

STATE AID: DEVELOPMENTS IN 2014 AND AN ASSESSMENT OF THE LONDON BUS LANE POLICY



This Briefing focuses on the development of EU State aid policy in 2014 and the recent preliminary ruling handed down by the European Union's Court of Justice (CJ) on whether the London bus lane restricted use policy constitutes State aid. This ruling provides guidance in particular on how to assess whether a measure confers a selective economic advantage.

State aid: 2014 developments

The European Commission (the Commission) made several changes to State aid control rules in 2014 as part of its modernisation project. The reforms were designed to increase transparency and reduce administrative burdens on Member States. The modernisation project is also designed to provide clarity on State aid control.

In order to achieve these objectives, the Commission adopted the following new rules and guidelines:

1. New guidelines on State aid to airports and airlines were adopted on 20 February 2014 and entered into force on 4 April 2014.
2. A revised General Block Exemption Regulation (Regulation 651/2014) which was adopted on 21 May 2014 and entered into force on 1 July 2014 extends the categories of aid covered by the former General Block Exemption Regulation.
3. A Commission Communication on the revised framework for State aid for research and development and innovation was adopted on 21 May 2014 and has applied since 1 July 2014. It provides clarification as to what constitutes State aid, how to assess market failures, as well as the negative and incentive effects of aid.
4. New guidelines on State aid to promote risk finance investments were adopted on 15 January 2014 and came into effect on 1 July 2014. These guidelines clarify when a Member State can grant aid to SMEs and certain medium-sized companies to facilitate access to finance.



5. New guidelines on State aid for environmental protection and energy were adopted on 9 April 2014 and applied from 1 July 2014. The guidelines set out a framework to support Member States with designing State aid measures that contribute to reaching climate targets without distorting competition.
6. An agricultural Block Exemption Regulation and guidelines for State aid in the agriculture and forestry sector and in rural areas were adopted on 25 June 2014 and entered into force on 1 July 2014. They declare certain categories of aid in agriculture and rural areas compatible with the internal market.
7. On 13 June 2014, the Commission announced that it had adopted a Communication on State aid to promote important projects of common European interest which would apply from 1 July 2014.
8. New guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty were adopted on 9 July 2014 and entered into force on 1 August 2014.
9. On 28 May 2014, the Commission published a staff working document setting out guidance on a common methodology for State aid evaluation to provide guidance to public authorities which plan and conduct State aid evaluations.

In 2014, the Commission began a well publicised investigation into Member States' corporate tax practices. Following the discovery of controversial tax treatments of top tier businesses by Member States such as Ireland, the Netherlands and Luxembourg, the Commission is investigating whether certain tax rulings give particular companies a selective economic advantage amounting to State aid. If



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so, then the Member States will be obliged to recover the amount given 'in aid' to the companies including interest.

CJ preliminary ruling on London bus lane policy

On 14 January 2015, the CJ handed down its preliminary ruling from the English Court of Appeal (CoA) on whether a London bus lane policy adopted by Transport for London (TfL), the traffic authority for certain roads in the Greater London Area (GLA), comes within the concept of 'State aid' under Article 107(1) TFEU¹.

The facts

The complainant, Eventech Ltd (Eventech), operates minicabs in the GLA. Eventech sought to challenge a benefit granted by the State to black cabs but denied to minicabs. TfL established bus lanes with restricted use during certain hours of operation to increase London public transport efficiency and safety. Failure to observe this restriction meant that the infringing minicab was subject to a penalty charge notice (PCN). TfL adopted a policy which allowed access to these lanes to black cabs within the hours of operation. Minicabs were not given this benefit beyond dropping off and picking up passengers.

Eventech was issued with two PCNs in 2010. Eventech applied for judicial review after its challenge of the PCNs was rejected and this was dismissed by the High Court. Between July 2011 and December 2012, fines exceeding £180,000 were imposed on Eventech for the use of bus lanes during operational hours. Eventech was eventually granted permission to appeal against the High Court's judgement. In its application, Eventech claimed that the bus lane policy constituted un-notified State aid to the operators of black cabs contrary to Article 107(1) TFEU.

Article 107(1) TFEU provides that:

"Save 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 internal market."

¹ Case C-518/13 The Queen, on the application of *Eventech Ltd v The Parking Adjudicator*, judgment of 14 January 2015.



The CoA referred five questions to the CJ:

1. On the facts of this case, does making the bus lanes available to black cabs but not minicabs constitute the use of State resources?
2. What is the relevant objective when assessing whether black cabs and minicabs are in a comparable legal and actual situation when determining whether the policy is selective?
3. If the policy is justified by safety and/or efficiency reasons, is the measure not then selective within the meaning of Article 107(1) TFEU?
4. Does the Member State relying on the justification need to show that this favourable treatment of black cabs is proportionate and does not go beyond what is necessary?
5. Is the policy of making a bus lane available to black cabs but not minicabs in its hours of operation liable to affect trade between Member States where the road is in central London and there is no bar to citizens from any Member State owning or driving either type of cab?

The preliminary ruling

1. **No reduction of State budget:** the CoA had determined that the bus lane policy granted an economic advantage to black cabs, that this was attributable to the State and was liable to distort competition between black cabs and minicabs. However, the CJ held that there had to be a sufficiently direct link between the advantage given to the black cabs on the one hand, and a reduction of, or a sufficiently concrete risk of burdens to, the



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State budget on the other. In the present case, the bus lanes were already constructed and established for use by buses. This meant that there was no reduction in State budget for this benefit to be given to black cab drivers.

The CJ also indicated that the black cabs could use the bus lanes because they were permitted to do so, not because the authority had waived fines that were payable. Therefore, the Member State was not forgoing revenue as use of the routes was free of charge. The State does not necessarily confer an economic advantage on a public user by granting him privileged access to public infrastructure which is not operated commercially. Because of this, there was no obligation on the authority to charge black cabs for the economic value of using the bus lanes. Part of the rationale used by TfL was that the access to the bus lanes was to further the legislative objectives of efficiency and safety. The CJ held that it is in TfL's discretion to decide

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whether forgoing possible revenue from beneficiaries of this right will help it to achieve this objective.

But the CJ emphasised that the assessment of who will benefit from this right must be determined in advance in a transparent and non-discriminatory manner. In this case, the criterion for granting this privilege was determined, in advance and transparently, as the provision of black cab services in London. The CJ considered that it was reasonable for TfL to view this policy in its discretion, as apt to enhance the efficiency and safety of London transport. It was also noted that it is conceivable that imposing a charge on black cabs could dissuade them from using the lanes thereby jeopardising the realisation of the objective.

2. **Absence of comparability:** on the matter of comparability, the CJ held that it is for the referring court to assess whether black cabs and minicabs were in a comparable situation. However, the CJ provided



guidance which determined that black cabs and minicabs were in factual and legal situations that were distinct due to the additional obligations imposed on, and rights granted to, black cabs by virtue of their legal status.

For example, black cabs must be adapted for wheelchair access and comply with strict regulations regarding fares, distance and time of the journey. They must comply with conditions as to fitness and appearance of the vehicle. In addition, their drivers must pass a 'Knowledge of London' test and take an advanced driving assessment. Minicabs are not subject to these additional obligations. Based on these facts, the CJ determined that a view could be taken that black cabs and minicabs were not comparable.

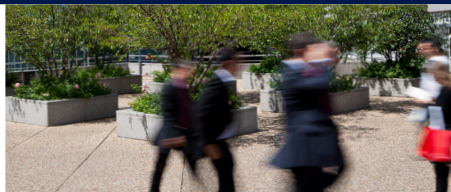
3. **Effect on trade between Member States:** although the policy was for central London road users, the CJ determined that the internal activities of the benefiting undertakings could result in the reduction of opportunities for undertakings from other Member States penetrating the London taxi market thereby affecting trade between Member States within the meaning of Article 107(1). It should be noted that whilst the policy only granted unrestricted taxi access to the bus lanes to black cabs, there is no bar to citizens or undertakings from any Member State owning or driving a black cab. Despite this, the CJ found that intra-Community trade could be affected by the policy. The CJ pointed out that there is no threshold below which it can be considered that trade between Member States is not affected. It was enough that the policy could make it less attractive to provide minicab services in London.

Comments

The case demonstrates how the EU prohibition of State aid is to be interpreted. Without expenditure on the part of the State or a concrete risk of a burden on the budget of the State, it is harder to show a commitment of State resources which constitutes aid. Furthermore, without a comparable undertaking which is being treated unequally, it is harder to prove that there is a selective economic advantage being acquired. However, the CJ is inclined to accept that a particular policy or practice can have an effect on trade between Member States even if the policy or practice does not preclude citizens or undertakings from other Member States from enjoying the same benefit: there is no *de minimis* threshold below which it can be considered that trade between Member States is not affected.

As there is an obligation on Member States to recover from beneficiaries unlawful State aid plus interest, beneficiaries should ensure that all relevant approvals have been obtained.

Equally, competitors will be keen to ensure that any State aid received by rivals has either been approved or is required to be recovered.



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