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Should the MEO Principle Apply to Charges set by Legislation? T-486/18 RENV – Danish Butchers' Federation (DBF)

Cees Dekker (Simmons & Simmons) · Wednesday, May 15th, 2024

Introduction

By judgment of 10 April 2024, the General Court (GC) annulled Decision 19.4.2018 – SA.37433 of the European Commission (EC) finding that Danish legislation concerning charges for wastewater treatment did not constitute State aid. In my view, the GC misapplied the Market Economy Operator Principle (MEOP) in this case when it assessed the legislation and the GC wrongly considered the EC Notice on the Notion of State aid as a self-limitation for the EC when applying Article 107(1) TFEU.

This was the second time that the GC had to consider DBF's appeal. The ECJ annulled the first judgment and referred the case back to the GC. In this blog, I will focus on the State aid assessment that the GC carried out "for the sake of completeness" (point 46). The GC had already annulled the decision on a rather rare ground: breach of the requirement of impartiality under Article 41(1) of the Charter of Fundamental Rights of the EU due to the conflict of interest of the Commissioner in charge of competition who had signed the contested decision. This Commissioner had previously been involved in the drafting of the relevant legislation within the Danish government. Very interesting (see judgment, paragraphs 24 to 45) but less relevant for day-to-day State aid practice.

Background – Commission decision

The case concerns Danish legislation setting charges for wastewater treatment, initially setting a flat tariff for all quantities of wastewater to be treated. In 2013 a degressive tariff was introduced, with tariffs becoming lower in stages for larger volumes of wastewater, entailing a volume discount for, inter alia, large slaughterhouses. By this, the Danish government wanted to bring the charges more into line with the actual costs of treating wastewater. The behaviour of the government could be compared to that of a private operator, the EC said, and it therefore assessed the Danish legislation in the light of the MEOP. It considered that, as the charges in question apply horizontally to all consumers connected to a particular plant and are not targeted at any particular consumer, the MEOP is satisfied if the staircase model ensures that the charges in question cover the extra costs of the plants. As this was the case, the EC found that the legislation did not grant aid

to the large slaughterhouses.

Judgment of the General Court

Holding that the EC was right to make the comparison with a private operator, the GC, in its latest judgment in the renvoi proceedings rules that it was for the EC to determine whether the undertakings paying the reduced water treatment tariffs could have obtained a comparable advantage from a normally prudent private operator, particularly in view of its profitability prospects (paras 66 and 67).

In this context, the GC reviews the EC's assessment under paragraph 228 of its Notion on the Notice of State aid. In the GC's view, the Notion constitutes a self-limitation on the EC's discretion regarding the concept of State aid (para 73). The GC holds that paragraph 228 compels the EC to examine, in the case of each undertaking connected to a wastewater treatment plant, whether the charge paid could cover the costs of using the infrastructure involved (para 79). Because the EC relied solely on average data relating to the total costs and revenues of six of Denmark's ninety-eight municipalities, the EC had disregarded the limits of its discretion under the Notice (paras 79 and 91). Furthermore, the EC should at least have checked whether the tiered tariff allowed it to allocate with sufficient probability to users the costs directly resulting from their use of a water treatment plant (the incremental costs), even if the EC could have applied the method of ex-ante profitability analysis without examining each individual user (para 82). The GC points out that the EC considered all costs that were not related to the quantity of water consumed as fixed costs, even if such costs would have arisen purely because of the presence of a particular user (para 86). Thus, the EC could not claim to have ascertained whether the charge set according to the tiered model could cover the marginal costs in the medium term.

The GC further considers that the EC was wrong to consider that the rebates introduced by the graduated tariff would satisfy the MEOP, since it did not examine whether the application of the graduated tariff allowed water treatment plant operators to reserve a profit margin (para 95).

Thus, the GC concludes that the EC infringed Article 107(1) TFEU and paragraph 228 of the Notice.

Comments

The first thing to note is that the GC considers that the Notice implies a self-limitation for the EC in assessing whether a measure constitutes aid. I have pointed out in my annotation to Case 211/20P – Valencia CF v. Commission that this approach is rather questionable because the concept of aid in Article 107(1) TFEU is an objective legal concept, the interpretation of which is not a matter for the EC but ultimately for the ECJ. The EC cannot limit (or extend) the interpretation of the concept. Such a self-limitation comes into play where the Commission has a political discretion: in the application of Article 107(3) TFEU, as the ECJ pointed out in, inter alia its judgment in Holland Malt v. Commission (para 46).

While it is true that the ECJ, in European Commission v Électricité de France (EDF), considered the application of the MEOP to a public law measure to be possible, that case concerned a situation

where it appeared that although the means used were instruments of State power, the Member State concerned granted that advantage in its capacity as shareholder of the undertaking belonging to it. In this case, however, the State is not behaving like a market player. It wants to regulate charges in a way that is more or less in line with what the market does, but without acting as a market player.

Apart from this, I believe that the ECJ's approach interferes (too) much with the Member States' power to determine the tariffs of a public service. By stating that the EC should have taken into account that the wastewater treatment plants should be able to make a reasonable profit over time, the ECJ is forcing Member States that want to use a tariff system based on (but not necessarily equal to) cost recovery to go 'all the way' and therefore to set up the system as if the services were provided by a market operator. It seems to me that it should be left to the Member States to decide whether they consider it desirable that a service such as the one in question should be able to make a profit, or whether it should only cover its costs, or perhaps even part of the costs because the Member State considers that the use of the service should be encouraged. Perhaps more importantly, if the Member State does not apply a profit margin to any of the tariffs (regardless of the size of the customer), which (category of) companies will benefit compared to others? The GC's reasoning, which requires a detailed assessment of the costs incurred by a customer may also imply that, if a flat tariff is applied, it is precisely the smaller companies that may benefit, as their costs per m3 will be higher. The GC's reasoning also raises other questions. For example, what does the GC's ruling mean for a national levy such as the one imposed under Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment, obliging Member States to ensure that producers of single-use plastic products cover the costs of, inter alia, waste collection and litter clean-up? Do Member States have to apply a profit margin here too?

While the GC's reasoning along the lines of the MEOP is understandable, since the EC also assessed the scheme in the light of the MEOP, albeit more loosely, the application of the MEOP to generally applicable legislation on tariffs for certain services is, in my view, a wrong approach. It interferes too much with political choices, without such legislation necessarily constituting State aid. In my view, the State aid assessment of public law (pricing) regulations should not be based on the MEOP. It should rather be approached in the same way as tax measures or charges, (see already ECJ judgment in Italian Textiles, case 173/73). That is, by taking as a starting point the 'reference framework' or 'normal regime' and then determining whether any advantage granted by the legislation may be selective. That may be the case if the measure involved derogates from that normal regime where it differentiates between economic operators who are in a comparable factual and legal situation, having regard to the objective of the legislation

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