

MEMO

To: The Norwegian Ministry of Transport and others

Oslo, 3 August 2023

Lawyer in charge: Svein Terje Tveit

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PROPOSAL FROM THE TAXI EXPERT COMMITTEE – EEA LAW ASSESSMENT

1 SUMMARY

We have assessed the Official Norwegian Report («NOU»), part I, presented to the Norwegian Government by the Taxi Expert Committee («the Committee») on 3 June 2023.¹ The Committee proposes *inter alia* that the licensees must be affiliated with a dispatch taxi central, a taximeter requirement and other restrictions relating to the taxi centrals' operations. In particular, we have assessed if and why the proposed legislation on the taxi market and the access restrictions violates the EEA Agreement.

We notice that the EFTA Surveillance Authority (ESA) decided on 19 July 2023 to close the case against Norway, initiated by a complaint in 2013, on the legislation governing the taxi services market. This is the case where ESA has issued a reasoned opinion, which again led to "the taxi-reform" which entered into force on 1 November 2020.² Therefore, ESA's decision to close the case is not based on the newly proposed amendments. Indeed, ESA refers to the new proposals stating that the decision to close the case is without prejudice to any future decision by ESA to open a new case on the issue or related issues, including if any relevant developments occur in EU/EEA law or at the national level. In that context, the Authority notes in particular the NOU.

Freedom of Establishment: The proposal violates the EEA Agreement and restricts the freedom of establishment by requiring licensees to be affiliated with a taxi central and imposing additional requirements on taxi centrals. This limits opportunities for market players regardless of their business model, organisation and setup.

Dispatch Central's Role: The proposed provisions Article 9 c., 9 d. and 9 e. of the Norwegian Professional Transport Act³, assign various requirements to the taxi central, such as information storage, monitoring of licensees, pricing, insurance, complaints handling, and access for disabled persons. This restricts access to and the exercise of professional transport services.

Taximeter Requirement: The proposed Article 48 d. of the Norwegian Professional Transport Regulation⁴ contains a technology-specific taximeter requirement, which creates an additional cost

¹ NOU 2023: 22 *På vei mot en bedre regulert drosjenæring*. Delutredning I fra Drosjeutvalget.

² ESAs reasoned opinion in case 41/17/COL of 22 February 2017.

³ Lov 21. juni 2002 nr. 45 om yrkestransport med motorvogn og fartøy.

⁴ Forskrift 26. mars 2001 nr. 401 om yrkestransport med motorvogn og fartøy (yrkestransportforskriften)

for market operators relying on platforms and apps, serving as a barrier to entry and limiting the freedom of establishment.

Justification: Restrictions on the freedom of establishment can be justified based on overriding reasons related to general interest. The proposed restrictions are not based on overriding reasons and/or are not suitable, and likely exceed what is necessary to achieve their objectives.

Overriding Reasons: Purely economic grounds are not valid reasons to justify restrictions on fundamental freedoms (e.g. limiting the number of licensees, thereby protecting some market players while excluding others). Public safety, tax compliance, and consumer protection can be valid if pursued in a coherent and systematic manner and within the limits set by the EEA Agreement.

Direct Link and Alternative Measures: There must be a direct link between the proposed measures and their stated purpose. The availability of alternative means must be considered to prevent and combat crime, tax evasion, and work-related crime without imposing trade restrictive regulations.

Litigation Risk: The government is at risk of litigation from private players or the ESA if the proposed legislation is adopted and found to be unlawful under the EEA Agreement.

Compensation for Breaches: Breaches of obligations under the EEA Agreement may result in the EEA EFTA state being held accountable and required to compensate the loss suffered by affected parties.

2 RESTRICTION OF THE FREEDOM OF ESTABLISHMENT (EEA ART. 31)

EEA Art. 31(1) 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/EEA citizens of the freedom of establishment.⁵

The taxi central requirement in the proposal Article 9 c., 9 d. and 9 e. does not allow for equal opportunities for all existing and new market players regardless of business model, organisation and setup. A number of the requirements also go beyond requiring a simple taxi central, such as requiring a CEO with an active license, equity of NOK 500,000 and EEA residing owners (the latter is likely a restriction under the WTO Agreement and other Bilateral Trade Agreements (BITS) with a non-discrimination clause). In effect, a number of tasks must be allocated to the taxi central and not the licensee (e.g. storing of information; monitoring of licensees, prices, insurance, taximeter, etc.; complaints handling; access for disabled persons, etc., and securing sufficient supply, etc.). Further, we assume that the licensees must pay fees for this affiliation. Whereas today, it is possible for licenses to convey rides directly without being affiliated with a taxi central or ride placement service, it is intended that the customer is informed about which affiliated taxi central has conveyed the ride.⁶ The minority opinion suggests also that all rides are conveyed through the taxi central/taximeter and not via mobile phones or other platforms, whereas the majority has queued this discussion to part two of the Official Norwegian Report.⁷ If and how this will be carried out in practice, and what it will entail as concerns risk of interference, prioritisation of rides and unlawful

⁵ See judgement of the Court (Grand Chamber) of 13 December 2005, *SEVIC Systems*, C-411/03, ECLI:EU:C:2005:762, paras 22-23 and case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 45.

⁶ Compare NOU 2023: 22, pp. 85 and 112.

⁷ *Ibid*, page 113-114.

information exchange, is not clear. In summary, the taxi central requirement effectively restricts both access to, and exercise of, professional transport services.

Furthermore, the taximeter regulation is not technology-neutral in that it requires a specific type of instrument (taximeter), which underscores the restriction. For market operators basing their services on a platform and an app, a taximeter requirement for all licensees is an additional cost and therefore in effect a barrier to entry and a restriction of the freedom of establishment.

3 THE RESTRICTION IS NOT JUSTIFIED (NECESSITY AND PROPORTIONALITY)

EEA EFTA states may justify restrictions on the freedom of establishment in view of overriding reasons relating to the general interest, provided that these are non-discriminatory, appropriate for attaining the objective pursued, in a coherent and systematic manner, and do not go beyond what is necessary for attaining that objective.⁸ The state bears the burden of proof.⁹

Restricting the number of licensees, albeit indirectly, is in our view not an overriding reason or suitable for the country as a whole.¹⁰ Grounds of a 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.¹¹ Considerations which do not individually constitute overriding reasons in the public interest do not acquire that quality by virtue of being bundled together.¹² We underline that the expert committee acknowledges in Chapter 11 of the NOU that the proposed provisions contain criteria that effectively will reduce the number of licensees.

Public safety, tax compliance and consumer protection could amount to overriding reasons and it is for the Member States to decide on the degree of protection that they wish to afford to such lawful interests, and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the EEA Agreement and must do so in a coherent and systematic way and within the other limits set by the EEA Agreement and must, in particular, observe the principle of necessity and proportionality.¹³

Regardless of the objective pursued, the objective must not be in the abstract. It must be assessed whether the measure actually seeks to protect the purpose it is said to protect.¹⁴ There must be a

⁸ See judgement of the Court of 1 June 2010, Blanco Pérez, joined cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, para. 64 and judgement of the Court of 8 June 2023, Prestige and Limousine SL v. Área Metropolitana de Barcelona and others, case C-50/21, ECLI:EU:C:2023:448, para 64.

⁹ Case C-110/05, ECLI:EU:C:2009:66, Commission v. Italy, para. 66.

¹⁰ See judgement of the Court of 8 June 2023, Prestige and Limousine SL v. Área Metropolitana de Barcelona and others, case C-50/21, ECLI:EU:C:2023:448. The limitation of PHV licences to one thirtieth (1/30) of the number of taxi licences was an inappropriate measure for ensuring objectives such as the sound management of transport, traffic and public space and environmental protection.

¹¹ Case C-338/09, ECLI:EU:C:2010:814, Yellow Cab Verkehrsbetrieb, para. 51.

¹² Judgement of the Court of 14 November 2013, Belgacom NV v. INTEGAN and Others, C-221/12, ECLI:EU:C:2013:736, para. 43.

¹³ See, to that effect, case C-169/07, ECLI:EU:C:2009:141, Hartlauer, para. 55 with further references. Judgement of the Court of 25 July 1991, Säger v. Dennemeyer & Co. Ltd, C-76/90S, ECLI:EU:C:1991:331, para. 15, and judgement of the Court of 13 July 2004, Commission v. France, C-262/02, ECLI:EU:C:2004:431, para. 24.

¹⁴ See Opinion of AG Pólares in Viking Line, C-438/05, ECLI:EU:C:2007:292, para. 67 et seq. and judgement, para 80.

direct link between the proposed measure and its stated purpose¹⁵. It is not sufficient that the proposed measure makes it *generally easier* for the authorities of that state to perform their supervisory task, if they can effectively carry out the task in the absence of the measure.¹⁶

Before proposing new legislation, the state must carefully assess if there are other means of preventing and combatting crime, tax evasion and work-related crime, and whether existing criminal-, labour- and sector law is sufficient or could be refined in less restrictive ways.¹⁷ A strict taxi central requirement must, if the ambition level is unprecedented high, be reflected in a coherent overall regulation within the relevant transport sector, e.g. relating to how licences are applied for, granted, supervised, and controlled, which is not the case here, and to which there are no alternatives. On the contrary, ESA firmly held in their 2017 reasoned opinion 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*”.¹⁸ It further noted that “[t]he 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”.¹⁹ We have not seen why this has changed now.

In order to conduct a proper proportionality assessment, alternatives should be mentioned and discussed. In particular, it is not clear, based on the proposal, why taximeter data inputted by the driver is better than data collected by a platform. Nor is it clear why data controlled by a taxi dispatch is better than data controlled by another service provider (e.g. platform operator). The overall assessment of proportionality should also reflect the ongoing EU initiatives to promote better working conditions for Europe whilst also harnessing the full benefits of digitalisation in platform work.²⁰ This balancing exercise appears to be missing in the proposal.

In summary, therefore, we do not see that there is a sufficiently direct link between the measures proposed and their stated purpose, since alternative means can achieve the same ends²¹ (e.g. exclusive rights, concessions, requirements upon the licensees or other incentives addressed to the local areas where there is a likely market failure). Existing regulation already provides for means to set criteria for granting licenses and imposing ex-post controls²², etc. Technical requirements focused

¹⁵ Case C-66/18 Commission v. Hungary, ECLI:EU:C:2020:792, para. 188 and case C-265/06 Commission v Portugal [2008], ECLI:EU:C:2008:210, para 41 and Case C-254/05 Commission v Belgium, [2007] ECR I-4269, paragraph 36.

¹⁶ Case C-369/96 Arblade and others, ECLI:EU:C:1999:575, para. 76.

¹⁷ See analysis in judgement of the Court of 8 June 2023, Prestige, and Limousine SL v. Área Metropolitana de Barcelona and others, C-50/21, ECLI:EU:C:2023:448, para. 85 et seq.

¹⁸ See ESAs reasoned opinion in case 41/17/COL of 22 February 2017, on page 15.

¹⁹ Ibid.

²⁰ Commission Notice on well-functioning and sustainable local passenger transport-on-demand (taxis and PHW), 2022/C 62/01, page 3.

²¹ Judgement of the Court of 6 October 2020, Commission v. Hungary, C-66/18, ECLI:EU:C:2020:792.

²² Compare judgement of 22 January 2002, Canal Satélite Digital, C-390/99, para. 39.

on instruments or specific means, rather than functions, may restrict innovation.²³ Today's GPS tracking- and machine-to-machine technology in telecom and the automobile industry, and the available mobility service offerings, make it difficult to see that a taxi central is necessary to ensure these objectives.²⁴

4 LITIGATION RISK

Affected parties could challenge the act, if adopted, through a declaratory judgement that the act is unlawful and contrary to the EEA Agreement or an application for an interim injunction to prevent the entry into force of the act until the EEA compliance has been finally resolved.

The EFTA Court has confirmed that the EEA EFTA States are obliged to provide compensation for loss caused as a result of breaches of obligations under the EEA Agreement for which the state in question can be held accountable.²⁵ The state may be held responsible for a breach of its obligations under EEA law when (i) the rule of law infringed is intended to confer certain rights on private parties, i.e. individuals and/or economic operators, (ii) the breach of the state's obligation is sufficiently serious and (iii) there is a direct causal link between the breach of the obligation and the loss suffered by the injured party.

In the case at hand, we are of the opinion that the breach will be deemed sufficiently serious and that there could be a causal link between the breach and the loss suffered, consequently giving private parties a basis for a compensation claim.

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²³ Cf. Commission Notice on well-functioning and sustainable local passenger transport-on-demand (taxis and PHW), 2022/C 62/01.

²⁴ Compare case C-319/06 Luxembourg v. Commission, ECLI:EU:C:2008:350, para. 91, where the Court of Justice held that the state must provide *specific evidence* in support of the proposed measure.

²⁵ See e.g. E-9/97 (*Sveinbjörnsdóttir*) and the Supreme Court's ruling in HR-2019-1801 (*Fosen Linje*).