Neutral Citation Number: [2017] EWHC 3141 (Admin)

Case No: CO/5808/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2017

Before :

JOHN HOWELL QC

- -

Between :

MARK ROSTRON	**Claimant**
- and -	
GUILDFORD BOROUGH COUNCIL	**Defendant**

- -
- -

Mr Charles Streeten (instructed on direct access) for the **Claimant**
Mr Philip Kolvin QC (instructed by **solicitor to Guildford Borough Council**) for the **Defendant**

Hearing dates: 7 and 9 November 2017

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Approved Judgment

John Howell QC :

1. This is a claim for judicial review of the decision of Guildford Borough Council to fix for 2016-2017 the maximum fares that may be charged for the hire of hackney carriages within the Borough. The decision, which involved a reduction in the fares previously chargeable, was to have had effect from November 16th 2016.

THE CLAIM FOR JUDICIAL REVIEW

2. The Claimant, Mr Mark Rostron, is the Secretary of the Guildford Hackney Association, an unincorporated association that seeks to represent the interests of taxi drivers in the Guildford area. It has about 100 members who are drivers and it claims to have the support of a number of private hire companies employing over 100 drivers. The Claimant has been authorised by the Association to bring this claim on their behalf.

3. The fares in issue were produced using a method of calculation which the Claimant has not impugned. But the decision setting the fares was impugned by the Claimant, in his claim filed on November 16th 2016, on the basis that it "was irrational and unreasonable as the [fares were calculated] based on flawed and outdated data".

4. On the same day that this claim was filed Edis J ordered the Borough Council to suspend the new maximum fares coming into force as had been planned on that date. Permission to make this claim was eventually granted by Nicola Davies J in an order dated August 29th 2017 but only on the grounds set out in the original Statement of Facts and Grounds. She refused the Claimant permission to rely on any of the additional grounds set out in a further, 29 page Statement of Facts and Grounds dated February 2nd 2017. Nicola Davies J also expedited the hearing of this claim so that it would be heard as soon as possible after October 23rd 2017.

5. Shortly before the hearing, the Claimant applied to amend the grounds upon which it was made and to adduce in evidence a witness statement by him and the additional documents it exhibited. In the circumstances I refused him permission to adduce that witness statement and those documents. I also refused him permission to contend that the Borough Council had failed to acquaint themselves with all relevant information to fix fares appropriately and that they had failed to take into account conscientiously the product of the statutory consultation which they had held. I gave permission, however, for the Claimant to contend, on the basis of the material already before the Court, that the Borough Council had relied on a material error of fact; that they had reached a decision the effect of which was disproportionate or unreasonable, and that they had failed to promote the statutory purpose of section 65(1) of the Local Government (Miscellaneous Provisions) Act 1976 ("*the 1976 Act*"), the provision under which the maximum fares were set.

THE LEGAL BACKGROUND

6. Hackney carriages, that is to say vehicles used in standing or plying for hire in any street[1], are subject to regulation in each district outside London under the Town

[1] see section 37 of the 1847 Act and section 80(1) of the 1976 Act; Halsbury's Laws of England Road Traffic Vol 89 (2011) para 1180.

Police Clauses Act 1847 ("*the 1847 Act*")[2] and under Part II of the 1976 Act (where the local authority have adopted it). The system of regulation is designed to protect the public in particular their customers.

7. Hackney carriages and their drivers both require licences from the local authority: see sections 37, 45, 46 and 47 of the 1847 Act. These requirements are imposed to ensure *inter alia* that both are fit to be relied on by the public. The grant of a licence for a vehicle (which is normally for a year) may be refused for the purpose of limiting the number of hackney carriages in respect of which licences are granted, if, but only if, the authority is satisfied that there is no significant demand for the services of hackney carriages (within the area to which the licence would apply) which is unmet[3]. The authority may attach such conditions to the grant of any such vehicle licence as they consider reasonably necessary[4]. If licensed, the vehicle may be inspected and tested for fitness by the authority at any time and, if it is unfit for use or there is any other reasonable cause, the licence may be suspended, revoked or not renewed[5]. Where Part II of the 1976 Act applies, the authority may not grant a driver a licence (which is normally granted for up to three years) unless they are satisfied that he or she is a fit and proper person to hold it, is not disqualified by reason of their immigration status from driving a hackney carriage, and is at the date of the application, and has been for at least 12 months, authorised to drive a motor car[6]. A driver's licence may be suspended, revoked or not renewed if, since its grant, the driver has been convicted of an offence involving dishonesty, indecency or violence or for any other reasonable cause {** Footnote see section 61 of the 1976 Act.}.

8. The grant of such licences enables a vehicle to ply for hire. But it also brings obligations. The local authority may make bylaws for regulating the conduct of the proprietors and drivers of such vehicles in their several employments, the hours within which they may exercise their calling, and the number of persons to be carried by such vehicles; for fixing their stands, the distance to which they may be compelled to take passengers, and the rates or fares to be paid; and for securing the safe custody and re-delivery of any property accidentally left in them: see section 68 of the 1847 Act. Further the driver of a hackney carriage standing at an appointed stand or in any street must, unless he or she has reasonable excuse, drive to any place within the district to which they may be directed to drive by the hirer or the person intending to hire the vehicle and a driver may not refuse to carry the full complement of passengers if required to do so by the hirer[7].

9. The Borough Council also has power to fix the fares by virtue of section 65 of the 1976 Act. This section provides *inter alia* that:

> *"(1) A district council may fix the rates or fares within the district as well for time as distance, and all other charges in connection with the hire of a vehicle or with the arrangements for the hire of a vehicle, to be paid in respect of the hire of hackney carriages by*

[2] The 1847 Act was extended to all areas not previously subject to it by the Transport Act 1985.
[3] see section 43 of the 1847 Act and section 16 of the Transport Act 1985.
[4] see section 47 of the 1976 Act.
[5] see Halsbury's Laws of England Road Traffic Vol 89 (2011) para 1209; sections 50 and 60 of the 1976 Act.
[6] see sections 53, 57 and 59 of the 1976 Act.
[7] see sections 52 and 53 of the 1847 Act and section 63 of the 1976 Act.

> *means of a table (hereafter in this section referred to as a "table of fares") made or varied in accordance with the provisions of this section.*
>
> *(2)*
>
> *(a) When a district council make or vary a table of fares they shall publish in at least one local newspaper circulating in the district a notice setting out the table of fares or the variation thereof and specifying the period, which shall not be less than fourteen days from the date of the first publication of the notice, within which and the manner in which objections to the table of fares or variation can be made.*
>
> ....
>
> *(3) If no objection to a table of fares or variation is duly made within the period specified in the notice referred to in subsection (2) of this section, or if all objections so made are withdrawn, the table of fares or variation shall come into operation on the date of the expiration of the period specified in the notice or the date of withdrawal of the objection or, if more than one, of the last objection, whichever date is the later.*
>
> *(4) If objection is duly made as aforesaid and is not withdrawn, the district council shall set a further date, not later than two months after the first specified date, on which the table of fares, shall come into force with or without modifications as decided by them after consideration of the objections.*
>
> *(5) A table of fares made or varied under this section shall have effect for the purposes of the Act of 1847 as if it were included in the hackney carriage bylaws made thereunder."*

10. The table of fares also constrains the amount that can be charged for the use of a hackney carriage in the district under a contract for private hire[8] and, in the absence of any prior agreement, the amount that can be charged for a journey ending outside the district[9].

11. In March 2010 the Department of Transport published a revised version of "*Taxi and Private Hire Vehicle Licensing: Best Practice Guidance*" to assist local authorities that had responsibility for the regulation of such vehicles. In relation to setting fares, it stated that:

> *"52. Local licensing authorities have the power to set taxi fares for journeys within their area, and most do so. (There is no power to set PHV fares.) Fare scales should be designed with a view to*

[8] see section 67 of the 1976 Act.
[9] see section 66 of the 1976 Act.

> *practicality. The Department sees it as good practice to review the fare scales at regular intervals, including any graduation of the fare scale by time of day or day of the week. Authorities may wish to consider adopting a simple formula for deciding on fare revisions as this will increase understanding and improve the transparency of the process. The Department also suggests that in reviewing fares authorities should pay particular regard to the needs of the travelling public, with reference both to what it is reasonable to expect people to pay but also to the need to give taxi drivers sufficient incentive to provide a service when it is needed. There may well be a case for higher fares at times of higher demand.*
>
> *53. Taxi fares are a maximum, and in principle are open to downward negotiation between passenger and driver. It is not good practice to encourage such negotiations at ranks, or for on-street hailings; there would be risks of confusion and security problems. But local licensing authorities can usefully make it clear that published fares are a maximum, especially in the context of telephone bookings, where the customer benefits from competition. There is more likely to be a choice of taxi operators for telephone bookings, and there is scope for differentiation of services to the customer's advantage (for example, lower fares off-peak or for pensioners).*
>
> *54. There is a case for allowing any taxi operators who wish to do so to make it clear – perhaps by advertising on the vehicle – that they charge less than the maximum fare; publicity such as '5% below the metered fare' might be an example."*

THE FACTUAL BACKGROUND

12. In 2013 the Borough Council's Executive approved a method for calculating the table of fares. This method involves a formula that produces the basic charge per mile travelled with one passenger by an average driver that is required to provide a certain annual salary having covered average running costs. The running costs include allowances for matters such as fuel, tyres, parts and servicing, depreciation, and insurance. A number of the costs involved were derived from figures about the costs of owning and running a car published by the Automobile Association ("*the AA*"). The annual salary is intended to represent the average of the median annual gross salary of residents and workers in Guildford. To determine how much needs to be charged to enable an average driver, one who drives the average distance each year travelled by a hackney carriage in Guildford, to earn that salary an estimate has to be made of the distance travelled without a passenger ("*dead mileage*"). Since each journey includes an initial fare for any distance up to 204 yards or 36 seconds (referred to as the "flag drop"), the calculation is adjusted so as to provide for a flag drop and the price for each 204 yards or 36 seconds travelled thereafter. The fares are fixed so as to secure that the flag drop and that variable charge on journeys to destinations within the Borough between 7am and 11pm, other than on Sundays, with one passenger ("*the basic tariff*") cover the annual salary and running costs. Additional amounts, however, can be earned at night, on Sundays and public holidays

and if there is more than one passenger or if the passenger is to be taken outside the Borough.

13. It was intended that the table of fares should be reviewed using this method annually or more frequently if there were significant changes to the costs taken into account. In 2015 a review had indicated that the maximum fares in the fares table calculated according to this method and approved in 2013 should be reduced mainly due to the decrease in the cost of fuel and, to a lesser extent, as the AA also showed a reduction in the costs associated with running a motor vehicle. In the event a new table of fares was not adopted given concerns about the potential increase in costs that drivers might face with the introduction of a new Taxi and Private Hire Licensing Policy by the Council and about the accuracy of the AA figures. The table of fares approved in 2013, therefore, was still that in force immediately before the decision impugned.

14. After the new Taxi and Private Hire Licensing Policy had been adopted and before undertaking the statutory consultation required if a new table of fares was to be adopted for 2016-2017, the Borough Council sent a consultation questionnaire to all 200 licensed hackney carriage drivers and the proprietors of 193 licensed taxis on April 27th 2016 seeking their views on each of the costs to be used in the calculation of fares (indicating what the 2015 review had found that they should have been), further information about the conduct of their businesses and any other comments that they might have. This consultation closed on May 27th 2016. The Borough Council received, however, only five substantive replies to the 262 consultation questionnaires that they had distributed. The Claimant did not respond substantively to this non-statutory consultation but he sent a copy of a pre-action protocol letter relating to the previous review in 2015, that had been sent to the Borough Council on his behalf, which alleged that the Council had been intending to place inappropriate reliance on, and to misuse, cost tables that had been published by the AA.

15. On September 14th 2016 the Borough Council's Licensing Committee considered a report on this non-statutory consultation. The Committee decided to recommend that the Executive should authorise the Head of Health and Community Care Services to make such changes to the costs to be input to the calculation, in consultation with the Lead Councillor for Licensing and Community Safety, as that Officer thought appropriate. The reason for the recommendation was to ensure that the fares were reviewed in line with the costs of providing the services and would allow drivers to cover the costs of running a taxi and providing a service to the public while ensuring that the fares were reasonable ones for the public to pay. A similar report was presented to the Borough Council's Executive which approved the recommendation. The report considered the responses to the non-statutory consultation, the appropriateness of using certain costs figures provided by the AA rather than those used by Transport for London ("*TfL*") when setting taxi fares in London, the reduction that had occurred in the cost of fuel since the table of fares had been last calculated in 2013 and various changes to the items of cost that should be taken into account.

16. The required statutory consultation began on October 14th 2016 with an advert in a local newspaper setting out the proposed fares table and giving until November 1st 2016, a period in excess of 14 days, within which objections could be made. The Claimant and nine others made representations. There was also a petition signed by drivers including the Claimant. The representations were considered in November 2016. Officers produced a table of individual representations and responses.

17. The relevant Officer then computed the fares using the method approved. The method and data used are shown in a document entitled "Hackney Carriage (Taxi) Table of Fares Methodology 2016/2017" ("*the Methodology*"). This set out and explained the various data used in the calculation. The data was also entered in an excel spreadsheet "Guildford Hackney Carriage Fares Calculator 2016/2017". It contained the calculation of fares including the formulas used and the calculation of running costs.

18. The new fares table adopted resulted in a reduction in the basic tariff for the first mile from £4.86 to £4.52 (a reduction of 7%) and for the second mile from £2.04 to £1.72 (a reduction of 15.7%). The amount chargeable for a journey of two miles, £6.24, a reduction of 9.6%, however, was the same as the amount that was then being charged for the same journey in Runnymede and more than the average charge of £6.20 for a trip of that length across Southern England. The national average was £5.68.

THE COUNCIL'S PURPOSE WHEN ADOPTING THE FARES TABLE AND HOW THEIR DECISION FALLS TO BE REVIEWED

i. submissions

19. In this case, so Mr Charles Streeten submitted on behalf of the Claimant, the Borough Council decided deliberately to reduce the potential earning capacity of taxi drivers in Guildford. Thus the use of T*f*L figures to identify the costs of running a hackney carriage was rejected, not on their basis of accuracy, but because "this would produce a higher cost and subsequently higher fares". That, so he contended, was not a proper exercise of the statutory power given by section 65(1) of the 1976 Act. Moreover, by unreasonably relying on arbitrary, outdated or obviously unreliable data to ensure a reduction in fares, the Council's approach risked making it unviable to operate a taxi in the area and the result was disproportionate.

20. Mr Streeten contended that a decision may be quashed if it is unreasonable or if it is based on a finding of fact, or inference from the facts, that is perverse or irrational or if there is no, or insufficient, evidence to support it: see *Stefan v General Medical Council (No 3)* [2002] UKPC 10 per Lord Steyn at [6]; *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, per Lord Millett at [99]. The intensity of the scrutiny and the weight to be given to any primary decision-maker's view depends, so he submitted, on the context: see *Kennedy v Charity Commission* [2014] UKSC 20 per Lord Mance at [51]-[56], *Pham v Secretary of State for the Home Department* [2015] UKSC 19 per Lord Mance at [94]-[96]. That is so even in relation to factual issues: see *IBA Healthcare Limited v Office for Fair Trading* [2004] EWCA Civ 142, [2004] ICR 1364 per Carnwath LJ at [94]. Here the Borough Council had itself recognised the importance of ensuring that the right costs were used. Setting the fares involved a highly fact sensitive analysis by the authority that put the livelihood of 220 drivers operating in Guildford at risk or would at least have a significant impact on it. In that context intense scrutiny of the data used by the Council and a robust justification of their choice was required.

21. Such an intense scrutiny was also required, so Mr Streeten contended, by EU law. He submitted that the table of fares was an unjustified restriction on the freedom of establishment enjoyed by EU nationals by virtue of article 49 of the Treaty of the Functioning of the European Union ("*TFEU*"). Unless justified, that article precludes any national measure which, even though it is applicable without discrimination on

the ground of nationality, is liable to hinder or render less attractive the exercise by EU nationals of their freedom of establishment: see *C-140/03 Commission v Hellenic Republic* EU:C:2005:242, [2005] ECR I-3193, [2005] 3 CMLR 5, at [27]; *C-465/05 Commission v Italian Republic* EU:C:2007:781, [2007] ECR I-11095, [2008] 3 CMLR 3, at [16]-[18].

22. The test for whether there is any such "cross-border" element, so Mr Streeten submitted, is low. It is sufficient if there is a realistic prospect of cross-border interest: see *R (Chandler) v Secretary of State for Children Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749 at [30]. It may be sufficient, however, if it is merely far from inconceivable that there is such an interest: see *C-357/10 Duomo Gpa Srl v Comune di Baranzate* EU:C:2012:283; [2012] 3 CMLR 10, at [27]. On either basis EU nationals may be interested in exercising their freedom to become taxi drivers in Guildford. Indeed, so Mr Streeten asserted, there is at least one EU national (Agniezka Druzba) who has applied for a hackney carriage licence in Guildford.

23. Limiting the fares a driver may charge plainly makes that activity less attractive by restricting a driver's capacity to earn profits and, so Mr Streeten submitted, it constitutes a restriction on that person's freedom of establishment. Any such interference has to be proportionate if it is to be justified. In this context that principle generally falls to be applied more strictly than in other areas and the justification needs to be examined in detail. Given that the justification for the restriction is economic, it is more open to detailed scrutiny by the court: see *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697, ("*Lumsdon*") at [35], [37], [50] and [56]. That meant, so he submitted, that the Borough Council had to identify the public interest in question and the level of protection necessary to protect that interest and to demonstrate that the required level of protection could not be attained by less restrictive means: see *R (Uber London Limited) v Transport for London* [2017] EWHC 435 per Mitting J at [14]-[18]. In this case the public interest concerns catering to the needs of the travelling public with reference to both what it is reasonable for them to pay and the need to give drivers a sufficient incentive to provide the service when required. The maximum rate set must be robustly justified. It must be the minimum interference necessary to ensure that customers are not overcharged for the use of taxis, bearing in mind that fares are always open to downward negotiation and imposing a maximum may preclude drivers offering a better service to customers.

24. When considering the evidence relied upon in justification for any restriction, Mr Streeten pointed to the judgment of Green J in *R (British American Tobacco (UK) Limited and others) v Secretary of State for Health* [2016] EWHC 1169 (Admin), [2016] ETMR 38, ("*British American Tobacco*") where he said that:

> *"408....It was agreed between the parties (and as I set out below) that...it was for the Court to decide upon the application of the proportionality principle to the facts; that it should do this upon the basis of the best up to date scientific information and evidence; that there was a margin of discretion to be afforded to the decision maker; and, that the extent of that margin was context specific. There is also no serious dispute to the proposition that the Court must examine the facts in detail and that this judicial task is not to be confused with the intensity of review: A Court might have to*

> *work very hard in order to come to the conclusion that the margin of appreciation was broad and that the decision taken was within that margin. The level of detail into which a Court delves, and the "margin of appreciation", are two quite different things.*
>
> ....
>
> *420. At base the Court is assessing the reasonableness of the evidence advanced by the State to justify the disputed measure. This is not classic broad brush "Wednesbury" reasonableness; it is a rationality challenge the intensity of which is calibrated according to a range of variable policy factors which are context specific but it is a challenge which nonetheless requires detailed judicial engagement with the facts.*
>
> *421. The margin of appreciation is not ignored in this process. Factors relevant to it are fed into the assessment of rationality/reasonableness."*

25. Any infringement of article 49 was, so Mr Streeten submitted, something that the Claimant, suing on behalf of himself and the Guildford Hackney Association, had a sufficient interest to assert given their interest in the proper running of the taxi regime in Guildford: cf *R (Chandler) v Secretary of State for Children Schools and Families* supra at [78].

26. In response, on behalf of the Borough Council, Mr Philip Kolvin QC contended that article 49 of the TFEU was not engaged. The Court of Justice has consistently held that that provision cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State: see eg *C-419/12 Crono Service scarl v Roma Capitale* EU:C:2014:81, [2014] 3 CMLR 5, at [36]. There must, therefore, be some evidential underpinning for the cross-border element so as to found an article 49 claim. Here there is none. Even if there is one EU national interested in providing taxi services in Guildford (about which there was no evidence), that is insufficient. Moreover the Claimant does not have a sufficient interest in such a challenge to give him standing: he is a British citizen and there is no evidence of any EU nationals within the Association that he claims to represent who are exercising their EU rights in Guildford and who are affected by the decision.

27. In any event, so Mr Kolvin submitted, there was no basis for concluding that the table of fares breached the rights of any national of another EU State under article 49. It is not suggested that the table is discriminatory. There is no evidence of any relevant adverse effect by the setting per se of a maximum fare for journeys undertaken wholly within the borough by one kind of licensed carrier of passengers. Nor is there any evidence that a maximum fare set so as to permit the driver to cover his or her costs while earning the median wage for Guildford residents and workers would genuinely render the exercise of any driver's freedom of establishment in the United Kingdom less attractive. But, if there was any relevant restriction involved, it was justified. There is a relevant overriding reason relating to the general interest, namely consumer protection: see *C-260/04 Commission v Italy* EU:C:2007:508, [2007] ECR I-7095, [2007] 3 CMLR 50, at [27]. That was the Council's aim: the allegation that its

purpose was in fact improper is in any event without foundation. Setting a maximum price is a suitable means of achieving that aim and the resulting table of fares, which is to be reviewed periodically, does not go beyond what is necessary.

28. In considering the approach to the data to be used, Mr Kolvin noted that, in considering whether an interference with a fundamental freedom was justified, "where... a national measure does not threaten the integration of the internal market, for example because the subject matter lies within an area of national rather than EU competence, a less strict approach [to what maybe proportionate] is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture": see *Lumsdon* supra per Lord Reed and Lord Toulson JJSC at [37]. "The court has also accepted that, where a relevant public interest is engaged in an area where EU law has not imposed complete harmonisation, the member state possesses "discretion" (or, as it has sometimes said, a "margin of appreciation") not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question": ibid at [64]. The test is not whether the scheme is "manifestly inappropriate": see ibid at [62]. It is, so Mr Kolvin submitted, whether the authority has exceeded its margin of appreciation. He also relied on other parts of the judgment of Green J in *British American Tobacco* to support his submissions.

29. In this case, so Mr Kolvin submitted, the best evidence of drivers' costs would have been those costs but, although consulted, the drivers did not supply usable or reliable evidence of such costs, even though they must have them for tax purposes. The Borough Council had rejected use of T*f*L data for proper reasons. They used a set of data from the AA, the applicability of which was considered and which was, where necessary, adjusted on an item by item basis. The Borough Council conscientiously assessed the available data sources and made reasonable judgments. Further the Council have made clear that they will review the fares fixed periodically and in the light of new data. In those circumstances, the fares table adopted was neither disproportionate nor unreasonable and was within the Council's margin of appreciation.

ii. the Borough Council's purpose

30. I reject the contention that the Borough Council's purpose when adopting the fares table was to reduce the potential earning capacity of taxi drivers in Guildford, although the table of fares may have that effect. The Council's aim when setting the maximum fares was to protect consumers by ensuring that the fares were ones that were reasonable for the public to pay for an available service. As the Report stated, for example[10],

> *"It is important to ensure taxi fares are reviewed regularly to allow drivers to cover the costs of running the service and earn a wage, and provide a service to the public when it is needed whilst ensuring that fares are reasonable for the public to pay for such a service."*

[10] See also the reason for the recommendation to the Executive.

31. Mr Streeten's contention was based on a partial citation from the report to the Executive. The passage in that report on which Mr Streeten founded his contention that the Council had an improper purpose appeared in part of the discussion which that report contained about the respective merits in relation to the costs of providing a service in Guildford of data from T*f*L and the AA. It was stated in the report (highlighting in italics the passage on which Mr Streeten relied) that:

> *"4.30 It is also important to emphasise that the fare methodology, including use of AA figures, was approved in 2013 to allow taxi drivers to recover their costs associated with running a taxi. The approval of this methodology followed nearly two years of consultation with the taxi trade with proposed amendments to the methodology subject to a number of reports to the Licensing Committee and Executive, and an independent audit.*
>
> *4.31 When the calculator was run in 2015, the trade questioned the use of AA data because, as at that time, a reduction in fares was proposed. The trade requested that running costs be calculated using TfL data. This would produce a higher cost and subsequently higher fares despite a reduction in motoring costs for the year 2015. During this current consultation, no evidence has been provided about the costs associated with running a taxi.*
>
> *4.32 Any increase in costs will have an impact on taxi fares, and it is important to ensure that costs are accurate so that the travelling public are charged fairly for the service they receive. Currently the public are not benefiting from reduced fares as a result of reduced fuel costs. Furthermore, the view from most members of the trade is that whilst they do not wish to have a reduction in fares, most do not wish for fares to be increased."*

32. The statement that using T*f*L data "would produce a higher cost and subsequently higher fares despite a reduction in motoring costs for the year 2015" was simply a statement of fact. The Borough Council intended, when setting the maximum fares, as stated in paragraph [4.32] of the report, "to ensure that costs are accurate so that the travelling public are charged fairly for the service they receive". The object (as also stated in paragraph [3.4]) was to ensure that fares were reasonable for the public to pay for such a service when it is needed. That in my judgment was a purpose for which the Council were entitled to exercise the power conferred on them by section 65(1) of the 1976 Act.

iii. the relevance and implications (if any) of article 49 of the TFEU

33. The issues raised by the submissions of the parties on article 49 of the TFEU are (i) whether the Claimant has standing to complain of any infringement of that article; (ii) whether in any event article 49 is engaged; and, if it is, (iii) what approach should be adopted by the court to determining whether or not the table of fares is a justified restriction on the freedom that article 49 confers.

34. Article 49 of the TFEU provides *inter alia* that;

> *"....restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited....Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings... under the conditions laid down for its own nationals by the law of the country where such establishment is effected..."*.

35. The concept of "establishment" is a broad one, allowing an EU national to participate on a stable and continuous basis in the economic life of a Member State other than his own (as opposed to merely providing services there on a temporary basis) and to profit from doing so[11]. As the Grand Chamber of the Court of Justice put it in *C-518/06 Commission v Italy* EU:C:2009:270; [2009] ECR I-3491; [2009] 3 CMLR 2 at [62] and [64],

> *"…it is settled case-law that the term 'restriction'... covers all measures which prohibit, impede or render less attractive the freedom of establishment...the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade."*

36. The requirement for a "cross-border" effect gives rise to the first two of the issues I have identified.

37. The Claimant is a British citizen and there is no evidence that any of the members of the Association that he claims to represent are nationals of other EU States. I will consider what standing the Claimant may have to make a claim for judicial review in relation to any infringement of article 49 that the table of fares may involve below together with questions about what relief (if any) he may be entitled to.

38. It is well established that a measure, which makes the issue of a prior authorisation a condition for undertaking any relevant activity, is a "restriction" that requires justification, since it is capable of hindering the exercise of freedom of establishment by preventing such activities from being freely pursued. The requirement for a licence for a hackney carriage and its driver would thus constitute such a "restriction". Neither party has suggested, however, that the limitation on maximum fares chargeable for the use of hackney carriages should be regarded simply as one element of a restrictive licensing system, all the elements of which need separate justification[12]. Instead they have focussed simply on whether the table of fares itself has a restrictive "cross-border" effect. That may be understandable given that there is no obligation on a local authority to promulgate a table of fares. It is only a potential, not a necessary, element of the system of prior authorisations to enable vehicles and their drivers to ply for hire. Accordingly I have considered whether or not the table of fares itself constitutes a "restriction" for the purpose of Article 49 of the TFEU (albeit that it operates within such a system).

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[11] Article 58 of the TFEU states that the provision of services in the field of transport is governed by Title VI of the Treaty. The Claimant does not rely on any provisions made in or under that Title.

[12] see eg *C-400/08 Commission v Spain* EU:C:2011:172, [2011] 2 CMLR 50, at [64]-[65], [75]-[76].

39. In considering cases on whether a "cross-border" element exists, in my judgment it is necessary to treat those in which the Court of Justice is considering whether it has jurisdiction to entertain a reference with caution. According to its settled case-law, that Court may decline to rule on a question referred for a preliminary ruling by a national court only when, in particular, it is quite obvious that the provision of EU law referred to the Court for interpretation cannot be applied. It is sufficient to establish admissibility, therefore, merely to show it may be applicable, that is to say that there may be a "cross-border" effect: see eg *C-692/15 Security Service Srl v Ministero dell' Interno* EU:C:2016:344 at [22] and [25]. In such cases it may well be sufficient to establish admissibility that it is "far from inconceivable" that there is such an element: cf *C-357/10 Duomo Gpa Srl* supra at [26]-[29].

40. It is also necessary in my judgment to be sensitive to the nature of the "cross-border" element that has to be shown to exist in the cases under consideration. A number of the cases cited to me concern the requirement to subject contracts to competition, in which those from other EU States may participate, in particular by advertising the opportunity to bid, that may arise under Article 49 and/or the Treaty provisions on services together with the principle of non-discrimination on the ground of nationality. In such cases the requirement applies to such contracts which are "likely to be" or "may be of interest" to those in such other States: see eg *C-147/06 SECAP SpA v Commune di Torino* EU:C:2008:277, [2008] ECR I-3565, [2008] 2 CMLR. 56, at [20]-[24]; *C-91/08 Wall AG v Stadt Frankfurt am Maim* EU:C:2010:182, [2010] ECR I-2815, at [34]-[35], *C-226/09 Commission v Ireland* EU:C:2010:697, [2010] ECR I-11807, at [32]-[33]. In those cases the existence of that interest was shown by the fact that in fact they had been advertised as being of EU wide interest or in the OJEU or by reference to the fact that the contract was likely to be of interest in view of its particular characteristics. Whether there is a certain "cross-border" interest in a contract, however, must nonetheless be the positive outcome of a specific assessment of the circumstances of the contract in issue: see *C-318/15 Tecnoedi Costruzioni Srl v Comune di Fossano* EU:C:2016:747 at [22].

41. In this case the alleged "cross-border" element does not relate to any potential interest in any specific contract. It concerns whether capping fares that may be charged by hackney carriages in Guildford impedes or renders less attractive the exercise of their freedom of establishment affecting access to the market by persons from other Member States and thereby hinders intra-Community trade: see paragraph [35] above. It is plainly a substantial interference in the freedom to contract that economic operators in principle enjoy. The Grand Chamber of the Court of Justice has held that a maximum tariff chargeable for a service may constitute a "restriction" where those from other States are deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition but whether it does so, and thus hinders intra-Community trade, depends on the facts: see *C-565/08 Commission v Italy* EU:C:2011:188, [2011] 3 CMLR 1 at [46], [51], [52]. In that case the Court found no such "restriction" had been shown to exist, given the flexibility available within the scheme that appeared to allow proper remuneration for all types of the services in question. Where it does not do so, in my judgment such a "restriction" may exist: see *C-475/11 Kostas Konstantinides* EU:C:2013:542, [2014] 1 CMLR 33, at [31], [48]-[49]. Such a "restriction" would not exist, however, if the maximum charges fixed exceeded what is chargeable for the service in practice given competition in the relevant market, if there would be no interest in providing the

service in any event from those from other EU States or if the maximum charges set did not render the exercise of their freedom of establishment less attractive in practice.

42. In this case the table of fares allows little or no flexibility in the maximum charges that may be made for the use of hackney carriages. There is also no suggestion that the maximum charges fixed exceed what is chargeable for the service provided by hackney carriages in practice given the level of competition from those plying for hire or from private hire vehicles. In my judgment the issue is whether there would be any interest in providing the service from those from other EU States and whether the exercise of the freedom to be do so would be rendered less attractive by the maximum fares set.

43. Whether there would be any interest in providing the service from those from other EU States in my judgment has to be determined absent the "restriction" in issue. Were the alleged "restriction" to be taken into account, it could extinguish any "cross-border" interest and thus negate the freedom of establishment that article 49 confers without justification.

44. There is no presumption that conducting any activity in the United Kingdom will necessarily be of interest to those from other EU States. Mr Kolvin submitted in effect that there is no evidence that there is any such interest in this case. I do not accept, however, that it is necessary to identify one or more persons from other EU States who would wish to be established in this country providing taxi services in Guildford. In my judgment what is required is an assessment of whether, absent the alleged "restriction", there would likely be such an interest. Given the need merely for a suitable vehicle, a driver's licence and the licences required to ply for hire, in my judgment it is likely that an EU national seeking employment or more remunerative employment (whether that person is already resident in the United Kingdom, or still resident in an another EU State) would be interested in providing such services, given the opportunity to earn at least or more than £28,240.50 a year, a not insignificant amount.

45. The table of fares may make the opportunity to provide such services less attractive than it otherwise would have been. In some cases, however, the effect of a measure may be too uncertain, indirect or insignificant to have the required deterrent impact. In this case the Claimant has provided no evidence that the table of fares adopted is likely to have any such impact if drivers are on average able to earn that salary when the basic tariff is applicable, with the ability to earn more at night, on Sundays and certain holidays and on trips with more than one passenger or ending outside the Borough. On the evidence I am not prepared to find that the Claimant has established that the table of fares in fact would have the required restrictive effect on the freedom of establishment of EU nationals.

46. It is also true that the table of fares in this case applies only to journeys within, or beginning in, the borough of Guildford. But in my judgment the freedom of establishment guaranteed by article 49 is not limited to parts only of the territory of the host State and a "restriction" which affects access to the market in some part of it for nationals of other EU States is one that requires justification if it is to be lawful.

47. Although the Claimant has not established that the table of fares constituted a "restriction", I nonetheless propose, however, to examine the Claimant's case on the assumption that the table of fares adopted engaged article 49 of the TFEU.

48. The issue is then, on that assumption, whether the table of fares is a justifiable restriction on the exercise of the fundamental freedom conferred by article 49. In *Lumsdon* supra Lord Reed and Lord Toulson JJSC stated at [37] that, in such a context,:

> *"Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject matter lies within an area of national rather than EU competence, a less strict approach is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture."*

49. More specifically Lord Reed and Toulson JJSC stated (at [52]) that, when considering a measure interfering with a fundamental freedom,

> *"The court's general approach in this context was explained in the* Gebhard *case, concerned with the provision of legal services:*
>
> > *"national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." (para 37)"*

50. In relation to the first of these four conditions, the Claimant does not suggest that the table of fares is applied in a discriminatory manner.

51. In relation to the second condition, protection of consumers is capable of being an overriding aim of public interest when considering any restriction under article 49 of the TFEU: see eg *Lumsdon* at [54]. In this case the market for taxis that ply for trade from ranks and from being hailed on the streets may make it difficult for consumers to exercise choice on price or quality of service (for example in another or better

vehicle)[13]. If the customer refuses any fare or service offered, he or she may face an uncertain waiting time before repeating the same negotiation with, or seeking a better service, from another cab that is plying for hire. Ensuring that those authorised to stand and ply for hire charge no more than is reasonable for the service provided and do not unfairly exploit their position is a legitimate aim in the public interest. It is not suggested that in this case the second condition is not met.

52. It is also not suggested in respect of the third condition that a table of fares is not suitable for securing the attainment of the objective.

53. The issue between the parties relates in effect to the fourth condition, whether the particular table of fares goes beyond what is necessary in order to attain that objective.

54. There are different types of issues, however, that may arise in relation to this condition. (i) The first is whether there is a ***type*** of measure that is less onerous that would achieve the relevant objective set by an authority. An example might be whether increased taxation generally on a product would be a measure to deter consumption of alcohol by particular groups that would be less onerous on producers than a minimum prescribed price but achieve the same public health benefits. (ii) The second concerns whether a different amount, limit or threshold than one incorporated in the measure would be less onerous than the one selected. Examples may be a specific price or a maximum or minimum charge.

55. It is a feature of any amount, limit or threshold incorporated in a restriction that it can always be asked why that particular amount, limit or threshold, rather than another one somewhat higher or lower, was adopted. Where such an amount, limit or threshold is set may not always be susceptible of precise justification but can only be determined by a judgment by the authority vested with the discretion to fix it, since it is for that authority to determine the degree of protection for the public interest that they wish to secure. A different amount, limit or threshold may be less onerous for those restricted but it would not be equally appropriate from the authority's point of view. Provided that the amount, limit or threshold selected is reasonable and that it preserves a fair balance between the public interest and the interests of those whose rights are restricted, however, in my judgment the result would not be disproportionate[14]. The fact that other authorities have used a different measure does not of itself indicate that the relevant condition has not been met. The burden of proof on the authority in respect of this condition does not require positive proof that no

[13] Drivers may also have little incentive to raise standards, where that involves a cost to them, when customers have no obvious way of distinguishing between them and may not be presented with the choice between different standards of service.

[14] Such an analysis is supported by the Opinion of Advocate-General Kokott in *C-236/16 Asociación Nacional de Grandes Empresas de Distribución (ANGED)v Diputación General de Aragón* EU:C:2017:854 at [52]-[60]. She considered that a threshold had merely to be not "manifestly erroneous" (as well as not disproportionate *stricto sensu*). It may very well be that there is little (if any) difference between an amount that is reasonable and one that is not "manifestly erroneous".

other conceivable measure could enable the relevant objective to be attained under the same conditions[15].

56. In this case the Claimant has not suggested that there is a measure of a different type, which did not involve limiting the maximum fares that could be charged, which would achieve the same objective in protecting customers using hackney carriages in Guildford from paying more than a reasonable amount. Moreover the Claimant accepts in effect that the method adopted by the Borough Council for calculating the table of fares does not go beyond what is necessary to attain that objective, and he does not suggest that it would not produce a fair balance between the interests of consumers and those of drivers[16], provided that the data used in the calculation are chosen appropriately.

57. The issue which the Claimant raises is directed at the evidence relied on by the authority and involves considering how the court should review the support it provides for the measure in question.

58. Both parties referred me to the recent decisions of Green J in *British American Tobacco* supra and of the Court of Appeal in that case. The starting point for understanding the discussion in those judgments, however, is the earlier decision of the Court of Justice in *C-333/14 Scotch Whisky Association and others v Lord Advocate and another* EU:C:2015:527, [2016] 1 WLR 2283. That decision was listed at the outset of Green J's judgment as one of the key judgments to which he was to have regard: see *British American Tobacco* supra at [7]. It also no doubt informed the submissions of the parties in that case on this point with which Green J agreed. It was also one in the light of which the Court of Appeal considered the appeal against those parts of Green J's judgment on which Mr Streeten relied.

59. In the *Scotch Whisky* case the Court of Justice addressed *inter alia* the extent of the review of evidence supporting the third and fourth conditions (to which I have referred above) in the context of a restriction on the free movement of goods that a proposed minimum unit price on alcohol ("MUP") involved. The Court stated that:

> *"54. In that regard, the reasons which may be invoked by a member state by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that state, and specific evidence substantiating its arguments....*
>
> *55. It must however be stated that that burden of proof cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MUP, they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions...*

[15] see *C-518/06 Commission v Italy* supra at [84]-[85] and *C-333/14 Scotch Whisky Association v Lord Advocate* at [55] quoted in paragraph [59] below.

[16] There is an issue about whether or not there is a fifth condition that has to be satisfied, sometimes referred to as proportionality *stricto sensu*: see *Lumsdon* supra at [33], *Scotch Whisky Association and others v the Lord Advocate* [2017] UKSC 76 per Lord Mance at [6], [9], [15]-[16] and [47].

> *56. In that context, it is for the national court called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the principle of proportionality. On the basis of that evidence, that court must, in particular, examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods.*
>
> ...
>
> *59 It follows from the foregoing that article 36 FEU must be interpreted as meaning that, where a national court examines national legislation in the light of the justification relating to the protection of the health and life of humans, under that article, it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the CMO."*

60. According to Lord Mance JSC (giving the subsequent judgment of the Supreme Court in *Scotch Whisky Association and others v The Lord Advocate and another* [2017] UKSC 77 at [14]):

> *"Paragraph 59 was in substance repeated as para 3 of the Court's ruling.....The explanation that the court is bound to or must "examine objectively whether it may reasonably be concluded from the evidence submitted" that the means are appropriate and cannot be attained by less restrictive measures can be seen as recognising the fact that the national court is a reviewing body, not the primary decision-maker."*

61. It follows that the test there adopted was whether it may reasonably be concluded from the evidence submitted that the relevant condition is satisfied[17].

62. The passages from the judgment of Green J in *British American Tobacco* on which Mr Streeten relied (quoted in paragraph [24] above) need to be read in the light of the decision of the Court of Justice in the *Scotch Whisky* case, as is apparent from the consideration of his judgment on this point by the Court of Appeal (to which I was referred by the parties but on which they made no submissions): see *R (British American Tobacco UK Ltd and others v Secretary of State for Health* [2016] EWCA Civ 1182, [2017] 3 WLR 225, at [226]-[232]. Giving the judgment of the Court of Appeal, Lewison LJ stated that the passages from Green J's judgment had to be read in context and that, when read in context, Green J had accepted in substance the

[17] see also the finding by Lord Mance at [63] that the courts in Scotland had correctly applied this test.

approach of the claimants in that case: see [229]-[232]. That meant that, when dealing with the evidence on the issue of necessity, the test which Green J had correctly applied was one of objective reasonableness as set out in the *Scotch Whisky* case (rather than margin of appreciation as such): see at [226]-[227] and in particular [241].

63. The test of objective reasonableness, namely whether it may reasonably be concluded from the evidence submitted that the relevant condition is satisfied, is thus one that is appropriate at least where the objective is public health.

64. I have considered whether there is any reason why the test should be different when the objective is one of consumer protection. Lord Mance JSC thought that the test of objective reasonableness adopted by the Court of Justice reflects the fact that the court is not the primary decision-maker: see paragraph [60] above. That would indicate that such a test is generally applicable. But, even if that is not the case, it does not necessarily follow that there should be a different approach when the objective is consumer protection. In both types of case authorities have a discretion about the degree of protection to afford and on the way in which that degree of protection is to be achieved. There may of course be differences in the complexity of the assessments required and differences in the uncertainty as to the effects of the measures that may be adopted in some cases when protecting public health or protecting consumers, although in other cases the protection of consumers may simply consist in protecting their health. But in my judgment such differences as there may be do not warrant the adoption of any different test when reviewing the evidence supporting measures promoting such objectives. Judging what can reasonably be concluded from the evidence in relation to any measure will necessarily depend on the circumstances, including matters such as the complexity of the assessments, the uncertainties involved and, in the case of alternatives, what they may be.

65. The onus in that respect is on the relevant authority seeking to justify the measure and the determination has to be made by the court on the evidence available to it (whether or not it was available when the measure was adopted or to the authority at that time): see the *Scotch Whisky* cases supra. In this case, however, the complications that the latter of these requirements may involve do not arise in practice given the ruling I made at the outset of the hearing of this claim refusing to admit further material.

66. Accordingly I will consider whether it may reasonably be concluded from the evidence submitted by the authority in respect of the particular matters in issue that the maximum fares selected were reasonable and that the table of fares preserves a fair balance between the public interest and the interests of drivers.

iv. what review on the ground of "Wednesbury" unreasonableness requires

67. Mr Streeten also contended that, in assessing whether the Council acted unreasonably, intense scrutiny of the data and assumptions used by the Council and a robust justification of their use was required.

68. In developing this contention Mr Streeten sought to rely on two judgments by Lord Mance JSC in which he discussed the relationship between review on the ground of unreasonableness (or irrationality) and review on the ground of proportionality. In neither case, however, did the issue of what either ground of review involved arise for

decision. In *Kennedy v Charity Commissioners* supra the issue concerned whether disclosure was obtainable under the Freedom of Information Act 2000. There was no application for judicial review of any decision not to give disclosure under other powers that the Charity Commissioners may have had. In *Pham v Secretary of State for the Home Department* supra the issue was simply whether the claimant had been rendered stateless. The question whether (if not) on what basis the decision to deprive the claimant of British citizenship might be reviewed had not arisen for determination. As is well known, the Supreme Court has subsequently determined that the question, whether proportionality should supplant or join unreasonableness as a ground for review and, if so, what version or versions of that test should be adopted, should be determined by a nine-person court, while also giving various accounts of the differences between the two: see *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355. More recently the Supreme Court has also discussed the differences between judicial review on the ground of unreasonableness and an appellate review, in which Lord Mance emphasised some similarities between the two: see *Michalak v General Medical Council* [2017] UKSC 71, [2017] 1 WLR 4193, per Lord Kerr JSC at [20]-[22], [30] and per Lord Mance JSC at [37].

69. Part of the difficulty when considering the various *obiter dicta* of Lord Mance and others in this context is not merely that what is involved when assessing proportionality may vary according to whether an interference with Convention rights or EU law is involved and, if the latter, what type of measure may be under consideration, as *Lumsdon* itself shows: see at [26] and [34]-[35]. The difficulty also arises from the fact that the contributors do not necessarily all share the same conception of what may be involved in a review of whether an authority has exercised a discretion it has in an unreasonable manner.

70. Such a review may relate not only to the decision reached but also to (i) the enquiries that the decision-maker made before that decision was taken; (ii) the considerations, that were capable of being material in law, which the decision-maker could have, or ought to have, taken into account; (iii) any particular inferences drawn, or conclusions reached, by the decision-maker from the information available; and (iv) any particular reasons on the basis of which the decision was, or ought to have been, taken. The decision may be unlawful if the decision-maker acted unreasonably in respect of any of these matters. The extent to which a court may be able to conclude, when reviewing such matters, that the decision-maker has exercised the relevant discretion in a particular manner which no reasonable person could have done, will depend not only on the statutory framework within which, the purposes for which, and the circumstances in which the discretion in question falls to be exercised as well as the nature of the particular issues raised and the consequences which its exercise in any particular way may involve but also the information available to the court and the court's own competence to make judgments in relation to the matter. The court's ability to conclude that a decision-maker acted unreasonably may well vary according to the nature of the error alleged. But there is no reason to assume that establishing the extent of what may reasonably be done in the circumstances will be assisted by referring to any particular intensity of review that may be thought desirable or how robust any justification need be.

71. Thus in this case Mr Streeten contended that, as the table of fares impugned put the livelihood of 220 drivers operating in Guildford at risk or would at least have a significant impact on it, intense scrutiny of the costs allowed by the Council and a robust justification of them was required. The practical usefulness of that submission may be illustrated by reference to two of the amounts used by the Borough Council in their calculation: the cost of using the taxi rank at Guildford Railway Station and the amount that an average driver charging the basic tariff may earn. Neither of these figures is challenged. But it is plain that, were they to have been, the court's ability to conclude that the decision-maker had been unreasonable in adopting particular amounts for each would not necessarily have been the same and deciding whether the decision-maker was unreasonable would not have been assisted by first determining what intensity of review to adopt. Predicting what is likely to be the cost of using a taxi rank is not the same type of judgment, for example, as deciding (as the Borough Council did) that the wage that an average driver should be able to earn should be the average of the median wages of Guildford residents and workers (rather than some other amount). What a reasonable authority could predict the cost of using the taxi rank will be may well fall within a narrower band than the wage that it should aim to allow an average driver to earn, given the object of enabling a service to be provided at fares that it is reasonable for the public to pay. Similarly, even when estimating specific costs, predicting the cost of using the taxi rank may involve a different type of judgment than, say, predicting the cost of fuel. Asserting that intense scrutiny and robust justification is required for each would do little or nothing to help answer any question whether the choices made were or were not unreasonable in the circumstances or what the range of reasonable choices might have been.

THE CALCULATION OF THE TABLE OF FARES

(i) reliance on AA data

a. submissions

72. Mr Streeten contended that the costs produced by the AA on which the Borough Council relied were unreliable and inappropriate as data on which to set fares that may be charged by hackney carriages. The Council had had available to them the costs used by T*f*L to set taxi fares in London. But they had chosen instead to use costs that the AA had produced only as a general guide to the costs for a private motorist associated with owning and running a four year old car.

73. Mr Streeten submitted that the Borough Council had made a material error of fact as to the date on which the AA data was produced. They mistakenly thought that the AA data had been produced in March 2015 and that there was no material difference in the age of the two data sets available from the AA and T*f*L. In fact the AA data was published on July 7th 2014. This mistake, so Mr Streeten contended, played a material role in the decision to rely on the AA data: reliance was placed on the fact that it was produced in 2015 as a reason why it should be used rather than the T*f*L data.

74. But in any event, so Mr Streeten contended, the AA had itself warned against reliance on their costs. The attempt to "explain away" its disclaimer in the report to the Executive was, so he submitted, unconvincing. The AA's disclaimer was not a "standard" disclaimer but one that was specific. It was plain that AA costs (as it stated) were "not intended to be used as the basis for setting mileage rates for business

use of private cars" and that actual costs "will vary..depending on car choice, age, type of use and driving style". Comparing the costs associated with owning and running a private car with the costs of running a taxi was like comparing apples and oranges. Running a taxi involves significantly higher milage, more rapid depreciation, higher servicing costs, higher insurance premiums and other additional costs compared with those that a private motorist has.

75. In response Mr Kolvin QC pointed out that those operating hackney carriages were specifically consulted on the particular costs that should be used. They had data on such costs but generally they failed to respond or provide any better data.

76. Mr Kolvin submitted that the Borough Council had given detailed consideration to whether and how the AA costs should be used. Rather than supply specific data about the costs involved using a hackney carriage in Guildford, the Claimant himself had promoted the use of the T*f*L data. But that set of data was rightly rejected as being untypical: the T*f*L data related to a London style cab, such as a TX, of which there were only 9 such models used in Guildford (out of the 193 licensed taxis). No one who responded to consultation produced figures or records to show that their running costs were equivalent to the T*f*L figures. The Council had not simply taken the lowest figures available. The AA had a higher figure for tyres (2.02p per mile) than TfL (1.49p per mile). But the Council had chosen to use AA figure as being a better representation of the likely cost. Only two of those consulted had said that the AA figures should not be used.

77. Mr Kolvin submitted that the Borough Council were well aware that the AA figures were not up to date and that they were for 2014 (as was stated both in the Methodology itself and on the table showing the data to be used in the Fares Calculator). It appeared that those figures were intended to represent the costs of owning and running a car in 2014-2015 as estimated by the AA. There was no error of fact. But, if there had been, it was immaterial. If anything, any costs estimated in July 2014 overstated the same costs compared with those obtaining in March 2015. The ONS Motoring Price Index (that uses January 1987 as a base of 100) showed a fall in costs from 239.6 in July 2014 to 227.7 in March 2015.

78. Mr Kolvin submitted that the Borough Council had also given detailed consideration as to how the AA figures should be used. In some cases, other costs (for fuel) had been used; a higher figure (for insurance) had been allowed and, in the case of depreciation, an amount had been allowed each year over the whole the life of the vehicle, which in fact was likely to be generous. Such little information as was supplied during the statutory consultation did not rationally require a change in the average costs that the Council decided to use.

b. discussion

79. The method adopted by the Borough Council for calculating the table of fares takes into account what are intended to represent certain average costs associated with, and certain average distances travelled when, operating a hackney carriage in Guildford.

That method, including the use of AA figures, had been approved in 2013 after nearly two years of consultation with the taxi trade and an independent audit[18].

80. The AA costs relate to the costs of owning and running a standard vehicle by a private individual. Mr Streeten submitted that the AA data was an unreliable and inappropriate source of data on which to determine the rate at which to set fares. He asserted, and it may well be true, that, compared with the use of a car by a private motorist, running a taxi may involve significantly higher mileage, more rapid depreciation, higher servicing costs, higher insurance premiums and other additional costs.

81. The best data from which the items to be used in the calculation of the table of fares could have been derived were the actual costs incurred, and distances travelled, when hackney carriages ply for hire in Guildford. Such information would have been known to those operating such vehicles in Guildford if only for tax purposes. For the purpose of the review of the table of fares, the Borough Council conducted a consultation, that was not required by the legislation, about specific costs and distances, setting out those which they had proposed using as a result of the review in 2015 (some of which had been based on AA data), together with a number of additional questions to assist the review. The Borough Council received, however, only five substantive responses. The Claimant himself provided no specific information about the costs he or other members of his Association had incurred or the distances he or they had travelled with or without passengers. Given that almost all those operating taxis in Guildford were not prepared to provide evidence about their actual costs and other information requested, the only other source of data specifically relating to the costs of use of a vehicle as a taxi was from T*f*L.

82. The report to the Executive contained a review of the AA motoring costs, including a comparison with figures used by T*f*L to set taxi fares in London. Mr Streeten contended that this comparison, and thus the review, was flawed by a material mistake of fact. In the course of this comparison, in paragraph [4.14] of the report, it was stated that:

> *"It is worth noting that the figures for the AA were produced in March 2015 and the figures for TfL in October 2015, so neither can be considered fully up to date. The ONS advises that there was a reduction of 0.1% in the costs associated with motoring expenditure in the 12 month period to May 2016."*

83. The report was clearly in error about the date on which the figures from the AA were produced. They were produced in July 2014, not March 2015. But in my judgment, however, the error was not material for the purpose of the comparison. The significance of the statement made about the reduction in motoring costs over the period to May 2016 was to indicate that, if anything, T*f*L's costs might be expected to be lower than the AA's as they were produced later. Had the ONS figures for July 2014 and October 2015 been compared, the result would have been the same. The ONS Index (that uses January 1987 as a base of 100) showed a fall in costs from 239.6 in July 2014 to 226.1 in October 2015.

[18] see paragraph [4.30] of the report to the Executive quoted in paragraph [31] above.

84. The report noted than T*f*L used a cost index relating to running a London style cab (of which there were only 9 out of the 193 licensed vehicles in Guildford) rather than an average vehicle. This meant that there could be significant differences in costs for that reason. For example, as the report pointed out, the cost of fuel for a vehicle travelling the average distance of Guildford hackney carriages using TfL costs (with an addition the Council's method allowed) would have been £5,827. But, given an average consumption of 50 miles per gallon at £1.15 per litre (the price in July 2016), the cost for an average vehicle would have been £2,838 (with the same addition). The report indicated that, using TfL's vehicle costs in the method of calculating the fares table used by the Borough Council, would have resulted in a fare over 2 miles of £8.30 compared with the average for Southern England of £6.24.

85. In my judgment, there was nothing intrinsically unreasonable in the circumstances in taking the average costs of owning and running a normal vehicle (such as those used as hackney carriages in Guildford) in a relevant price band as a starting point for considering what costs to allow in the calculation of the table of fares, provided always that adjustments where appropriate were made to reflect differences in how such vehicles may be used when used as a taxi. In the absence of data relating to what the costs of using such a vehicle as a taxi are (which persons such as the Claimant and members of his Association could have provided), in my judgment that was a reasonable approach in the circumstances for the Council to adopt.

86. Mr Streeten contended, however, that in effect the AA data should been ignored given the disclaimers attached to it. The report to the Executive stated that:

> *"4.33 An additional concern raised by the trade about the use of AA data was the AA's disclaimer:*
>
> > "AA running costs tables are intended only as a general guide to the costs associated with owning and running a car.
> >
> > AA running costs tables have no official status and are not intended to be used as the basis for setting mileage rates for business use of private cars. Approved mileage rates are set by HMRC and reviewed from time to time.
> >
> > The AA tables are based on the costs of running a four year old car. Actual running costs will vary by individual depending on car choice, age, type of use and driving style."
>
> *4.34 With regard to this point, this appears to be a "standard" disclaimer about the intended use of this information absolving the AA from any risk of liability in the event of a dispute. It is important to emphasise that this data is used to estimate the running costs associated with a taxi, and is only one element of the overall information factored into the running costs of a vehicle in Guildford.*
>
> *4.35 Data from the ONS is used to calculate the average salary for a driver also contains a disclaimer about the accuracy of its information."*

87. The second of the AA's statements quoted in paragraph [4.33] of the report is intended as a warning that the AA's costs have no official status; that they are not mileage rates for the business use of private cars approved by Her Majesty's Revenue and Customs; and that they were not intended to provide a basis for setting such rates. The fact that they have no such status and were not compiled with that intention does not mean, however, that they may not reasonably be taken as the general guide they are stated to be.

88. The first and third of the AA's statements quoted in paragraph [4.33] indicate the need to consider, and possibly adjust, the costs provided as a general guide if a more realistic estimate of the costs of using a vehicle of a different age in a different way is required. But again that would not make it unreasonable to consider the costs provided as a starting point when making such an estimate.

89. Thus it is important to recognise in that respect that the Borough Council did not simply adopt the lowest figure available or adopt the AA figures for costs in 2014 without further thought. For example using TfL's figures the cost of tyres per year was £388. In the letter accompanying the petition in response to the statutory consultation it was said that "tyres can cost between £300-£400 to replace over the year, and in many cases more". The report noted that a typical set of four mid-range to premium tyres would cost about £500 and last for 27,000 miles (somewhat more than the average distance travelled per year by a hackney carriage in Guildford). The Borough Council nonetheless allowed £526 per annum for tyres, a figure derived from the AA data to take account of the distance travelled, which was possibly more generous to drivers than the other information indicated. By contrast the Council based the fuel cost figure in the final calculation on the price of 111.2p per litre in August 2016 (plus an addition) rather than the AA's figure for 2014 of 137p per litre.

90. In my judgment, therefore, it was not unreasonable in the circumstances for the Council to take the average costs of owning and running a normal vehicle (such as those used as hackney carriages in Guildford) in a relevant price band provided by the AA as a starting point for considering what costs to allow in the calculation of the table of fares, provided always that adjustments where appropriate were made to reflect differences in how such vehicles may be used when used as a taxi. The question is whether or not any necessary adjustment was not made.

ii. depreciation

91. The AA motoring costs are calculated by reference to the purchase price of a car when new and fall into five brackets. Guildford has a mixture of saloon and purpose built wheelchair accessible vehicles in the licensed taxi fleet which, when new, fall within two price brackets. Guildford has chosen to use the higher bracket (£26,000-£36,000), in which costs are greater, in part (so it was stated in the Methodology) to reflect the use of the vehicles as taxis rather than purely for domestic use. The AA estimates that vehicles in this price bracket depreciate over the first four years after they have been purchased new at £3,373 per annum (which amounts to £13,492 at the end of four years). The Borough Council allows this annual rate of depreciation in each year, whether or not the car was purchased new and regardless of its age.

a. submissions

92. Mr Streeten contended that the rate of depreciation appeared to have been based by the AA on a car used to drive 10,000 miles per annum, whereas the Council's figure for the average annual miles driven by a hackney carriage in Guildford is 25,255. The rate of depreciation, therefore, must be higher. He submitted that no adjustment to the AA figure has been allowed for that and reliance upon it was unlawful.

93. Mr Kolvin QC pointed out that, according to information in the Methodology, there were 193 licensed taxis and that 74.6% of the fleet were already over 4 years old. But they all continue to receive the allowance of £3,373 per annum. Over the lifetime of a taxi, which is approximately 10 years, this makes a sum of £33,730 for depreciation (which reflects the cost of acquisition of a car assuming that the vehicle was in fact purchased new in the bracket £26,000-£36,000). The amount reflected depreciation on a straight-line basis. Mr Kolvin submitted that in reality the driver increasingly benefits from the annual depreciation figure as the vehicle gets older and that there was nothing irrational in selecting £3,373 as an annual average. No one had stated that they had claimed a higher rate from HMRC.

94. In response Mr Streeten contended that, as the vehicle ages, so other running costs such as parts and servicing increase and that no allowance had been made for that.

b. discussion

95. In my judgment the Borough Council's approach was not unreasonable. Given that what had to be identified was the same amount for depreciation whatever the age, usage or purchase price of the vehicle (new or second hand), the amount it chose was reasonable given the potential acquisition cost of the vehicle if purchased new within the price bracket selected (the choice of which itself was intended to take account of the increased costs of operating a taxi to some extent). True it is that amount may be likely to understate the amount of depreciation in the first four years after the purchase of any new vehicle in that bracket given the average distance travelled by a hackney carriage in Guildford. But thereafter it is likely to overstate the amount of depreciation. Given almost three-quarters of the hackney carriages in Guildford are more than four years old, it is an amount that may appear more likely to overstate, rather than understate, the average amount of depreciation in the current year even if the vehicle was originally purchased new rather than second-hand.

96. Service labour costs and replacement parts are calculated in the Methodology using the AA data and adjusting it to provide a cost per mile which is then multiplied by the number of miles travelled on average by a hackney carriage in Guildford. The amount allowed for service labour and replacement parts in the calculation was £1,320.83. The only specific figure for servicing and repairs that any operator of a hackney carriage appears to have given in response to the extra-statutory and the statutory consultation was £1,000 per year, although one other individual stated that he had "*running costs 3 x service £900*" but also "*unexpected maintenancey £1500*".

97. The Statement of Facts and Grounds, however, contains no complaint about amounts allowed for service labour and replacement parts calculated as it was. In my judgment Mr Streeten's attempt to impugn the amount chosen is not one open to the Claimant to make at this stage. Moreover there is nothing to show that the amounts that the

Borough Council took into account did not reasonably reflect the average costs involved or that any benefit that drivers may have obtained on average from the amount allowed for depreciation or on other items was more than offset by any under-estimate of the amounts payable on average for service labour and replacement parts.

iii. insurance

98. The AA figures used by the Council indicated that the cost of insurance for a fully comprehensive policy (with a 60% no claims bonus) was £601 per annum, to which the Council added £500 to reflect the higher cost of insuring a vehicle for hire and reward. The allowance made for insurance in the calculation, therefore, was £1,101 per annum.

a. submissions

99. Mr Streeten contended that there was no rational basis for starting with the AA figure or for increasing it by £500. Moreover, so he submitted, the Borough Council had ignored the recent increase in insurance premiums. In October 2016 the AA said that, over the previous 12 months, the average quoted premium had risen by 16.3%, adding almost £82 to a typical motor insurance policy. Two drivers had stated in response to the statutory consultation that their insurance cost was £1,500. The letter under which a petition was submitted during the statutory consultation also asserted that the cost of insurance was on average around £1,000 to £1,500.

100. Mr Kolvin QC pointed out in response that the result of the 16.3% increase to which Mr Streeten had referred was that the resulting cost of a comprehensive policy for a private motorist nationally was £585.84. Within the region of which Guildford is part, the cost was less, some £497.67. That, so Mr Kolvin submitted, compared well with the £601 that formed part of the Council's calculation (although the document in question was not before the Council when the decision was taken). There were three replies to the extra-statutory consultation that addressed the cost of insurance: one indicated that his costs were £1,100 and two had indicated that theirs were £1,000. The material obtained on the statutory consultation was not sufficient to require a change to the amount allowed.

b. discussion

101. In my judgment this item illustrates the difficulties that the Borough Council had to confront given the general lack of specific information from drivers, including the Claimant and members of his Association.

102. Mr Streeten contended that the method by which the amount was initially arrived at, starting with the AA figure and adding £500, was irrational. In my judgment it would plainly have been better had the Council been able to start initially with the actual costs incurred. But, in the absence of sufficient information on such costs, the Borough Council had to consider what approach they should adopt. The method for determining the amount had been adopted in 2013 after consultation. Moreover, as the report to the Executive stated following the extra-statutory consultation, "feedback from the trade indicates that a typical insurance policy costs £1,100." There was certainly nothing then or subsequently to support the cost allowed by TfL, namely £2,896.

103. As Mr Kolvin showed, the response to the extra-statutory consultation supported the proposed result of the Borough Council's approach. Even if the range of payments made for insurance was on average between £1,000 and £1,500 (as asserted without any evidence in the letter accompanying the petition that the Council received), figures which the very few individual responses received in both consultations tended to support, the Council would still have had to fix on an amount within that bracket with no statistically significant information about the distribution within it of the actual costs incurred. The Methodology recognised that running costs vary between businesses and that it was not intended to compensate some proprietors for bad business practice. In such circumstances, given the objective of protecting consumers, it would have been reasonable in my judgment for the Borough Council to have used in the calculation an amount toward the bottom end of that bracket as representing an amount that an efficient, well run operation could be expected to pay. Such an approach would be reasonable. The amount chosen was consistent with such an approach.

104. In my judgment, therefore, the amount allowed for insurance was not unlawful.

iv. dead mileage

105. In the Statement of Facts and Grounds, it was simply stated (accurately) that "dead mileage is the amount of mileage done without a paying passenger on board". No complaint was made, however, about the allowance of 45% of the miles travelled as dead mileage. Mr Streeten nonetheless sought to raise such a complaint.

106. The Methodology stated that:

> *"21. A taxi does not travel all of its mileage with a fare paying passenger on board. This is usually referred to as "dead mileage". It is not possible to calculate the exact amount of dead mileage travelled by each taxi.*
>
> *22. For example, if customers are taken from point A (the rank) to point B and the taxi always returns to point A without a customer on board the dead mileage would be approximately 50 per cent of the total mileage therefore this is the starting point for the calculation.*
>
> *23. However if customers are taken from point A to point B and the taxi occasionally returns to point A with a customer the dead mileage would be less than 50 per cent of the total mileage.*
>
> *24. In addition a number of other factors should be taken into account as follows:*
>
> *a. taxis do not always return empty to the point of initial departure*
>
> *b. taxis may travel with a customer from point A to point B and then from point B to point C thus not enduring any dead mileage*

c. the taxi may be flagged down whilst returning empty to point A therefore the dead mileage will not always be the same distance as the initial paid mileage

d. taxis may operate by being pre-booked and this can reduce the amount of dead mileage for example from Point A to the taxi rank and then from the taxi rank to point B

e. taxis drivers use the vehicle travelling to and from work

f. some drivers use their taxi for personal, social and domestic journeys away from work

...

28. Information supplied by HMRC shows that the level of dead mileage will vary between council areas and cannot therefore, be stated as a fixed percentage. HMRC is aware that taxi journeys carried out on contract such as home to school trips or pre-agreed fares to airports will not always be recorded on the taximeter and could appear to be dead mileage when in fact there is a fare paying passenger in the vehicle. HMRC also state that any travel to and from the taxi drivers place of work is not deemed to be dead mileage for the purposes of calculating tax liability. Both of these factors therefore reduce the amount of dead mileage that can be included in the overall calculation.

29. Previous consultation with taxi drivers provided information to show that dead mileage accounts for between 33 per cent and 50 per cent of the total mileage travelled by the taxi.

30. It is clear from information provided by HMRC, the taximeter agents and consultation responses that a number of factors will cause this initial percentage to reduce such as travel to and from work, private journeys and unmetered journeys.

31. An issue only arises in relation to mileage completed whilst travelling to and from work if the driver does not live within the Borough of Guildford. A driver who is resident in Guildford can ply for hire immediately within the district in which the driver is licensed. However the driver who is not resident in Guildford cannot ply for hire until the driver is within the Guildford Boundary. Therefore, any mileage travelled before entering Guildford cannot be included in the dead mileage calculation.

32. The consultations and additional enquiries have not provided sufficient evidence to identify the exact amount of dead mileage

> *travelled by taxis in Guildford. The rate of dead miles was set at 45% for fare reviews in 2013 and 2015 and the consultation responses do not provide any evidence in order to justify any changes to this figure."*

107. Mr Streeten contended on the basis of this explanation that the reduction of 5% (from 50% to 45%) was arbitrary and had no rational basis. Two responses to the statutory consultation had suggested that the rate should be 50%.

108. Mr Kolvin QC submitted that the Council had adequately justified the percentage chosen, which was at the higher end of the range referred to in paragraph [29] of the Methodology, and that, had drivers considered that it was insufficient, they could have produced data to show that. They did not do so before the decision impugned.

109. In my judgment the figure adopted cannot be said to have been unlawfully selected on the basis of the explanation in the Methodology. It is plain from paragraph [29] and [32] that information provided by drivers in the context of previous reviews showed that dead mileage accounted for between 33% and 50% of the total mileage travelled; that the Borough Council had chosen a proportion at the end of that bracket that favoured drivers; and that the consultation responses did not provide any evidence to justify a change. But in any event there is no allegation that the proportion chosen was unlawful in the Statement of Facts and Grounds and such a complaint is not one now open to the Claimant to make.

v. other specific matters

110. There were some other specific items about which complaints were made in the Statement of Facts and Grounds. These were not actively pursued by Mr Streeten in his submissions. I have considered those matters but in my judgment none gives rise to any sustainable complaint. One, concerning the cost of capital, indicates that the Borough Council may, if anything, have been generous to those operating hackney carriages.

vi. the resulting table of fares

111. The Claimant contends that the table of fares was unreasonable and disproportionate.

112. For the reasons given above, in my judgment the specific complaints made about how it was calculated are unsustainable.

113. Further there is no evidence that the resulting table of fares is one that no reasonable authority could have adopted. It was envisaged that a driver driving no further than the average could earn, charging the basic tariff, the average of the median salaries of Guildford residents and workers. The Claimant has not shown that that expectation was unreasonable on the basis of the evidence that the Borough Council had. If the Borough Council's estimates of the costs that such a driver incurs were wrong, the Claimant, the other members of his Association and other operators of hackney carriages in Guildford have only themselves to blame for not submitting sufficient reliable evidence on such costs in the two consultations that the Borough Council conducted. Moreover a driver may earn more than this calculation envisages for any journey for which more than the basic tariff may be charged or if the driver uses the

vehicle to ply for hire more than the average driver does. It is true that the decision involved a significant reduction in the fares chargeable. But, since the maximum fares were last fixed, there had been a reduction in certain costs, in particular fuel costs (from 142p to 111.2p per litre), and a decision taken to exclude an annual radio circuit cost[19]. The resulting amount chargeable for a journey of two miles, £6.24, was the same as the amount that was then being charged for the same journey in Runnymede and more than the average for that journey across Southern England (£6.20). The reduction in the basic tariff is also not necessarily disadvantageous in all respects to drivers: it may increase the demand for the service that hackney carriages provide.

114. In my judgment it may also reasonably be concluded from the evidence submitted by the Borough Council in respect of the particular matters in issue that the maximum fares selected were reasonable and that the table of fares adopted preserves a fair balance between the public interest and the interests of drivers. Having regard to the intention to review the table of fares annually, if not sooner if new information emerges, in my judgment the adoption of the table of fares impugned cannot be said in all the circumstances to have exceeded the extent of the discretion that the Borough Council had. It was not disproportionate.

STANDING AND RELIEF

115. Section 31(3) of the Senior Courts Act 1981 provides that "the court shall not grant leave to make..an application [for judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates". It is plain that the Claimant, as a hackney carriage driver and as the Secretary of the Guildford Hackney Association that authorised him to bring the claim on its behalf, had a sufficient interest in whether the Borough Council's decision to adopt the table of fares was valid.

116. Mr Kolvin QC submitted, however, that the Claimant had no sufficient interest to impugn the table of fares on the ground that it was an unlawful restriction on any EU national's freedom of establishment, as neither he nor any other member of the association had been shown to be nationals of, or undertakings established in, other EU States. On any basis their rights under article 49 of the TFEU have not been shown to have been infringed.

117. In *Chandler* supra the Court of Appeal held that a person who did not enjoy any right under EU law had a sufficient interest in an authority's compliance with EU law if, but only if, that person was affected in some identifiable way by any failure to comply with it: see at [77]-[78]; cf *David Wylde v Waveley Borough Council* [2017] EWHC 466 (Admin), [2017] JPL 466 (Admin). It is thus clear, for example, that a person representing the interests of those who do have EU rights has standing to assert them, even if that person has no EU right in issue: see eg *R (Law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin) per Beatson J at [111] and [114]; *Gibraltar Betting and Gaming Association Limited v Secretary of State for Culture, Media and*

[19] This appears to have been allowed at £3,978.82 in the 2015 review, an amount which significantly exceeded the additional types of costs included in the 2016-17 review.

Sport [2014] EWHC 3236, [2015] 1 CMLR 28, per Green J at [1] and [207][20]; *Gibraltar Betting and Gaming Association Limited v Her Majesty's Revenue and Customs* [2015] EWHC 1863 (Admin) per Charles J at [102]-[104]. But in these cases the organisations in question had members or at least one member that enjoyed the EU rights in issue. In this case there is no evidence that the Claimant or any member of the Association does.

118. Before considering the significance (if any) of that fact, it is also necessary to consider what establishing an EU law complaint may involve and the relief which may be granted in respect of it. In *Gibralter Betting and Gaming Association Limited*, at least one of the members of the claimant company had EU rights and Green J indicated in his judgment that, had he been minded to grant any relief, he would not have granted it so as to operate *erga omnes* but would have limited in some way to reflect "the claimant member's specific interests in the outcome of the litigation": see at [220]. Section 31 of the Senior Courts Act 1981 also now provides that:

> *"(2A) The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review,*
>
> *... ....*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."*

119. In some cases the appropriate relief when a measure is found to be incompatible with a person's EU rights is to treat it as inapplicable to any such person and such relief has no necessary effect on the application of the measure to those who do not have such rights: see eg *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)* [1999] 1 WLR 2035. Such may indeed be the relief that ought to be granted if the measure is lawful as a matter of EU law when adopted but subsequently becomes unlawful, if it falls to be treated as disproportionate in the light of evidence of matters that have emerged after it was adopted.

120. The difficulty in this case, if the table of fares involved an unlawful restriction under article 49 of the TFEU but was otherwise not unlawful, in simply requiring it not to be applied to any drivers exercising their rights under that provision is not that, under that provision, the Borough Council could not have treated them differently to the disadvantage of British citizens and others who do not enjoy such EU rights. It is that the Borough Council never considered whether to adopt a table of fares applicable only to those persons whose EU rights were not infringed, allowing those with EU rights to charge whatever they could or some other, higher amounts that would not be disproportionate. Doing so might also have involved other types of legal objection. Thus, had the Borough Council not been able lawfully, or not willing, to make the table of fares it adopted applicable without exempting from its restrictions those exercising EU rights, the outcome would have been substantially different for the

[20] Green J regarded the fact that at least one of the members of the company had EU rights as one of a number of reasons why it had a sufficient interest: see at [215]. He did not have to consider whether such other reasons would have sufficed absent such an interest.

Claimant and members of his Association (had the table of fares been incompatible with EU rights). That would also serve to indicate why the Claimant and other members of his Association who are not exercising the freedom of establishment conferred by article 49 of the TFEU would have had a sufficient interest in the matter.

121. On none of these matters, however, have I received submissions. Given that I have not found that the table of fares engaged article 49 but that in any event, had it done so, it would nonetheless have been lawful, I need not reach any concluded view, or invite further submissions, on the Claimant's standing or on what relief it might have been appropriate to grant (if any) had the article 49 complaint been well founded.

CONCLUSION

122. For the reasons given above, this claim for judicial review must be dismissed.