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Are the Supposed Regulatory Privileges of the Taxi Sector Coming to an End? The Opinion of AG Szpunar in Case C?50/21

Isaque Leite (Backer McKenzie) · Tuesday, January 24th, 2023

"*In many places across the European Union, suppliers of taxi services have traditionally been shielded from competition thanks to State regulation, while web-based platforms have started offering local passenger transport-on-demand services with a high degree of zeal, precision and efficiency*".

The previous statement was one of the opening lines of the Opinion issued by Advocate General Szpunar on the preliminary ruling request from the High Court of Catalonia, providing us yet with another chapter in the competition *vs.* regulation saga and, more specifically, in the taxi *vs.* private hire vehicles (**PHV**) contest.

This fight between the taxi service operators and PHV companies has been fought in European courts for more than a decade now. The taxi industry won one of the last and most remarkable combats (see ECJ preliminary ruling *Élite Taxi* v. *Uber*). In this case, the Court concluded that certain web-based platforms provide a service in the field of transport, the consequence being that neither the provisions of the *Services Directive* (Directive 2006/123/EC) nor those of the *Electronic Commerce Directive* (Directive 2000/31/EC), nor the freedom to provide services under Article 56 TFEU applied. Thus, the measures adopted by Member States cannot be scrutinised against the yardstick of those provisions. In particular, such undertakings cannot evade any obligations they might have as undertakings offering transport services by 'escaping' Member State regulation through Directive 2000/31, which, by definition, entails little obligation for internet service providers.

The Case at Hand

This time, the clash between both sectors was triggered by the approval of a Regulation issued by the Metropolitan Council of the Barcelona Metropolitan Area (the **RVTC)**. On one hand, the Regulation limited the number of PHV licences to 1 for every 30 of the taxi licences currently in force in the Barcelona Metropolitan Area (the **AMB**). On the other hand, the Regulation required economic operators wishing to provide PHV services within the AMB to obtain a related licence, in addition to the national licence allowing them to provide 'inter-urban' and 'urban' PHV services throughout the national territory.

These limitations led Prestige and Limousine S.L. (**P&L**) and other thirteen companies holding licences to operate a PHV service within the AMB to challenge the Regulation governing non-scheduled urban transport services provided by private hire passenger vehicles with up to nine seats operating solely within the AMB before the High Court of Catalonia (the **Court**).

Against this background, the Court decided to bring the proceedings to a standstill and to refer the following questions for a preliminary ruling to the ECJ:

1. Do Article 49 and Article 107(1) TFEU preclude national laws – statutory and regulatory provisions – which, without any reasonable justification, limit PHV licences to 1 for every 30 taxi licences or fewer?
2. Do Article 49 and Article 107(1) TFEU preclude a rule of national law which, without any reasonable justification, requires a second licence and the fulfilment of additional requirements for PHVs wishing to provide urban services?

AG Spuznar's Response: The Finding of a Restriction on the Freedom of Establishment

The AG proposes that the European Court of Justice (the **ECJ**) answers that **the 1/30 licence ratio imposed by the RVTC constitutes a restriction on the freedom of establishment under Article 49 TFEU**.

The main line of reasoning put forward by the Council of the AMB and the Spanish Government for the measures imposed in the regulatory intervention was that taxis provide a service of public interest and, therefore, they are *ipso facto* worthy of protection. In this respect, it is worth noting that the Spanish Supreme in its judgment of 4 June 2018 concludes that taxi service, as currently conceived, constitutes a service of public interest and it is for the responsible administrations to try to guarantee certain levels of quality, safety and accessibility through regulation (including licensing quotas and the establishment of regulated fares).

This view is in connection with the wide definition of service of public interest subscribed by the Spanish Supreme Court in its judgment. In said judgment, the Court concludes that the public interest is linked with "*public order, public safety, public security, civil protection, public health, preservation of the financial equilibrium of the social security system the preservation of the financial equilibrium of the social security system, the protection of the rights, safety and health of consumers, service of the rights, safety and health of consumers, recipients of services and workers, the requirements of good faith in commercial transactions, the fight against fraud, the fight against the requirements of good faith in commercial transactions, the fight against fraud, the protection of the environment and the urban environment. protection of the environment and the urban environment, animal health, intellectual and industrial property, preservation of national historical and artistic preservation of the national historical and artistic heritage and the objectives of social and cultural policy*".

The AG starts by noting that a 'service of public interest' is not a category recognised by the ECJ or an expression used in EU Law. Resorting to such an expression could lead to confusion. In turn, the expression '*services of general economic interest*' -although not defined by the ECJ- is a very well-known expression in EU Law (Recital 63). In any case, after this *excursus*, the Opinion makes use of both expressions 'service of public interest/public service obligation' and 'service of general economic interest' to address the argument put forward by the AMB.

Identifying an overriding reason relating to the public interest

At this point, the Opinion challenges both (i) the assumption that *taxi service operators carry out a public service obligation* and (ii) the assumption that the categorisation of a particular service as a 'service of general economic interest' automatically overrides, among others, the freedom of establishment provided under Article 49 TFEU.

As regards the first assumption, the Opinion notes that: "*it is questionable whether taxi services can be regarded as a service of general economic interest. Indeed, the 'market definition' applied by the AMB appears to me to be too narrow. It may be that local transport as a whole may constitute a service of general economic interest, but not the sub-segment of (traditionally) private local transport in the form of taxi services. While there is undeniably a need for individuals to be able to travel locally by means of transport, this is not necessarily true of travelling by taxi*" (Recital 66).

As regards the second assumption, the Opinion reminds us that "*[a] restriction on the freedom of establishment cannot be justified unless it serves, in the first place, an overriding reason relating to the public interest and, in the second place, observes the principle of proportionality, meaning that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it*" (Recital 56). It is, therefore, necessary to identify possible overriding reasons relating to the public interest that would justify a restriction on the freedom of establishment provided by Article 49 TFEU.

The overriding reasons invoked by the AMB (and the Spanish Government)

In the proceedings before the High Court of Catalonia, the arguments put forward by the Council of the AMB in favour of the RVTC were that, first, "*PHVs would threaten the economic viability of taxis provide them with 'unfair competition' and lead to intensive use of transport routes*". Secondly, "*the 10,523 metropolitan taxi licences granted would be sufficient to meet the needs of the population and at the same time ensure the profitability of the taxi business"*.

The previous submissions are in line with the wording of Article 10 of the RVTC, entitled 'Determining the number of licences', which establishes that it is for the AMB to fix the maximum number of licences at any given time, "*having regard to the need to ensure a sufficient supply of high-quality services to the public and to enable operators to remain profitable*".

The Opinion notes that the Council of the AMB and the Spanish Government also invoked the following justifications as overriding reasons: (i) maintaining the right equilibrium between taxis and PHV service providers; (ii) managing local transport, traffic and the use of public space; and (iii) the protection of the environment.

The economic viability of taxi services cannot in itself constitute an overriding reason

The Opinion clearly states that the economic viability of taxi services cannot in itself constitute an

overriding reason relating to the public interest that would justify a restriction on the freedom of establishment provided by Article 49 TFEU.

This is in line with the ECJ case law (see, for example, ECJ's judgment Commission v Spain, paragraph 74) which provides that "*an objective of a purely economic nature can never constitute an overriding reason relating to the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty"* (Recital 60).

The Opinion goes on to say that the maintenance of an equilibrium between the two types of transport (taxis and PHVs) could not be regarded as a valid overriding reason relating to the public interest. Although it is not mentioned in the Opinion, the Spanish Supreme Court considered in its judgment of 4 June 2018 that maintaining the equilibrium between taxis and PHVs does constitute a valid overriding reason relating to the public interest.

The arguments of the AG in this respect seem to be in clear opposition with the Spanish Supreme Court's position, asserting instead that "*it is questionable whether such an equilibrium should be maintained between two services which are, as established above, converging to the point of being almost similar. Besides, one may wonder whether the best way to maintain an equilibrium is through a system other than through state intervention. In the logic of the internal market established by the TFEU, an equilibrium is normally maintained through concepts which tend to be forgotten in the midst of discussions surrounding cases such as the one at issue: supply and demand"* (Recital 72).

The Opinion provides examples of what objectives could be considered overriding reasons

The Opinion notes that the protection of the urban environment and of the need to ensure road safety have been accepted by the ECJ as overriding reasons relating to the public interest. Additionally, the AG submits that the objectives of managing local transport, traffic and the use of public space also constitute overriding reasons relating to the public interest. Moreover, the Opinion states that "*the protection of the environment can, in principle, constitute an overriding reason relating to the public interest*" (Recital 76).

However, the AG concludes that, in the case at hand, none of the previous reasons were in line with the main reasoning invoked by the Council of the AMB (i.e., the economic viability of taxi services justified the existence of the RVTC).

The AG's suitability remarks

As mentioned above, for a restriction of a fundamental freedom to be justified it is not only necessary to identify the existence of a valid overriding reason/objective, but also to prove that the attainment of the objective pursued does not go beyond what is necessary to attain it (Recital 56).

In this respect, the AG notes that such *suitability/necessity analysis* corresponds to the referring Court. Therefore, the High Court of Catalonia is expected to assess whether the measures introduced by the RVTC are suitable to address the objectives submitted by the AMB.

According to the AG, the requirement for PHVs to obtain a second licence (in addition to the national [first] licence) to operate in the Metropolitan Area could, in principle, pass this suitability test. Conversely, the AG considers that it has not been proven that restricting the issuing of PHV licences to a ratio of 1 for every 30 taxi licences, currently in force, is suitable to attain the objectives of management of local transport, local traffic, the use of public space and the protection of the environment.

Considerations on the suitability of the licence requirement

Firstly, the AG questions whether any of the objectives mentioned above justify requiring aspiring operators of PHV services in the Barcelona Metropolitan Area to obtain a licence.

According to the Opinion, there is no general impediment under EU law that "[…] *a regional entity such as the AMB requires aspiring operators of PHV services to obtain a licence which caters for the specificities of the region in question. Should the AMB find that there are issues not addressed by the national (first) licence, then it is, in principle, free to require PHV operators to obtain a second licence. It is clear that the situation of each city or agglomeration across the European Union is different when it comes to local issues such as congestion and pollution*" (Recital 78).

Consequently, it will be for the High Court of Catalonia to conclude whether, in practice, the second licence required by the RVTC implies that economic operators wishing to offer PHV services have to go through the same controls that are necessary for obtaining the [first] national licence.

Considerations on the suitability of the 1/30 ratio

Secondly, the AG considers whether the controverted 1/30 PHV/taxi licence ratio could be suitable to achieve the objectives abovementioned without going beyond what is necessary to attain them. His conclusions are categorical: "*at no point has it been proven by the AMB that restricting the issuing of licences to a ratio of 1 for every 30 taxi licences is suitable to attain the management of local transport, of local traffic, of the use of public space and the protection of the environment"* (Recital 81).

The AG goes on to question why such objectives would be better achieved by passing regulation that only affects PHV services and not the entire sector (that is to say, also the taxi industry). In this respect, the Opinion recalls that taxi services and PHV services cater for the same demand (private individual local transport) and that they are in competition with each other.

Concluding remarks

As it is well known, the opinions issued by the ECJ's Advocate General are not binding on the Court. However, if it is, in the end, followed by the ECJ (which is also what happens in the majority of the cases), the High Court of Catalonia will have the necessary legal basis to annul the

provisions of the RVTC introducing the 1/30 ratio.

In the same way, the provisions introducing the regional licence requirement for PHV companies aspiring to operate in the Barcelona Metropolitan Area could be also annulled if the Court found that, in practice, this system translates into a duplication of controls. Some of the facts in the proceedings pending before the High Court of Catalonia seem to go in the same direction.

This is noted by the AG, for instance, when he states that, with regards to the "*considerations relating to the use of transport routes, the AMB failed to weigh up the effect that PHV services may have on reducing the use of private cars*" (Recital 28). As for environmental considerations, the AG seems to have a similarly sceptical opinion: "*it would be curious if, in this context, the taxi fleet were described as clean without any indication as to why that description does not extend to the PHV fleet.*" (Recital 28).

The implications of future rulings (by the ECJ and, later, by the High Court of Catalonia) following the recommendations proposed in the Opinion could go far beyond the direct legal and economic consequences of the potential annulment of the RVTC (e.g., a significant increase in the number of competitors in the market of local passenger transport-on-demand services caused by an increase in PHV licencing).

In any case, the existence of what seems to be a privileged status for the taxi sector in Spain calls for rather moderate expectations. As noted in the Opinion, although "[…] *times and markets change, the taxi system is, figuratively speaking, set in stone and it is merely for the newcomers to adapt*" (Recital 81). However, the Opinion of AG Szpunar and the expected rulings by the ECJ and by the High Court of Catalonia offer an extraordinary chance to change the *stone-carved rules* into a confrontation between two professional sectors.

Whether the result will be more or less regulation remains to be seen. The Opinion builds a clear and reasoned argument for less regulation as a potential solution for pursuing the AMB's objectives of management of local transport, local traffic, the use of public space and the protection of the environment (Recital 79).

Should the regulators decide to depart from the AG's suggested pathway and resort to more regulation that somehow collides with the freedoms warranted by the EU law, the Opinion remains useful in that it provides a solid framework with valid overriding reasons and suitable measures that could, in principle, address the legitimate objectives reportedly pursued by the AMB.

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