Kluwer Competition Law Blog

The Taxi Sector Regulatory Protection Crashes with the ECJ Judgment in Case-50/21… Is the Taxi Sector Totaled?

Isaque Leite (Backer McKenzie) · Friday, August 4th, 2023

My previous comment on Case-50/21 *Prestige and Limousine SL v Área Metropolitana de Barcelona et al* (see here) started with the following question: "*Are the Supposed Regulatory Privileges of the Taxi Sector Coming to an End? The Opinion of AG Szpunar in Case C?50/21*". The conclusions in the ECJ judgment of June 8, 2023 (Judgment) make it possible to answer the previous question with a decided yes.

A different question is when said regulatory privileges may come to an end. The answer to this last question depends mostly on the course of action to be taken by the regulators in Spain to adapt their regulations to the standards set out in the Judgment (at the end of this comment I provide some insight into this aspect in light of recent regulations passed by the Spanish Government).

Background

The Judgment addresses the reference for a preliminary ruling made by the High Court of Justice of Catalonia (Court) on 19 January 2021 on the compatibility with European Union (EU) law, first, on the limitation imposed on the number of licences for private hire vehicle (PHV) services and, second, on the dual licencing system to which these services have been subject in the Barcelona Metropolitan Area (AMB).

The parties affected by said limitations argued that they were contrary to Article 49 TFEU (which provides that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited), in that they make it practically impossible for undertakings offering PHV services in the EU to establish themselves in the Barcelona Metropolitan Area. They also submitted that said limitations were contrary to the prohibition in Article 107(1) TFEU by hindering trade within the EU by the grant of State aid.

The questions referred

In view of the above, the Court decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling:

(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 one 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?

The questions relating to Article 107(1) TFEU

The Judgment quickly addresses the questions concerning a potential breach of Article 107(1) TFEU by stating that the limitations imposed on the PHV services do not meet the first of the four cumulative requirements for a measure to be considered state aid (i.e., the commitment of state resources).

In this respect, the ECJ concludes that "*it is sufficient to note that there is no indication in the order for reference that the legislation at issue in the main proceedings involves the commitment of State resources*" (para 55). Firstly, none of the limitations seems to imply any positive benefits, such as subsidies, for the undertakings providing taxi services or to mitigate the burdens that are normally placed on the budgets of those undertakings (para 56). Secondly, the two measures also do not appear to lead to a reduction in the State budget or to a sufficiently concrete economic risk of burdens on the State budget, which could benefit undertakings providing taxi services (para 57).

The questions relating to Article 49 TFEU

The Judgment widely follows and confirms the Opinion of AG Szpunar as regards the compatibility of the limitations imposed on the PHV services with the freedom of establishment enshrined in Article 49 TFEU.

First, the Judgment concludes that the limitations imposed on the PHV services meet the first requirement for finding a breach of Art. 49 TFUE. That is, that the disputed limitations can be effectively considered a restriction on the freedom of establishment. This finding is in line with settled case law according to which "*all measures that prohibit, impede or render less attractive the exercise of the freedom guaranteed by Art. 49 TFEU must be regarded as restrictions on the freedom of establishment"* (see, to that effect, *Hartlauer, C?169/07*, para 34 and *Canal Satélite Digital, C?390/99*, para 29).

More specifically, the requirement of a specific licence to provide PHV services in the AMB, in addition to the national licence required for the provision of urban and interurban PHV services, constitutes in itself a restriction on the exercise of the freedom guaranteed by Article 49 TFEU since such a requirement effectively limits access to the market for any newcomer. As regards the limitation on the number of licences for PHV services, the Judgment finds it equally restrictive of the freedom of establishment since such a limitation restricts the number of PHV service providers established in the AMB.

Identifying an overriding reason relating to the public interest

Once established the restrictive nature of the limitations is challenged, the Judgment sets out to consider whether such restrictions are justified by an overriding (no pun intended) reason relating to the public interest and, if in the second place, they comply with the principle of proportionality.

In order to cross over this first crest, the Judgment addresses what are, in my opinion, two of the most relevant aspects of the case for operators faced with the application of Article 49 TFEU: i) what are services of general economic interest (SGEI); and ii) if it suffices to conclude that a given service falls within the category of a service of general economic interest to justify a restriction of the freedom of establishment.

According to the ECJ case law, for a service to qualify as a service of general economic interest it must meet both formal and substantive requirements. As regards the formal aspect, the Judgment notes that "*in order to qualify as an SGEI, a service must be provided in pursuance of a particular public service mission entrusted to the provider by the Member State concerned* […] *which presupposes the existence of one or more acts of public authority defining with sufficient precision at least the nature, duration and scope of the public service obligations incumbent on the undertakings entrusted with the discharge of those obligations*" (paras 78 and 79).

As for the substantive aspect, the Judgment states that "*while Member States are entitled to define the scope and organisation of their SGEIs, taking into account in particular objectives specific to their national policy, and that, in that respect, Member States have a broad discretion which may be called into question by the Commission only in the event of manifest error, that discretion cannot be unlimited and must, in any event, be exercised in compliance with EU law*" (para 76). Moreover, "*a service is capable of being of general economic interest where that interest has specific characteristics in relation to that of other activities in economic life*" (para 77).

As for the second aspect, the Judgment follows AG Szpunar on departing from the conclusions reached by the Spanish Supreme Court in its 2018 Judgment. The Spanish Supreme Court had established that taxi services were a service of general interest and that, it was, therefore, justified to preserve a balance between said services and PHV services in order to guarantee the maintenance of that service of general interest.

On the contrary, the ECJ notes that, despite the fact that the regulation that introduced the limitations on the PHV services had the objective of ensuring the quality, safety and accessibility of taxi services and that the activity of taxi services is highly regulated, "*it was not possible to establish that the interest in that activity has specific characteristics in relation to that of other economic activities"* (para 81).

Moreover, it stresses that: i) the limitations at issue in the main proceedings do not, in themselves, pursue those objectives and that; ii) [in any case] "*only the objectives of sound management of transport, traffic and public space, on the one hand, and of protection of the environment, on the other hand, can be relied on in the present case as overriding reasons in the general interest to justify the measures at issue in the main proceedings"* (para 83).

The Judgment's suitability remarks

In the last section of the Judgment, the EC considers whether the limitations at stake are suitable for ensuring, in a consistent and systematic manner, the attainment of the objectives of sound management of transport, traffic and public space and of protection of the environment without going beyond what is necessary to attain them. Also in this section of the Judgment, the ECJ follows the AG Opinion closely.

The second license requirement

As regards the requirement for a second licence, both the Judgment and the Opinion coincide in that the requirement *per se* is not incompatible with EU Law. However, both the Opinion and the Judgment elaborate on the test that the referring Court must apply to assess whether the said requirement fulfils the suitability thresholds.

According to AG Szpunar, the relevant suitability test would consist of assessing whether, in practice, the second licence 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. The Judgment goes further and concludes that such duplication of controls test should not be done in the abstract but it has to assess, in particular, "*whether the particular characteristics of the Barcelona conurbation justify the introduction of that requirement, in addition to the requirement to obtain a national licence, in order to achieve the objectives of sound management of transport, traffic and public space and the protection of the environment within it"* (para 93).

By doing this, the ECJ limits the ability of regulators to simply add more features to initially overlapping license regimes and, thus, potentially circumvent the first duplication of controls test. Therefore, any additional license requirements imposed on the providers of PHV services must also be necessary to achieve the objectives of sound management of transport, traffic and public space and the protection of the environment.

The measure limiting PHV licences to one-thirtieth of taxi licences

With respect to the measure limiting PHV licences to one-thirtieth of taxi licences, the Judgment concludes that there is no evidence that this measure is capable of guaranteeing the achievement of the objectives of sound management of transport, traffic and public space and of protection of the environment. More specifically, the ECJ notes that "*in response to a question put by the Court at the hearing, the Spanish Government stated that it was not aware of the existence of any study of the impact of the PHV fleet on transport, traffic, public space and the environment in the Barcelona conurbation*" (para 96).

In addition, the Judgment notes that there is also no evidence of how such a limitation of PHV service licences does not go beyond what is necessary to achieve any of the above objectives. To illustrate this point, the Judgment argues that "*it cannot be excluded that a possible impact of the PHV fleet on transport, traffic and public space in the Barcelona conurbation could be adequately limited by less restrictive measures, such as measures for the organisation of PHV services, limitations on those services during certain time slots or traffic restrictions in certain areas*" (para 99). Similarly, the ECJ considers that "*it cannot be ruled out that the objective of environmental protection in the Barcelona conurbation can be achieved by measures that are less intrusive on the*

freedom of establishment, such as emission limits for vehicles in that conurbation" (para 100).

In short, the so-called *1/30 ratio* is not proven to be suitable nor proportionate for the purpose of achieving the objectives of sound management of transport, traffic, and public space and of the protection of the environment.

The taxi case may be totaled after all… just not yet?

The Judgment was received with enthusiasm by the PHV services sector. This enthusiasm was echoed by multiple media outlets' press releases that also noted that this ruling would meet some backlash from the taxi sector. Indeed, the latest blunt victory of the PHV companies in the courts of justice was short-lived.

As noted at the beginning of this comment, only 20 days after the release of the Judgment, the Spanish Government quickly reacted with a piece of regulation that, at least according to its preamble, seeks to comply with the ECJ Judgment. The Spanish Government regulation declares the taxi services as a SGEI. This first move comes as a surprise when the Judgment clearly stated that the taxi service does not present specific characteristics in relation to that of other economic activities that warrant its consideration as an SGEI. The regulation also expressly includes the achievement of the objectives of sound management of transport, traffic and public space and of protection of the environment as a principle that must guide the concession of PHV licenses.

Whereas the inclusion of such objectives, if proportionally applied in practice, could contribute to mitigating the hurdles and unlawful limitations faced by the PHV services sector in Spain, it seems that the end of the regulatory privileges of the taxi sector may take a little longer.

The prediction with which I concluded my last comment on this case was confirmed: the regulators decided to depart from the AG's [and now the ECJ's] suggested pathway and resort to more regulation that seems to collide [again] with the freedoms warranted by the EU law. In light of this outcome, the Judgment can be expected to be featured soon in the challenges of the Spanish Government (and also the expected local government regulations) already announced by representatives of the PHV services sector associations.

The outcome of said challenges is hard to predict. In the meantime, AG Szpunar's adage rings truer than ever: "[…] *times and markets change, the taxi system is, figuratively speaking, set in stone and it is merely for the newcomers to adapt*".

** Any opinions or conclusions provided in this blog entry shall not be ascribed to Baker McKenzie or any clients of the firm*

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Friday, August 4th, 2023 at 9:00 am and is filed under Advocate General, European Court of Justice, European Union, Fundamental rights, Regulation, SGEI
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.