Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 24 September 2014[1]

Case C-518/13

The Queen, on the application of Eventech Ltd
v
The Parking Adjudicator

(Request for a preliminary ruling from the Court of Appeal (England and Wales) (United Kingdom))

(State aid — Concept of 'aid' under Article 107(1) TFEU — Rules governing access to and use of public infrastructure — Authorisation granted to taxis but not to private hire vehicles to use the bus lanes in the Greater London Area — Transfer of State resources — Selectivity — Effect on trade between Member States)

1. The Court of Appeal (England and Wales) has asked the Court to clarify whether a contested London bus lane policy ('the bus lane policy') adopted by Transport for London ('TfL') comes within the concept of 'aid' under Article 107(1) TFEU. Under that policy, only black cabs (that is to say, London taxis) are allowed, during certain periods of the day, to use the lane reserved for public buses on public roads, to the exclusion of private hire vehicles ('PHVs').

2. This dispute comes in the wake of the technological advances made over the past few decades. In particular, the advent of satellite navigation systems and smartphones with specific applications designed for facilitating requests for transport have changed the way in which customers behave, blurring the lines between taxis and PHVs. The result is that taxis and PHVs are engaged in fierce competition with each other across Europe, and London is not the only city where conflicts have arisen.[2]

3. In point of fact, I do not find that the State aid rules are generally concerned with State measures such as the bus lane policy, provided that equal treatment is ensured in respect of comparable undertakings.

1 — Original language: English.

2 — See, inter alia, the Opinion of the French National Competition Authority (Autorité de la Concurrence) No 13-A-23 of 16 December 2013 regarding a draft decree on the pre-booking of chauffeured private hire vehicles; the interlocutory order of 5 February 2014 of the French Conseil d'État in Cases No 374524 and No 374554, *SAS Allocab and Others*; the judgment of 31 March 2014 of the tribunal de commerce de Bruxelles (Brussels Commercial Court) in Case A/14/01645, *Taxi Radio Bruxellois* and the decision of 16 September 2014 of the Landgericht Frankfurt (Frankfurt Regional Court) in Case 03 0 329/14, *Taxi Deutschland*.

I – **The national legal framework**

A – *Black cabs and PHVs*

4. In London taxi services are provided by black cabs and PHVs. Both types of services are licensed by a body which is under the supervision of TfL. They are, however, licensed under different statutory provisions and are subject to different conditions.

5. Black cabs are licensed under the provisions set out in the London Cab Order 1934. That Order was made pursuant to the power in section 6 of the Metropolitan Public Carriage Act 1869 ('the 1869 Act'), which provides in section 8(2) that 'no hackney carriage shall *ply for hire*' (emphasis added) in London unless under the charge of a driver licensed by TfL under section 8 of the 1869 Act. The effect of this is that only black cabs are permitted to collect passengers from the street despite the absence of a prior booking.

6. PHVs are licensed separately under the Private Hire Vehicles (London) Act 1998. They are not permitted to 'ply for hire' in London, but may take passengers that have pre-booked their services.

B – *Traffic regulation powers and the bus lane policy*

7. Under section 121A of the Road Traffic Regulation Act 1984 ('the 1984 Act'), TfL is the traffic authority for certain roads in Greater London known as 'GLA roads',[3] whereas the traffic authorities responsible for almost all other roads in London and Greater London are the individual London boroughs.

8. Section 6 of the 1984 Act (as amended) confers on the traffic authority responsible for a particular road the power to restrict traffic on that road (or part of it) to certain types of vehicles. In exercise of its powers under section 6, TfL designated bus lanes along a number of GLA roads. In that connection, it adopted the bus lane policy.

9. Most London boroughs have adopted bus lane policies similar to that of TfL. An example is the Southampton Row bus lane operated by the London Borough of Camden ('LBC'). PHVs are, however, permitted to enter the bus lanes for the purposes of picking up and setting down passengers.

C – *Enforcement*

10. Under section 4 of the London Local Authorities Act 1996, traffic authorities may issue a penalty charge notice ('PCN') in respect of a breach of an order made under section 6 of the 1984 Act.

11. Orders made under section 6 of the 1984 Act may also be enforced by the Police, as section 8(1) of the same act provides that it is a criminal offence to act in contravention of, or to fail to comply with, an order made under section 6. However, in practice, the majority of infringements of such orders are dealt with by the issue of PCNs by traffic authorities.

3 — The referring court mentions that GLA roads extend to 580 km and are, very broadly speaking, the most important roads in Greater London.

II – **Facts, procedure and the questions referred**

12. Eventech Ltd ('Eventech') is an associated company of Addison Lee plc ('Addison Lee'), which is the operator of a fleet of PHVs in Greater London. Eventech is the registered keeper of all of Addison Lee's PHVs, which are leased under contract by Addison Lee to self-employed drivers.

13. On 6 October 2010 and 13 October 2010 respectively, two of Addison Lee's drivers drove their PHVs along the Southampton Row bus lane in central London. LBC subsequently served PCNs on Eventech in respect of those two uses of the Southampton Row bus lane. Eventech brought proceedings against those PCNs and the lawfulness of the bus lane policy before the Parking Adjudicator.

14. The Parking Adjudicator refused that challenge. Eventech subsequently applied for judicial review before the High Court of Justice, arguing that the bus lane policy infringed the applicable rules on freedom to provide services, freedom of establishment and State aid. By judgment of 13 July 2012, the High Court dismissed that application.

15. On 7 December 2012 Eventech obtained permission to appeal against the decision of the High Court, and the case was subsequently heard by the Court of Appeal. Entertaining doubts as to the proper interpretation of Article 107(1) TFEU, the Court of Appeal decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) Does making a bus lane on a public road available to black cabs but not [PHVs], 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?

(2)(a) In determining whether making a bus lane on a public road available to black cabs but not [PHVs], during the hours of operation of that bus lane, is selective for the purposes of Article 107(1) TFEU, what is the relevant objective by reference to which the question whether black cabs and [PHVs] are in a comparable legal and factual situation should be assessed?

(2)(b) If it can be shown that the relevant objective, for the purposes of [Q]uestion 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 [PHVs], can it be said that the measure is not selective within the meaning of Article 107(1) TFEU?

(2)(c) In answering [Q]uestion 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 [PHVs] is proportionate and does not go beyond what is necessary?

(3) Is making a bus lane on a public road available to black cabs but not to [PHVs], 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, and there is no bar to citizens from any Member State owning or driving either black cabs or [PHVs]?'

16. Written observations have been submitted by Eventech, TfL, the Polish Government, the Commission and the EFTA Surveillance Authority ('ESA'). With the exception of the Polish Government, those parties also presented oral argument at the hearing on 3 July 2014.

III – **Analysis**

A – *Preliminary observations*

17. The Court of Appeal has put three questions for a preliminary ruling to the Court, all of which seek to obtain an interpretation of certain of the constitutive elements of the concept of 'aid' under Article 107(1) TFEU. Question 1 deals with the matter of a transfer of 'State resources'. Question 2, in particular, concerns three different aspects of the assessment as to whether the bus lane policy favours 'certain undertakings or the production of certain goods', that is, whether that policy is selective. Lastly, Question 3 asks for an interpretation of the concept of an 'effect on trade between Member States' ('an effect on inter-State trade').

18. Interestingly, before the High Court of Justice, the State aid issues which were in dispute were (i) the requirement of selectivity; (ii) whether the bus lane policy 'distorts or threatens to distort competition' and (iii) whether the bus lane policy is liable to have an effect on inter-State trade. In other words, on the one hand, whereas it was common ground before the High Court of Justice that the bus lane policy involved a transfer of State resources, that matter is now in issue before the Court of Appeal, being the focus of Question 1.[4] On the other hand, it is no longer contested that the bus lane policy is liable to distort competition. Leaving those matters aside, it has not been disputed before either court that the bus lane policy does indeed confer an advantage upon black cabs and, accordingly, the referring court has not posed any question in that regard.

19. It follows from the applicable national rules that the competitive setting regarding the provision of local passenger transport services by vehicle is one where black cabs have a partial legal monopoly. They alone may 'ply for hire', that is to say, be picked up at a cab rank or be hailed from the street. However, both black cabs and PHVs may provide their services in respect of pre-booked journeys. As to the extent to which black cabs operate on the market for pre-bookings, according to evidence submitted to the High Court of Justice, a 2009 survey showed that 8% of black cab journeys were pre-booked.[5]

B – *Question 1: the transfer of State resources*

20. By its first question, the referring court asks whether the bus lane policy gives rise to a transfer of State resources. What the Court must clarify, therefore, is whether the fact that the State grants a specific group of undertakings access to public infrastructure where there previously was none constitutes such a transfer.

21. Eventech argues that the bus lane policy gives rise to a transfer of State resources in three different ways, namely (i) the preferential access to a State asset for the use of which black cabs are not charged; (ii) the exemption of black cabs from the obligation to pay fines for using the bus lanes; and (iii) the increased expenditure for the maintenance of the bus lanes due to the added traffic from black cabs.

22. As for that last issue, public funds will have to be used to maintain the roads, including any possible bus lanes. The fact that the lane normally reserved for buses might undergo more wear and tear as a result of granting access to black cabs does not change this, as the other lanes will need correspondingly less maintenance. Therefore, I fail to see how the bus lane policy might give rise to an additional burden on the State in this regard.

4 — At the hearing, it was explained that the Court of Appeal decided, of its own motion, to raise the issue of the transfer of State resources and requested the view of the parties thereon.

5 — This information further indicates that 52% of black cab journeys result from passengers hailing them from the street, and 34% were picked up from cab ranks. What occurs in the case of the remaining 6%, was not, however, disclosed; see the judgment of the High Court of Justice in *Eventech Ltd* v *the Parking Adjudicator* [2012] EWHC 1903 (Admin), paragraphs 9 and 50(i).

23. In what follows, I will deal with the other two issues separately.

1. Access to the bus lanes free of charge

24. The bus lane policy gives black cabs the possibility of avoiding traffic and therefore of providing taxi services to a higher number of fare-paying passengers within the same amount of time at no added cost. Such an authorisation carries an economic value.[6] The question is therefore whether this amounts to forgoing State resources or, put differently, whether Member States have an obligation, *under the State aid rules*, to charge for the use of public infrastructure.

25. Although the Court's case-law provides some guidance, the issue under consideration does not appear to have been resolved in previous cases.

26. On the one hand, the case-law according to which measures which, whilst not involving a formal transfer of State resources, nevertheless give rise to a potential forgoing of revenue,[7] does not seem transferable to situations involving access to public infrastructure, as that line of case-law relates essentially to favourable tax treatment.[8] In the same vein, the case-law applicable to State guarantees, which, leaving aside the premium, may entail an additional burden on the State as such guarantees may involve a transfer of State resources at some later point in time,[9] cannot be applied to the issue under consideration.

27. On the other hand, a different line of case-law appears to support the idea that regulatory intervention in the market which benefits one group over another but does not entail an actual or potential payment of State monies (or a loss of gain) does not necessarily involve a transfer of State resources.[10] It could also be inferred from a similar line of case-law that a financial burden on the State which is a simple consequence of a given statutory system and inherent to it, does not come within the concept of a transfer of 'State resources' either.[11]

28. However, neither line of case-law mentioned in the previous point deals with the question of access to public infrastructure.

29. On that basis, I am of the opinion that — generally speaking — the State aid rules do not specifically require that Member States demand payment for access to such infrastructure, but leave it to their discretion whether or not to grant access free of charge.[12] As an asset in the public domain intended to facilitate transport and mobility for end-users, such infrastructure by its very nature requires that rules be set for its use, including access to it — most evidently in relation to traffic control and maintaining order. That is a regulatory, rather than a commercial, matter of the kind that does not justify the application of the rules on competition set out in Chapter 1 of Title VII of the FEU Treaty, including those on State aid.[13] As the Polish Government points out, Member States may have enacted specific rules for the organisation of traffic. This does not mean that by regulating access to public infrastructure, a resource has been transferred (or indeed forgone).

6 — See, to that effect, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraphs 118 and 119 and case-law cited.

7 — See *Commission* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72, and *Vent De Colère and Others*, C-262/12, EU:C:2013:851, paragraph 19.

8 — See, to that effect, *P*, C-6/12, EU:C:2013:525, paragraph 18.

9 — See, for instance, *Bouygues and Bouygues Télécom* v *Commission*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 106 and 107.

10 — See *Kirsammer-Hack*, C-189/91, EU:C:1993:907, paragraphs 17 and 18; *Viscido and Others*, C-52/97 to C-54/97, EU:C:1998:209, paragraphs 14 and 15; and *PreussenElektra*, C-379/98, EU:C:2001:160, paragraphs 61 and 62. See also *Van Tiggele*, 82/77, EU:C:1978:10, paragraphs 24 and 25.

11 — See *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 21, and *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 36.

12 — See, to that effect, the Opinion of Advocate General Mengozzi in *Commission* v *Netherlands ('NO_x')*, C-279/08 P, EU:C:2010:799, point 84.

13 — See, to that effect, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 70 and case-law cited. See also *Netherlands* v *Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraph 93.

30. If, for the sake of argument, the State aid rules were interpreted as generally requiring Member States to charge for access to public infrastructure or State-controlled resources, this might deter States from creating or opening up areas to which there has previously been no, or only limited access. Equally, it might deter undertakings from participating in that process. For example, in the matter under consideration, if black cabs were required to pay for access to bus lanes, that might deter certain of them from requesting access, which might result in access being given only to the economically most resourceful, thus defeating the purpose of the policy.

31. However, I should stress that the scenario described above in point 29 is *the default scenario*, which may vary according to the circumstances, and a number of caveats therefore apply. For one thing, specific EU legislation may lay down detailed rules in relation to a particular area. [14]

32. In addition, when regulating access to infrastructure, the State must evidently act in a *genuinely* regulatory capacity. That includes regulating comparable situations in the same way so that competition is not distorted. [15] Indeed, where infrastructure is made available to all users on an equal and non-discriminatory basis, that is an indication that no aid has been given to those users. [16] By contrast, if, for example, the State generally requests payment for access to public infrastructure (such as a toll fee for using a public motorway) or other resources in the public domain, but grants various undertakings access free of charge on a discretionary basis, revenue may well be forgone in respect of those undertakings. The NO_x case is illustrative in that regard. [17] There, the Netherlands authorities had made certain emission allowances tradable only in respect of large undertakings with a total installed thermal capacity of more than 20 thermal megawatts, as a group, rather than to all emitting undertakings. The Court, finding first that distinction not to be justified by the object and general purpose of a scheme intended to reduce industrial pollution, held that those authorities had forgone resources, as no payment had been made in return for the emission allowances concerned.

33. Thus, when the State acts in a regulatory capacity, as described above, in respect of access to resources in the public domain, I essentially concur with the Commission and ESA that, provided it treats all comparable undertakings concerned in the same way by establishing the award criteria in advance in a transparent and non-discriminatory manner, the State may legitimately decide not to maximise the revenues which could otherwise have been achieved, without falling foul of the State aid rules.

34. As for the bus lane policy, nothing suggests that it has been adopted for any reason other than to promote a common regulatory aim. Therefore, and in light of the above considerations, I do not find it of relevance that in a number of places in London, the entire road is designated as a bus lane — including particularly busy roads. This is simply an inherent consequence of the way in which traffic is regulated.

35. Lastly, I acknowledge that, with the approach I have taken, whether State resources have been transferred is dependent on whether equal treatment has been ensured. Certainly, the link between, on the one hand, equal treatment and, on the other, a transfer of State resources seems to follow from the very nature of the resource in question, that is to say, public infrastructure. In that respect, whether TfL has respected the principle of equal treatment is an issue which is more closely related

14 — By way of example, Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15) and Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third generation mobile and wireless communications system (UMTS) in the Community (OJ 1999 L 17, p. 1) granted the Member States the discretion as to the choice of procedure for the award of UMTS licences, provided that the principles of free competition and equal treatment were respected.

15 — See, to that effect, *Bouygues and Bouygues Télécom* v *Commission*, T-475/04, EU:T:2007:196, paragraph 110 (upheld on appeal, see *Bouygues and Bouygues Télécom* v *Commission*, EU:C:2009:223, in particular paragraphs 98 and 103).

16 — See, to that effect, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 109 (upheld on appeal in *Mitteldeutsche Flughafen and Flughafen Leipzig* v *Commission*, C-288/11 P, EU:C:2012:821).

17 — *Commission* v *Netherlands* (NO_x), C-279/08 P, EU:C:2011:551.

to the question whether the bus lane policy is selective than to the question whether State resources have been forgone. I will therefore address that issue separately in Question 2, not least because the issues raised in the main proceedings are ones of principle that merit individual attention, and it would clearly be desirable for State authorities and undertakings alike if the Court were also to provide guidance on all those issues.

36. Before doing so however, I will examine the exemption from penalties which black cabs enjoy.

2. The exemption of black cabs from penalties for using the bus lanes

37. As has already been mentioned, Eventech argues that exempting black cabs from penalties for using the bus lanes entails an additional burden for the public authorities. The logic behind this reasoning appears to be that the Court has, on occasion, held that the release from the obligation to pay fines involves a forgoing of revenue, in the same way as tax advantages and the like.

38. However, as a starting point at least, a release from the obligation to pay fines cannot always be equated to other ways in which the State might be deemed to have waived its right to revenue. Eventech's argument that a Member State can be held accountable under the State aid rules for forgoing resources generated from fines seems to presuppose that States generally have an obligation to enact legislation imposing fines.

39. Moreover, fines and penalties — particularly so far as criminal penalties are concerned — are instruments which belong to the sphere of public policy and which have as their aim both deterrence and punishment. By contrast, taxes and levies primarily serve a budgetary aim, as the whole purpose of any tax system is to collect revenue to finance State expenditure.[18] Though both fines and taxes clearly entail a financial burden for those that they are aimed at, this does not mean that they are interchangeable. If a fine cannot be equated to a tax per se, nor can an exemption from having to pay a fine be equated as such to a tax advantage.

40. Similarly, a fine is not the same as a *fee* (whether fixed or variable), as fees are normally paid in return for the receipt of goods or services. In this respect, as the Polish Government rightly observes, a fine for exceeding the speed limit is not a fee for more intensive use of the road than is permitted.

41. The cases in which the Court has hitherto considered a release from the obligation to pay fines and penalties to involve a forgoing of resources are, in my view, self-explanatory inasmuch as they involve a simple mitigation of business costs.

42. *Ecotrade*[19] and *Piaggio*[20] both concerned the same Italian legislation. In those cases, the release from the obligation to pay fines and pecuniary penalties *in the context of a special insolvency procedure* (which included a set of advantageous measures such as a State guarantee) led the Court to declare that it could not be excluded that that procedure involved State aid. The fines and pecuniary penalties in question were imposed for failure to pay social security contributions, wherefore the special insolvency procedure mitigated the charges normally included in the budget of an undertaking.

18 — Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ 1998 C 384, p. 3, point 26.

19 — EU:C:1998:579, paragraphs 42 to 44.

20 — C-295/97, EU:C:1999:313, paragraphs 41 and 42.

43. Moreover, the NO_x case,[21] on which Eventech relies, is radically different from the case under consideration. Nothing suggests that the authorisation given to black cabs to use the bus lanes is tradable or that fines for unlawful use of the bus lanes may be avoided. The order for reference quite clearly states that unauthorised use of the bus lanes is a criminal offence.[22] By contrast, in the NO_x case, seeing as undertakings with potentially high emissions which had exceeded the applicable standard were tempted to speculate on an annual basis as to whether it would be more profitable for them to pay a penalty or to acquire emission allowances, the penalty at stake in that case — as in *Ecotrade* and *Piaggio* — also presented all the classic features of a business cost.

44. By contrast, the fine imposed for using the bus lanes unlawfully cannot be reduced to a mere business cost (even though some undertakings might treat it that way). The provisions under which fines are imposed are of general application, thus applying to undertakings and private individuals alike. Moreover, fines are a logical consequence of a regulatory activity concerned with access to public infrastructure: as previously stated, a regulatory activity of this type does not come per se within the scope of the State aid rules — provided that all comparable undertakings concerned are treated equally when the regulatory policy is applied.

45. In view of the foregoing, I also cannot agree with the argument that releasing black cabs from the obligation to pay a fine for using the bus lanes gives rise to a transfer of State resources.

3. Interim conclusion

46. On that basis, I propose that the Court should answer Question 1 to the effect that, on a proper construction of Article 107(1) TFEU, where State authorities make a bus lane on a public road available to black cabs but not to PHVs during the hours of operation of that bus lane, that does not involve a transfer of 'State resources', provided that all comparable undertakings are granted access on equal terms, which falls to be verified by the referring court.

47. Given my position with regard to Question 1, the actual answer to be given in the case before the referring court will depend on whether the bus lane policy is selective. This is the focus of Questions 2(a), (b) and (c).

C – *Questions 2(a), (b) and (c): the selectivity of the bus lane policy under Article 107(1) TFEU*

1. Introductory remarks

48. As alluded to in point 17 above, by its second question — divided into three parts — the referring court requests guidance on various aspects of the requirement of selectivity under Article 107(1) TFEU.

49. By Question 2(a), the referring court asks 'what … the relevant objective [is] by reference to which the question whether [b]lack [c]abs and [PHVs] are in a comparable legal and factual situation should be assessed'. By Question 2(b), the Court of Appeal asks whether, if it can be shown for the purposes of Question 2(a) that the objective pursued is the creation of 'a safe and efficient transport system', that objective may justify the bus lane policy in the sense that it cannot be deemed to be selective for the purposes of Article 107(1) TFEU. Lastly, by Question 2(c), the referring court asks whether the Member State must show, in the course of the justification process, that the advantage conferred complies with the principle of proportionality.

21 — EU:C:2011:551.

22 — TfL adds that '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' (emphasis added), that is to say, theoretically unlimited.

50. It is worthy of note that, apart from referring to the submissions of the parties in the main proceedings, the order for reference does not state the underlying reasons that have led the referring court to formulate Questions 2(a), (b) and (c) in the manner that it has.

51. Given that ambiguity, a first — literal — way in which Question 2(a) might be understood is that the referring court simply wishes to know what the relevant objective is by reference to which black cabs and PHVs are to be compared.

52. However, if this interpretation were to be correct, it would be surprising that, by Question 2(b), the referring court itself mentions that the objective might be the creation of a safe and efficient transport system. Moreover, under Article 267 TFEU, it is for the national courts to set out the applicable national rules and, in that connection, to ascertain the objective which those rules pursue. It is not for the Court to suggest possible objectives which may lead to finding that a given State measure is not selective. [23]

53. Therefore, a second — and perhaps more interpretative — reading of Question 2(a) might be that the referring court in reality wishes to know whether selectivity is to be assessed solely on the basis of the market on which both black cabs and PHVs compete (that is to say, the market for pre-bookings), or whether it ought to include the 'ply for hire' market. This is arguably a decisive issue in the case under consideration, so I will answer Question 2(a) with that reading in mind.

54. By Questions 2(b) and (c) — which appear to be linked in the same way as Questions 2(a) and 2(b) — it seems to me that the referring court wishes to know whether safety and efficiency considerations may explain why only black cabs and not PHVs may use the bus lanes during certain hours (such as peak travel, or 'rush', hours) and, if so, whether measures adopted to that effect must comply with the principle of proportionality.

55. Bearing these considerations in mind, I will attempt to provide a coherent answer, addressing each of the issues raised by the referring court in turn.

2. Assessment

a) The relevant market(s) when comparing black cabs to PHVs

56. As an exception to the normal situation under the transport and traffic regime applicable within the Greater London Area, the bus lane policy allows black cabs to use the bus lanes during certain hours of the day, to the exclusion of PHVs.

57. In this respect, it is settled case-law that a State measure is selective if, under a particular statutory scheme (also known as 'the reference framework'), that measure is such as to favour certain undertakings or the production of certain goods *in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question*. [24]

23 — See, by way of analogy, order of 7 March 2013 in *Bertazzi and Others*, C-393/11, EU:C:2013:143, paragraph 54, and also, to that effect, *P*, EU:C:2013:525, paragraphs 20 and 21.

24 — *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 41. See also *Portugal* v *Commission ('Azores')*, C-88/03, EU:C:2006:511, paragraph 54, and *Commission* v *Government of Gibraltar and United Kingdom*, EU:C:2011:732, paragraph 75.

58. So, depending on whether black cabs and PHVs are in a *comparable* situation, the bus lane policy might give rise to selective treatment.[25] One way of determining this is to assess whether PHVs and black cabs may be substituted for each other. This, in turn, requires establishing on which relevant market(s) a comparison is to be based.

59. Black cabs and PHVs both compete on the market for pre-bookings, and it is common ground that competition is affected by the bus lane policy on that market. If that market were the only one relevant, they would clearly be comparable and, consequently, the bus lane policy would be selective.

60. However, one cannot simply extract a part of the business model of an undertaking and then limit the comparison with another undertaking to the segment thus extracted. Certainly that is true for the taxi business as well, certain specificities of which make it unjustified to limit the assessment of comparability to the market for pre-bookings alone.

61. In brief, taxis provide a service which supplements the existing methods of public transportation and which, in some ways, can arguably be assimilated to a universal public service. At a time when methods of communication were less developed, being able to hail a taxi from the street or to pick one up from a cab rank was an essential alternative to the other methods of transportation available. This is the reason why black cabs traditionally have a monopoly on 'ply for hire' journeys, and the same reason why taxis in many cities across Europe enjoy similar privileges, including the right to use bus lanes.

62. Moreover, as mentioned in point 19 above, according to the evidence submitted, a mere 8% of black cab journeys are pre-booked. Accordingly, I am not persuaded that the pre-booked market is the only significant market on which black cabs operate.[26] In this connection, although it does not appear self-evident to me, it has not escaped my attention that the High Court in its judgment found that '[i]t would clearly not be possible to legislate that … black cabs could not use the bus lane when carrying a pre-booked passenger'.[27] With that in mind, there appears to be no justification for limiting the assessment to the market for pre-bookings alone.

63. At this juncture it is therefore necessary to consider Question 2(b) and accordingly also Question 2(c), namely whether, owing to safety and efficiency considerations, black cabs are not comparable to PHVs on those combined markets and whether, accordingly, allowing only black cabs and not PHVs, to use the bus lanes during certain hours is justified. I will turn to that issue now.

b) Are black cabs and PHVs comparable in light of the objective of creating a safe and efficient transport system?

64. It follows from the discussion above that the relevant markets to be taken into consideration for comparing black cabs and PHVs are the 'ply for hire' market *and* the market for pre-bookings.

65. Essentially, four main reasons have been put forward as to why black cabs and PHVs are not comparable on those combined markets.

66. First, unlike PHVs, black cabs have certain obligations with regard, inter alia, to customers whom they pick up in the street or at a taxi rank ('compellability'). Those customers may include, for instance, persons with disabilities, for whom black cabs must therefore be accessible.

25 — It is important to bear in mind that the case-law referred to in point 57 above only refers to 'a legal and factual situation that is *comparable*' (emphasis added) and not to a legal and factual situation that is similar, let alone identical.

26 — Without discussing the accuracy of this figure, in view of the constant evolution in technology, time will tell whether smartphones (and the various phone applications created by black cab and PHV operators) might definitively change this market structure.

27 — See paragraph 60(ii) of the High Court judgment cited in footnote 5 above.

67. Second, black cabs must conform to certain standards ('the Conditions of Fitness'), such as the shape and size of the vehicle and the taxi sign (currently only two models comply with the Conditions of Fitness), so as to be more easily visible to hailing customers.

68. Third, black cabs are subject to strict fare regulation. [28]

69. Last, in order to become a black cab driver, the licence requirements are generally stricter than to become a private hire driver and include a thorough topographical test of the geography of Greater London known as 'the Knowledge'.

70. Given those factors, although I consider black cabs to be comparable to PHVs on the market for pre-bookings, *they are not comparable in all respects*. I can therefore accept, as a matter of principle, that, on the combined relevant markets, the objective consisting in the creation of a safe and efficient transport system may mean that black cabs are not comparable to PHVs.

71. However, black cabs unquestionably operate on a market which overlaps with PHVs and can thus use their competitive advantage over PHVs in respect of the pre-bookings segment. That being so, and as the referring court seems to suggest by Question 2(c), although the creation of a safe and efficient transport system may require distinguishing between certain groups of undertakings, there are also limits to what may be justified by that objective. I do not believe that the aim of maintaining a safe and efficient transport system requires the distortion of competition caused by the bus lane policy on the market for pre-bookings to be unrestricted.

72. In this connection, I would call to mind that it is the State that, by adopting a given measure, defines its objective(s). It is therefore up to the State to show that certain groups of seemingly comparable undertakings are not, in fact, comparable under a particular scheme, in view of the objectives of that measure. [29] I am of the opinion — contrary to the view expressed by the Polish Government — that, when it does so, the State must also show that a difference in treatment arising from the objective of the measure is consistent with the principle of proportionality in that it does not go beyond what is necessary to achieve the objective and that that objective could not be attained by less far-reaching measures. [30] Only a comprehensive review by the national courts in this regard is sufficient to prevent arbitrariness and to ensure that the State is mindful of its burden of proof in demonstrating that these requirements are fulfilled.

73. Thus, although I can accept that, as a matter of principle, a distinction can be made between black cabs and PHVs on grounds of efficiency and safety, in keeping with the principle of proportionality, it is also necessary to assess specifically whether the contested bus lane policy is suitable for achieving that objective and does not go beyond what is necessary in order to achieve it. That, however, is a matter to be determined by the referring court.

3. Interim conclusion

74. In light of the above, I propose that the Court answer Questions 2(a), (b) and (c) together to the effect that, in the circumstances under consideration, where State authorities make a bus lane on a public road available to taxis but not PHVs during the hours of operation of that bus lane, that does not amount to 'favouring certain undertakings' within the meaning of Article 107(1) TFEU, provided

28 — According to the Law Commission Paper No 347, 'Taxi and Private Hire Services', May 2014, point 9.21, available at URL http://www.lawcom.gov.uk, regarding fares, pre-booked journeys are regulated on the same basis as 'ply for hire' journeys.

29 — See, by way of analogy, *Commission* v *Government of Gibraltar and United Kingdom*, EU:C:2011:732, paragraph 146 and case-law cited.

30 — See, by way of analogy, *Paint Graphos*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 75.

that those authorities demonstrate (i) that taxis and private hire vehicles are not legally and factually comparable, owing to objective considerations relating to the safety and efficiency of the transport system, and (ii) that such a measure is suitable for achieving that objective and does not go beyond what is necessary in order to achieve it. It is for the referring court to verify whether that is the case.

75. The effect of my proposed answer to Question 2 in the light of Question 1 is that, if TfL can show that black cabs and PHVs are not legally and factually comparable on grounds of safety and efficiency, allowing black cabs to use the bus lanes during certain hours of the day cannot in those circumstances be deemed to involve a transfer of State resources.

76. If that is the case, there can be no question of 'aid' for the purposes of Article 107(1) TFEU, as the requirements laid down in that provision are cumulative.[31] However, irrespective thereof, I will set out below my view on Question 3 as it, too, involves an issue of principle.

D – *Question 3: the effect on trade between Member States*

77. Lastly, the Court of Appeal asks whether the bus lane policy is liable to affect trade between Member States.

78. If black cabs and PHVs are *not* comparable because of safety and efficiency considerations, then Question 3 becomes rather nonsensical. There is in practice no restriction on the number of black cabs in London,[32] and it is open to all EU citizens to apply to become a licenced black cab driver. Given this, it would be questionable how a local measure of that kind might still be liable to affect inter-State trade.

79. Therefore, the premiss on which I base my answer is that black cabs and PHVs *are* comparable in all respects and, accordingly, that the bus lane policy confers a selective advantage on black cabs involving a transfer of State resources which is liable to distort competition.

80. Unlike Eventech, the Commission and ESA, I do not find that the judgment in *Altmark*[33] settles that matter. Though it is true that in *Altmark* the Court held, inter alia, that the requirement of an effect on inter-State trade does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned[34] (a view which has been upheld in subsequent case-law),[35] two important elements must be emphasised here.

81. First, the advantage in *Altmark* was conferred on a single undertaking in respect of a single bus transport concession contract, which took the form of a public subsidy. Naturally, that concession therefore reinforced the position of that recipient undertaking as compared to undertakings from other Member States which might have been interested in providing a similar service in the local area.[36] By contrast, in the present case, the advantage conferred by the bus lane policy — which does not involve a subsidy — has not been granted to a single or significantly limited number of transport undertakings. As stated in the order for reference, there is no bar to citizens from any Member State owning or driving a black cab, should they wish to benefit from the bus lane policy.

31 — See, inter alia, *Vent De Colère and Others*, EU:C:2013:851, paragraph 15.

32 — See section 16 of the Transport Act 1985, and the Law Commission Paper No 347, 'Taxi and Private Hire Services', May 2014, point 11.1, available at URL http://www.lawcom.gov.uk.

33 — *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

34 — Ibid., paragraphs 77 and 82.

35 — See, inter alia, *Comitato "Venezia vuole vivere" and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 135.

36 — See, similarly, *ACEA* v *Commission*, T-297/02, EU:T:2009:189, paragraph 91, and Case SA.34056 (2012/N) — United Kingdom, Cable Car for London, Decision of 27 June 2012, available at URL http://ec.europa.eu/competition/state_aid/cases/244896/244896_1341324_ 89_1.pdf, points 43 to 46 (summary publication in OJ 2012 C 220, p. 6).

82. Second, in *Altmark* the Court, although emphasising in general terms the low threshold needed to meet the requirement of an effect on inter-State trade, at no point stated that this requirement was actually met as regards the advantage granted to the bus service provider at issue in that case.[37] The Court merely limited itself to saying that that possibility could not be excluded. That is also true of later case-law concerning local activities.[38] It is not for no reason that, by the language it typically uses in these types of cases, the Court usually errs on the side of caution.[39]

83. Moreover, when considering the requirement for an effect on inter-State trade, it is relevant to distinguish between goods and services as goods are intrinsically more exportable, with the risk that undertakings in other Member States will have less chance of exporting their products to the market in the Member State conferring the aid.[40] Services, on the other hand, are a more complex matter; particularly so far as transport services are concerned. If the service in question has any cross-border potential, then inter-State trade can be assumed to be affected.[41] With local services, such a cross-border potential does not always exist, in which case there cannot be any cross-border effect. Local taxi services are but one example where a cross-border potential is not evident.[42]

84. Nevertheless, it is an established fact in the main proceedings that the bus lane policy confers an advantage on black cabs. Such an advantage is, according to case-law, presumed to be liable to affect inter-State trade.[43] Despite it being wholly unclear how undertakings established in other Member States providing a similar service might be affected by the bus lane policy, the differences highlighted above may not be enough to justify a result other than that reached in *Altmark*, according to which even local advantages may be liable to affect inter-State trade. Following *Altmark*, at the least a potential effect on inter-State trade cannot be excluded.

85. In light of the foregoing, should the Court hold that the bus lane policy *is* liable to affect inter-State trade, I would have to point out that in such a case there would seem to be no threshold too low to meet the requirement of an effect on inter-State trade. For all intents and purposes, this would mean passing from a *presumption* of an effect on inter-State trade — which is rebuttable, as Commission practice shows[44] — to an *irrebuttable presumption*. Though irrebuttable presumptions have the advantage of bringing legal certainty, here it would certainly also have its drawbacks.

86. It is therefore not without cause that ESA has suggested that the Court should reconsider its approach to the requirement of an effect on inter-State trade as, in ESA's view, that requirement is interpreted so broadly that hardly any measures escape it. According to ESA, the decisive point should be whether undertakings established in other Member States have less chance of providing their services in the market in the Member State where the advantage is conferred.

37 — See *Altmark* (EU:C:2003:415, paragraph 77) where the Court simply stated 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' (emphasis added).

38 — See, inter alia, *Comitato "Venezia vuole vivere" and Others* v *Commission*, EU:C:2011:368, paragraph 135.

39 — See similarly the Opinion of Advocate General Alber in *Spain* v *Commission*, C-409/00, EU:C:2002:475, point 116.

40 — See, inter alia, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 47 and case-law cited.

41 — See, inter alia, *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraphs 47 and 48, concerning an aid scheme to shipbuilding and ship conversion to Galician shipyards whose customers where both domestic and foreign.

42 — See, on this point, the Opinion of Advocate General Jacobs in *GEMO*, C-126/01, EU:C:2002:273, paragraph 145; the answer given by Commissioner Kinnock to Written Question E-3484/96, OJ 1996 C 186, p. 96; and Case N 733/2000 — Italy (Liguria), Regional action to upgrade the public taxi service, Decision of 25 April 2001, available at URL http://ec.europa.eu/competition/state_aid/cases/134182/134182_1154208_1_2.pdf (summary publication in OJ 2004 C 67, p. 11). However all those elements predate the ruling in *Altmark*, EU:C:2003:415.

43 — See *Altmark*, EU:C:2003:415, paragraph 78 and case-law cited. See also *Philip Morris Holland* v *Commission*, 730/79, EU:C:1980:209, paragraph 11.

44 — See, inter alia, Case N 258/2000 — Germany, Leisure Pool Dorsten, Decision of 21 December 2000, available at URL http://ec.europa.eu/competition/state_aid/cases/137009/137009_ 1153410_12_2.pdf (summary publication in OJ 2001 C 172, p. 16), and Case SA.36581 (2013/NN) — Greece, Construction of Archeological Museum Messara, Crete, Decision of 6 November 2013, available at URL http://ec.europa.eu/competition/state_aid/cases/250254/ 250254_1484489_76_2.pdf (summary publication in OJ 2013 C 353, p. 4).

87. However, in my view it would be premature at this point to consider retreating from that line of case-law, which has been settled for more than 30 years, by restricting the requirement of an effect on inter-State trade in the manner suggested by ESA. Only if that requirement were to change from a simple presumption to an irrebuttable one might it be worth entertaining that idea. Obviously, that will depend entirely on how the Court decides to respond to Question 3.

88. Of course, the Court may simply choose to maintain the status quo by having recourse, in its answer, to the time-tested, cautiously worded formula according to which, despite its local character, it is not impossible that the bus lane policy might affect inter-State trade. This would, moreover, be consonant with the practice of the Court to leave it to the referring court to have the final say as to whether, in the circumstances of the main proceedings, inter-State trade is liable to be affected, taking due account of the guidance given by the Court.[45] In that respect, the referring court could naturally take into account those factors referred to in points 81 to 83 above, in particular those which distinguish the case under consideration from the judgment in *Altmark*.

89. Given my proposed answers to Questions 1 and 2(a), (b) and (c), that is the answer which I would also suggest that the Court give to Question 3, in the event that the other requirements for a finding of 'aid' under Article 107(1) TFEU are deemed to be met.

IV – **Conclusion**

90. In light of the foregoing, I propose that the Court respond to the questions referred by the Court of Appeal (England and Wales) (United Kingdom) as follows:

On a proper construction of Article 107(1) TFEU, where the authorities of a Member State make a bus lane on a public road available to taxis but not to private hire vehicles during the hours of operation of that bus lane:

— this does not involve a transfer of 'State resources', provided that access is granted on equal terms to all comparable undertakings; and

— this does not amount to 'favouring certain undertakings', provided that those authorities show (i) that taxis and private hire vehicles are not legally and factually comparable, owing to objective considerations relating to the safety and efficiency of the transport system, and (ii) that such a measure is suitable for achieving that objective and does not go beyond what is necessary in order to achieve it.

It is for the referring court to determine whether that is the case in the circumstances of the main proceedings. If that is not the case, the mere fact that the right to use the bus lanes is conferred in the context of a local traffic policy does not, in itself, exclude the possibility of trade between Member States being affected, which also falls to be determined by the referring court.

45 — See *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 51.