

Eventech, the Selectivity of a Bus Lines Policy

Annotation on the Judgment of the Court of Justice of the European Union (Second Chamber) of 14 January 2015 in Case C-518/13 *Eventech v The Parking Adjudicator*

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The London bus lanes policy resulted in a remarkable and somewhat controversial preliminary ruling by the Court of Justice of the EU (CJEU) in January 2015. The most important criticism on this judgment is that the CJEU has stretched the State aid rules too far by suggesting that although no transfer of State resources is involved, the grant of a preferential right could nevertheless qualify as State aid. In reply to the preliminary questions the CJEU set out specific conditions for assessing whether the grant of a preferential right of access to bus lanes confers a selective advantage to Black Cabs. These conditions seem to go along the lines of what is customary in the context of free movement rules and the rules on the compensation for a public service obligation. They require amongst others the necessity and the proportionality of the preferential right and the determination of the criteria for the grant in advance in a transparent and non-discriminatory manner. Although the CJEU held with regard to the preferential right granted to Black Cabs that it did not seem to result in a selective advantage, the judgment raises various questions as to the general applicability of the reasoning of the CJEU.

Keywords: Selectivity; Public Service Obligation; Non-Discrimination; Proportionality.

I. Introduction

This article is structured as follows. First the facts of the *Eventech*¹ case and the judgment will be summarised. In the next part we will formulate some comments on the balance between national freedom to pursue public policy objectives and the applicability of the State aid rules, the objectives-based approach versus the effects-based approach and, finally, the selectivity test in the objectives approach.

II. The Facts of the Case

In London, both London taxis (Black Cabs) and private hire vehicles (minicabs) require licences issued by Transport for London ("TfL"). Those licences are issued under different statutory provisions and are subject to different conditions.² Following the London Cab Order 1934 and Metropolitan Carriage Act 1869, only Black Cabs are permitted to 'ply for hire', that is, soliciting or waiting for passengers regardless of whether a passenger has made a reservation in advance. Minicabs are not allowed to 'ply for hire' and can only pick up passengers that have pre-booked their transport. Further, drivers of Black Cabs are subject to specific requirements in relation to their vehicles (i.e. the vehicles must be black and accessible for wheelchairs), their fares, and their knowledge of London, whereas those standards do not apply to minicabs.³

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1 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9.

2 *Ibid*, [3].

3 *Ibid*, [4-11].

TfL and the London Boroughs are the traffic authorities for almost all the roads in London and Greater London. TfL adopted the bus lanes policy of permitting Black Cabs to use the bus lanes during rush hours when the bus lanes restrictions are operational. Licensed minicabs are prohibited from using those bus lanes during rush hours and can only make use of them outside these designated hours or when they need to pick up or drop off a passenger. Each unauthorised use of the bus lanes constitutes an offence punishable by a fine. Most London Boroughs have also adopted this policy with respect to roads for which they are responsible.⁴

Eventech operates a fleet of minicabs in London and was fined several times by TfL and various London Boroughs for an amount exceeding of £180,000 for using bus lanes in central London. Eventech challenged the penalty notices before the Parking Adjudicator, claiming among other things that the bus lanes policy constitutes State aid to the operators of Black Cabs, which is contrary to Article 107(1) TFEU and Article 108(3) TFEU.⁵

The action before the Parking Adjudicator was dismissed by a decision on 16 August 2011. An action against that decision was dismissed by the High Court of Justice. Eventech obtained permission to bring an appeal against that judgment and the Court of Appeal examined the case of Eventech.⁶ The Court of Appeal referred to the CJEU questions for a preliminary ruling in order to determine whether the permission for Black Cabs to use the bus lanes during specific times constitutes State aid. The three main questions concerned: (1) Whether there are State resources involved in making the bus lanes available to the Black Cabs, but not to minicabs? (2) Is the advantage granted to the Black Cabs a selective one? (3) Can trade between Member States be affected by the measure of TfL and the London Boroughs?⁷

III. The Judgment of the CJEU

The CJEU examined the first and the second question together and concluded that the grant of the preferential access right to Black Cabs does not involve the transfer of State resources nor does it confer a selective economic advantage on Black Cabs within the meaning of Article 107(1) TFEU.⁸

Eventech submitted that the bus lanes policy entailed a budgetary burden on the State resources as

a consequence of (i) the preferential access of Black Cabs to infrastructure belonging to the State for the use of which they are not charged and, (ii) the fact that Black Cabs are exempted from any liability to pay fines when they use bus lanes. However, the CJEU concluded that the bus lanes were not operated commercially; therefore the TfL does not forego possible revenues by not charging a fee for the preferential access right. The fact that Black Cabs do not have to pay fines when using bus lanes does not imply that TfL forgoes possible revenues either, since the fines were never due by the Black Cabs as they are allowed to use the bus lanes.⁹

The CJEU observes that the right of privileged access to use bus lanes has an economic value. Moreover, Eventech submitted that Black Cab operators refer in their advertising to the advantages of booking a taxi rather than a minicab, since Black Cabs are allowed to use bus lanes in peak periods.¹⁰ However, since the privileged access to the non-commercially operated infrastructure is granted in the context of the pursuit of the regulatory objectives, namely ensuring safe and efficient transport system, the CJEU holds that this does not necessarily qualify as an economic advantage within the meaning of Article 107(1) TFEU.¹¹ Such preferential access right does not constitute an economic advantage if (i) the objective pursued is a matter within the prerogative of the competent national public authorities alone and (ii) the authorities have a degree of discretion with regard to the necessity for the achievement of the regulatory objective pursued and the decision to forgo possible revenue and (iii) the criteria for the grant of the right must be appropriate and determined in advance in a transparent and non-discriminatory manner.¹²

With regard to the necessity the CJEU considers it conceivable that if a charge corresponding to the eco-

4 *Ibid*, [17-18].

5 *Ibid*, [22-26].

6 *Ibid*, [24-26].

7 *Ibid*, [30].

8 *Ibid*, [63].

9 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [35-40].

10 *Ibid*, [21].

11 *Ibid*, [48].

12 *Ibid*, [49].

conomic value of the privileged access right would have been imposed on Black Cabs, the realisation of the objectives might have been jeopardised at least in part, since it might deter some Black Cabs from using the bus lanes.¹³ Therefore the CJEU concludes that, having regard to the characteristics of Black Cabs, the competent national authorities could reasonably take the view that the access of those taxis to bus lanes was liable to enhance the efficiency of the London road transport system.¹⁴

Subsequently, the CJEU examines whether the granting of the privileged access right to bus lanes confers a selective economic advantage on Black Cabs. This assessment boils down to the examination whether the preferential right has been granted in a non-discriminatory manner. For that purpose the CJEU points out that it must be assessed in the first place whether the factual and legal situation of the Black Cabs is comparable to that of minicabs. This assessment falls within the jurisdiction of the referring court which alone has available to it all the relevant matters of fact and law. Nevertheless, the CJEU provides some guidance on the basis of the information it has in its file. Firstly, the CJEU points out 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. According to the CJEU, 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.¹⁵ Secondly, the CJEU underlines that it must be taken into consideration that, by virtue of their legal status, only Black Cabs can ‘ply for hire’ and are subject to other strict standards in

relation to their vehicles, their fares, and their knowledge of London.

On the basis of these two aspects, the CJEU concludes 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.*”¹⁶ As a consequence, the CJEU considers it not necessary to answer the question of the referring court whether the favourable treatment of Black Cabs is proportionate and does not go beyond what is necessary to realise the safe and efficient transport objectives.

In reply to the first and second questions of the referring court, the CJEU answers that the granting of the privileged access rights to Black Cabs in order to establish safe and efficient transport system does not appear to involve a commitment of State resources or to confer a selective economic advantage on Black Cabs for the purpose of Article 107(1) TFEU.

The third question seeks to ascertain whether the practice of permitting Black Cabs to use bus lanes during the hours when traffic restrictions are operational, is liable to affect trade between the Member States.¹⁷ The CJEU referred to its settled case law, in particular the *Libert* case and the *Altmark Trans* case, and observed that it is not necessary “*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.*”¹⁸ Such effect is present if the position of an undertaking is strengthened compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. It is also unnecessary that the benefitting undertakings are themselves involved in intra-Community trade. The internal activity may be maintained or increased as a result of the aid, so that the opportunities for undertakings established in other Member States to enter the market are thereby reduced.¹⁹ The CJEU concludes, in a brief paragraph, that it is conceivable that the contested bus lanes policy could have the effect of making it less attractive to provide minicab services in London. In other words, resulting in reduced opportunities for undertakings established in other Member States. The CJEU concludes that it is for the referring Court of Appeal to determine whether the contested bus lanes policy has such an effect.²⁰

13 *Ibid*, [51].

14 *Ibid*, [52].

15 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [59].

16 *Ibid*, [60-61].

17 *Ibid*, [64].

18 Joined Cases C-197/11 and C-203/11 *Libert and Others* [2013] ECLI-288, [76].

19 *Ibid*, [77-78].

20 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [71].

IV. Comments

In this preliminary judgment the CJEU answers questions that the referring national court had whilst applying the criteria of Article 107(1) TFEU in the particular case at hand. As is customary in the preliminary procedure, the CJEU provides answers but leaves the assessment to the national court. By way of a general comment it has to be said that the judgment leaves little room for the national court's assessment by providing rather 'directive' guidance on the presence of a commitment of State resources, the granting of a selective economic advantage and the presence of a potential distortion of competition and a potential effect on trade between Member States. Hereinafter we will make some comments on the balance between the national freedom to pursue public policy objectives and the applicability of the State aid rules, the objectives-based approach versus effects-based approach and the way the selectivity test relates to the objectives-based approach.

1. The Balance between National Freedom to Pursue Public Policy Objectives and the Applicability of the State Aid Rules

The answer of the CJEU to the first question of the referring court whether the preferential access right to bus lanes for Black Cabs involves the use of State resources, seems to depend on the discretionary power for a Member State to choose the instruments that it deems appropriate to realise the public policy objectives it pursues.²¹ According to the CJEU, the grant of the preferential access right to bus lanes may be an inherent element of the public policy objectives provided there is a direct link between that right and the realisation of those objectives, in this case a safe and efficient transport system.

The mere fact that the building and maintenance of bus lanes relies on State resources does not imply a transfer of State resources to Black Cabs by granting the preferential access to the bus lanes to Black Cabs for free. Different from the *Leipzig-Halle* judgment²² in which the capital contribution to the infrastructure was considered a transfer of State resources, the CJEU points out that the bus lane infrastructure is not operated commercially.²³ Moreover, the CJEU considers the construction of infrastructure to be different from the preferential access to the bus

lane infrastructure that was not constructed for the benefit of specific undertakings and was not allocated to them after the construction, but was constructed as part of the London road network in order to facilitate public transportation by bus.²⁴ The fact that Black Cabs uses its preferential access to bus lanes in the context of its commercial activity is not sufficient for the criterion of the transfer of State resources to be met.²⁵ *Eventech* had argued that the competent authorities are obliged to impose a charge which corresponds to the economic value of the preferential access right. According to the CJEU this argument is to be assessed in the context of the question whether Black Cabs have been conferred an economic advantage within the meaning of Article 107(1) TFEU.²⁶

The reasoning of the CJEU when assessing whether Black Cabs has been conferred an economic advantage has much in common with the reasoning in relation to the compensation for a public service obligation or service of general economic interest.²⁷ Black Cabs are subject to obligations that do not apply to minicabs. In the first place the Black Cabs must meet requirements relating to the design, the colour and the fitness of the vehicle. In the second place the fares are strictly regulated and can be charged only by reference to a taxi meter. Furthermore, Black Cabs must be accessible for wheelchairs and Black Cab drivers must undertake an exam on the knowledge of London which may require two to four years of preparation. Finally, Black Cabs are bound by the so called rule of 'compellability' which requires the taxi to take the passenger, that he agreed to pick up, where he wishes to go within a prescribed

21 As is the case in the area of free movement, in the absence of harmonisation, it is rare that the CJEU calls into question the legitimacy of the objective invoked by the Member State so there is considerable discretion for the Member States.

22 Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECLI-821, [43-44].

23 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [43].

24 *Ibid.*, [45].

25 See A Sánchez-Graells, 'The European Court of Justice rules that allowing London taxis to use bus lanes while prohibiting private hire vehicles from doing so does not appear to involve State aid (*Eventech*)', e-Competitions no 70928, January 2015.

26 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [47].

27 See GS Ølykke, 'Exclusive Rights and State Aid' (2017) 16(2) EStAL, 164-180.

distance or up to a prescribed journey time. Nevertheless, the CJEU does not refer to the *Altmark*-criteria but formulates the criteria that must be met by the public policy objectives pursued with the preferential access right for Black Cabs:

- a. the objective pursued is a matter within the prerogative of the competent national public authorities alone;
- b. the public authorities have a degree of discretion with regard to the necessity of the decision to forgo possible revenue and with regard to the appropriate criteria for the grading of the right; and
- c. the right must be determined in advance in a transparent and non-discriminatory manner.*

If these conditions are met, a possible economic advantage is considered to be inherent to the public policy objectives pursued. The CJEU does not assess the necessity and the proportionality (appropriateness) of the preferential access right very thoroughly. The CJEU is of the opinion that the decision to forgo possible revenues for the preferential access granted to Black Cabs is directly linked to the realisation of the objectives, since “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 realization of that objective, since it might deter some Black Cabs from using the bus lanes.”²⁸ Furthermore, it considers the obligations for Black Cabs liable to enhance the objective pursued relating to the efficiency of the London road transport system.²⁹ It

seems that this reasoning resembles very much the approach the CJEU takes in the context of free movement. In that context the case-law is well established and the national courts can draw from that case-law to make the necessary assessment and “balancing exercise” that goes with it. However, in the context of State aid this is a fairly new approach³⁰ and the judgment provides for a framework that has a great potential for Member States. But how strict should the measure be assessed in the light of the pursued objective? Is it indeed sufficient that it is likely that the objective might be achieved? And, in line with the assessment in the context of the free movement, the CJEU could have given more guidance on the requirements of necessity and proportionality. It does not seem unlikely that the objective pursued could also have been attained by means of measures which are less restrictive of the competition between Black Cabs and minicabs in the pre-booking sector. In the case-law on free movement, the discretion given to Member States in the choice of objectives and measures is “compensated” by a strict assessment on proportionality.

2. Objectives-Based Approach versus Effects-Based Approach

Our previous comment drew attention to the interaction between State aid rules and free movement rules in light of the reasoning of the CJEU in *Eventech*. There are also some interesting aspects of the judgment that seem related to debates we know from other areas in competition law (Articles 101 and 102 TFEU).

Some writers have concluded from the CJEU’s reasoning that it introduced the doctrine of the inherent advantage in State aid³¹ as an equivalent for the doctrine of the inherent restriction in competition law.³² Moreover, it has been underlined that the CJEU by introducing the doctrine of inherent advantage has nuanced the effects-based doctrine that is generally applied in order to establish whether a measure results in a selective economic advantage. The discussion on objective *versus* effect is also one that is still ongoing in competition law, be it more in relation to the burden of proof regarding the restriction of competition.

The effects-based doctrine in State aid law has been introduced primarily in order to avoid that the

* Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [49].

28 *Ibid*, [51].

29 *Ibid*, [52].

30 The absence of reference to *Altmark* is also not helpful because it would have been very useful to know how the reasoning of the CJEU relates to the *Altmark* assessment.

31 C Dekker, *Eventech: ‘Hoe busbanen leiden tot een leerstuk van ‘inherent voordeel’ in het staatssteunrecht’* (2015), 4.NtER.

32 See for example Case C-309/99 *J.C.J. Wouters and others* [2002] ECLI-98, further developed in Case C-519/04 P *Meca Medina* [2006] ECLI-492. Incidentally, these judgments in the area of competition also illustrate the system highlighted in our previous comment whereby proportionality plays a key role in assessing the restrictive measure in the light of a legitimate objective. In *Meca Medina*, the CJEU clearly attached a lot of importance to the fact that the objective (sport) was also explicitly recognised by the Union. This can always be helpful when arguing a case in which also the *Eventech* route is used. A later judgment also in the area of sport is also quite relevant, Case C-1/12, *OTO* [2013] ECLI-127.

social or fiscal character of a measure would escape the scope of the State aid rules.³³

*“The social character of such State measures is not sufficient to exclude them outright from classification as aid for the purposes of Article 92 of the Treaty [...]. Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects”.*³⁴

The concept of an ‘inherent’ advantage is not entirely new in the case-law³⁵ and the effects-based approach was not meant to exclude any role for the objectives of a State measure under the concept of aid.³⁶ The objectives-based approach is still present in the case-law and in particular in the context of the selectivity-criterion that we will discuss below. See for example the notion that a tax exemption does not create a selective advantage if it can be justified on the basis of the nature or the general scheme of the system, as developed in the case-law on fiscal aid measures:

*“A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives”.*³⁷

In *Eventech* the role of the objectives-based approach in the assessment of the bus lane policy is demonstrated by the fact that the CJEU takes this policy as a starting point for the assessment and does not accept *Eventech*’s argument that this policy involves the transfer of State resources since Black Cabs are not subject to fines when using bus lanes.³⁸ The CJEU clearly distinguishes on the one hand the situation in which certain use of bus lanes is authorised by the national law and therefore not subject to fines and on the other hand the situation in which an exemption from the obligation to pay a fine or other pecuniary penalty is granted, such as in the *NOx*-case.³⁹ In that case an exemption was created from the general scheme on the basis of which undertakings that

exceeded the statutory limits on their emissions of nitrogen oxide and were liable to pay a fine. The exemption offered undertakings with potentially high emissions the possibility to acquire more profitable emission allowances in order to avoid a penalty. As the AG pointed out in his opinion, the penalty at stake presented the classic features of a business cost for these undertakings. The exemption offered by the emission allowances system enabled them to waive at least part of the penalty-burden by speculating on an annual basis as to whether a penalty or the purchase of emission allowances would be more profitable.⁴⁰ The situation of Black Cabs cannot be compared to the situation of such undertakings since the penalty cannot be considered as normal business costs’ for Black Cabs as no penalty is due on the basis of the bus lanes policy.⁴¹

It follows therefore from the *Eventech* case that the objectives-based approach is the starting point for the assessment of the measure under the State aid rules, provided the national measure meets the criteria formulated by the CJEU.⁴² If it is necessary for the realisation of the public policy objectives pursued that an advantage is conferred on a certain category of undertakings, such as the preferential access right for Black Cabs, such advantage is considered to

33 See for example the Joined Cases C-6/69 and C-11/69 *Commission v France* [1969] ECRI-523. For a recent overview on the object/effect discussion and selectivity, Mi Honoré, in P Werner and V Verouden (eds), *EU State aid control, Law and economics* (Wolters Kluwer 2017), chapter 4.

34 Case C-75/97 *Kingdom of Belgium v Commission of the European Communities* [1999] ECLI-311, [25] and the case law referred to therein.

35 Case C-379/98 *PreussenElektra* [2001] ECLI-160, [61, 62].

36 JJ Piernas López, *The Concept of State Aid under EU Law, From internal market to competition and beyond* (Oxford 2015), 108.

37 Case C-88/03 *Portugal v Commission* [2006] ECLI-511, [81]. See also Case 173/73 *Italy v Commission* [1974] ECR I-709, [15]. The case-law demonstrates that the conditions for this justification are rarely fulfilled. Moreover, the CJEU in its *Gibraltar* judgment (Joined Cases C-106/09 P and C-107/09 P *Government of Gibraltar v Commission* [2011] ECLI-732, [91-92]) held that the notion of selectivity may not be dependent on the use of a certain regulatory technique if the measure at stake produces the same selective advantage in law and or in fact as State aid.

38 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [39, 40].

39 Case C-279/08 P *Commission/Netherlands* [2011] ECLI-551.

40 Opinion of AG Wahl of 24.09.2014 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [43].

41 See also Case C-200/97 *Ecotrade* [1998] ECLI-579 [42-44] and Case C-295/97 *Piaggio* [1999] ECLI-313, [41-42].

42 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [49].

be inherent to these objectives and does not constitute an economic advantage for the purpose of Article 107(1) TFEU.

We believe the first criterion, that the objectives pursued must lie within the prerogative of the competent national public authorities alone, implies that the ‘inherent advantage’ doctrine is limited to non-economic objectives. This is supported by the fact that the CJEU attaches great importance to the fact that the bus lanes were not exploited commercially.⁴³ It is also in line with both the case-law in free movement (objectives invoked for exception cannot be of economic nature) and (some) of the case-law in the area of competition mentioned before, for example in the area of sports. Once the public policy objectives pursued are economic in nature, it is our interpretation that the rules for a compensation of services of general economic interest, amongst which the *Altmark*-criteria, must be observed.

3. The Selectivity Test in the Objectives-Based Approach

In *Eventech* the selectivity test coincides with the assessment under the third criterion formulated by the CJEU, namely that the granting of the preferential right of access to bus lanes must be applied to the economic operators in a non-discriminatory manner.⁴⁴ This criterion is identical to the first step in the selectivity test as described earlier, namely the test whether the bus lane policy provides for an unequal treatment of at least two groups of undertakings that are in a comparable factual and legal situation.

The CJEU indirectly admits that Black Cabs and minicabs are partly in comparable factual and legal situations by pointing out to the national court that

the identification of the factual and legal situation of each of the taxi services cannot be confined to the pre-booking sector in which both taxi services are in direct competition.⁴⁵ It follows indeed from the standing case law, that is recently confirmed in the *Hansestadt Lübeck* judgment,⁴⁶ that the fact that Black Cabs are in direct competition with minicabs in the pre-booking sector is not sufficient to establish that the bus lanes policy is selective. In order for the policy to be selective, it would have to be established that, within the context of the bus lanes policy, that policy confers an advantage on Black Cabs using bus lanes to the detriment of minicabs which are, in light of the objective pursued by that regime, in a comparable factual and legal situation. In that regard, the CJEU underlines that all journeys made by Black Cabs and minicabs are liable to affect the objectives pursued, namely the safety and efficiency of the transport system on the entire road traffic routes in London. However, the CJEU points out that the national court must also take account of the specific obligations that apply to Black Cabs.

Although the assessment is for the national court, the CJEU concludes 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*”.⁴⁷ The fact that the cab services are to some extent in a comparable factual and legal situation is therefore not sufficient to conclude that the bus lanes policy is selective.

From the objectives-based approach, the somewhat circular selectivity-reasoning of the CJEU can only be explained by the margin of appreciation and discretion that is granted to Member States to design the policy according to the objectives pursued. The underlying policy choices are taken as a starting point for the State aid assessment of the general scheme.

The question is whether the judgment is to be understood in such a way that the grant of the preferential access right can qualify as State aid if the criterion for the grant of such right is discriminatory although the grant does not imply a commitment of State resources.⁴⁸ The CJEU seems to have followed the Advocate General who proposed that the CJEU should answer the first preliminary question with regard to the commitment of State resources that “*where State authorities make a bus lane on a public*

43 Whereas the CJEU in the *NOx* case considered it of importance that the State had the opportunity to commercialise emission allowances (Case C-279/08 P *Commission/Netherlands* [2011] ECLI-551, [106]).

44 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9 [49].

45 *Ibid.* [59].

46 Case C-524/14 P *Hansestadt Lübeck* [2016] ECLI-971, [41-49].

47 *Ibid.* [61].

48 Case C-518/13 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [49]. See also MA Fierstra, ‘Toekennen van preferentiële rechten tot infrastructuur kan, ook als deze infrastructuur niet economisch wordt geëxploiteerd, in beginsel staatssteun zijn’ (2016) 2 SEW, 82.

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".⁴⁹

For the purpose of the objectives-based approach the CJEU seems to take together the assessment of the commitment of State resources and the selectivity of the grant of the preferential access right. We wonder whether the CJEU stretches the State aid rules a bit too far here. If the bus lane policy does not involve the commitment of State resources at all, the discriminatory aspects of that policy and the restrictive effect thereof have to be assessed under the rules on the free movement of services provided the bus lane policy does not concern a purely internal situation.

Furthermore, the test developed by the CJEU for the objectives-approach in *Eventech* raises the question whether the objectives of the measures that are only partially discriminatory, such as the bus lane policy, should be subject to a further assessment. The CJEU has based its ruling on the information provided by the referring court which indicates that 8% of the journeys made by Black Cabs are subject to pre-booking. However, it is unclear if the factual and legal situation of the cab services would still be sufficiently distinct if the part of the activities of Black Cabs for which they compete with minicabs would represent a much higher percentage than 8%. Since the proportionality test is apparently less relevant once the measure is likely to be necessary to realise the public policy objectives pursued, the question ris-

es whether it would be necessary – like some authors have suggested⁵⁰ – to introduce in the selectivity test a rule of reason in order to distinguish legitimate policy objectives from objectives for which a distortion of competition cannot be justified. Such rule of reason should be based on the prior balancing of the policy objectives against the negative effects on competition of the policy. This brings us back to the previous comments that it is a pity that the CJEU has not clarified further what the role of proportionality should be in the framework proposed. Even though the *Eventech* judgment has been referred to in a number of subsequent judgments of the CJEU,⁵¹ we believe its potential to set a new standard is somewhat undermined by the questions its considerations leave open. It will be up to the Court to show the way in the future. One of the interesting developments to look forward to is whether the Court will take further steps in the convergence between free movement, State aid and competition rules.⁵²

49 Opinion of AG Wahl of 24.09.2014 *Eventech v The Parking Adjudicator* [2015] ECLI-9, [46].

50 A Bartoch, 'Is there a need for a rule of reason in European State aid Law? Or how to arrive at a coherent concept of material selectivity' (2010) *CMLR*, 729-752 and C Romariz, 'Revisiting Material Selectivity in EU state Aid law – Or "The Ghost of Yet-To-Come"' (2014) 13(1) *EStAL*, 47.

51 See amongst others Case C-524/14 P *Hansestadt Lübeck* [2016] ECLI-971, Case C-76/15 *Paul Vervloet and others* [2016] ECLI-975 and Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* [2016] ECLI-981.

52 The convergence of these rules was the main theme in the inaugural lecture of 6 December 2016, delivered by Laura Parret, 'Wat, voor wie en hoe? Rol en identiteit van de staatssteunregels' (2017) 1 *TvS*.