EUROPEAN COMMISSION

LEGAL SERVICE

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TO THE PRESIDENT AND MEMBERS
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Written Observations

submitted pursuant to Article 23, second paragraph, of the Statute of the Court of Justice of the European Union

by the European Commission,

represented by Leo Flynn and Paul-John Loewenthal, Members of its Legal Service, acting as Agents, with an address for service at the office of Merete Claussen, also a Member of its Legal Service, Bâtiment Bech, 5 rue A. Weicker, L-2721 Luxembourg,

Case C-518/13

Eventech

to the Court under Article 267 of the Treaty on the Functioning of the European Union from the Court of Appeal of England and Wales for a preliminary ruling on the interpretation and application of Article 107 of that Treaty.
# Table of Contents

1. Introduction .................................................................................................................. 3

2. National legal framework ................................................................................................. 3
   2.1 Regulation of taxi and PHV services ....................................................................... 3
   2.2 Regulation of traffic ............................................................................................... 5

3. Background to the case and questions referred to the court ............................................ 6

4. Observations on the questions referred ............................................................................. 8

5. Conclusion .................................................................................................................... 14
1 INTRODUCTION

1. By order of 24 September 2013 (hereinafter: the order for reference), the Court of
Appeal of England and Wales (hereinafter: the referring court) referred three
questions to your Court on the interpretation and application of Article 107 of the

2. This reference arises in the context of legal proceedings between Eventech Ltd.
(hereinafter: Eventech) and, amongst others, Transport for London (hereinafter: TfL),
in which Eventech is seeking to challenge the lawfulness of a policy implemented by
TfL and most Boroughs of London which allows taxis (black cabs) to drive in most
London bus lanes during the hours when bus lane restrictions are operational, but
prohibits private hire vehicles or “minicabs” (hereafter: PHVs or minicabs) from
doing so, save for the purposes of picking up or setting down pre-booked passengers
(hereinafter: the bus lane policy).

2 NATIONAL LEGAL FRAMEWORK

2.1 Regulation of taxi and PHV services

3. Three broad categories of regulation applying to taxi and PHV services within the
United Kingdom: quantity regulation, quality and safety regulation, and fare
regulation\(^1\). The applicable legal framework depends on where the service is carried
out. In England (outside London), Wales and Scotland there are two levels of
regulation: primary enabling legislation grants local authorities licensing powers
subject to certain conditions\(^2\); the local authorities then set more detailed requirements
in byelaws and/or licence conditions. In Northern Ireland, the licensing regime is set
out in orders and regulations that apply only in Northern Ireland.

4. In London, separate statutes contain the main provisions relating to taxis (black cabs)
and detailed licensing conditions are set out in the London Cab Order 1934 and
subsequent orders issued by TfL. Minicabs are regulated in London by the Private

\(^1\) Office of Fair Trading, *The regulation of licensed taxi and PHV services in the UK*, November 2003,

\(^2\) The principle piece of legislation for the regulation of taxis outside London is the Town Police Clauses
Act 1847, as amended by the Local Government (Miscellaneous Provisions) Act 1976, various
Hire Vehicles (London) Act 1998. The main distinction between taxis and minicabs is that the former “ply for hire” from taxi ranks and can be hired in the street without a pre-booking, whereas the latter must be pre-booked by telephone or calling in person at an office.

5. In London, both taxis and minicabs are licensed by London Taxi and Private Hire, which is a part of TfL. For both taxis and minicabs, both the vehicle and the driver need to be licensed independently. Since the owner of the licensed vehicle may also drive it\(^3\), the same person can hold both licenses. Licensed vehicles may also be owned and maintained by individuals or companies that rent those vehicles out to licensed drivers\(^4\).

6. To obtain either a taxi driver or a minicab driver’s licence, applicants must meet the following conditions\(^5\): (i) be at least 21 years of age, (ii) hold a full DVLA\(^6\), Northern Ireland or other EEA State driving license, (iii) be of good character (established through an enhanced criminal records check), and (iv) be medically fit. In addition, applicants for a taxi driver’s license must pass a rigorous examination demonstrating thorough knowledge of central London (known as “The Knowledge”)\(^7\), while applicants for a minicab driver’s licence will need to take a topographical skills assessment from an accredited assessment centre. Applicants for a taxi driver’s license must also pass a driving test. A license is valid for three years from the date of issue.

7. Licensing authorities outside London have the power to limit the number of taxis they

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\(^3\) According to TfL’s website, a majority of the 20,000 taxi vehicles currently licensed are owned and driven by individual licensed drivers.

\(^4\) The owner is then known as a “proprietor”.


\(^6\) Driver and Vehicle Licensing Agency

\(^7\) There are two types of taxi driver’s license issued in the Greater London Authority area: the All London and the Suburban Licence. An “All London” driver is licensed to ply for hire anywhere within the Greater London Authority area. Drivers may also be licensed for one or more of the nine suburban sectors, which are based on borough boundaries. To obtain an “All London” driver’s license, applicants must demonstrate a thorough knowledge, primarily, of the area within the six-mile radius of Charing Cross, as well as a more general knowledge of the major arterial routes throughout the rest of London. The knowledge is tested by a written examination followed by a series of short interviews with Knowledge of London Examiners over a period of time. On average, it takes two years to complete the examination process. Suburban drivers will need to demonstrate a detailed knowledge of their chosen sector along with a more general knowledge of central London. See Transport for London, London Taxi and Private Hire, MHC/201, *London Taxi Driver Licensing. A reference guide to becoming a licensed taxi driver*, available at www.tfl.gov.uk, page 9.
license in their area, provided there is no significant unmet demand for taxis in the area. In London, there is no statutory power to restrict the number of taxis.

2.2 Regulation of traffic

8. In the United Kingdom, the regulation of traffic is covered by the Road Traffic Regulation Act 1984 (hereinafter: the 1984 Act).

9. Section 6 of the 1984 Act, read in the light of Section 1(1) and Schedule 1 thereof, allows the traffic authority responsible for a particular road to restrict traffic thereto (or a part thereof) to certain types of vehicles and thus provides the power to designate bus lanes. Section 121A of the 1984 Act designates which body is the traffic authority in respect of all public roads in England, Wales and Scotland. Subsection (1A) thereof designates TfL as the traffic authority for certain roads in Greater London (known as GLA roads), while under subsection (2) thereof the traffic authorities responsible for almost all other roads in London and Greater London are the individual London Boroughs.

10. In exercise of its powers under section 6 of the 1984 Act, TfL has designated bus lanes along a number of GLA roads. It has, in addition, adopted a policy of permitting taxis to drive on the bus lanes during the hours when restrictions are operational, but prohibited minicabs from using those same lanes, except for the purposes of picking up and setting down passengers. Most London Boroughs have adopted a similar policy.

11. By virtue of section 4 of the London Local Authorities Act 1996, TfL and the Boroughs of London have the power to issue penalty charge notices (hereinafter: PCNs) in respect of breaches of orders made under section 6 of the 1984 Act in relation to roads for which they are responsible.

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8  Transport Act 1985, section 16.
9  While no quantity restrictions apply in London, the Law Commission observed in its Consultation Paper No. 203, “Reforming the Law of Taxis and Private Hire Services” (2012), available at http://www.lawcom.gov.uk, point 9.4, that “the stringent knowledge tests required of drivers in London and the costly vehicles required to meet the conditions of fitness constitute a significant barrier to entry and are widely regarded as achieving an equivalent result to quantity regulation”.
3 BACKGROUND TO THE CASE AND QUESTIONS REFERRED TO THE COURT

12. On 13 and 20 October 2010, the London Borough of Camden issued two PCNs against Eventech for the unauthorised use of a bus lane on 6 October and 13 October 2010, respectively, by two minicabs owned and leased under contract by Addison Lee plc (hereinafter: Addison Lee) to self-employed drivers. Eventech, an associated company of Addison Lee, is the registered keeper of all of Addison Lee’s minicabs.

13. Eventech’s appeal of the two PCNs was first dismissed by the Parking Adjudicator on 16 August 2011. Its subsequent application for judicial review of that decision was dismissed by the High Court of Justice by order of 13 July 2012. On 7 December 2012, Eventech obtained permission from the referring court to appeal against that order.

14. Eventech argues that the bus lane policy confers an advantage on black cabs which is granted through State resources within the meaning of Article 107(1) TFEU. Black cabs are given preferential access to a road owned and managed by the State, which also entails an additional burden for the public authorities in that they forgo collecting fines or other penalties for the use of those lanes. Eventech further argues that the bus policy is selective, since black cabs and minicabs are comparable in light of the objective pursued by that policy. It also claims that the advantage granted to black cabs is not justified by the nature of the scheme and that TfL has not demonstrated that the bus lane policy is proportionate. Finally, Eventech argues that the bus lane policy is liable to affect trade between Member States, on the one hand, because the policy concerns a sector in which undertakings from any Member State can take part and, on the other hand, because both black cabs and minicabs transport and take bookings from customers established in other Member States.

15. TfL argues that the bus lane policy does not constitute State aid within the meaning of Article 107(1) TFEU. First, the advantage granted to black cabs as a result of that policy has no effect on State resources. The roads on which the bus lanes have been designated are public roads, open to all potential users on an open, non-discriminatory basis and the bus lane policy gives rise to no more than a limited discrepancy between the treatment of black cabs and minicabs in relation to certain roads. Moreover, allowing black cabs to use the bus lanes cannot be adequately described as a policy
involving the waiver of a charge, since enforcing the restrictions on black cabs would likely result in them no longer driving in the bus lane, so that any loss of State resources is only indirect and marginal. Second, TfL contends that the bus lane policy is not prima facie selective, since black cabs and minicabs are not in a comparable legal or factual situation in light of the objective pursued by that policy to regulate traffic. The former may ply for hire, whereas the latter may not. Alternatively, if the bus lane policy is found to be prima facie selective, TfL argues that the different treatment is justified by the nature and general scheme of the system. According to TfL, it is an inherent feature of the regulatory framework that black cabs (but not minicabs) need to be accessible to prospective passengers, so that they may conveniently and safely be hailed from the pavement. Finally, TfL submits that the bus lane policy is not liable to affect trade between Member States: the policy is a local measure, applying only within London; the activity that is alleged to be affected is inherently local and even if the policy affected whether a person travelling to London from another Member State used a black cab or a minicab while in London, that would be an effect on trade within London, not between Member States.

16. It is in the context of this dispute that the referring court decided to refer the following three questions to the Court of Justice for a preliminary ruling:

1. Does making a bus lane of 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 comparative 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) TEFU?

(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?”

4 OBSERVATIONS ON THE QUESTIONS REFERRED

17. By its three questions, the referring court seeks, in essence, to ascertain whether the bus lane policy constitutes State aid within the meaning of Article 107(1) TFEU.

18. Under that provision, 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 is, in so far as it affects trade between Member States, incompatible with the internal market. Accordingly, four conditions must be met for State aid to be present within the meaning of that provision: first, there must be an intervention by the State or through State resources; second, the intervention must confer an selective advantage on a recipient undertaking; third, the intervention must be liable to affect trade between Member States; and fourth, the intervention must distort or threaten to distort competition10.

19. The referring court’s three questions essentially coincide with the first three conditions of Article 107(1) TFEU. The court’s first question seeks to ascertain whether the bus lane policy involves the use of State resources, its second question whether the bus lane policy confers a selective advantage on black cabs, and its third

20. For the reasons set out below, the Commission is of the opinion that, in the circumstances of the present case, making a bus lane of a public road available to black cabs but not minicabs, during the hours of operation of that bus lane, does not involve State aid within the meaning of Article 107(1) TFEU. While the Commission does not think it possible to maintain that a selective advantage derived from State resources does not affect trade between Member States in the circumstances of the present case, it considers that the first two questions raised by the referring court should be examined together and should be given a negative answer.

21. In Case C-431/07 P Bouygues and Bouygues Telecom v Commission [2009] ECR I-2665 your Court upheld the judgment of the General Court in Case T-475/04 Bouygues SA v Commission [2007] ECR II-2097. Those cases concerned the grant of UMTS radio spectrum licences, in which context the State simultaneously performs the roles of manager of such public resources through the grant of special and exclusive rights and the role of telecommunications regulator pursuing the regulatory objectives laid down by 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 telecommunication services. In its judgment, the General Court confirmed that the award of UMTS licences without maximising the revenue which could otherwise have been achieved from that grant did not involve State aid, considering that the award was justified by the regulatory objectives set out in Directive 97/13/EC and complied with the principle of non-discrimination.

22. The scenario at issue in Bouygues and Bouygues Telecom differs from that in which the State commercially exploits an asset, for instance, by selling or leasing it to an undertaking, and, in the absence of obtaining a market price for that transaction, confers a selective advantage on the recipient undertaking. Imagine, for example, a

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11 According to the referring court, it is common ground that the bus lane policy is imputable to the State, confers an economic advantage on black cabs and distorts or is liable to distort competition between black cabs and minicabs, paragraph 23 of the order for reference.


13 Paragraphs 108 to 111 and 123 of the General Court’s judgment, upheld in paragraphs 94 to 98 and 125 of the Court of Justice’s judgment. By contrast, in Case C-279/08 P Commission v Netherlands [2011] ECR I-7671, paragraphs 88 et seq. the Court did not identify regulatory reasons that would have justified the grant without consideration of freely tradable emission rights.
case in which the State tenders out the lease of a broadband network which it owns, but for regulatory reasons so designs the award criteria that instead of awarding the network to the bidder offering the highest price, it awards the network to the bidder best fulfilling those qualitative criteria. In such a scenario, the Commission would conclude that, since the State did not act as a hypothetical private investor would have done by accepting the highest bid for the lease of the network, it conferred a selective advantage on the selected bidder. Any regulatory reasons that motivated the State to do so could only be taken into account during the compatibility analysis. That outcome follows from the case-law according to which Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects, so that in applying the private investor test the hypothetical private investor should be considered to ignore any social, regional or sectoral policy considerations, as well as any other social costs resulting from its decision.

23. The difference in treatment between the two scenarios set out in paragraphs 21 and 22 can be explained by the fact that in the latter scenario the asset in question is meant to be commercially exploited and in fact competes with other broadband networks, so that the lease of the network at a price below its normal market price distorts competition on the broadband market by conferring a selective advantage on the lessee. By contrast, in the former scenario, it is the award by the State of the UMTS licenses to exploit the spectrum that enables the beneficiary undertakings to exercise the commercial activity in question. The means to conduct the economic activity in question is, as it were, “created” by the State as regulator of the public domain through the grant of a special right, in that case, the UMTS license. It is not sold on

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15 The awarding authority is not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in its award decision. However, those award criteria must be closely related to the subject-matter of the service provided and allow for the most economically advantageous offer to match the value of the market. In other words, the criteria should be defined in such a way so as to allow for an effective competition on price, which minimises the advantage accruing to the successful bidder.

16 See Case 234/84 Belgium v Commission [1986] ECR 2263, paragraph 14 and Case 40/85 Belgium v Commission [1986] ECR 2321, paragraph 13. That rule has been consistently applied throughout the case-law, most recently by the General Court in Joined Cases T-443/08 and T-455/08 Freistaat Sachsen e.a. v Commission [2011] ECR II-1311, paragraph 102. Any “market” for the economic activity in question only exists because special rights have been granted to the operator in question. As such, the “market” has been artificially created so that there is no true “market price” for the rights granted.
a particular market, it is not transferrable by the licensed operator, nor could it be replicated by a competitor, so that there cannot be said to be a “market” for the license or a corresponding market price. In such a scenario, the presence of an advantage does not result from a sale below market price, but from discriminatory treatment by the State.

24. In the Commission’s opinion, the reasoning applied in the *Bouygues* judgment can be applied to all scenarios in which the State grants access to public domain or natural resources through the award of special or exclusive rights to pursue a regulatory objective. In those scenarios, provided the State, in its role of regulator of the public domain, treats all undertakings concerned equally by establishing the award criteria in advance in a transparent and non-discriminatory manner, and provided that there is an inherent link between achieving a particular regulatory purpose and the foregoing of revenue, it can legitimately decide not to maximise the revenues which could otherwise have been achieved without falling under the scope of the State aid rules. By contrast, State aid would be present if, in a given case falling under that scenario, the public authorities do not charge the normal amount under their general system for access to the public domain or natural resources and thus privileges certain undertakings over others.

25. According to the Commission, the present case also falls to be examined in the light of that reasoning. TfL is the regulatory authority responsible for the licensing of black cabs and minicabs (through London Taxi and Private Hire); it is also the regulatory authority responsible for the regulation of traffic for GLA roads. Through the grant of special rights in the form of non-transferrable licenses, TfL is exercising its task as regulator of the public domain by allowing black cabs and minicabs to conduct economic activities on public roads.

26. In setting up distinct licensing systems for black cabs and minicabs, TfL is exercising regulatory choices which correspond to its regulatory objective of creating a safe and efficient transport system. Indeed, the main licensing differences for operating a black

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18 In addition to the award of UMTS licenses, examples of scenarios include the award of mining or gambling concessions and the award of licenses to undertake a particular economic activity. For example, many Member States require road hauliers to apply for a heavy goods vehicle license. Such a license obviously has an economic value to those operators, but the State is not required to charge those
cab and operating a minicab relate, first, to the specifications of the vehicle in question (as regards the vehicle license) and, second, the level of geographical knowledge that needs to be demonstrated by the driver (as regards the driver’s license). The conditions which undertakings must meet in order to obtain either set of licenses to perform the economic activity in question are set out in advance in a clear and non-discriminatory manner, there are no quantitative restrictions as to the number of black cabs or minicabs that may operate within London, and undertakings are free to apply for either license.

27. In limiting the use of the bus lanes to undertakings which possess a black cab vehicle and driver’s licenses, to the exclusion of undertakings operating minicabs, TfL is exercising its role as regulator of the public domain through the grant of special rights attached to those licenses. The public roads in question are not meant to be commercially exploited, cannot be replicated and do not compete with other roads. Provided that TfL treats all undertakings concerned equally in awarding those licenses, by establishing the award criteria in advance in a transparent and non-discriminatory manner, the bus lane policy cannot be considered to give rise to a selective advantage within the meaning of Article 107(1) TFEU.

28. Finally, in the Commission's opinion the bus lane policy does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State or TfL. The consequences arising from that policy, in so far as they relate to the difference in treatment between black cabs and minicabs and to the potential loss of revenues for the State through foregone fines, are inherent in the system and are not a means of granting a particular advantage to the undertakings concerned19. Therefore, the non-application of fines for the use of the bus lane by black cabs does not involve any direct or indirect transfer of State resources to those undertakings.

29. Consequently, the Commission considers that, in the circumstances of the present case, the bus lane policy does not constitute a means of granting a selective advantage operators that economic value rather than a standard license fee as a result of applying the State aid discipline.

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to black cabs through State resources within the meaning of Article 107(1) TFEU.

30. Nevertheless, for the sake of completeness, the Commission will examine the referring court’s final question, which is whether the bus lane policy is liable to affect trade between Member States within the meaning of Article 107(1) TFEU.

31. In the late 1990s and early 2000s, the Commission took a number of decisions concerning subsidies to taxi operators in which it found that the measures did not amount to State aid due to the local nature of the activities, their geographical confinement and conditions of access\(^\text{20}\). However, since the mid-2000s and, in particular, your Court’s ruling in Altmark\(^\text{21}\), it is not possible to maintain that State aid favouring taxi activities in a major European city does not affect trade between Member States within the meaning of Article 107(1) TFEU.

32. More specifically, in paragraphs 77 and 78 of that judgment your Court held, on the one hand, 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”. On the other hand, in paragraph 81 your Court observed that “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.”\(^\text{22}\) Accordingly, in paragraph 82 of that judgment your Court concluded that “the condition […] that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the

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22  See also Case C-172/03 Heiser [2005] ECR I-1627, paragraph 32.
scale of the field of activity concerned\textsuperscript{23}.

33. In present case, since the activity in question, namely the provision of taxi and PHV transport services to passengers by road, is open to undertakings from all Member States\textsuperscript{24}, there is by definition competition between economic operators of all Member States for that activity, so that any selective advantage given to an operator to perform either activity is by its very nature liable to affect trade between Member States. Moreover, since both black cabs and minicabs transport and take bookings from customers established in other Member States visiting London, the bus lane policy, if it is deemed to fulfil all the other conditions of Article 107(1) TFEU, is liable to affect trade between Member States in that way as well.

34. Nevertheless, considering that other conditions of Article 107(1) have not been met in the present case, the Commission does not consider the measure to constitute State aid within the meaning of that provision.

5 CONCLUSION

35. In light of the foregoing, the Commission respectfully submits that the Court should answer the questions referred as follows:

“Making a bus lane of a public road available to black cabs but not minicabs, during the hours of operation of that bus lane, does not involve State aid within the meaning of Article 107(1) TFEU, in the circumstances of the present case.”

Leo FLYNN Paul-John LOEWENTHAL

Agents for the Commission

\textsuperscript{23} See also, more recently, Joined Cases C-197/11 and 203/11 Libert and others [2013] ECR I-0000, paragraphs 75 to 79.

\textsuperscript{24} Natural or legal persons engaged in an economic activity.