

The burden of proof and evidence required under the Market Economy Operator Principle. Lessons learnt from the recent case law

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**Dr. Malgorzata Cyndecka
Postdoctoral research fellow**

The origins of the MEOP

Articles 345 TFEU / 125 EEA:

- The principle of **neutrality** and **equality** of public and private undertakings
- MS have right to run a «**mixed economy**»
- The «dual image of Janus» problem.

Articles 107(1)TFEU / 61(1) EEA:

- State aid rules must be observed
- A «**level playing field**» and **competition**
- The notion of aid – a state measure must confer an **economic advantage**.

The notion of the MEOP

- If the state behaves like **a normal, profit-oriented, private investor** would have behaved in **similar circumstances under normal market conditions**, it does not grant aid, but enters a **typical business transaction**
- No (undue) economic advantage, no aid
- *Meura* and *Boch II* of 1986.

Different subtypes and variations...

The test of a private **investor**, creditor, **guarantor**, reinsurer, **lender**, borrower, **vendor**, purchaser, **supplier** or operator

... but the **same logic**

«... to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in **similar circumstances**, a **private investor** of a **comparable size** operating in **normal conditions of a market economy** could have been prompted to make the investment in question.»

Public authority v entrepreneur

Hytasa of 1994:

«a distinction must be drawn between the **obligations** which the State must assume as **owner of the share capital of a company** and its obligations as a **public authority**».

For the purposes of the **MEOP**:

only the obligations, benefits, circumstances, factors that would be relevant to an entrepreneur.

The imperative of being profit-motivated

- The state must pursue an economic objective - either **maximize the profit** or **minimize the losses (risks/costs)**
- It may have a **short term, medium term or long term perspective** while pursuing structural policy, either general or sectoral
- Costs/risks stemming from **aid granted in the past?**
- **Law v economics?**

Assessment of profitability

- ***Ex-ante* assessment** v ***ex-post* assessment**
- A rate of return
- «The average rate of return in the sector concerned»
- A **complete analysis.**

Non-economic objectives under the MEOP

Meura of 1986:

- «leaves aside all social, regional-policy and sectoral considerations»
- **Prohibited** under the MEOP?
- No, but...

A case-by-case assessment

- The state undertaking a **given intervention (measure)** with behaviour of a hypothetical, comparable, rational and profit-oriented private market operator acting in similar circumstances under normal market conditions
- No «**general perspective**» of the grantor
- **All relevant factors and circumstances.**

Applicability and application of the MEOP

- **Applicability** - **could** a given state intervention have been undertaken by a private market operator?
- **Application** – **would** a private market operator have undertaken this intervention?
- The applicability - the **economic nature** of a state intervention
- The application - its **economic soundness**
- **CONSEQUENCES.**

Applicability - how to determine?

«In order to determine whether measures taken by the State represent the exercise of State authority or whether they are the consequence of obligations that the State must assume as shareholder, it is important to look **not at the form** of those measures, but at their **nature, their subject-matter and the rules to which they are subject, while taking into account the objective pursued**.»

(*EDF* of 2009, upheld in 2012)

Applicability

Who bears the burden of proof?

The Commission/ESA or the Member State?

Case 124/10 *EDF* of 2012 (I)

- If a **MS** relies on **MEOP** during the administrative procedure, it **must**, where there is doubt, **establish unequivocally and on the basis of objective and verifiable evidence that it acted as shareholder**
- It may be necessary to produce **evidence** showing that the decision is based on **economic evaluations comparable** to those which, in the **circumstances**, a **rational private investor in a situation as close as possible to that of the MS** would have had carried out, before making the investment, in order to determine its **future profitability**.

Case 124/10 *EDF* of 2012 (II)

- If the **MS** provides the requisite evidence, it is for the **Commission** to carry out a **global assessment**, taking into account — **in addition** to the **evidence provided by that MS** — **all other relevant evidence**
- **MEOP** is **not an exception** which applies **only if a MS so requests** ... where it is **applicable**, MEOP is among the factors which the **Commission is required** to take into account for the purposes of establishing the existence of aid.

Case 124/10 *EDF* of 2012 (III)

Where it **appears** that the **private investor test could be applicable**, the **Commission is under a duty to ask the Member State** concerned to provide it with **all relevant information enabling it to determine** whether the conditions governing the **applicability and the application** of that test are met, and it cannot **refuse to examine** that information **unless the evidence produced** has been established **after** the adoption of the decision to make the investment in question.

Case C-300/16 *Frucona Košice* of 2017

- Where **MEOP** appears to be applicable, it is for the **Commission to ask the MS** to provide it with all the relevant information...
- ... and **irrespective of any request** to that effect
- The starting point for determining the applicability is the **economic nature of the MS's action, not** its subjective state of mind.

Case T-747/15 *EDF* of 2018

Extension decision on *EDF* 2016/154 of 2015 - section 126 quotes **Case C-124/10 *EDF* P.**, paras **82, 83, 84, 86, 95** and **104**

YET, without the first part:

Consequently, where it appears that the private investor test could be applicable, **the Commission is under a duty to ask the Member State concerned to provide it with all relevant information** enabling it to determine whether the conditions governing the applicability and the application of that test are **met**, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question.

Case T-747/15 *EDF* of 2018

- Still, a correct exclusion of applicability and application (alternative)
- It was **after completing a global assessment and after considering each of the pieces of possibly relevant evidence that the Commission concluded that the measure failed the MEOP.**

Case T-93/17 *Duferco* of 18 September 2018

- The GC quotes Case C-124/10 *EDF P.*, para 104 in its entirety:
“where it appears that the private investor test could be applicable, **the Commission is under a duty to ask the Member State concerned to provide it with all relevant information** enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question.
- In para 38, the GC stressed the **Commission’s burden of proof** concerns the issue of **applicability**.

Application

Who bears the burden of proof?

The Commission/ESA or the Member State?

Application - Case T-747/15 *EDF* of 2018

- If the **state relies** on the **MEOP in the administrative procedure**, it **must**, where there is doubt, establish **unequivocally** and on the **basis of objective, verifiable and contemporaneous evidence** that the measure implemented falls to be ascribed to the state acting as **shareholder** and is based on the **requisite prior economic evaluations**
- The **Commission** must conduct a **diligent and impartial examination** of the contested measures based on the **evidence** submitted by **the state**.

Application - Case C-300/16 *Frucona Košice* of 2017

- The Commission: an **overall assessment of all relevant evidence/information**
- **Relevant information**: all information liable to have a **significant influence** on the **decision of a normally prudent and diligent private creditor**, who is in a **situation as close as possible** to that of the public creditor and is seeking to recover sums due to it by a debtor experiencing difficulty in making the payments and that is available, and the developments which were foreseeable, **at the time when the decision was taken.**

«Excessive burden of having to seek all ‘imaginable’ evidence and information»? (I)

T-103/14 *Frucona Košice v Commission*:

- An overall assessment of **all relevant evidence**
- Yet, the Commission **cannot be criticised for not taking into account matters of fact or of law which could have been submitted** to it during the administrative procedure, but which **were not** - no obligation to consider what information might have been submitted
- A **diligent and impartial examination** – must have the **most complete and reliable information** possible for that purpose
- **No explanation regarding the liquidation factors** used to determine the max possible proceeds from a sale of the assets in the context of a bankruptcy procedure.

«Excessive burden of having to seek all ‘imaginable’ evidence and information»? (II)

- «Complex economic assessment» + «wide margin of discretion»
- **Not** for the Courts to **substitute** their own economic assessment for that of the **Commission**
- **BUT**: the **EU Courts must**, i.a., establish not only whether the **evidence** relied on is **factually accurate, reliable and consistent** but also whether that **evidence contains all the relevant information** which **must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.**
- **Conclusions** that are reached **must be substantiated** from the **facts** in the file.

Burden of proof/evidence and the statement of reasons

The statement of reasons

- must be **appropriate** to the measure and its context
- must disclose in a **clear and unequivocal fashion the reasoning** behind the decision - the **Court** must be able to carry out its **review** and the **persons concerned** must be able to **ascertain the reasons** for the measure and **defend** their rights and ascertain whether or not the measure is **well founded**
- **Not necessary** to specify all the relevant matters of fact or of law
- In particular, **no obligation to adopt a position on all the arguments** relied on by the parties
- Sufficient to set out the **facts and the legal considerations** having **decisive importance** in the context of the decision.

Key evidence under the MEOP

- **Prior evaluation of profitability** - appropriate **business plan**
- *SACE* of 2015 (economic crisis):
 - The **content/accuracy** - **circumstances** of the case, **market situation** and the **economic climate**
 - Absence of a **detailed business plan** ≠ **non-compliance** with the MEOP
 - **Margin of assessment** (?)
 - **No appropriate prior evaluation...? (EDF, Duferco...)**

Assessment methods (I)

The Commission's notice «Notion of aid»:

1. *Pari passu* transaction
2. Tender procedure
3. Benchmarking
4. Other assessments methods, such as internal rate of return (IRR) or net present value (NPV).

In principle, free to choose, but **choose wisely!** (e.g. pricing access to publicly-funded infrastructure).

Cases T-165/16 *Ryanair v Commission* and T-53/16 *Ryanair v Commission* of 13 December 2018

- Ryanair's agreements with Altenburg-Nobitz airport in Germany and France's Aéroport de Nîmes
- The Commission: the *ex-ante* incremental profitability analysis
- Ryanair: comparison with a suitable market price
- Suitability of a given method of assessment.

Compliance with the MEOP must be established ...

- **Unequivocally**
- On the basis of information that is **objective, verifiable, actually accurate, reliable, relevant** and **consistent**
- **How detailed** information/evidence?
- **Independent/external reports/studies?**
- Issues such as **branding, corporate image, general promotional activities** - **quantify them!**

Textbook cases on the application of the MEOP – complex economic analysis and the quality of evidence

- Joined Cases T-319/12 and T-321/12 *Ciudad de la Luz* of 2014 – Commission Decision of 8 may 2012 No. SA.22668
- Case T-747/15 *EDF* of 2018 (under appeal Case C-221/18) - Commission Decision (EU) 2016/154 of 22 July 2015
- Case T-93/17 *Duferco* of 2018 - Commission Decision (EU) 2016/2041 of 20 January 2016.

Thank you
for your attention.