Case No: 74881
Document No: 818034
Decision No: 041/17/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning certain provisions of Norwegian law governing access of transport operators to the market for taxi services and their compliance with Article 31(1) of the EEA

1 Background

By letter dated 6 March 2014 (Doc No 700930), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had received a complaint against Norway concerning rules unduly restricting access to the taxi services market in Oslo. The complainant argues that the system currently in place in the Oslo municipality to regulate the access of new entrants to the taxi service market is in conflict with EEA law.

After having examined the complaint and having thus issued a letter of formal notice, the Authority still considers that the Norwegian national measures regulating the access to the market for the provision of taxi services constitute a restriction on the freedom of establishment. The restriction is not justified.

2 Correspondence

By letter dated 6 March 2014 (Doc No 700930), the Authority requested information from the Norwegian Government regarding the application of existing rules on the award of licences to new entrants to the taxi services market. The Norwegian Government replied by letter dated 9 April 2014 (Doc No 705245). In this reply, the Norwegian Government made reference to two letters (dated 12 March 2012, Doc No 627756, and 14 May 2012, Doc No 634780) it had sent to the Authority in a previous complaint case (Case No 69474) regarding taxi regulation in Norway. The Norwegian Government considered that the relevant legal issues in the present complaint case are largely similar to those raised in that previous complaint case. The matter was further discussed during the package meeting which took place in Oslo on 16 October 2014.

By letter dated 8 July 2015 (Doc No 759724), the Authority's Internal Market Affairs Directorate set out its preliminary view that the Norwegian national measures on access to the taxi services market constitute a restriction on the freedom of establishment and that the restriction is not justified.

Norway replied by letter dated 30 September 2015 (Doc No 774703), claiming that in the absence of EEA legislation, the provision of taxi services falls under the competence of the EEA States. Furthermore, Norway maintained the reasoning it put forward in earlier correspondences that the restrictions in question are necessary and justified by proportionate overriding requirements in the public interest. The matter was further discussed at the package meeting in Oslo on 12 November 2015. The Norwegian Government sent a further letter to the Authority on 18 January 2016 (Doc No 789047), again maintaining its reasoning that the restrictions are necessary and justified by proportionate overriding requirements in the public interest.

On 25 May 2016, the Authority issued a letter of formal notice (Doc No 791247) to Norway, establishing that by maintaining rules on access to the taxi services market which provide for a system of prior authorisation, in the form of a licence, for establishing new taxi businesses, which (1) contains a numerical limitation of licences (2) under conditions for granting new licences which are not objective, non-discriminatory and known in advance and (3) provide for an obligation for taxi licence holders to be affiliated to a dispatch centre, Norway had failed to fulfil its obligations under Article 31(1) of the EEA Agreement.

By letter dated 3 August 2016 (Doc No 814115), the Norwegian Government replied to the letter of formal notice, contesting the Authority's conclusions. In particular, the Norwegian Government stated that it considered the provision of taxi services to fall under

the competence of the EEA States and that the Authority should therefore close the case due to insufficient EEA interest, as it had done in the previous complaint case. In addition, the Norwegian Government claimed that as a result of the so-called standstill provision in article 48 EEA, it was not necessary to consider whether the Norwegian rules in question constitute restrictions on the freedom of establishment under Article 31(1) EEA. Furthermore, the Norwegian Government claimed that even if the provisions in the Norwegian taxi regulation do constitute restrictions on the freedom of establishment, they are justified on grounds of public interest.

The matter was further discussed at the package meeting in Oslo on 28 October 2016.

3 The complaint

According to the complainant, Oslo municipality has rejected, on different occasions, his application for a licence to establish a new taxi service. The complainant argues that in general, the number of available taxi licences in a district is limited and that applications by new entrants for a new licence are treated on the basis of a "needs-based" analysis, whereby the competent authority restricts the total number of available taxi licences corresponding to demand in a given district. Furthermore, the complainant claims that the Norwegian rules in question require taxi drivers to be members of a taxi dispatch centre and to pay a fee for this affiliation. In this regard, the complainant contends that there are no objective criteria for assessing whether in a given situation there is a need for new taxi licences. In addition, the complainant submits that Oslo municipality requires independent taxi businesses to become affiliated with so-called taxi dispatch centres ("*drosjesentral*") and to pay fees for this affiliation.

According to the complainant, the system in place limits the number of taxi licences and restricts new entrants, and, as a consequence, has led to disproportionally high prices for taxi services in Oslo. In the Oslo municipality, several taxi dispatch centres have been established and all taxi service operators are obliged to be affiliated with one of them. Both existing licence holders and recipients of a new licence in Oslo are free to choose their affiliation among the approved taxi dispatch centres, subject to the quantitative restriction that no dispatch centre can have more than 50% of the total available licences.

Furthermore, the complainant points to the fact that Oslo City Government, in a resolution dated 28 April 2016, decided not to increase the number of existing taxi licences in the Oslo licence district, inter alia on the grounds that existing licence holders should have an income that they can live by.[1] It is undisputed that the number of existing taxi licences in the Oslo municipality has remained unchanged since 2003 and that, all applications for taxi licences by new applicants have been rejected by the municipality.

4 Legal framework

4.1 Relevant EEA Law

No secondary EEA legislation exists laying down rules regarding the access to the market of providing taxi transport services.

[1] In a resolution dated 28 April 2016, Oslo City Government concludes as follows: "*Behovsprøving av antall drosjeløyver skal ivareta to hensyn: publikums behov for et drosjetilbud og et tilstrekkelig inntektsgrunnlag for drosjenæringen.*" (Office translation by the Authority: "The system of establishing the number of taxi licences on the basis of a needs-based analysis is intended to ensure the protection of two interests: the general public's need for a supply of taxi services and a sufficient income for the taxi industry.").

Regulation (EU) No 1071/2009 *of the European Parliament and of the Council establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC*[2] regulates the admission to the occupation of road haulage operator and road passenger transport operators.[3]

As regards Regulation (EC) No 1073/2009 *on common rules for access to the international market for coach and bus services*[4], it should be pointed out that the conditions for its application are not met in the present case, given that the regular transport services envisaged by the complainant constitute urban or suburban services which are expressly excluded from the scope of that Regulation by means of its Recital (12).

Furthermore, as regards Directive 2006/123/EC *on services in the internal market*[5], transport services, including urban transport and taxis, are expressly excluded from the scope of the Directive, pursuant to its Article 2(2)(d) and Recital (21).

4.2 Relevant national law

The complaint relates to the Norwegian national legislation on the access to the taxi services market in Oslo Municipality. The provisions in question are contained in the Norwegian Act on Professional Transport of 21 June 2002 no. 45 ("Professional Transport Act")[6] and Regulation 401/2003 ("the Professional Transport Regulation")[7].

The following rules and principles apply to new applicants seeking to obtain a professional transport licence:

- New operators of taxi services are required to obtain a taxi licence (Section 9(1) of the Professional Transport Act). In order to obtain the licence, applicants have to fulfil the requirements in Section 4(2) of the Act, which includes, *inter alia*, that they must be of good repute, have a satisfactory financial standing, and have sufficient professional competence.

- The number of taxi licences available in each licence district is limited and new licences are awarded subject to a needs test, which means that the competent authority in a licence district limits the number of taxi licences to a number corresponding to the (assumed) demand in the respective district.[8] New licences are only granted if and when an existing licence becomes available (due to death or retirement), or when a new licence is issued by the authority.

- In order to determine the right level of supply for taxi services in a licence district, the competent authority in that district must regularly carry out an analysis of the taxi industry. According to the Norwegian Government, this analysis is undertaken with the intention of finding the right correspondence between demand and supply

[2] OJ L 300, 12.11.2009, p. 51. Referred to at point 33b of Chapter II of Annex XIII to the EEA Agreement.
[3] Road passenger transport operators in this context are limited to operators of motor vehicles suitable for carrying more than nine persons, cf. Article 2(3) Regulation (EC) No 1071/2009.
[4] OJ L 300 14.11.2009, p. 88. Referred to at point 32a of Chapter II of Annex XIII to the EEA Agreement.
[5] OJ L 376, 27.12.2006, p. 36. Referred to at point 1 in Annex X to the EEA Agreement.
[6] Lov 21. juni 2002 nr. 45 om yrkestransport med motorvogn og fartøy (*yrkestransportlova*).
[7] Forskrift 26. mars 2003 nr. 401 om yrkestransport innenlands med motorvogn og fartøy (*yrkestransportforskriften*).
[8] See the Norwegian Ministry of Transport and Communication's information page on the arrangement: http://www.regjeringen.no/nb/dep/sd/tema/yrkestransport/loyver.html?id=444316

for taxi services in the licence district. Relevant factors to be taken into account in this analysis are the population in the licence district, statistics from the taxi industry with regard to earnings as well as changes in the demand for taxi services and the level of functioning of other forms of public transport services in the district.

- The criteria for the distribution and the grant of *existing* licences are listed in Sections 43 and 44 of the Professional Transport Regulation. The competent authority of each licence district decides upon the substantive conditions under which new licence(s) shall be granted/allocated.[9]

- Section 43(1)-(2) of the Professional Transport Regulation foresees that an applicant with at least two years' experience as a full-time taxi driver within the licence district will be given priority to a licence which becomes available as a consequence of the death or ceased service of a previous licence holder, provided that the taxi driver was exercising the taxi driving as a main occupation. Section 43(3) of the Professional Transport Regulation furthermore stipulates that the applicant with the longest service as a full-time taxi driver within the licence district shall be awarded the available licence, if several applicants fulfil the conditions in Section 43(1)-(2). If a licence cannot be awarded on the basis of seniority, the decision is subject to the licensing authority's discretion, cf. Section 44 of the Professional Transport Regulation.

- Available licences shall be publicly announced, cf. Section 37(3) of the Professional Transport Regulation. In the announcement, the criteria for awarding the licence shall be set out. Furthermore, the Norwegian Government has referred to Circular N-14/81 paragraph 3, according to which the relevant criteria to be taken into account in this regard are the following: previous experience as a cab driver, gained seniority, connection with the taxi profession in general and geographical conditions. If the applicant claims that there are special circumstances which speak in his favour these shall be considered.

- Pursuant to Section 46 of the Professional Transport Regulation, the competent licensing authority can decide to establish one or more taxi dispatch centres (*drosjesentraler*) within a licensing district, and to require licence holders to be affiliated with a dispatch centre.

- According to the Norwegian Government, Section 1(1)(f) of the Professional Transport Regulation implies that operators are under an obligation to contribute to a 24-hours a day supply (see Section 46 of the Professional Transport Regulation) if the licence is connected to the licence holder's place of residence. If the licence is connected to a dispatch centre, the licence holder is obliged to be available according to a shift plan of that centre. In sparsely populated areas, licences are mostly connected to the licence holder's place of residence.

5 The Authority's assessment

The Authority takes the view that the applicable Norwegian national legislation on access to the market for the provision of taxi services, as described under Section 4.2 above,

[9] See the Norwegian Ministry of Transport and Communication's information page on the arrangement: http://www.regjeringen.no/nb/dep/sd/tema/yrkestransport/loyver.html?id=444316

constitutes a restriction on the freedom of establishment under Article 31(1) EEA. In the Authority's view, the restriction is not justified.

5.1 Applicability of Article 31(1) EEA

In its letter dated 3 August 2016, as well as in its letters to the Authority dated 12 March and 14 May 2012, the Norwegian Government has made reference to Article 48(1) of the EEA Agreement and argued that as a result of that provision, it is not necessary to assess whether the Norwegian rules in question here constitute restrictions on the freedom of establishment under Article 31(1) EEA.

Article 48(1) EEA reads: "*The provisions of an EC Member State or an EFTA State, relative to transport by rail, road and inland waterway and not covered by Annex XIII, shall not be made less favourable in their direct or indirect effect on carriers of other States as compared with carriers who are nationals of that State.*"

The Norwegian Government interprets this provision in such a way that national provisions regulating road transport in existence at the time of entry into force of the EEA Agreement, and which have not later been changed in such a way as to make them less favourable to foreign operators, may continue to be in force. Furthermore, the Norwegian Government argues that the Norwegian rules in question here are based on objective and transparent, non-discriminatory criteria. Accordingly, and due to Article 48 EEA, the Norwegian Government argues that it is not necessary to consider whether the aforementioned rules constitute restrictions on the freedom of establishment under Article 31(1) EEA.

The Authority does not agree with the Norwegian Government's interpretation of Article 48(1) EEA. The corresponding rule in the TFEU, Article 92, provides for a national "standstill obligation" for Member States in the area of transport policy until the EU has passed measures foreseen under Article 91 TFEU. It prohibits Member States from applying existing national rules in the area of transport in such a way as to directly or indirectly discriminate against carriers from other Member States, unless a derogation is granted.

The CJEU has held with regard to Article 92(1) TFEU that the other basic rules of the Treaty are applicable insofar as they have not been excluded, and they can only be rendered inapplicable "as a result of an express provision in the Treaty".[10] The only express provision in the EEA Agreement rendering inapplicable basic rules in this regard is Article 38 EEA which foresees a special exemption under which the freedom to provide services in the field of transport shall be governed by the provisions of Chapter 6 of the EEA Agreement.

Furthermore, in its judgment in Case C-195/90, the CJEU ruled with regard to the standstill obligation in Article 92(1) TFEU that "*the fact that a common transport policy has not yet been achieved does not empower the Member States to adopt national legislation, even limited in time, which is incompatible with the requirements of [Article 76] (now Article 92 TFEU) of the Treaty.*"[11]

[10] Case C-167/73, ECLI:EU:C:1974:35, *Commission v France*, paras. 21-33; See also CJEU, Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 23.
[11] Case C-195/90, ECLI:EU:C:1992:219, *Commission v Germany*, para. 33.

The Authority holds that it follows from this case-law that also during the standstill period mentioned in Article 92(1) TFEU and Article 48(1) EEA, national legislation in the field of transport must be compatible with the general rules of the Treaty and the EEA Agreement.

Accordingly, it is the view of the Authority that Article 31 EEA is directly applicable in the field of transport, e.g. as regards national measures regulating access to the market for taxi services. Article 48(1) EEA does not provide that all national measures regulating road transport in force at the time of signature of the EEA Agreement can be maintained, regardless of their restrictive or discriminatory effect.

5.2 Restriction within the meaning of Article 31(1) EEA

As the ECJ and EFTA Court have consistently held, Article 31(1) EEA precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU citizens of the freedom of establishment.[12] The concept of 'restriction' for the purposes of Article 31(1) EEA covers measures taken by an EEA State which, although applicable without distinction, affect the access to the market for undertakings from other Member States and thereby hinder intra-EEA trade.[13] Article 31 EEA also prohibits discriminatory national measures which do not distinguish upon nationality as such, but *de facto* have (indirect) discriminatory effects.[14] Furthermore, it prohibits rules which impede or render less attractive the exercise of the freedom of establishment, in particular through the application of a prior authorisation procedure.[15]

National legislation which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation constitutes a restriction, since it is capable of hindering the exercise by that undertaking of its freedom of establishment, by deterring or even preventing it from freely pursuing its activities through a fixed place of business.[16]

5.2.1 The restrictive measures in question

The legislation in question governs access to the taxi services market in Oslo. In so far as it contains a numerical limitation of taxi licences, establishes conditions for granting new licences which are discriminatory, not objective and not known in advance and provides for an obligation for taxi licence holders to be affiliated to a dispatch centre, this legislation constitutes a restriction of the freedom of establishment. Such a restriction exists notwithstanding the fact that the legislation in question applies irrespective of the nationality of the persons concerned.[17]

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[12] ECJ, Case C-400/08, ECLI:EU:C:2011:172, Commission v Spain, para. 64; Case C-338/09, ECLI:EU:C:2010:814, Yellow Cab Verkehrsbetrieb, para. 45.

[13] ECJ, Case C-442/02, ECLI:EU:C:2004:586, *CaixaBank France*, para. 11; Case C-518/06, ECLI:EU:C:2009:270, *Commission* v *Italy*, para. 64.

[14] Case E-14/12 *ESA v Liechtenstein*, para. 28; Case E-8/04 *ESA v Liechtenstein*, para. 16.

[15] Case C-265/12, ECLI:EU:C:2013:498, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, para. 35; Case C-205/99, ECLI:EU:C:2001:107, *Analir and Others*, para. 21; Case C-439/99, ECLI:EU:C:2002:14, *Commission v Italy*, para. 22.

[16] Case Joined Cases C-171/07 and C-172/07, ECLI:EU:C:2009:316, *Doc Morris NV*, para. 23; Case C-169/07, ECLI:EU:C:2009:141, *Hartlauer*, paras. 34, 35 and 38

[17] Case C-400/08, ECLI:EU:C:2011:172, *Commission v Spain*, para. 64; Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 45.

For the sake of clarification, it should be stressed from the outset that the Authority does not in the present case challenge the requirement of a prior authorisation in itself.

However, the Authority is concerned with the restriction of the freedom of establishment that follows from the numerical limitation of available taxi licences. Under the applicable legal framework referred to under Section 4.2 above, a licence for the establishment of a new taxi business will only be granted under very specific conditions that are outside the sphere of influence of the provider seeking to obtain a licence. In the view of the Authority, these conditions do not satisfy the requirements set up by the European Courts for prior authorisation schemes, namely that they constitute objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.[18]

Under the applicable rules, new applications for a taxi service operator's licence will be considered only if and when there is an available (free) licence, and priority will be given to local drivers in a district with at least two years' experience, taking into account criteria such as previous experience as a cab driver and gained seniority as a driver. Where these criteria do not apply and do not provide guidance, the competent authority shall decide, at its own discretion, which applicant should be awarded a free licence.

In the view of the Authority, this system of allocating new licences effectively favours existing taxi licence holders (incumbents) and precludes new operators seeking to obtain a taxi licence from entering the market. Criteria such as previous experience as taxi drivers and gained seniority in the respective district appear to be, *prima facie*, discriminatory, as they clearly favour existing taxi operators in a district over new entrants without there being any discernible legitimate justification.

The Authority notes that in a case concerning the application by Spanish pharmacists for new licences, the CJEU held that national rules whereby licences for the establishment of new pharmacies are to be granted in accordance with an order of priority in which precedence is given to pharmacists who have pursued their professional activities within the province, are indirectly discriminatory[19], as they, *de facto*, favour national pharmacists over those from another Member State. The same applies with regard to the Norwegian legislation on taxi licences in question. This legal framework has the potential to deter and prevent new operators from establishing a new taxi business and constitutes a restriction.

Furthermore, in those districts where there is an obligation upon taxi service providers to be connected to a taxi dispatch centre, including the corresponding requirements that follow from this affiliation, this requirement constitutes an additional restriction of the freedom of establishment.

On this basis, the Authority is of the view that the Norwegian legislation in question governing the access of transport operators to the taxi services market, constitutes a restriction of the freedom of establishment. As a result of these provisions, the number of taxi services available in a district is limited and transport operators seeking to establish themselves in a district are impeded from doing so. The Norwegian licensing scheme impedes or renders less attractive the exercise of the freedom of establishment, cf. Article 31(1) EEA.

[18] Case C-390/99 ECLI:EU:C:2002:34, *Canal Satélite Digital v Administration General Del Estado*, para. 35 and Case C-205/99, ECLI:EU:C:2001:107, Analir and Others, para. 37.
[19] Joined Cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, *José Manuel Blanco Perez and Maria del Pilar Chao Gomez*, paras. 122-125.

5.2.2 Justification

Restrictions on the freedom of establishment are lawful only if they can be justified by overriding reasons in the public interest.[20]

It is settled law that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality cannot be justified unless the restriction (1) serves overriding reasons in the public interest, (2) is suitable for securing attainment of the objective pursued and (3) does not go beyond what is necessary for attaining that objective.[21]

In this regard, it should be recalled that it is for the national authorities to demonstrate that a restrictive measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons which may be invoked by a State in order to justify a restriction must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments.[22]

In its reply to the letter of formal notice dated 3 August 2016, the Norwegian Government has questioned that the burden of proof to demonstrate that a restrictive measure is appropriate and necessary lies with the Member State and has cited case-law where, in the view of the Norwegian Government, the European Courts have accepted assumptions by the Member States and have placed the burden of proof on the European Commission. In particular, the Norwegian Government cites the European Court of Justice Cases C-171/07 and C-172/07 (*Apothekerkammer*), C-110/05 (*Commission vs Italy*) and the EFTA Court Case E-16/10 (*Philip Morris Norway AS*) to emphasise its submission.

The Authority does not concur and notes that in Case E-16/10 (*Philip Morris Norway AS*), the EFTA Court, in line with settled case-law of the European Courts, stated that it is for the EEA States to decide what degree of protection they wish to afford to public health and the way in which that protection is achieved and that the EEA States have a certain margin of discretion in this regard.[23] However, the EFTA Court also stressed that notwithstanding this discretion, national rules restricting the free movement of goods, or are capable of doing so, can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it.[24] Furthermore, the EFTA Court stressed that it is for the national authorities to demonstrate that their rules are necessary in order to achieve the declared purpose and that that objective could not be achieved by less extensive prohibitions or restrictions.[25]

In the Authority's view, a different interpretation does not follow either from the judgment by the European Court of Justice in case C-110/05. In this judgment, the Court confirmed

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[20] Case E-9/11, *ESA v Norway*, para. 83; Case E-15/11, *Arcade Drilling AS*, para. 82; Case E-3/06 *Ladbrokes*, para. 41; Case E-8/04, *ESA* v *Liechtenstein*, para. 23.

[21] Case C-400/08, ECLI:EU:C:2011:172, *Commission v Spain, para. 73;* Case C-55/94, ECLI:EU:C:1995:411, *Gebhard*, para. 37; EFTA Court, Case E-*3/05 ESA v Norway, para. 57.*

[22] Cf. EFTA Court, Case E-12/10 *ESA v Iceland*, para. 57; ECJ, Case C-8/02, ECLI:EU:C:2004:161, *Leichtle*, para. 45; Case C−73/08, ECLI:EU:C:2010:181, *Bressol and Others*, para. 71; Case C-110/05, ECLI:EU:C:2009:66, *Commission* v *Italy*, para. 66; Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* para. 75.

[23] Case E-16/10, *Philip Morris Norway AS*, para. 77.

[24] Case E-16/10, *Philip Morris Norway AS*, para. 81.

[25] Case E-16/10, *Philip Morris Norway AS*, para. 85.

the principle that a Member State invoking a requirement as justification for the hindrance to free movement of goods has the burden to demonstrate that its rules are appropriate and necessary to attain the legitimate objective pursued.[26] The Court added that this burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.[27] Thus, also in this judgment the Court of Justice confirmed the principle that the burden of proof for the appropriateness and proportionality of a restriction lies with the Member State. Hence, the Authority disagrees with the Norwegian Government's assessment that it follows from the judgment in Case C-110/05 that the burden of proof is placed on the European Commission. In addition, in the current case the Authority is not requiring Norway to prove that no other conceivable requirements could enable the objectives to be attained.

5.2.2.1 Overriding reasons in the public interest

(a) Arguments brought forward by the Norwegian Government

The Norwegian Government argues that the existing Norwegian rules on access to the taxi services, and in particular the needs-based licensing scheme, are necessary in order to ensure a satisfactory service justified by legitimate objectives in the public interest. The main purpose of the rules, according to the Norwegian Government, is to ensure a satisfactory supply of taxi services at all times. More precisely, it claims that it is necessary to restrict licences and to award them on the basis of a needs-based test in order to oblige operators to be available and to contribute to the provision of taxi services 24 hours a day. The Norwegian Government submits that without a limitation and a needs-based test, the legal obligation for taxi service providers to be available 24 hours a day (where a licence is connected to the place of residence rather than to a dispatch centre) could not be sustained, and that in consequence the taxi services in sparsely populated areas would become unsatisfactory and would most likely disappear at certain times of the day.

Furthermore, the Norwegian Government claims that the limitation of taxi licences also seeks to meet the objective of providing a secure and foreseeable income for taxi service operators, and helps to ensure a steady recruitment to the profession. In its letter dated 18 January 2016, the Norwegian Government explained that these considerations are not policy objectives in themselves justifying the restriction, but they are necessary means to achieve a satisfactory supply of transport services. In the view of the Norwegian Government, without ensuring a secure and foreseeable income for taxi service operators as well as a steady recruitment to the profession, the main objective of providing the public with a satisfactory supply of taxi services at all times could not be achieved.

With regard to the restrictive measure conferring competence upon the competent authorities to oblige licence holders to be affiliated with a dispatch centre and to pay a fee for it, the Norwegian Government claims that this requirement is necessary to pursue the interests of consumers and security objectives. In this regard, the Norwegian Government submits that the requirement is in the interest of customers and ensures "market clarity", as it ensures that taxi customers only have to dial one single telephone number when ordering a taxi and they that they have a contact point for assistance in cases of unexpected or uncomfortable incidents. Furthermore the system increases transport safety, as it enables the dispatch centres to track the location of a taxi at a given time and thereby also serves a preventive effect, in that it deters taxi drivers from committing acts of abuse, theft or violence.

[26] Case C‑110/05, ECLI:EU:C:2009:66, *Commission v Italy, para. 66.*
[27] Ibidem.

(b) The Authority's assessment

The Authority has assessed the arguments that the Norwegian Government has brought forward to demonstrate that the restrictions inherent in the contested legislation governing taxi services are justified by overriding requirements relating to the public interest.

As regards the measures limiting the number of taxi licences, thus limiting access to establishment as a taxi operator, the Authority recalls that grounds of purely economic nature cannot constitute an overriding reason in the public interest justifying a restriction on a fundamental freedom and may thus not serve as a justification in this regard.[28]

As regards the argument that the limitation of available taxi licences serves to pursue the achievement of a right correspondence between supply and demand, the Authority takes the view that this does not constitute an overriding reason in the public interest capable of justifying the restriction of the freedom of establishment. This is an objective that is undoubtedly purely economic in nature. The same applies to the argument that the numerical limitation of licences shall serve to guarantee taxi service operators a foreseeable income and ensure a steady recruitment to the profession. These objectives are linked to the financial and professional interests of specific economic operators and therefore do not serve a public interest. The above considerations can therefore not constitute overriding reasons in the public interest.[29]

In contrast, the Authority acknowledges that a limitation of licences can, under certain circumstances, be necessary to guarantee a satisfactory, round-the-clock supply in rural areas where taxis are often an indispensable means of transport and thereby serve a public interest. This reasoning relates to safeguarding a necessary standard and availability of passenger transport services for the inhabitants of a district and is, as such, not purely economic in nature. Ensuring that taxi transport services are permanently available serves the protection of consumers which in itself can constitute an overriding requirement justifying a restriction of the freedom of establishment.[30] Therefore, the Authority acknowledges that the objective of guaranteeing a satisfactory, permanent supply of taxi transport services in the interest of consumers can be accepted as a requirement in the public interest in principle capable of justifying the restriction that follows from the numerical limitation of licences.

In addition, as regards the requirement to be affiliated with a dispatch centre, the Authority acknowledges that grounds of transport safety can be relied upon as a justification for a restriction of the freedom of establishment. The Norwegian Government argues that the connection to the dispatch centre enables the centre to track the location of a given taxi at a given time and thereby also serves a preventive effect as it deters taxi drivers from committing acts of abuse, theft or violence. The Authority acknowledges that

[28] Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* para. 74; Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 51; Case C-254/98, ECLI:EU:C:2000:12, *TK-Heimdienst*, paras. 32-33; Case C-456/10, ECLI:EU:C:2012:241, *ANETT*, para. 53; Case C-109/04, ECLI:EU:C:2005:187, *Kranemann*, para. 34.

[29] See, in this context, Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* paras. 95-98, in which the Court held, in connection with a decision to grant a licence for a new retail establishment, that to take account, for the purposes of granting such a licence, of the existence of retail facilities in the area concerned and the impact of a new establishment on the commercial structure of that area concerns the impact on existing traders and the market structure, and therefore does not relate to consumer protection.

[30] Case C-260/04, ECLI:EU:C:2007:508, *Commission v Italy*, para. 27; Case C-393/05, ECLI:EU:C:2007:722, *Commission v Austria*, para. 52; Case C-458/08, ECLI:EU:C:2010:692, *Commission v Portugal*, para. 89.

grounds of transport safety can in principle be relied upon as a justification for a restriction of the freedom of establishment.

5.2.2.2 Suitability

While the objectives of guaranteeing a satisfactory, permanent supply of taxi transport services in the interest of consumers and ensuring transport safety are capable of constituting overriding reasons in the public interest justifying a restriction, the Authority has doubts whether the national rules referred to above are suitable in order to attain these objectives. The Authority recalls in this regard that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.[31]

The Authority considers that the numerical limitation of licences as well as the requirement to be affiliated with a taxi centre (or the obligation to offer 24 hours a day taxi service where the licence is connected to the licence holder's place of residence, respectively) can be suitable for attaining the former objective that the Norwegian Government has invoked, as these requirements can in fact serve to ensure the existence of a satisfactory supply of taxi services, in certain sparsely populated areas where it is not commercially viable to offer round the clock taxi services.

However, the Authority takes the view that with regard to the numerical limitation of the available taxi licences, the Norwegian Government's reasoning does not hold, in particular when considering the provision of taxi services in densely populated licence districts such as Oslo where different means of transport are available at all times. In these areas, it is rather likely that limiting the number of available licences for each taxi district on the basis of a needs-based test will have the result of limiting supply, as new operators will be precluded from entering the market. Therefore, insofar as densely populated districts are concerned, the Authority takes the view that the Norwegian Government has not shown that the numerical limitation of licences is suitable to achieve the objective of guaranteeing a satisfactory, permanent supply of taxi transport services.

The Authority notes that its view appears to be in line with the conclusions drawn by the Norwegian Competition Authority (*Konkurransetilsynet*) in a recently published report on the Norwegian taxi market.[32] In that report, *Konkurransetilsynet* held that the needs-based licensing system constitutes the most significant entry barrier in the taxi market, and that it leads to an inefficient exploitation of resources and limits labour productivity.[33] Furthermore, the Authority refers to the fact that the so-called Sharing Economy Committee which was recently set up by the Norwegian Government, in its report of 6 February 2017[34], proposed to the Government to repeal the licensing requirement for taxis in Norway.[35]

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[31] Case C-169/07, ECLI:EU:C:2009:141, *Hartlauer*, para 55.

[32] Konkurransetilsynet, Rapport: Et drosjemarked for fremtiden, published on 20 March 2015 (www.konkurransetilsynet.no/globalassets/filer/publikasjoner/rapporter/rapport_drosjemarked-for-fremtiden.pdf).

[33] Ibid, page 33: "*Den vesentligste etableringsbarrieren er knyttet til det behovsbaserte løyvesystemet. Konkurransetilsynet er av den oppfatning at behovsprøvingen bør fjernes i hele landet. Behovsprøvingen begrenser tilbudet og ikke minst nødvendig fleksibilitet på tilbudssiden. Ut over behovsprøvingen er det særlig kravet om at drosjekjøring skal være hovederverv som fører til lite effektiv utnytting av ressurser, og begrenser arbeidskraftproduktiviteten.*"

[34] Cf. Delingsøkonomiutvalget: Delingsøkonomien – muligheter og utfordringer Utredning fra utvalg oppnevnt ved kongelig resolusjon 4. mars 2016. Avgitt til Finansdepartementet 6. februar 2017., Norges offentlige utredninger 2017:4

It is the Authority's view that allowing new entrants to the market would, incidentally, also be likely to lead to a reduction of taxi fares, thereby benefitting customers by satisfying their need for affordable means of transport. There are evidently indicators showing that the current system of regulating access to the taxi services market have had adverse effects for customers, as taxi prices in Oslo have seen a rather steep increase in recent years[36], while at the same time the demand for taxis has decreased significantly. According to information published by the Norwegian Statistics Bureau *Statistisk sentralbyrå* (SSB), between 2004 and 2015, taxi fares have increased almost three times more than the level of general inflation[37] (while consumer prices rose by 25 per cent, taxi fares increased by over 65 per cent during that period). SSB also found that the overall number of taxi journeys has decreased by 10 per cent between 2008 and 2015, while at the same time the overall turnover for the taxi industry has increased by nearly 20 per cent. SSB concluded from these numbers that the taxi industry offsets the decrease in passenger numbers by increasing prices which in turn leads to a further decrease in passenger numbers. The Authority notes that this development seems to point to the absence of a right correspondence of supply and demand.

Furthermore, the Norwegian Government has failed to demonstrate, in its submission, which methodology is used to find the "right correspondence between supply and demand" (as part of the analysis underlying the needs test) in Oslo municipality and other large, densely populated municipalities in Norway. Therefore, the Authority concludes that the Norwegian Government has not demonstrated that restricting the number of available licences is an appropriate measure to guarantee a satisfactory (with 24 hours daily availability) supply in the public interest.

Finally, as regards the objective of ensuring transport safety supposedly pursued by imposing the requirement to be affiliated with a dispatch centre, it appears inconsistent that this affiliation requirement is not systematically imposed on all drivers in all districts. In some districts, dispatch centres are established and the affiliation requirement exists, whereas in other districts, the licence is linked to the drivers' residence and no such requirement exists. As a consequence, the Authority concludes that the national legislation at issue does not pursue the stated objective of ensuring transport safety in a consistent and systematic manner and therefore cannot be considered appropriate for attaining the objective.

5.2.2.3 Necessity

In addition to being suitable, any restriction must not go beyond what is necessary in order to attain its overriding public interest objective.

In the Authority's view, the Norwegian Government has not put forward any arguments to support its view that the limitation of the number of licences is necessary in order to

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(https://www.regjeringen.no/contentassets/1b21cafea73c4b45b63850bd83ba4fb4/no/pdfs/nou201720170004000dddpdfs.pdf).

[35] Ibid, page 108: "*Flertallet mener etter dette at behovsprøvingen bør oppheves.*"

[36] Pursuant to a newspaper article published on 24 November 2014 (http://www.nettavisen.no/na24/elleville-taxipriser---76-prosent-priskning-pa-7-ar/8512709.html), the average taxi fare per kilometer has risen from 16.56 NOK to 29.15 NOK between 2007 and 2014, thus an increase of 76 per cent. These figures are based on data collected by the Norwegian Statistics Bureau (*Statistisk sentralbyrå*, SSB).

[37] http://ssb.no/transport-og-reiseliv/artikler-og-publikasjoner/faerre-drosjekundar-gjev-hogare-prisar

ensure a satisfactory supply of taxi services. For the following reasons, the Authority considers that the rules go beyond what is strictly necessary:

- Pursuant to the Norwegian rules in question, the needs-based test and the numerical limitation is applied in such a way that new applicants shall not be granted a new licence where the demand for taxi services in a district can be satisfied by the existing number of taxi operators. The Authority recalls in this context that the fact that a particular number of licences is considered on the basis of a specific assessment to be 'sufficient' for a particular territory cannot in any event of itself justify the obstacles to the freedom of establishment and the freedom to provide services brought about by that limitation.[38] In the view of the Authority, it is moreover highly unlikely that in such a situation, the entry of new operators to the market will immediately result in overcapacity and in a situation where the needs of customers will no longer be satisfied in the same way. Rather, it can reasonably expected that there will be a margin within which new entrants to the taxi market can be admitted, despite the fact that the existing demand can be met by the existing number of operators. The argument that without a needs-based test and a numerical limitation there would be too many taxi operators which would in turn lead to taxi services of lower quality must be rejected, as the Norwegian Government has not presented any evidence to support this claim.

- A less restrictive rule than a needs-based test is possible and feasible. A limitation on numbers would only seem justifiable very exceptionally on the basis of clear evidence that the admission of new entrants would put the functioning of the local taxi services market in danger. Rejecting an application for a new licence should only ever be possible if, under the specific circumstances in the respective district, there are indications that allowing new entrants into the market would seriously threaten to destabilise the local taxi services market and lead to a generalised market failure.

- As has already been explained under Section 5.2.1 above, the criteria that are applied in Norway for the decision to award a new licence, i.e. to give priority to applicants that have been working the longest, and for a minimum at least two years within the licence district (seniority rule), are discriminatory. What is more, this seniority rule goes beyond what is necessary to achieve the pursued objectives. The rule is in itself very restrictive as it will, in most situations, make it practically impossible for new operators from outside a district to establish a new business in the district. During the package meeting in Oslo in October 2014, the Norwegian Government representatives expressed their view that this rule contributes to ensuring a steady recruitment to the professions of taxi driver and taxi operator, as it makes the professions more attractive, by giving an incentive for entering a business which may be perceived by some as not having the highest status. The Authority notes that there is no evidence to support the claim that recruitment to the taxi profession is improved by the seniority rule. Rather, it would seem that opening up the market for new entrants would allow for an increase of recruits to the profession. The seemingly uncircumscribed residual discretion on the part of the competent authority, in cases where experience and seniority of the applicants for a licence do not permit to identify the candidate to whom the licence should be awarded, also appears in conflict with the requirements of EEA law concerning the transparency and impartiality. The rules in question must be clear, precise and

[38] Case C-338/04, EU:C:2007:133, *Placanica*, para 51.

> predictable as regards their effects and circumscribe the competent authority's discretion by reference to objective criteria.[39]

Furthermore, the Authority considers that the obligation for operators to be connected to a taxi dispatch centre and to comply with the corresponding requirements, such as being part of a shift plan, appears to go beyond what is necessary in order to achieve the legitimate objectives. The Norwegian Government's arguments in favour of the affiliation to a dispatch centre, such as being able to hold track of drivers and taxis in the interest of security, could be achieved in the same way with less restrictive measures, such as the requirement for taxi operators to make use of technological equipment like GPS-tracking or electronic means of identifying a taxi in connection with payment.

6 Conclusion

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that, by maintaining rules on access to the taxi services market which provide for a system of prior authorisation, in the form of a licence, for establishing new taxi businesses, which (1) contains a numerical limitation of licences (2) under conditions for granting new licences which are not objective, non-discriminatory and known in advance and (3) provide for an obligation for taxi licence holders to be affiliated to a dispatch centre, Norway has failed to fulfil its obligations under Article 31(1) of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 22 February 2017

For the EFTA Surveillance Authority

Helga Jónsdóttir
College Member

Carsten Zatschler
Director

[39] Case C-72/10, EU:C:2012:80, *Costa and Cifone*, paras 72-74 and case law cited.

This document has been electronically signed by Helga Jonsdottir, Carsten Zatschler on 22/02/2017