



## Reports of Cases

### JUDGMENT OF THE COURT (Second Chamber)

14 January 2015 \*

(Reference for a preliminary ruling — Competition — State aid — Article 107(1) TFEU — Practice of permitting London taxis to use bus lanes while prohibiting private hire vehicles from doing so — Concept of State aid — State resources — Economic advantage — Selective advantage — Effect on trade between Member States)

In Case C-518/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 24 September 2013, received at the Court on 26 September 2013, in the proceedings

**The Queen**, on the application of:

**Eventech Ltd**,

v

**The Parking Adjudicator**,

intervening parties:

**London Borough of Camden**,

**Transport for London**,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court and acting Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: N. Wahl,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 July 2014,

after considering the observations submitted on behalf of:

— Eventech Ltd, by K. Bacon, Barrister, instructed by J. Maitland-Walker, Solicitor,

\* Language of the case: English.

— Transport for London, by C. Moore, acting as Agent, and by M. Chamberlain QC and S. Love, Barrister,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by L. Flynn and P.-J. Loewenthal, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis, C. Perrin and A. Steinarsdóttir, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 September 2014,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU.
- 2 The request has been made in proceedings between Eventech Ltd ('Eventech') and the Parking Adjudicator concerning the lawfulness of a policy implemented by Transport for London ('TfL') and by the majority of London Boroughs which consists in permitting London taxis ('Black Cabs') to use most London bus lanes during the hours when the bus lane restrictions are operational, while prohibiting private hire vehicles ('minicabs') from using those bus lanes, except for the purpose of picking up and setting down passengers who have pre-booked such a vehicle ('the bus lanes policy').

### **Legal context**

#### *Black Cabs and minicabs*

- 3 In London, both Black Cabs and minicabs are vehicles which carry passengers for consideration. Both require licences issued by London Taxi and Private Hire, which is part of TfL. Those licences are issued under different statutory provisions and are subject to different conditions according to whether they are issued to Black Cabs or to minicabs.
- 4 A licence to operate Black Cabs is issued under the provisions set out in the London Cab Order 1934. That order was made pursuant to the power conferred by section 6 of the Metropolitan Carriage Act 1869, section 8(2) of which provides that a taxi is permitted to 'ply for hire' in London only when the driver holds a licence issued by TfL under section 8 of that Act.
- 5 It follows that only a taxi which is licensed in accordance with the London Cab Order is permitted to 'ply for hire' in London, a concept which is defined as soliciting or waiting for passengers without any pre-booking. According to the referring court, a survey carried out in 2009 indicates that 8% of the journeys made by Black Cabs are subject to pre-booking, 52% are due to a passenger hailing the taxi in the street and the majority of other journeys result from a passenger being picked up at a taxi rank. Eventech however disputes those figures and claims that approximately 60% of Black Cabs now use an application, called 'Hailo', which allows customers to book a taxi from their mobile phone.
- 6 A licence for minicabs is issued in accordance with the provisions of the Private Hire Vehicles (London) Act 1998. Minicabs are not permitted to 'ply for hire' in London and accordingly can pick up only people who have pre-booked their services. As regards people who have pre-booked, it is common ground that minicabs are in competition with Black Cabs.

- 7 Further, it is apparent from the file that, since the London Hackney Carriage Acts 1831 and 1853, Black Cabs are subject to the rule of ‘compellability’, which requires that where a taxi has agreed to pick up a passenger at a taxi rank or in the street, the taxi must take the passenger where he wishes to go, within a prescribed distance or up to a prescribed journey time. No such obligation is imposed on minicabs.
- 8 Black Cabs are instantly recognised by reason of their shape and size and the illuminated ‘Taxi’ sign, since they must comply with conditions of fitness which contain a number of standards with which currently only two vehicle makes comply. Minicabs, on the other hand, can be of any colour and any design, and consequently some 700 different makes and models of minicabs are currently licensed.
- 9 The fares of Black Cabs are strictly regulated and can be charged only by reference to a taxi meter. The drivers of minicabs are, for their part, free to set their own fares and minicabs do not have a meter, the fare to be paid being quoted when the minicab is booked, irrespective of the duration of the journey, whereas Black Cab fares vary depending upon that duration.
- 10 Black Cabs must be adapted for wheelchair access. There are no accessibility requirements for minicabs.
- 11 Before being licensed, Black Cab drivers must undertake an examination known as the ‘Knowledge of London’, which may require two to four years of preparation. Minicab drivers must before being licensed undertake a topographical test, which generally takes a day. Black Cab drivers must also take the Driving Standards Agency Advanced Driving Assessment, whereas there is no similar requirement for minicab drivers.

*Traffic regulation powers and the bus lane policy*

- 12 Section 121A of the Road Traffic Regulation Act 1984 (‘the 1984 Act’) designates which body is the traffic authority in respect of all public roads in England, Wales and Scotland. Subsection (1A) of that section designates TfL as the traffic authority for certain roads in Greater London known as ‘Greater London Authority (GLA) roads’. Those roads, subject to the Greater London Authority, extend to 580 km and are, generally speaking, the most important roads in Greater London. Under section 121A(2) of the 1984 Act, the traffic authorities responsible for almost all other roads in London and Greater London are the London Boroughs.
- 13 The power of a traffic authority responsible for a particular road to restrict traffic on that road (or part of it) to certain types of vehicles is conferred by section 6 of the 1984 Act, which in the version applicable to the main proceedings provides:
  - ‘1. The traffic authority for a road in Greater London may make an order under this section for controlling or regulating vehicular and other traffic (including pedestrians). Provision may, in particular, be made:
    - (a) for any of the purposes, or with respect to any of the matters, mentioned in Schedule 1 to this Act, and
    - (b) for any other purposes which is a purpose mentioned in any of paragraphs (a) to (g) of section 1(1) of this Act.
  2. In the case of a road for which the Secretary of State is the traffic authority, the power to make an order under this section is also exercisable, with his consent, by the local traffic authority.

3. Any order under this section may be made so as to apply:

- (a) to the whole area of a local authority, or to particular parts of that area, or to particular places or streets or parts of streets in that area;
- (b) throughout the day, or during particular periods;
- (c) on special occasions only, or at special times only;
- (d) to traffic of any class;
- (e) subject to such exceptions as may be specified in the order or determined in a manner provided for by it.'

- 14 The purposes specified in Schedule 1 to the 1984 Act include, in paragraph 3 thereof, the objective of 'regulating the relative position in the roadway of traffic of differing speeds or types'. The purposes mentioned in section 1(1) of that Act include 'for avoiding danger to persons or other traffic using the road [in Greater London] or any other road or for preventing the likelihood of any such danger arising' and 'for facilitating the passage on the road or any other road of any class of traffic (including pedestrians)'.
- 15 Section 6 of the 1984 Act is thus the provision that enables bus lanes to be designated by the various London Boroughs and by TfL in respect of the roads for which they are the traffic authority.
- 16 In exercise of its powers under section 6 of the 1984 Act, TfL has designated bus lanes in a number of GLA roads. TfL has, in addition, adopted the bus lanes policy of permitting Black Cabs to use the bus lanes that are managed by TfL, but prohibiting licensed minicabs from using those bus lanes, during the hours when the bus lane restrictions are operational. Minicabs are, however, permitted to use the bus lanes for the purposes of picking up and setting down passengers. That policy has been applied since at least 2000.
- 17 In accordance with the bus lanes policy applied by TfL, most London Boroughs have also adopted a policy of allowing the bus lanes operated by them to be used by Black Cabs but not minicabs, while the restrictions are operational. This is, in particular, the case for the Southampton Row bus lane operated by the London Borough of Camden.

### *Penalties*

- 18 The power of traffic authorities to issue penalty charge notices in respect of breaches of orders made under Section 6 of the 1984 Act is contained in section 4 of the London Local Authorities Act 1996, which provides:

'1. Where-

- (a) in relation to any GLA road or GLA side road, [TfL] ...

on the basis of information provided by the use of a prescribed device, have reason to believe that a penalty charge is payable ... with respect to a vehicle by the owner of the vehicle, ... [TfL] may serve a penalty charge notice on the person appearing to them to be the owner of the vehicle.

2. ... [A] penalty charge is payable with respect to a vehicle, by the owner of the vehicle, if the person in charge of the vehicle acts in contravention of or fails to comply with an order under section 6 or 9 or regulations under section 12 of [the 1984 Act] in so far as provision is made thereby for the reservation of all or part of a carriageway of a road as a bus lane and the penalty charge shall be paid,

(a) where the contravention or failure is in respect of a GLA road or a GLA side road, to [TfL] ...'

- 19 Orders made under section 6 of the 1984 Act may also be enforced by the Police, as section 8(1) of the 1984 Act provides that it is a criminal offence to act in contravention of, or to fail to comply with, an order made under that section. However, in practice, the vast majority of infringements of such orders are dealt with by civil enforcement procedures: in other words, by the issue of penalty charge notices by the traffic authorities.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 20 Eventech is a wholly-owned subsidiary of Addison Lee plc ('Addison Lee'), which is the operator of a fleet of minicabs in Greater London. Eventech is the registered keeper of all Addison Lee's minicabs, which are leased under contract by Addison Lee to self-employed drivers.
- 21 Eventech submits that, in the main proceedings, it produced evidence of several instances of advertising by Black Cab operators referring to the advantages of booking a taxi rather than a minicab, in that taxis can use the bus lanes in the peak periods. According to Eventech, that evidence is not disputed and it is for that reason that TfL does not dispute that its bus lanes policy confers on the operators of taxis an economic advantage imputable to the State.
- 22 TfL states that the Chairman of Addison Lee issued a notice to its drivers informing them that they were entitled to use the London bus lanes which Black Cabs are permitted to use and offering to indemnify them in respect of any fines or other liabilities incurred for doing so. TfL adds, in that regard, that an injunction to restrain a breach of the criminal law was obtained as an interim measure.
- 23 Eventech has stated that, in a period of 16 months, from the end of July 2011 to early December 2012, TfL and various London Boroughs imposed on it fines to an amount exceeding 180 000 Pounds Sterling (GBP), or approximately EUR 215 166, for having used London bus lanes.
- 24 In particular, the London Borough of Camden served two penalty charge notices on Eventech due to the fact that, on 6 and 13 October 2010 respectively, two drivers of Addison Lee minicabs had used the Southampton Row bus lane in central London. Eventech challenged those charges before the Parking Adjudicator. The action was dismissed by the latter's decision of 16 August 2011.
- 25 The action brought by Eventech against that decision was dismissed by a judgment of 13 July 2012 of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court). After Eventech obtained permission to bring an appeal against the judgment of the High Court, the case was examined by the Court of Appeal on 23 and 24 April 2013.
- 26 Eventech claims, inter alia, that the bus lanes policy constitutes un-notified State aid to the operators of Black Cabs, which is contrary to Article 108(3) TFEU and Article 107(1) TFEU.
- 27 In that regard, the referring court considers that it is common ground that the bus lane policy confers an economic advantage on Black Cabs, that the policy is attributable to the State, and that it is liable to distort competition between Black Cabs and minicabs, in that it allows the former to travel faster than

minicabs on those roads covered by the policy, thereby giving them (in particular) a competitive advantage in attracting potential customers. However, the referring court considers that the other conditions inherent in the concept of State aid are not necessarily satisfied.

- 28 TfL submits that the economic advantage granted to Black Cabs by the bus lane policy is not granted through State resources, since it does not have any effect on such resources. Further, nor is the bus lane policy selective, as Black Cabs and minicabs are not in a comparable legal or factual situation in the light of the objective pursued by that policy. In any event, the differentiation caused by the policy is justified by the nature and general scheme of the system. Last, the bus lane policy is not liable to affect trade between Member States, since it is a local measure, applying solely to London.
- 29 Eventech contends, on the contrary, that there are two reasons why the economic advantage at issue is conferred through State resources: first, Black Cabs are provided with preferential access to a State asset and, second, the bus lanes policy exempts Black Cabs from liability to pay fines or other penalties for the use of those lanes. The policy is selective in that it confers an advantage on Black Cabs over their competitors, namely minicabs. Last, since the policy concerns a sector which is open to undertakings from any Member State, an effect on trade between Member States cannot be ruled out.
- 30 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. 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?
  2. (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 purposes of Article 107(1) TFEU, what is the relevant objective by reference to which the question whether Black Cabs and minicabs are in a comparable legal and factual situation should be assessed?  
  
(b) If it can be shown that the relevant objective, for the purposes of question 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(1) 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?
  3. 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, and there is no bar to citizens from any Member State owning or driving either Black Cabs or minicabs?’



## Consideration of the questions referred for a preliminary ruling

### *The first and second questions*

- 31 By its first and second questions, which can be examined together, the referring court seeks, in essence, to ascertain whether the practice of permitting Black Cabs to use bus lanes on public roads during the hours when traffic restrictions with respect to those lanes are operational, in the interests of establishing a safe and efficient transport system, while prohibiting minicabs from using those lanes, except for picking up and setting down their pre-booked passengers, involves a commitment of State resources and confers on taxis a selective economic advantage for the purposes of Article 107(1) TFEU. The referring court also asks whether consideration need be given, in order to answer that question, to whether that measure is proportionate and does not go beyond what is necessary.
- 32 Article 107(1) TFEU provides that '[s]ave as otherwise provided in the Treaties, 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'.
- 33 As regards the condition relating to the commitment of State resources, it must be recalled that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (the judgment in *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32, paragraph 69 and case-law cited).
- 34 Consequently, for the purposes of determining the existence of State aid, it is necessary to establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget (see, to that effect, the judgment in *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109).
- 35 In this case, it is clear from the file before the Court that the referring court doubts the merits of the argument, put forward by Eventech before the referring court and repeated before the Court, that the bus lanes policy entails such budgetary burdens as a consequence of, on the one hand, the preferential access of Black Cabs to infrastructure belonging to the State, namely the London bus lanes, for the use of which those taxis are not charged and, on the other, the fact that those taxis are exempted from any liability to pay fines when they use those bus lanes.
- 36 As regards the second of the arguments mentioned in the preceding paragraph, which can be examined first, it must be stated at the outset that it is inherent in any legal system that conduct previously defined as being lawful and permitted does not expose individuals to penalties.
- 37 In the main proceedings, it is undisputed that the fact that Black Cabs can use the London bus lanes without being subject to fines is the result of those taxis being permitted, under the bus lanes policy, to use those bus lanes during the hours when the traffic restrictions are operational.
- 38 To the extent that Eventech bases its argument on the alleged similarity of the factual and legal circumstances of this case to those of the case which gave rise to the judgment in *Commission v Netherlands* (C-279/08 P, EU:C:2011:551), it is clear that the circumstances of that case are distinguishable from those of the main proceedings.

- 39 In paragraph 106 of the judgment in *Commission v Netherlands* (EU:C:2011:551), the Court held that the measure at issue could entail an additional burden for the public authorities in the form of an exemption from the obligation to pay fines or other pecuniary penalties because the Kingdom of the Netherlands had given to the undertakings covered by the measure in question the possibility of buying emission allowances in order to avoid the payment of fines which, if such allowances had not been available, would have been payable because the undertaking concerned had exceeded the statutory limits on their emissions of nitrogen oxide.
- 40 However, in the main proceedings, it is undisputed that each unauthorised use of the bus lanes constitutes an offence punishable by a fine and that the competent public authorities have not put in place any means of evading payment of such fines. Further, it follows from the finding made in paragraph 37 of this judgment that the reason why Black Cabs can use those bus lanes without being subject to fines is not that the public authorities have made a decision not to collect fines which are payable, but that taxis are permitted to use those bus lanes.
- 41 Accordingly, the fact that Black Cabs are not obliged to pay fines because of their use of bus lanes does not involve additional burdens on the public authorities which might entail a commitment of State resources.
- 42 As regards the first argument relied on by Eventech, that there is preferential access to State-funded transport infrastructure for the use of which no payment is sought from Black Cabs, it is certainly true that, as stated by that company, the Court has held that the financing, by means of capital contributions made by the public authorities as a shareholder, to the construction of infrastructure which is to be commercially operated may involve the grant of State aid (see, to that effect, the judgment in *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11 P, EU:C:2012:821, paragraphs 43 and 44).
- 43 However, in the main proceedings, first, it is undisputed that the traffic routes at issue, in general, and the bus lanes which are part of them, in particular, are not operated commercially by the public authorities. As was confirmed at the hearing before the Court, both by Eventech and by TfL, use of those routes and those lanes is free of charge.
- 44 It follows that the public authorities are not, under the bus lanes policy, forgoing revenue which they would have received in the absence of that policy.
- 45 Second, it must be noted that the measure at issue in the main proceedings concerns not the financing as such of the construction of bus lanes, but preferential access to them. It must be added that it is unequivocally stated in the file before the Court that the bus lanes were not constructed for the benefit of any specific undertaking or any particular category of undertakings, such as Black Cabs, or the suppliers of bus services, and were not allocated to them after their construction, but that they were constructed as part of the London road network and, primarily, with a view to facilitating public transportation by bus, irrespective of whether the organisation of that public service fell to either the public sector or the private sector.
- 46 In the light of the foregoing, the question raised by Eventech's argument, as summarised in paragraph 35 of this judgment, is, as stated by the Advocate General in point 24 of his Opinion, whether, in circumstances such as those of the main proceedings, the competent public authorities are obliged, pursuant to Article 107(1) TFEU, to impose on users entitled to privileged access to public infrastructure a charge which corresponds to the economic value of that privilege.
- 47 It must however be stated that that question does not, as such, pertain to the criterion of commitment of State resources, but concerns whether the bus lanes policy, by which TfL pursues the objective laid down by the State legislation, namely to ensure a safe and efficient transport system, must be regarded



as conferring on its beneficiaries an economic advantage, for the purposes of Article 107(1) TFEU, which falls within the scope of EU law on State aid and which has an economic value which must be paid for by those beneficiaries.

- 48 In that regard, as stated by the European Commission and the EFTA Surveillance Authority, it must be held that where the State, in order to pursue the realisation of an objective laid down by that State's legislation, grants a right of privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure, the State does not necessarily confer an economic advantage for the purposes of Article 107(1) TFEU.
- 49 Further, it must be stated that the identification of the objective pursued is, in principle, a matter within the prerogative of the competent national public authorities alone and they must have a degree of discretion both as regards whether it is necessary, in order to achieve the regulatory objective pursued, to forgo possible revenue and also as regards how the appropriate criteria for the granting of the right, which must be determined in advance in a transparent and non-discriminatory manner, are to be identified.
- 50 In the main proceedings, it is common ground that the right of privileged access is the right to use bus lanes; that that right has an economic value; that the right is granted by the competent traffic authority; that it is stated in the relevant road traffic legislation that the objective pursued by the legislation at issue is that of ensuring a safe and efficient transport system; that neither the road network concerned nor the bus lanes are operated commercially; that the criterion for granting that right is that of providing taxi services in London; that that criterion was established in advance and in a transparent manner and, last, that all the providers of such services are treated equally.
- 51 As regards whether there is a link between the realisation of the regulatory objective of ensuring a safe and efficient transport system and the decision to forgo, under the bus lanes policy, possible revenue, as rightly stated by the Advocate General in point 30 of his Opinion, it is conceivable that if a charge was imposed on Black Cabs corresponding to the economic value of their right of access to the bus lanes, that might jeopardise, at least in part, the realisation of that objective, since it might deter some Black Cabs from using the bus lanes.
- 52 Further, having regard to the characteristics of Black Cabs, as described in paragraphs 4 to 11 of this judgment, the competent national authorities could reasonably take the view that the access of those taxis to bus lanes is liable to enhance the efficiency of the London road transport system and that, consequently, the criterion for the granting of the right at issue, namely the provision of taxi services in London, is liable to achieve the realisation of the objective concerned.
- 53 In the light of the foregoing, it remains to be determined whether the criterion adopted by the competent authority for the granting of the right of access is applied to the economic operators concerned in a non-discriminatory manner. As stated however by the Advocate General in point 35 of his Opinion, that examination is subsumed, in essence, in the issue of whether the bus lanes policy confers on Black Cabs a selective economic advantage. Consequently, that issue will be dealt with in examining the existence of such an advantage.
- 54 In that regard, it must be recalled that Article 107(1) TFEU prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid (the judgment in *Mediaset v Commission*, C-403/10 P, EU:C:2011:533, paragraph 36).
- 55 It follows from the Court's settled case-law that Article 107(1) TFEU requires an 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 (the judgment in *Mediaset v Commission*, EU:C:2011:533, paragraph 36).

- 56 By its question 2(b), the referring court asks the Court, in essence, to assess, in order to determine whether there is any selectivity in the advantage granted, whether the measure at issue introduces distinctions between operators who are, in the light of the objective pursued, in a comparable factual and legal situation.
- 57 In that regard, it must be emphasised that the identification of the respective situations of Black Cabs and minicabs and the assessment of whether those situations may be comparable is an issue which falls within the jurisdiction of the referring court, which alone has available to it all the relevant matters of fact and law.
- 58 Nonetheless, on the basis of the material in the file before it, the Court can provide the referring court with guidance which may assist that court in the assessment which it must carry out.
- 59 In that regard, it must be stated, first, that the identification of the factual and legal situation of Black Cabs and minicabs cannot be confined to that prevailing in the market sector in which those two categories of conveyors of passengers are in direct competition, namely the pre-booking sector. It cannot seriously be doubted that all the journeys made by Black Cabs and minicabs are liable to affect the safety and efficiency of the transport system on all the road traffic routes in London.
- 60 Secondly, it must be taken into consideration that, by virtue of their legal status, only Black Cabs can ply for hire; they are subject to the rule of ‘compellability’; they must be recognisable and capable of conveying persons in wheelchairs, and their drivers must set the fares for their services by means of a taxi meter and have a particularly thorough knowledge of the city of London.
- 61 It follows that Black Cabs and minicabs are in factual and legal situations which are sufficiently distinct to permit the view that they are not comparable and that the bus lanes policy therefore does not confer a selective economic advantage on Black Cabs.
- 62 In those circumstances, there is no need to answer question 2(c).
- 63 In the light of all the foregoing, the answer to the first and second questions is that the practice of permitting, in order to establish a safe and efficient transport system, Black Cabs to use bus lanes on public roads during the hours when traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except to pick up and set down passengers who have pre-booked such vehicles, does not appear, though it is for the referring court to determine, to be such as to involve a commitment of State resources or to confer on Black Cabs a selective economic advantage for the purpose of Article 107(1) TFEU.

### *The third question*

- 64 By its third question, the referring court seeks, in essence, to ascertain whether the practice of authorising Black Cabs to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except in order to pick up and set down passengers who have pre-booked such vehicles, is such as to affect trade between Member States within the meaning of Article 107(1) TFEU.
- 65 In that regard, it should be borne in mind that, in accordance with the Court’s settled case-law, for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (the judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 76 and case-law cited).

- 66 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see, to that effect, the judgment in *Libert and Others*, EU:C:2013:288, paragraph 77 and case-law cited).
- 67 In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see, to that effect, the judgment in *Libert and Others*, EU:C:2013:288, paragraph 78 and case-law cited).
- 68 Further, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 81).
- 69 Consequently, the condition that the aid must be capable of affecting trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned (the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, EU:C:2003:415, paragraph 82).
- 70 In the main proceedings, the view must be taken, in particular, that it is conceivable that the effect of the bus lanes policy is to render less attractive the provision of minicab services in London, with the result that the opportunities for undertakings established in other Member States to penetrate that market are thereby reduced, which it is for the referring court to determine.
- 71 It follows that the answer to the third question is that it is conceivable that the practice of permitting Black Cabs to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except in order to pick up or set down passengers who have pre-booked such vehicles, may be such as to affect trade between Member States within the meaning of Article 107(1) TFEU, which it is for the referring court to determine.

## Costs

- 72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The practice of permitting, in order to establish a safe and efficient transport system, Black Cabs to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except in order to pick up and set down passengers who have pre-booked such vehicles, does not appear, though it is for the referring court to determine, to be such as to involve a commitment of State resources or to confer on Black Cabs a selective economic advantage for the purpose of Article 107(1) TFEU.**
2. **It is conceivable that the practice of permitting Black Cabs to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except in order to pick up or set down**

**passengers who have pre-booked such vehicles, may be such as to affect trade between Member States within the meaning of Article 107(1) TFEU, which it is for the referring court to determine.**

[Signatures]