The Role of the State: Policy maker or business actor? The application of the Market Economy Operator Principle (MEOP)

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Where are we coming from?

Article 107 (1) TFEU

"*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*"

Article 345 TFEU

"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

BUT State aid rules apply => **MEOP** = the rational economic operator

The MEOP - economics or law?

- When does the State act as a (rational) economic operator?
- Applicability vs application
- When does the MEOP apply?
- Not if:
  - Exercise of public authority
  - Pursuit of public policy
  - Market failure
- Does the type of measure or instrument matter?

The EDF saga

The EDF saga

- Conversion of tax debt to capital
- **EC** considers MEO inapplicable where State acts as (tax) authority (OJ 2005 L 49, p. 9, "initial decision")
- EDF supported by France challenges the EC Decision
- **GC** states: "*the Commission was under an obligation to ascertain the economic rationale for the investment in question by undertaking an assessment as to whether, in the same circumstances, a private investor would have invested* ***a comparable amount*** *in EDF. That obligation was incumbent upon the Commission,* ***whatever the form*** *in which the capital had been provided by the State.*" (T-747/15 para. 37) "***However****, such a conclusion presupposed that an economic analysis had been carried out in the context of applying the private investor test.*" (T-156/04 para. 38)

The EDF saga

- The **CJEU** dismissed the EC's appeal: "*the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but **on the amount** that the undertaking ultimately receives.*" (C-124/10 P, para. 91) **HOWEVER**: "*if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder.*" (C-124/10 P, para. 82) and "*it is not enough to rely on economic evaluations made **after** the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.*" (C-124/10 P, para. 85)

The EDF saga

- **EC** adopts "New Decision": The MEOP is inapplicable because evidence shows that France, at the time, did not intend to make an investment in EDF. (New Decision, para. 154) **AND**, in any event, the tax write-off does not appear to be a productive investment (New Decision, para. 192)
- **GC** dismisses EDF's application: *inter alia* by reference to C-124/10 P, paras 82 and 85 (T-747/15 paras 246 and 247)
- …

The FIH case

The FIH Case

- Further State support to manage exposure resulting from previous compatible aid*
- **EC** adopts Decision in 2014 stating that: "*FIH had already received [State aid]. Whilst those facts do not exclude the application of the MEOP in this case per se, they are indicative of the difficulties faced by FIH and would affect the willingness of private investors to invest in the measures. The previous aid already distorts the economic circumstances, creating a perception of continued State support.*" (SA.34445, para. 88) and applies the MEIP rather than the MECP (effectively excluding the State's previous exposure from the assessment) concluding that the new measures do not generate an acceptable return (indeed the estimated return was negative) (SA.34445, para. 93)
- FIH challenges EC Decision arguing *inter alia* that EC applied the wrong test (MEIP instead of MECP)
  - In 2009 FIH received a DKK 1.9 billion (EUR 255 million) Tier 1 hybrid capital injection and a government guarantee totalling DKK 50 billion (EUR 6.31 billion) covering a bonds issue. This was followed in 2012 by an impaired assets measure of DKK 2.25 billion (approximately €300 million), to address liquidity problems.

The FIH Case

- The **GC** annuls the EC Decision, agreeing with FIH that the EC applied the wrong test (T-386/14) stating *inter alia*: "*the mere fact that a public undertaking has already made capital injections into a subsidiary that are classed as aid does not automatically mean that a further capital injection cannot be classed as an investment satisfying the market economy investor test (judgment of 15 September 1998, BP Chemicals v Commission, T-11/95, EU:T:1998:199, para. 170)*" [BUT forgets an important sentence from the same paragraph*] and that "*an economic operator in a situation such as that in the present case, in which it has previously granted a capital injection and a guarantee to the company concerned, is akin to a private creditor seeking to minimise its losses rather than a private investor seeking to maximise the profitability of the funds that it might invest where it so wishes*" (T-386/14, para. 64).

* "*Nevertheless, it is the Court's view that in a case such as this, which concerns three capital injections made by the same investor over a period of two years, the first two of which brought no return, the Commission must determine whether the third injection **could reasonably be severed** from the first two and classed, for the purposes of the private investor test, as an independent investment*"

The FIH Case

- The **CJEU** on appeal by the EC annuls GC ruling, stating *inter alia* that if: "*by granting aid, a Member State pursues, by definition, objectives other than that of making a profit from the resources made available to undertakings, it must be held that those resources are, in principle, granted by the State exercising its prerogatives as a public authority (see, to that effect, judgment of 24 October 2013, Land Burgenland and Others v Commission, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, para. 56). It follows that the risks to which the State is exposed and which are the result of State aid that it has previously granted are linked to its actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations (see, to that effect, judgments of 28 January 2003, Germany v Commission, C-334/99, EU:C:2003:55, paras 138 and 140). This consideration applies, in particular, to the obligations arising for the State from loans and guarantees previously granted to an undertaking and constituting State aid. Taking those obligations into account in the assessment of State measures adopted in favour of the same undertaking would be liable to prevent those measures from being classified as State aid even though they **do not satisfy normal market conditions**, on the sole ground that they prove economically more advantageous for the State than if they had not been adopted. Such a consequence would compromise the **objective of ensuring undistorted competition**, set out in paragraph 45 above.*" (C-579/16 P, paras 57-59)

How did we get there?

- Link/contradiction with other cases?
- Here the question is not whether previous aid (automatically) excludes the application of the MEOP to latter measures but whether risks stemming from previous aid can be taken into account
- *Frucona Košice* (C-300/16 P, para. 28)

  *"… the private creditor test is intended to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor that sought to recover sums due to it by a debtor in financial difficulty (judgment of 24 January 2013, Frucona Košice v Commission, C-73/11 P, EU:C:2013:32, paragraph 72) and, accordingly, whether that undertaking **could**, in circumstances which correspond to normal market conditions, **have obtained the same advantage** as that which has been made available to it through State resources (judgment of 24 January 2013, Frucona Košice v Commission, C-73/11 P, EU:C:2013:32, paragraph 70)."*

- Previous exposure not a result of economic activity but exercise of public authority

Does this make sense?

- Distinction by type of previous measure – policy instruments vs market tools?
- Compatible vs incompatible aid – what could have been obtained “on the market”?
- Accuracy as to the amount of previous aid – a refined approach

What are the consequences?

- Notification (and approval) more onerous for the beneficiary
- If no basis for compatibility – State is deprived from reducing its financial exposure
- Implications under other (EU) rules – e.g. BRRD

Thank you