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A controversial expansion of the MEIP in a financial crisis case – the GC's judgment in Case T?386/14 FIH of 15 September 2016 (under appeal)

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Introductory remarks

Following such landmark cases as *Ryanair*,[1] *EDF*[2] and *ING*,[3] one may observe a truly impressive expansion and development of the MEIP. While the EU Courts have (finally) drawn attention to the question of the applicability of the MEIP, the Commission and ESA often have had to decide on quite novel and complex issues when applying the test. In this respect, one may mention applying the MEIP in market conditions that were substantially altered by the financial crisis,[4] proposing new subtypes of the test, such as the private borrower test,[5] or applying the private vendor test to option agreements.[6]

In *FIH*,[7] the GC dwelled on both the applicability and application of the MEIP in a financial crisis case. As one may argue, however, the case could have (and probably should have) been decided by verifying the applicability of the test. As the GC's judgment is under appeal, one may possibly expect more clarifications on that issue from the CJUE.[8]

The factual background and the Commission's Decision

The contested decision concerned state measures granted to a Danish bank, FIH, in 2012.[9] FIH and its subsidiaries were owned by the other applicant, FIH Holding. Importantly, in 2009, FIH received two state measures. These were: a hybrid tier 1 capital injection of approximately €225 million, which was granted under a scheme open to fundamentally sound and solvent banking establishments, and a State guarantee totalling approximately €6.31 billion. Both aid schemes were declared compatible.[10] FIH used the entire guarantee to issue bonds that were due to mature in 2012 and 2013. Between 2009 and 2011, however, FIH's rating was downgraded from A2 to B with negative outlook. Due to facing liquidity problems, which the maturity profile of the bonds was going to create, in March 2012, Denmark notified new measures in favour of FIH. Those were: a transfer of FIH's impaired assets to its new subsidiary, NewCo, and the subsequent purchase thereof by the Danish Financial Stability Company, a public body set up in the context of the financial crisis. NewCo would be wound up in an orderly manner thereafter.

In 2014, the Commission approved those measures as compatible aid under Article 107(3)(b) TFEU.[11] In particular, the measures provided an advantage to the FIH Group. As the Net Present Value of the share purchase would generate a loss rather than a profit for the FSC, the 2012 intervention did not meet the MEIP.

FIH was of the opposite opinion. As it argued, the Commission misapplied the MEIP by applying the private investor test, and not the private creditor test. In this respect, the Commission allegedly failed to consider the pre-existing risk for the state of suffering very large losses on the hybrid tier 1 capital injection and the State guaranteed bonds issued by FIH. The contested transfer of assets supposedly aimed to do away with the risk of FIH face liquidity difficulties or even having to be wound up. The Commission rejected that argument by pointing out that the 2009 measures amounted to aid.

The GC's findings

When ruling on the plea concerning the MEIP, the GC recalled the difference between the private investor and the private creditor test. It also noted that

> 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.[12]

Moreover, as clarified in *EDF*, the Commission must consider the applicability of the MEIP as it is a part of assessment under Article 107(1) TFEU. In the GC's opinion, the Commission should have taken into account that Denmark would have considered its exposure arising from the 2009 measures. It could have been rational to accept measures such as a transfer of impaired assets, in so far as they had a limited cost and involved reduced risk. The Commission applied thus an incorrect legal test. When answering the Commission's arguments, the GC recalled that even though *ING* concerned the applicability of the MEIP, and not its concrete application, it confirmed that the Commission could not refuse to apply the MEIP to the amendment to the repayment terms of a capital injection solely on the ground that that capital injection constituted aid. Furthermore, *Commission v EDF* clarified that

> an economic advantage must, even where it has been granted through fiscal means, be assessed in the light of the private investor test if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it.[13]

As regards *Land Burgenland*,[14]

> the Commission was fully entitled to refuse to take account of the legal guarantee at

> issue since, by that grant, the State pursued objectives other than that of making a profit and exercised its prerogatives as a public authority.[15]

This case

> concerned … the specific application of what was the correct test, namely, the private seller principle, and the elements to be taken into account as part of that application.[16]

Finally, unlike in *FIH*, in *Land Burgenland*

> the guarantee at issue covered neither a specific period nor a specific amount and was not granted in exchange for payment of a premium or by means of a market mechanism.[17]

The Commission Decision was thus annulled.

Commentary

As *FIH* dealt with both the applicability and application of the MEIP, one may recall the following. While the former verifies whether a private market operator could have undertaken the intervention at stake, ie whether the state could have had an economic objective when it intervened, the latter verifies whether a market operator would have undertaken the given measure, ie whether the state's intervention was economically wise. Needless to mention perhaps, but the application of the MEIP may be verified only after its applicability has been confirmed. Importantly, when deciding on both the applicability and application of the MEIP, one may take into account only those obligations and circumstances that are relevant to the state acting as a shareholder. When the state acts as public authority, the MEIP does not apply.

In *FIH*, one should have first considered the applicability of the MEIP in light of *BP Chemicals*. While the GC rightly recalled that

> 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.[18]

it did not mention the second part of the relevant formula. For the purpose of applying the MEIP, one must separate new measure(s) from 'old aid'. Such separateness depends on the chronology of the granted measures, their purpose, and the beneficiary's situation at the time when each decision to make an intervention was made.[19] While the Commission failed to consider those factors when it excluded the applicability of the MEIP to the 2012 measures, it is rather doubtful that those

measures could be separated from the 2009 aid. FIH's financial situation was (still or again) difficult and that initiated the new intervention. Furthermore, while the 2009 aid aimed to address the consequences of the financial crisis, the 2012 measures aimed at enabling FIH the repayment of that aid.

Granting aid amounts to acting within the public authority capacity. In this regard, *ING* in which the Court established the applicability of the MEIP to an amendment to repayment terms of aid does not invalidate that finding. In that case, even though the Commission considered the contested amendment to be a separate measure, it failed to consider the applicability of the MEIP. In fact, it made the same mistake as in *FIH*, ie neglected *BP Chemicals*. Moreover, in *ING*, the Court dealt solely with the applicability of the MEIP; it did not and could not say anything about its application.

As regards the application of the MEIP in *FIH*, the GC's conclusion on the private creditor test runs against the logic of the MEIP. Under the test, the state cannot take into account the obligations resulting from its actions taken as a public authority. This was clearly stated in *Germany v Commission*.[20] Surprisingly, however, the GC decided to distinguish that case from *FIH*. As it ruled, while

> the guarantees of loans granted to GS [*Gröditzer Stahlwerke*] … were given in favour of an undertaking in difficulty which supplied no adequate consideration

in *FIH*,

> the aid scheme was open to fundamentally sound and solvent banking establishments and that the guarantee could only be granted in exchange for payment of a market oriented premium.[21]

Still, neither in *Germany v Commission*, nor in *FIH* a private operator would have given the beneficiary concerned the guarantee at stake. Both GS and FIH received aid, which means that the state acted within its public authority dimension.

The necessity of excluding the costs of aid under the application of the MEIP was also accentuated in *Land Burgenland* that concerned the application of the private vendor test. The risk of invoking Ausfallhaftung was irrelevant when choosing the buyer of Bank Burgenland following a bidding procedure. The character of Ausfallhaftung, ie the fact that the guarantee was unlimited in both scope and duration, merely strengthened its 'public authority character'. Indeed, only the state disposes of resources that are unlimited.

[1] Case T-196/04 *Ryanair v Commission (Ryanair)*, ECLI:EU:T:2008:585.

[2] Case T-156/04 *EDF v Commission*, ECLI:EU:T:2009:505, upheld in Case C-124/10 P *Commission v EDF*, ECLI:EU:C:2012:318.

[3] Joined cases T-29/10 and T-33/10, *Netherlands and ING v Commission (ING)*, EU:T:2012:98, upheld in Case C-224/12 P *Commission v Netherlands and ING (ING)*, ECLI:EU:C:2014:213.

[4] EFTA Surveillance Authority, Decision of 27 June 2012 on restructuring aid granted to Íslandsbanki, (*Íslandsbanki*), 244/12/COL.

[5] Case T-525/08 *Poste Italiane v Commission*, ECLI:EU:T:2013:481.

[6] EFTA Surveillance Authority, Decision of 13 July 2011 on the notification of the sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the Municipality of Asker, 232/11/COL, and Case E-12/11 *Asker Brygge v EFTA Surveillance Authority*, EFTA Ct. Rep [2012] p. 536; European Commission, Decision of 8 February 2012 on State aid implemented by Sweden in favour of Hammar Nordic Plugg AB, 2012/293/EU, and Case T-253/12 *Hammar Nordic Plugg v Commission*, ECLI:EU:T:2015:811.

[7] Case T?386/14 *FIH*, ECLI:EU:T:2016:474.

[8] Case C-579/16 P *Commission v FIH Holding and FIH Erhversbank*.

[9] European Commission, Decision of 11 March 2014 on State aid implemented by Denmark for the transfer of property-related assets from FIH to the FSC, 2014/884/EU.

[10] European Commission, Decision of 3 February 2009 on State aid scheme N31a/2009 – Denmark, C(2009)776 final.

[11] European Commission, Decision of 11 March 2014 on State aid implemented by Denmark for the transfer of property-related assets from FIH to the FSC, 2014/884/EU.

[12] *FIH* (n 7), [59]. The GC referred to Case T-11/95 *BP Chemicals*, EU:T:1998:199, [170].

[13] *Commission v EDF*, (n 2), [92].

[14] Joined cases C-214/12 P, C-215/12 P and C-223/12 P, *Land Burgenland*, EU:C:2013:682, [54-56].

[15] *FIH* (n 7), [79].

[16] *FIH* (n 7), [80].

[17] *Land Burgenland*, (n 14), [5].

[18] *FIH* (n 7), [59].The GC referred to *BP Chemicals*, (n 12), [170].

[19] *BP Chemicals* (n 12), [171].

[20] *Case C-334/99, Germany v Commission (Gröditzer Stahlwerke)*, EU:C:2003:55.

[21] *FIH* (n 7), [70].

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