TRAFFORD CITY COUNCIL HACKNEY CARRIAGE POLICY REVIEW

ADVICE

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1. Trafford City Council ('the Council') has decided to review its Hackney Carriage Licensing Policy ('the Review'/'the Policy') which, broadly, requires that vehicles submitted for licensing as Hackney Carriages locally should comply in all respects to the 'Conditions of Fitness' used by London's Public Carriage Office.

2. I have been asked urgently to advise Allied Vehicles Ltd ('Allied') on the legal consequences of any decision to maintain the Policy and apply it to any application to license one of Allied's E7 taxis for use in Trafford as a Hackney Carriage pending the outcome of the Review. The E7 taxi does not comply with all of the Conditions of Fitness, in particular the requirement that a taxi licensed as a Hackney Carriage in London should have a particular turning circle.

3. The reasons my advice has been sought now are:

    a. Allied understands that some Trafford Hackney Carriage drivers who want, or need, to replace their existing vehicle would like to buy or lease E7 taxis, which are significantly cheaper than the vehicles currently licensed (adapted One80 Vitos and TX4s) and considered to be a better vehicle in several other respects.

    b. At least one such driver has contacted the Council to enquire about licensing an E7 now.

    c. The Review is likely to take several months (it will not be looking exclusively at the E7 and may involve vehicle testing, an equality impact assessment, consultation with the public generally and with interested groups). I note that, in a report to the Licensing Committee meeting on 21 November 2013, officers anticipate the Licensing Committee considering a final report on the outcome of the review, with recommendations, in June 2014.

d. Officers have recommended interim measures in that report, specifically that:

> "Pending a full review of the Councils current Hackney Carriage Vehicle Policy, in addition to the vehicles currently authorised, the Licensing Team Leader be authorised to consider licensing as a hackney carriage any vehicle which meets all of the following criteria:
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> - Any vehicle which has European Community Whole Vehicle Type Approval; and has a Certificate of Conformity specific to that vehicle; and
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> - is black in colour and displays the word 'Taxi' on an illuminated roof sign and on either side of the vehicle; and
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> - has been constructed to facilitate the carriage of disabled persons comfortably and securely and is capable of accommodating a disabled person in a wheelchair in the passenger compartment (acknowledging that not all wheelchairs may be accommodated); and
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> - has suitable ramps for a wheelchair user; and
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> - is less than four years old or in exceptional condition.
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> Pending a full review of the Council's current Hackney Carriage Vehicle Policy, the Licensing Team Leader also be authorised to consider licensing as a hackney carriage any vehicle even though it does not meet the Condition of Fitness turning circle requirement, provided it meets all the above criteria."

e. Officers have advised (correctly) in the body of that report that:

> "the proposals being made now are considered to be the minimum requirements necessary to meet the concerns about the legality of the existing policy."

and note that:

> "Following discussions with the Council's Legal Services, officers would recommend that an interim position is agreed pending a full review of the Council's Hackney Carriage Vehicle Specification policy."

4. My advice, in summary, is:

a. Regardless of the position under its policy, the Council is not legally entitled to wait until the outcome of its Review before reaching a conclusion on whether refusing any individual application for a Hackney Carriage License for an E7 taxi is compatible with EU law. That is because EU law supersedes any such policy, and the Council is bound to comply with it.

b. EU law requires that E7 taxis should be licensed for use as Hackney Carriages in the UK unless the licensing authority to which applications are made can justify refusal on the basis of existing evidence that is sufficiently compelling to justify a measure that amounts to a restriction on inter-state trade under Article 34 TFEU. There is, as far as I am aware, no such evidence in Trafford (or indeed anywhere else in the UK, including neighbouring licensing authority areas, where I am instructed that the E7 is widely available as a licensed Hackney Carriage).

c. In any event, the Council is not entitled to fetter its discretion under section 47 Local Government (Miscellaneous Provisions) Act 1976 in relation to individual Hackney Carriage licence applications. That would be the effect of maintaining the Policy rigidly pending the outcome of the Review, rather than considering individual applications on a case by case basis, guided by legal advice where necessary.

d. To avoid acting unlawfully pending the outcome of the Review, the Council therefore must (at the very least) be willing to consider individual applications to license E7s and determine them in accordance with EU law and genuinely exercising its discretion.

e. If the Council does not do so, it will expose itself to immediate legal challenge including by judicial review but also to a potential damages claim, or claims, for the consequences of a breach of Article 34 TFEU.

EU law

5. The position under EU law is as follows:

a. All trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade are to be considered as measures having an effect equivalent to quantitative restrictions (Case 8/74 *Dassonville* [1974] ECR 837);

b. In the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 34 TFEU. This is so even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649);

c. The limited exception identified in *Keck and Mithouard* (C-267 & 268/91) [1993] ECR I-6097 relates only to "*national provisions restricting or prohibiting certain selling arrangements*" (*Keck*, para. 15) *Keck* related to a French law prohibiting the resale of goods at a loss. It has since been applied to cases concerning, for example, rules on opening hours and advertising. It does not apply to "product requirements".

6. These points are made by Lord Bingham in *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 at [27]-[28] and are emphasised in more recent judgments of the ECJ referred to in the *R (Lunt and another) v Liverpool City Council* [2009] EWHC 2356 (Admin) ('*Lunt*') case, in particular Case C-142/05 *Åklagaron v Mickelsson and Roos* [2009] ECR I-4273 and Case C-110/05 *Commission v Italy* [2009] ECR I-519.

7. They are also set out very clearly and helpfully in the EU Commission's Guide to the application of Treaty provisions governing the free movement of goods.[1] In particular, that document makes it clear (at §3.1.6) that:

[1]http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf

> "There is no *de minimis* principle in relation to the articles concerning the free movement of goods. According to long-established case-law, a national measure does not fall outside the scope of the prohibition in Articles 34–35 TFEU merely because the hindrance which it creates is slight and because it is possible for products to be marketed in other ways (See Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797; Case 269/83 *Commission v France* [1985] ECR 837; Case 103/84 *Commission v Italy* [1986] ECR 1759.).
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> Therefore a state measure can constitute a prohibited measure having equivalent effect even if:
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> - it is of relatively minor economic significance;
> - it is only applicable on a very limited geographical part of the national territory (Case C-67/97 *Bluhme* [1998] ECR I-8033);
> - it only affects a limited number of imports/exports or a limited number of economic operators."

8. In short, product requirements imposed by a local licensing authority such as that a taxi should have a particular turning circle, particular types of door, a particular floor height etc. fall within the prohibition in Article 34 TFEU because they are capable of hindering, directly or indirectly, actually or potentially, the free movement of vehicles lawfully manufactured in other Member States.

9. It makes no difference that the product requirement only applies to a relatively small part of the country (although Trafford is one of the UK's larger licensing authorities), and it also makes no difference whether it is possible for manufacturers to produce a vehicle in accordance with the relevant specification: the requirement to do so amounts to a potential hindrance on the free movement of goods.

10. Thus, as a matter of law, <u>all</u> aspects of a local authority's Hackney Carriage Licensing Policy which require manufacturers to make adjustments to vehicles that are otherwise lawfully used as taxis elsewhere must be justified in accordance with the strict requirements of EU law. The requirements for justification are again helpfully summarised in the European Commission's guidance document, at §6.1 (footnotes omitted):

> "Article 36 TFEU lists the defences that could be used by Member States to justify national measures that impede cross-border trade:
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> 'The provisions of Articles 34 to 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national

> treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'.
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> The case-law of the Court additionally provides for so-called mandatory requirements (e.g. environmental protection) on which a Member State may also rely to defend national measures.
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> The Court of Justice interprets narrowly the list of derogations in Article 36 TFEU, which all relate to non-economic interests. Moreover, any measure must respect the principle of proportionality. The burden of proof in justifying the measures adopted according to Article 36 TFEU lies with the Member State…
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> Even if a measure is justifiable under one of the Article 36 TFEU derogations, it must not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'…As the Court has stated, 'the function of the second sentence of Article [36] is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products', i.e. to adopt protectionist measures.

11. As the High Court found in the *Lunt* case, referring to the EU Commission guidance at paragraphs [77-80] of the judgment, local licensing requirements such as for a tight turning circle must therefore be clearly justified by evidence, must be shown to be in pursuit of a legitimate end such as public safety, and must be "proportionate and no more intrusive than is needed to give effect to the legitimate end".

12. As the Judge in *Lunt* went on to observe at [81], there are a number of specific considerations that must be taken into account by any local authority seeking to justify a local licensing condition that excludes certain types of vehicle (emphasis added):

> "The fact that the E7 is used as a public hire taxi extensively in the UK without reported incident is a compelling source of relevant evidence that would have to be addressed….Of course the turning circle is useful for the avoidance of three point turns in narrow streets where someone seeks to specifically hail a passing taxi. However, where a particular assessment has been made as to the safety consideration of this issue, as it has in the Edinburgh study, the Liverpool Council would have to consider whether it has a cogent basis for disagreeing with such evidence and why.
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> Local knowledge is a well recognised virtue of local democracy, where decision-makers reach decisions on matters of broad policy: generally a political decision. It is not to be equated with expertise in a specialist area of assessment. The fact that other Councils have different policies as to which vehicles types are authorised does not by itself

> suggest that Liverpool is wrong in maintaining its policy. If, however, the issue is safety, then the practice and experience of other authorities over a reasonable period of time cannot be ignored. It is impermissible to speculate if the answer to the relevant inquiry can be ascertained by demonstrated experience.
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> What should weigh in the balance on any discussion of justification on safety grounds is the clear safety benefits for secure travel for all wheelchair users, irrespective of the dimensions of their chairs, that can be apparently accommodated in the E7. It is common ground that travelling unsecured sideways in a cab is unacceptable. The introduction of the E7 alongside but not in replacement of the TX is likely to make a substantial contribution to eliminating such practices."

13. The Judge went on to hold that the E7 is a vehicle that is manufactured another Member State (specifically in France, by Peugeot). So product requirements, in particular the turning circle, that formed part of Liverpool's Hackney Carriage licensing policy were unlawful, and could not be used as a basis for refusing a licence, unless they could be justified as an exception to Article 34 TFEU on the basis of current, compelling evidence. There was no such evidence.

14. There is no such evidence of which I am aware in Trafford either. That is unsurprising given the fact that the E7 is, I am told, licensed in 374 other licensing authorities around the UK, none of which have identified safety or other significant concerns. Further, in a letter of 31 July 2013 Bindmans LLP put this point to the Council, and there has been no response indicating that there are concerns, less still evidence-based ones.

15. In the absence of such evidence, the practical effect is that EU law therefore requires Hackney Carriage licences to be issued in Trafford in respect of E7 taxis if drivers, or proprietors, seek them.

Discretion

15. Under Part II of the Local Government (Miscellaneous Provisions) Act 1976 each vehicle operating as a hackney carriage outside London must be licensed as such by the responsible local authority. Subsections 47(1) and (2) provide as follows:

> "(1) A district council may attach to the grant of a licence of a hackney carriage under the Act of 1847 such conditions as the district council may consider reasonably necessary.

> (2) Without prejudice to the generality of the foregoing subsection, a district council may require any hackney carriage licensed by them under the Act of 1847 to be of such design or appearance or bear such distinguishing marks as shall clearly identify it as a hackney carriage."

16. The 'Act of 1847' is the Town and Police Clauses Act of that year, which defines 'hackney carriage' at section 38:

> "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage: Provided always, that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act."

17. To which section 37 of the 1847 Act adds:

> "The commissioners may from time to time licence to ply for hire within the prescribed distance, or if no distance is prescribed, within five miles from the General Post Office of the city, town, or place to which the special Act refers, (which in that case shall be deemed the prescribed distance,) such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit."

18. The effect of these provisions is to give local authorities discretion to license particular vehicles as Hackney Carriages (and indeed particular numbers of vehicles) in their locality.

19. The discretion must be exercised consistently with EU law (as above) and also equality law (see again *Lunt*). Authorities may also legitimately set a general policy describing how they propose to exercise it, as with other discretionary powers. However, they are not permitted to fetter it by treating such a policy as binding: see *R v Police Complaints Board ex parte Madden* [1983] 2 All ER 353 and *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 per Lord Dyson at [21]. Account must be taken of what an affected individual or body has to say about the

circumstances of their individual case: see *R v Home Secretary, ex parte Venables* [1998] AC 407 per Lord Browne-Wilkinson at 496G-497C.

20. Refusal to consider and open-mindedly exercise discretion to determine any application for an E7 Hackney Carriage License pending the outcome of the Review would be unlawful, particularly given the changes in circumstances that have occurred since the current Policy was adopted. Slavish adherence to the Policy whilst purporting to exercise discretion would also be unlawful: see *R v Hampshire County Council ex parte W* [1994] ELR 460 at 476B. There must be a genuine consideration of individual circumstances and an equally genuine exercise of discretion.

Conclusion

21. There is nothing objectionable in the Council's decision to embark on the Review of its Policy. It is not required to abandon the Policy in the meantime either. But the Policy must be applied in accordance with EU law, as described in the judgment of the High Court in *Lunt,* and it also must not be treated as a straightjacket for decision-making on individual Hackney Carriage licence applications.

22. It follows the sensible, and only lawful, way for the Council to proceed pending the outcome of the review is to accept its officers' proposal That way the Council can proceed with a proper, thorough and careful review, whilst avoiding illegality and the very real risk of a successful legal challenge in the meantime.

23. I am happy to advise further if required.

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