

Advice case title: Cross-border commercial passenger transport

Full official name of the advised entity: Chamber of commerce, industry, crafts, and agriculture of Bozen/Bolzano

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I. Executive summary

The authorities in Germany and Austria complain that taxis and hired cars with up to 9 seats entering from or going to the Italian territory are not allowed to carry passengers across borders.

This has to do with the fact that this type of passenger transport is currently not regulated at EU level, nor by bilateral agreements, and is therefore not permitted at present. To eliminate this problem, the EU as legislator would have to intervene or a bilateral or trilateral agreement would have to be concluded between the states or possibly regions concerned.

II. Description of the obstacle with indication of the legal/administrative provisions causing the obstacle

A rental car with driver (*Mietwagen mit Fahrer/ Noleggio con conducente*) is a vehicle which is rented with a driver, and which carries out passenger transport with passenger cars with up to 9 seats. Taxis and rental cars with drivers travelling from Trentino or South Tyrol to Germany or Austria (and vice versa) are regularly objected to during police checks.

In practice, this particularly often concerns rental cars with drivers who take tourists from South Tyrol to Franz Josef Strauß Airport (MUC) in Munich or pick them up there and take them to hotels in South Tyrol.

The authorities in Germany and Austria complain that taxis and rental cars with up to 9 seats entering from or travelling to Italian territory are not authorised to carry out cross-border passenger transport. There are currently no reports that the Italian authorities have imposed or threatened to impose sanctions in such circumstances.

According to the German and Austrian authorities, cross-border passenger transport should only be carried out with coaches (> 9 seats) that have an EU licence and a journey form, whereby reference is made to European Regulation No. 1073/2009. As a result, transport with vehicles with up to 9 seats (taxis or rental cars with drivers) could be deemed illegal by this legal opinion and punished with fines and confiscation of the vehicle.

This interpretation of the law and its application creates a considerable difficulty for cross-border traffic with rental cars with drivers to and from Trentino, South Tyrol, Tyrol, and Bavaria and for tourism in the Alpine regions of Tyrol, South Tyrol and Trentino.

The cross-border commercial passenger transport by taxi and rental car with driver is actually prohibited due to EU and national regulations.

In Germany, as well as in Austria and South Tyrol, a licence is required for the exercise of the profession of passenger transport:

- In Germany, it is § 48 (driving licence for passenger transport) of the Ordinance on the Admission of Persons to Road Traffic (*Fahrerlaubnis-Verordnung*)
- In Austria, it is § 2 (obligation to hold a licence) of the Federal Act on the Non-scheduled Commercial Transport of Passengers by Motor Vehicle (*Gelegenheitsverkehrs-Gesetz 1996*)
- In South Tyrol, it is Article 6 (taxi licence and authorisation to provide the service "hired car with driver") of the Decree of the Provincial Governor of 12 December 2019, No. 32 (*Durchführungsverordnung über Taxidienste und Dienste „Mietwagen mit Fahrer/Fahrerin“*).

However, all these provisions only grant licences for national passenger transport, but not for international passenger transport.

At EU level, only the international carriage of passengers by bus and coach has so far been regulated.

Regulation (EC) No 1073/2009 should be mentioned here in particular. As the legislator stated in the 2nd and 3rd recital:

“(2) The establishment of a common transport policy entails, inter alia, laying down common rules applicable to the international carriage of passengers by road as well as the conditions under which non-resident carriers may operate national transport services within a Member State.

(3) To ensure a coherent framework for the international carriage of passengers by coach and bus throughout the Community, this Regulation should apply to all international carriage on Community territory. Carriage from Member States to third countries is still largely covered by bilateral agreements between the Member States and those third countries. Therefore, this Regulation should not apply to that part of the journey within the territory of the Member State of picking up or setting down, as long as the necessary agreements between the Community and the third countries concerned have not been concluded. It should, however, apply to the territory of a Member State crossed in transit.

With this regulation, the European legislator has realised the freedom to provide services as a basic principle of the common transport policy and made it possible that the markets of international transport are open to carriers from all Member States without discrimination on grounds of nationality or place of establishment.

However, the liberalisation applies explicitly only to buses and coaches, but not to passenger cars with up to 9 seats, because Article 1(1) of the Regulation reads as follows:

“This Regulation shall apply to the international carriage of passengers by coach and bus within the territory of the Community by carriers for hire or reward or by own-account carriers established in a Member State in accordance with its law, using vehicles which are registered in that Member State and are suitable and intended, by virtue of their construction and equipment, to carry more than nine persons, including the driver, and to the movement of such vehicles when empty in connection with such carriage.”

Directive 2006/123/EC on services in the internal market does not apply either, as it excludes transport services. This is stated in the 21st recital:

“(21) Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.”

And then in Article 2(2):

“2. This Directive shall not apply to the following activities:

...

(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty”

This is not at all surprising, since the transport of persons and goods is in principle a typical service in the sense of the Treaties, but due to historical conditions, Article 58 of the TFEU (Treaty on the Functioning of the European Union) excludes this specific area from the freedom to provide services of Article 56 TFEU:

“Article 58 (ex Article 51 TEC): 1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.”

According to Art. 58(1), the provisions of the Title on Transport (Art. 90-100 TFEU) thus apply to the freedom to provide services in the field of transport. This in turn means that it is up to the respective Member States to regulate the conditions under which taxis or hire cars with drivers may offer their services.

This is therefore a fundamental rule of EU primary law, which was also confirmed by the European Court of Justice in Case C-434/15 "Uber":

“44 Moreover, since the intermediation service at issue in the main proceedings is to be classified as ‘a service in the field of transport’, it is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU, a specific provision according to which ‘freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport’ (see, to that effect, judgment of 22 December 2010, Yellow Cab Verkehrsbetrieb, C-338/09, EU:C:2010:814, paragraph 29 and the case-law cited).

45 Accordingly, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy (judgment of 22 December 2010, Yellow Cab Verkehrsbetrieb, C-338/09, EU:C:2010:814, paragraph 30 and the case-law cited).“

III. Description of possible solution(s)

1. Regulation at the EU level

As we have seen, no rules have yet been adopted at Union level in relation to the international carriage of passengers by taxi and hire car.

Nevertheless, the EU has legislative competences in this area. They can be found in Article 91 of the Treaty on the Functioning of the EU (TFEU), which is part of the Treaty provisions on transport (Article 90 to 100 TFEU). According to this, the European Parliament, and the Council, taking into account the specificities of transport, may adopt rules "on the admission of non-resident carriers to operate transport services within a Member State" (Article 91(1)(b) TFEU).

According to Article 4(2)(g) TFEU, the legislative competences of Article 91 TFEU are shared competences within the meaning of Article 2(2) TFEU. In these cases, both the Union and the Member States may legislate; the Member States exercise their competence if and to the extent that the Union has not exercised its competence.

In the context of road passenger transport, this has so far only been done for international transport by bus and coach, i.e., vehicles which, by virtue of their construction and equipment, are suitable and intended for carrying more than nine persons (including the driver). This is regulated by Regulation No. 1073/2009 on common rules for access to the international market for coach and bus services.

The opening of the Member States' markets for the carriage of passengers by coach and bus for hire or reward, as regulated by this act, is ultimately based on the mutual recognition of the relevant Member State authorisations in this field. The basis for these activities on the territory of a Member State other than the State of establishment is the possession of a so-called Community licence. This is granted to the haulier in question by the competent authorities of the Member State of establishment if - apart from other conditions - has obtained a licence there under national law for the carriage of passengers by coach and bus.

In substance, market access is thus based, among other things, on a normative, general (mutual) recognition of Member State authorisations for the carriage of passengers in question.

A comparable secondary law regulation - assuming the corresponding political will - would in principle also be conceivable for cross-border taxi and rental car traffic, which is usually carried out with vehicles that are suitable and intended to carry no more than nine persons according to their design and equipment.

2. Regulation through bilateral agreements

The European legal situation currently seems to be incomplete in the area described above, which is why some European countries (e.g., Germany and Austria) have already concluded bilateral agreements years ago that regulate the implementation of cross-border

commercial passenger transport (*Verfahrensgrundsätze für die Genehmigung und die Durchführung des grenzüberschreitenden gewerblichen Straßenpersonenverkehrs zwischen der Bundesrepublik Deutschland und der Republik Österreich*).

Such an agreement between Germany, Austria and Italy could also be a sensible solution for the cross-border transport of passengers to and from Italy in order to create legal certainty without delay.

As long as there are no corresponding EU legal acts, the member states are, as explained above, entitled to make their own regulations for this. This is also done at least by means of bilateral intergovernmental agreements.

For the sake of completeness, it should be added that the member states only have to observe (other) EU law requirements to a very limited extent, especially when regulating these issues domestically.

This is because the freedom to provide services under primary law pursuant to Article 56 f. TFEU, which otherwise allows the cross-border (temporary) provision of services in a Member State other than the one in which the Member State other than the Member State of establishment of the entrepreneur, is not applicable in the transport sector pursuant to Article 58 (1) TFEU.

This also applies to the so-called Services Directive, which in principle covers all services. The freedom of establishment under Article 49 TFEU, which allows for a permanent economic activity (establishment) in another Member State, is generally not relevant in the case of international passenger transport. At most, the general prohibition of discrimination on the grounds of nationality under Article 18 (1) TFEU would have to be observed by the member states when regulating this transport business.

In addition, a brief examination of the question of whether such a bilateral agreement could also be concluded at the regional level between the respective regions concerned, i.e., Trentino - South Tyrol, Bavaria, and Tyrol.

§ 12 of the Austrian Occasional Transport Act (*Gelegenheitsverkehrs-Gesetz*) explicitly provides for such intergovernmental agreements:

“(1) Agreements with third countries on the international carriage of passengers pursuant to § 11 of this Federal Act or on the international carriage of passengers pursuant to § 32(4)(14) of the Trade, Commerce and Industry Act 1994 (non-scheduled carriage of passengers) may be concluded on the basis of this Federal Act if the volume of interstate passenger traffic so requires. The agreements shall in particular provide that motor vehicles with foreign number

plates may make journeys to, through and from Austria on the basis of reciprocity. When quotas are established, the traffic and economic interests of Austria shall be taken into account. The issuing of quotas may also be carried out by the respective contracting party."

But it explicitly speaks of "intergovernmental agreements" (*zwischenstaatliche Vereinbarungen*) and thus does not seem to provide for regional regulation.

In general, external affairs, including political and economic representation vis-à-vis foreign countries, in particular the conclusion of state treaties, are a matter for the federal government pursuant to Art. 10 (1) (2) of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*, B-VG).

According to Art. 16 (1) of the B-VG, the Länder may only conclude international treaties with states bordering on Austria or their constituent states in matters that fall within their independent sphere of action. Insofar as the Federation concludes the treaties itself, it must give the Länder the opportunity to comment. If the Länder give a uniform opinion, the Federation is bound by it (Art. 10 (3) B-VG).

If the Länder wish to conclude treaties themselves, the Länder government must be authorised by the Federal President and obtain the consent of the Federal Government to conclude the treaty. The federal government must be informed of such a treaty before negotiations are started.

It may at any time demand that the Land terminate the treaty. In any case, the federal government has the right of supervision in the implementation of state treaties also in such matters that belong to the independent sphere of action of the Länder (Art. 16 (4) and (5) B-VG).

On Germany: The federal relationship between the Federation and the Länder with regard to relations with foreign states (so-called "*Verbandskompetenz*") has been regulated in Article 32 of the Constitution (*Grundgesetz – GG*).

It is disputed whether Art. 32 (3) GG gives the Länder an exclusive right to conclude treaties, provided they have legislative competence, or whether this is merely a concurrent right to conclude treaties and the Federation is authorised by Art. 32 (1) GG to conclude treaties even where the Länder have exclusive legislative competence.

The Lindau Agreement of 1957 seeks a procedural compromise in order to avoid conflicts of competence. According to Art. 4 lit. b of the Agreement, the Permanent Treaty Commission of the Länder is available as an interlocutor for the Federal Foreign Office or the otherwise competent specialised departments of the Federation at the time of negotiation of

international treaties.

Following its deliberations on a draft treaty, the Commission issues a coordinated unanimous declaration on behalf of the Länder, which is transmitted to the Federal Foreign Office by the Chairperson of the Commission.

Article 117, last paragraph of the Italian Constitution reads:

"In matters within its competence, the region may conclude agreements with states and arrangements with territorial entities within another state, in the cases and with the forms regulated by state laws."

South Tyrol has primary legislative competence in the area of "transport in the province's sphere of interest" in accordance with Article 8 (1)(18) of the Statute of Autonomy.

Article 6 of Law no. 131 of 5 June 2003, regarding treaty-making power provides as follows:

"The Regions and the Autonomous Provinces of Trento and Bolzano, in matters within their legislative competence, may conclude, with territorial entities within another State, agreements aimed at fostering their economic, social and cultural development, as well as at carrying out activities of mere international importance, by notifying the Presidency of the Council of Ministers - Department for Regional Affairs and the Ministry of Foreign Affairs before signing them, for the purpose of possible observations by the latter and by the competent Ministries, to be forwarded by the same Department within the following thirty days, after which the Regions and Autonomous Provinces may sign the agreement. With the acts relating to the above-mentioned activities, the Regions and Autonomous Provinces of Trento and Bolzano may not express evaluations relating to the foreign policy of the State, nor may they make commitments from which obligations or financial burdens may arise for the State or which harm the interests of the other subjects referred to in Article 114, first paragraph of the Constitution".

In concrete terms, therefore, it would still have to be examined politically whether an intergovernmental agreement for this regional transport issue between South Tyrol, Tyrol and Bavaria would be possible.

IV. A full list of all legal provisions relevant to the case with the correct citation both in original language and in English

Germany: § 48 (driving licence for passenger transport) of the Ordinance on the Admission of Persons to Road Traffic (Driving Licence Ordinance - FeV) of 18 August 1998 (Federal Law

Gazette I p. 2214) as amended on 13 December 2010 (Federal Law Gazette I p. 1980) / § 48 (*Fahrerlaubnis zur Fahrgastbeförderung*) der Verordnung über die Zulassung von Personen zum Straßenverkehr (*Fahrerlaubnis-Verordnung - FeV*) vom 18. August 1998 (BGBl. I S. 2214) in geltender Fassung vom 13. Dezember 2010 (BGBl. I S. 1980)

Austria: § 2 (obligation to hold a licence) of the Federal Act on the Non-scheduled Commercial Transport of Passengers by Motor Vehicles (Occasional Transport Act 1996 - GelverkG) of 7 March 1996, Federal Law Gazette No 112/1996 as amended on 17 March 2022 (Federal Law Gazette I No 18/2022) / § 2 (*Konzessionspflicht*) des Bundesgesetzes über die nichtlinienmäßige gewerbsmäßige Beförderung von Personen mit Kraftfahrzeugen (*Gelegenheitsverkehrs-Gesetz 1996 - GelverkG*) vom 7. März 1996, BGBl. Nr. 112/1996 in geltender Fassung vom 17. März 2022 (BGBl. I Nr. 18/2022)

South Tyrol / Italy: Art. 6 (taxi licence and authorisation to operate the service "hired car with driver") of the Decree of the Governor of 12 December 2019, no. 32 (implementing decree on taxi services and services "hired car with driver") as amended on 13 August 2020 (Official Gazette of the Region of 20 August 2020, no. 34) / Art. 6 (*Taxilizenz und Ermächtigung zur Ausübung des Dienstes „Mietwagen mit Fahrer/Fahrerin“*) des Dekrets des Landeshauptmanns vom 12. Dezember 2019, Nr. 32 (*Durchführungsverordnung über Taxidienste und Dienste „Mietwagen mit Fahrer/Fahrerin“*) in geltender Fassung vom 13. August 2020 (*Amtsblatt der Region vom 20. August 2020, Nr. 34*)

Article 8 (Arrangements for issuing licences and authorisations) of the Framework Law on the Transport of Persons by means of Non-Scheduled Public Bus Services) in the version in force on 11 September 2020 (Official Gazette, 14. September 2020, No. 228, S.O.) / *articolo 8 (Modalità per il rilascio delle licenze e delle autorizzazioni) della Legge quadro per il trasporto di persone mediante autoservizi pubblici non di linea*) in versione vigente del 11 settembre 2020 (*Gazz. Uff. 14. September 2020, Nr. 228, S.O.*)

Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

Kind regards

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