

GARRIGUES

PUBLIC INTERVENTION IN THE ECONOMY IN TIMES OF CRISIS

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Introduction

- Not all public investment in an undertaking entails State aid (Art. 345 TFEU).
- There is no State aid if MEIP/MECP applies
- We have reviewed the state of play of those principles in times of crisis (decisions and case law from 2008-2012)
- Main conclusion: the crisis does not appear to have had an impact on the application of the MEIP
- However, there is still room for legal and economic discussion
 - What are the main current concerns regarding the application of the MEIP?
 - Are there any signs of change for the coming future?

MEIP/MECP/MEGP

- MEIP: Market Economic Investor Principle
 - MECP: Market Economic Creditor Principle
 - MEGP: Market Economic guarantor principle
- The three principles share the same basic elements: notwithstanding the different methods of market intervention, the existence of aid would be excluded if the State acted as a private operator would have done.

HOWEVER

- When does this happen?
- Traditional practice and case law:
 - (i) a case-by-case application.
 - (ii) difficult to demonstrate.

Has something changed because of the crisis?

- We have reviewed the Commission's practice and case law from 2008-2012.
- Most of the decisions relate to investments carried out before the crisis: this may distort our conclusion.
- However, some conclusions can be reached:
 - The Commission continues to conduct a case-by-case analysis. There are no safe harbours
 - The Commission accepts the application of the MEIP in all sectors of the real economy (there is no negative *a priori* premise)
 - Reference rates remains a proxy for market rates but not a safe harbour
 - Concomitance: remains a key element (but only real concomitance)
- Other interesting issues to discuss:
 - Pollution theory: it should not be applied
 - MEIP and public tenders. What is the current relationship?

Case-by-case analysis

- The concept of State aid (MEIP application): objective in nature, thus, “*it is a legal concept which must be interpreted on the basis of objective factors*”.
- There should be a minimum level of legal certainty. However, the conclusions in one case do not affect the conclusions in another case. The Commission does not consider itself bound by its own previous decisions.
- Each investment requires its own *ad hoc* assessment (key elements: risk, remuneration, concomitance, the analysis is different in each case).
- In practice, this means that the Commission tends to open the formal procedure to review whether the MEIP applies.

MEIP : in theory, could be applied in all sectors

■ Financial crisis:

- The Commission interprets the notion of State aid very broadly.
- Almost all interventions constitute State aid.
- Since 2008, any aid granted to financial and banking institutions would never have been mirrored by private operators. (A *de facto* exclusion of the application of the MEIP).

■ Real economy:

- No negative *a priori* premise.
- Therefore: in theory, the application of the MEIP remains possible in all sectors.

Reference rates

- Remain a useful proxy
- However, the application of the correct reference rate it is not sufficient. The Commission carries out a more general assessment of all of the characteristics of the public investment. Mainly risk analysis.
- **Interesting case: *Ceske aerolinie (SA 29864)***
- *Ceske aerolinie (SA 29864)*: Investment (public loan in 2009) under reference rate but very significant securities.
- Curious case: the Commission first carried out an assessment of the application of the MEIP. The MEIP applies. Secondly, it assessed the loans under the rules of the temporary framework. Reluctance to apply only MEIP?

Concomitance

- Remains a key element in the MEIP assessment but the Commission requires real concomitance. The mere presence of other private operators is not enough.
- **Is there a minimum private participation?**
 - Communication 1984: “real economic significance”
 - Decision 11,12,2007 -Citynet (C-53/2006) – Is joint control required?
 - 2009: Broadband guidelines: “significant participation” . Is there a difference?
- **What is a “significant participation” in times of crisis?**
 - In the banking sector: only 70% (NN 40/2009 Hypo Steiermark) (even 50% has not been accepted).
 - Case-by-case analysis = there is no a safe harbour
 - **Investment in cash or in kind?** Telecom Italia/Trento (SA,33063 Trentino NGA)
 - Commission reluctant to accept application of MEIP: during the first phase, TI’s investment limited to contribution in kind.
 - According to the Commission’s opening decision: “*despite the value of TI’s network, it is necessary to check whether real concomitance exists*”

Pollution theory

- Pollution theory: if a company has already received State aid, any future public investment will constitute State aid.
- No real legal basis for this theory.
- The EU Courts do not accept it (Case T-11/95). And not in the banking sector (ING T-33/10).
- However, the Commission seems keen on it.
- If this theory is applied in times of crisis, it would have very negative effects because “fundamentally sound companies” might require public support in times of crisis



Tenders and the MEIP

- The tender: State aid “*washing machine*”?
- **Public sales:** The Commission’s traditional State aid practice would suggest that no aid is involved, as the very existence of the tender “cleans” the aid. See *inter alia* Commission Decision of 12.11.2008 in case N510/2008 *Transfer of assets of Alitalia*
- **Banking:** Partly in keeping with this idea, the Commission has always applied the principle that no aid can be granted to the buyer. Nevertheless, in certain cases the Commission has considered it legitimate to impose conditions on the “activity transferred”.
- **Real economy:** Example to discuss: Sale of public land - is the launch of a public tender enough to exclude the presence of State aid?
- Almunia’s new package (SIEGs): Tenders reduce the aid to the minimum but do not exclude the existence of aid.
- This seems to be the Commission’s current approach. Is this approach a result of the crisis?

Conclusions

- MEIP in times of crisis: the legal and economic criteria remain the same as those previously applied.
- The crisis has certainly not softened the Commission's approach.
- The Commission prefers to introduce a more flexible approach to the assessment of compatibility: (i) the concept of State aid is objective in nature; (ii) with this strategy, notifications are required, endowing the Commission with greater control.
- **What about the future?**
 - The application of the MEIP is possible but as difficult as ever.
 - We do not see any signs of change in this approach.
 - If the Commission wishes to respond to the crisis, it can make use of its powers and make the rules on compatibility more flexible.
 - Done once: Temporary Framework.
 - Nothing to prevent the Commission from doing it once again, in one way or another.

Thanks for your attention