "State resources" within the meaning of Article 107(1) TFEU, in circumstances where:
>
> (i) that making available does not change the level of use of the road or add to the cost of maintaining it;
> (ii) that making available does not otherwise impose any extra burden on public funds;

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31 The injunction was granted by Mr Justice Eder on 26 April 2012: *Transport for London v John Griffin, Addison Lee PLC and Eventech Limited [2012] EWHC 1105 (QB).*

32 See Cases C-52-54/97, *Viscido v Ente Poste Italiane* [1998] ECR I-2629, Advocate-General's Opinion at p.2635; Case C-379/98 *PreussenElektra*, fn. 5 above, Advocate-General's Opinion at p. 2138.

33 See the commentary in Quigley, C., *European State Aid Law and Policy* (2nd ed, 2009) at p. 20.

(iii) minicabs remain permitted to enter the bus lane to pick up or set down pre-booked passengers;
(iv) the right of minicabs to use the public road is not denied or altered in any way; and
(v) the State does not make any funds available to Black Cabs and is not deprived of revenue which it would otherwise have received by relieving Black Cabs of any licence or other fees; but
(vi) insofar as the State imposes fines for use of the bus lane by non-permitted vehicles, the making available may indirectly and marginally result in the State losing revenue (to the extent that it loses fines which might have been payable had Black Cabs entered the bus lane illegally)."

Question 2: Selectivity

48 The second question referred to the Court relates to the requirement of selectivity. It asks:

"(a) In determining whether making a bus lane on a public road available to Black Cabs but not minicabs, during the hours of operation of that bus lane, is selective for the purpose of Article 107(1) TFEU, what is the relevant objective by reference to which the question whether Black Cabs and minicabs are in comparable legal and factual situation to be assessed?
(b) If it can be shown that the relevant objective, for the purposes of 2(a), is at least in part to create a safe and efficient transport system, and that there are safety and/or efficiency considerations that justify allowing Black Cabs to drive in bus lanes and that do not apply in the same way to minicabs, can it be said that the measure is not selective within the meaning of Article 107 TFEU?
(c) In answering question 2(b) is it necessary to consider whether the Member State relying on that justification has demonstrated, in addition, that the favourable treatment of Black Cabs by comparison with minicabs is proportionate and does not go beyond what is necessary?"

49 According to the case-law of the Court as regards the selectivity of a particular measure, Article 107(1) TFEU requires the assessment of whether under a particular legal regime, a national measure is such as to favour "certain undertakings or the production of certain goods" in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.[34]

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34 Case C-400/08 *Commission v Spain* [2011] 2 CMLR 50 at [75]; Case C-143/99 *Adria-Wien Pipeline* [2011] ECR I-8365 at [41]; C-172/03 *Heiser* [2005] ECR I-1627 at [40].

50 Following this approach: first, the objective pursued by the regime has to be identified; secondly, it must be assessed and determined whether any advantage granted by the measure at issue differentiates between economic operators who, in the light of the objective pursued by the regime, are in a comparable factual and legal situation; finally, if (and only if) the measure is *prima facie* selective, it is necessary to consider whether the differentiation is justified by the nature or general scheme of the legal regime in question.[35] The latter condition is alternatively expressed as a requirement for the Member State to show whether the differentiations derive directly from the basic or guiding principles of the system.[36]

The objective pursued by the measure

51 The case-law of the Court of Justice of the European Union establishes that the relevant objective by which selectivity is to be assessed is the objective pursued by the legal regime in question:

(a) In determining whether the measure is selective, the Court in *British Aggregates* asked whether, "within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation" (emphasis added).[37]

(b) Similarly, the General Court in *British Aggregates* started with the question whether "under a particular statutory scheme", the measure has the effect of favouring certain undertakings in comparison with others.[38]

(c) In *Paint Graphos*, a case about Italian corporation tax rules which gave a special concession or exemption to co-operative societies because of the special purpose of such societies, the Court compared the different undertakings "in light of the objective pursued by the corporation tax regime, namely the taxation of company profits."[39]

52 In light of the above:

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35 Case C-487/06 *P British Aggregates Association v Commission* [2008] ECR I-10515 at [83].
36 Decision 2011/527/EU *Sanierungsklausel* [2011] L235/26 at [18]-[20].
37 *Op cit*, fn. 35 above, at [82].
38 Case T-210/02 [2006] ECR II-2789 at [47]-[48].
39 Joined Cases C-78 to 80/08 *Paint Graphos* [2011] ECR I-7611 at [54].

(a) The starting point in this case must be the applicable legal or statutory regime. On the facts of this case, Eventech challenged two penalty charge notices issued for breach of an Order relating to the bus lane on Southampton Row. As set out above, the order designates the lanes to which it applies, and designates which vehicles may use these lanes at the designated times.

(b) The Order was made under s. 6 of the 1984 Act, which (as set out in the Order for Reference) confers power on a traffic authority to make orders "for controlling or regulating vehicular and other traffic". Thus, answering the question posed by the Court in *Paint Graphos,* the legal regime under which the question of selectivity falls to be answered is a traffic control and regulation regime.

(c) The particular order challenged was not made by TfL, but TfL has made many similar orders pursuant to the same traffic control and regulation power. This specific power is consistent with its general statutory duty to exercise its functions to facilitate the discharge, by the GLA, of its duty to secure the provision of "...safe, integrated, efficient and economic transport facilities and services to, from and within Greater London": see generally [7]-[8] above.

53 The second stage of the selectivity assessment is to ask whether Black Cabs and minicabs are in a comparable factual and legal situation with regard to the objective pursued by the Camden Order, namely, traffic control and regulation. They are not. The summary at [12]-[13] above indicates that the two categories of vehicle are subject to fundamentally different regulatory regimes and do not operate in the same market. Black Cabs can ply for hire, are not particularly reliant upon pre-bookings and are subject to extensive regulation (including a requirement of compellability, strict accessability requirements, a limited choice of vehicles, regulated fares and stringent driver training and knowledge standards). Minicabs are not entitled to ply for hire, can only be pre-booked and both licensed operators and licensed drivers are subject to less extensive regulation. There are therefore highly relevant differences between the roles that they play in the context of traffic control and regulation.

54 If, as TfL submits, Black Cabs and minicabs are not, in the light of the objective pursued by the scheme, in a comparable legal and factual position, then no further question arises. The requirement of selectivity is not met and there is no State aid.[40]

Justified by the nature and scheme of the system

55 Alternatively, if (contrary to TfL's submissions) Black Cabs and minicabs were considered to be in a comparable position, the question that falls to be answered is whether the distinction between Black Cabs and minicabs is nevertheless justified by the nature or general scheme of the statutory regime. Or to put the question differently: whether the differentiations derive directly from the basic or guiding principles of the statutory regime.

56 In that regard, in *Paint Graphos* the Court stated that:

> "... a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.
>
> Consequently, tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article [107(1) TFEU]."[41]
>
> [Emphasis added]

57 Applying the above to the present case:

(a) The basic or guiding principles of the legal regime in question are to be found in s. 6 of the 1984 Act. As set out above, this empowers the traffic authorities to make an order for controlling or regulating vehicular and other traffic. The statutory provision then goes on to stipulate that the power is to be exercised for any of the purposes, or with respect of any of the matters, mentioned in Schedule 1 to the 1984 Act. The purposes specified in Schedule 1 to the 1984 Act include, at paragraph 3, "regulating

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40 *Op. cit.*, fn. 39 above, at [64] where the Court ruled that it was necessary to consider whether the measures in issue were justified by the nature or general scheme of the system of which they form part only "[i]f the national court concludes that, in the disputes before it, the condition set out in the preceding paragraph [sc. whether the situations are comparable in the light of the objective pursued] is in fact met".

41 *Op cit*, fn. 39 above, at [69]-[70].

the relative position in the roadway of traffic of differing speed or types." The purposes mentioned in section 1(1) of the 1984 Act include "(a)...avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising"; and "(c)... facilitating the passage on the road or any other road of any class of traffic (including pedestrians)": see the Order for Reference at [13].

(b) It follows that the control and regulation of traffic has as its basic or guiding principles considerations of safety and/or efficiency. This is consistent with TfL's general statutory duty to exercise its functions to facilitate the discharge, by the GLA, of its duty to secure the provision of "...safe, integrated, efficient and economic transport facilities and services to, from and within Greater London".

(c) It is intrinsic to a traffic control and regulation scheme which restricts access to the lane closest to the pavement that it would take into account the safety and/or efficiency considerations pertaining to a vehicle that has a right to ply for hire, accessing customers from the pavement.

(d) The Policy in question is to "allow for [Black Cabs] 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 into account the effects on safety of excluding [Black Cabs] from the bus lane" (emphasis added).[42] Thus the safety and/or efficiency considerations that justify Black Cabs to drive in bus lanes, and which do not apply in the same way to minicabs, are not extrinsic to the traffic management scheme that has as its basic or guiding principles considerations of safety and efficiency: on the contrary, they are integral to it.

(e) Thus, the differentiation between Black Cabs and minicabs derives directly from the basic or guiding principles of the Order, as set out by Schedule 1 to the 1984 Act. It follows that the Order in question is not selective within the meaning of Article 107(1) TFEU.

Proportionality

58 In *Paint Graphos*, the Court held that, in order to show that a measure is justified by the general nature of the scheme, it is necessary to show that the measure does not go beyond

[42] See judgment of Mr Justice Burton at [13].

what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures.[43]

59 The requirement of proportionality is a familiar one in many areas of EU law – in particular when considering derogations from the fundamental freedoms guaranteed by the TFEU. As the Grand Chamber of this Court held, when considering the requirement of proportionality in the context of obstacles to the free movement of goods, the burden on Member State authorities to prove that interferences with that freedom were proportionate:

> "...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..."[44]

60 That observation should surely apply equally (if not with greater force) when the question of proportionality arises in the context of considering whether a measure is justified by the general nature of a regulatory scheme for the purposes of Article 107(1) TFEU.

61 Mr Justice Burton held on the facts of this case that the other options put forward by Eventech were not viable.[45] It follows that, on the findings thus far made by the national court, TfL has established that it is "necessary" to allow Black Cabs to access bus lanes to enable them safely and efficiently to perform their function of plying for hire.

The answer to the second question

62 The answer to the second question should be as follows:

> "(a) In determining whether making a bus lane on a public road available to Black Cabs but not minicabs, during the hours of operation of that bus lane, is selective for the purpose of Article 107(1) TFEU, the relevant objectives by reference to which the question whether Black Cabs and minicabs are in comparable legal and factual situation to be assessed are the statutory objectives of (i) controlling or regulating vehicular or other traffic and (ii) creating a safe and efficient transport system.

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43 See *Paint Graphos*, fn. 39, at [75].

44 Case C-110/05 *Commission v Italy* [2009] ECR I-519 at [66] (a case concerning Article 56 TFEU).

45 See his judgment at [62].

(b) In the light of the answer to (a) above, if it can be shown that there are safety and/or efficiency considerations that justify allowing Black Cabs to drive in bus lanes and that do not apply in the same way to minicabs, it follows that Black Cabs and minicabs are not in a comparable situation when viewed in light of the relevant objective and, accordingly, the measure is not selective within the meaning of Article 107 TFEU.

(c) Once it is shown that Black Cabs and minicabs are not in a comparable situation, there is no need to consider whether it has been demonstrated, in addition, that the favourable treatment of Black Cabs by comparison with minicabs is proportionate and does not go beyond what is necessary. That issue arises if and only if it is first shown that Black Cabs and minicabs are, when viewed in light of the relevant objective, in a comparable situation. In that case, and only in that case, it is necessary for the Member State to establish that (i) the impugned measures are justified by the nature or general scheme of the system of which they form part; and (ii) the favourable treatment of Black Cabs by comparison with minicabs is proportionate and does not go beyond what is necessary. But in applying this latter requirement, the 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."

Question 3: Trade between Member States

63 The third question referred to the Court asks:

> "Is making a bus lane on a public road available to Black Cabs but not to minicabs, during the hours of operation of that bus lane, liable to affect trade between Member States for the purposes of Article 107(1) TFEU, in circumstances where the road in question is located in central London?"

64 As a preliminary point, TfL observes that:

> "the condition that the aid must be liable to affect inter-State trade is not a mere formality, but is an important requirement, since it marks the dividing line between the jurisdiction of the EU authorities and the area reserved to the independent action of the Member States".[46]
>
> [Emphasis added]

65 This is reflected in the test for whether inter-State trade is affected, set out by the Court in *Remia BV v Commission*:

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[46] Bacon, K., *European Union Law of State Aid* (2nd ed, 2013) at [2.149], emphasis added.

"... 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." [47]

[Emphasis added]

66 TfL submits that it is simply insufficiently likely that the regulation of traffic flow in Greater London, during certain hours of the day on certain days of the week, would prejudice the realisation of the aim of a single market in all the Member States.

67 This would require, as a starting point, that the advantage conferred by the Policy should "[strengthen] the position of a class of undertakings in relation to other undertakings competing in intra-Community trade".[48] It follows that it must be at least conceivable that a Black Cab is in competition with undertakings providing a similar service in other Member States.[49]

68 In support of this proposition, Eventech argued before the High Court and the Court of Appeal that a substantial and expanding part of Addison Lee's business consists in the provision of services to persons established in other Member States. This was contrasted with the findings of the Commission in cases where inter-State trade was held not to be affected, such as the decision in *Ireland: capital allowances for hospitals*,[50] in which it was held that the hospital's capacity would not "attract customers from other Member States", and that in *Bataviawerf*,[51] in which it was held in relation to support for local museums that they were not likely to attract international tourists.

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47 Case 42/82 [1987] 1 CMLR 1 (a case concerning what is now Article 101 TFEU) at [22].

48 Case C-53/00 *Ferring* [2001] ECR I-9067 at [21]; Case T-298/97 *Mauro Alzetta v Commission* [2000] ECR II-2319 at [81].

49 The threshold was set low in the Case C-172/03 *Heiser* [2005] ECR I-1627 at [35], where the Court seemed to have been satisfied that inter-State trade is liable to be affected "since it is not inconceivable...that medical practitioners specialising in dentistry ... might be in competition with their colleagues established in another Member State."

50 Decision in Case N 543/2001 (27 February 2002) at [30].

51 Decision in Case N 377/2007 (28 November 2007) at [17]-[18].

69 However, reliance on these cases is misplaced. Whether international patients are likely to be attracted to a particular hospital is relevant to the question whether the beneficiary hospital is strengthened vis-à-vis potential competitors in other Member States. Similarly, a museum that attracts international tourists has the potential to divert tourists away from other museums in other Member States. The present case is simply not analogous. A Black Cab or minicab carrying international customers around London is not diverting customers away from undertakings providing similar services in other Member States.

70 In *Altmark*, the Court held that:

> "...it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States.
>
> Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State..."[52]
>
> [Emphasis added]

71 Similarly, in its 'Communication concerning State aid N 376/01' (the "Cableways Communication"),[53] the Commission said:

> "It may be that in some cases the beneficiary is active only locally and an alternative transport activity would not be economically or technically viable: in those circumstances the measure would not distort competition and affect trade between Member States. In other cases, the transport activity – by cableways or other means – is technically or economically viable and capable of attracting commercial operators who carry out an economic activity within the meaning of [Article107(1)] of the Treaty. In view of the progressive liberalisation of the transport sector, the possibility of this transport being provided by operators of other Member States is not to be excluded. In those latter cases the measures

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52 Case C-280/00 [2003] ECR I-7747 at [77]-[78].

53 Commission communication to the Member States and other interested parties concerning State aid N 376/01 – Aid scheme for cableways – Authorisation of State aid under Articles 87 and 88 of the EC Treaty (Proposal to which the Commission has no objection) OJ C 172, 19.7.2002 at [25].

would distort or threaten to distort competition and affect trade between Member States and therefore constitute State aid within the meaning of [Article 107(1)]."

72 The Cableways Communication was cited in the Commission's 'Communication concerning State aid SA.430/56' ("United Kingdom Cable Car for London"), in which the Commission found that a potential effect on competition and trade as a subsidy paid to Docklands Light Railway Limited ("DLRL") could not be entirely excluded in circumstances where:

(a) the notified measure had the potential of strengthening the position of DLRL; and

(b) it is neither legally prohibited nor can it be excluded that either private taxis or domestic or foreign bus operators could now or in the future fill the gap in the transport network and provide passenger transport services between the areas connected by the cable car.

73 However, this decision is, again, not analogous to the present case:

(a) The Policy merely has the result that a category of undertakings, namely Black Cabs, can potentially drive down certain London roads at a faster speed compared with minicabs during certain hours of the day, on certain days of the week. Whether or not this strengthens the position of Black Cabs vis-à-vis minicabs, it has no bearing on the ability of citizens from any Member State providing either service in London, since it is open to them to own or drive either a Black Cab or a minicab in London (subject to the regulatory requirements applicable in either case).

(b) In contrast, in the Cable Car for London case, substantial subsidies were paid to a particular operator, the effect of which was self-evidently to strengthen the position of that specific operator in relation to operators of other Member States who might have wished to compete for the provision of the service in question.

(c) Mr Justice Burton found on the facts that "there is nothing which suggests that the fact that all minicab drivers (including those 91% who do not come from other Member States) have any difficulty with exercising their profession, or regard their occupation as rendered unattractive. There is no limitation upon their licence, no limitation upon their right to charge what fares they wish (taking into account travelling through congested areas otherwise than in bus lanes)."[54]

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54 Judgment of Mr Justice Burton at [55]. This finding of fact was made in relation to Eventech's claim in relation to freedom of establishment (a ground that it ran in the High Court but did not renew before the Court of Appeal).

74 While the amount of alleged aid is not determinative of the question whether inter-State trade is capable of being affected,[55] the amount of aid may (depending on the facts of the case) have a bearing on that question. It is well established that, where a sector is particularly exposed to inter-State competition, such as the export market for fruit and vegetables, although the amount of aid (or the size of the undertakings that receive it) may be small, this does not exclude the possibility that intra-Community trade may be affected.[56] The corollary is that:

> "In economic sectors with little competition in intra-Community trade such as car repairs, taxi services, or sectors with prohibitive transport costs, aid of a relatively small amount granted to small undertakings operating on essentially local markets might not affect trade between member States."[57]
>
> [Emphasis added]

75 Thus, it is clearly relevant to the assessment whether inter-State trade is affected that:

(a) Black Cabs are small undertakings;[58]

(b) they operate on an essentially local market;

(c) the relevant sector is not particularly exposed to inter-State competition, if at all;

(d) there is no question of a subsidy or grant: the measure merely gives rise to the potential that Black Cabs may travel at a faster speed than minicabs during certain hours of the day, on certain days of the week;

(e) any such advantage arising from the measure would apply equally to any holder of a Black Cab licence, who could be a citizen of any Member State; and

(f) it is the (unchallenged) finding of the High Court that there is no obstacle to citizens of other Member States exercising their right to freedom of establishment and coming to London to avail themselves of such an advantage.

76 Accordingly, TfL submits that the third question submitted by the Court of Appeal should be answered as follows:

> "The making of a bus lane on a public road available to Black Cabs (but not to minicabs) for driving in during its hours of operation is not liable to affect trade

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55 See *Altmark, op cit*, fn. 52 above, at [82].

56 See Case C-113/00 *Spain v Commission* [2002] ECR I-7601 at [30]-[31].

57 Case C-126/01 *GEMO* [2003] ECR I-13769, Advocate-General's Opinion at [145].

58 All Black Cab drivers are self-employed individuals.

between Member States for the purposes of Article 107(1) TFEU in circumstances where:

(i) the road in question is located in Greater London;

(ii) the activity that is said to be affected is highly local (being limited to Greater London); and

(iii) there is no bar to citizens from any Member State owning or driving either Black Cabs or minicabs."

Conclusion

77 For the reasons set out herein, the Court is respectfully invited to answer the questions set out above in the manner suggested at [47], [62] and [76] above.

[redacted] [redacted] [redacted]

Martin Chamberlain QC Sarah Love Caroline Moore 06.01.14

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