UNIVERSITY OF BERGEN

# The applicability of the MEIP - high time to take it seriously?

Malgorzata Agnieszka Cyndecka

PhD candidate

# PhD project

- The Applicability and Application of the Market Economy Investor Principle
- One of its objectives is to highlight the importance of distinguishing between two stages in which it is examined whether a given state intervention complies with the MEIP
- These are: the stage of determining the applicability and the stage of verifying the application of the MEIP
- This presentation focuses on the applicability, which appears to be (often) misinterpreted and thus misapplied
- This misinterpretation (and mixing them) can have serious negative consequences

UNIVERSITAS BERGENSIS

# The MEIP - point of departure - Article 345 TFEU (ex 295 EC) / 125 EEA

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

- The EU is neutral on the question of privatisation / nationalisation of undertakings by the Member States

- The Member States can run a mixed economy

- The state acts as both a public authority and an entrepreneur – the dual capacity of the state (the problem of the "dual image of Janus")

# EU/EEA rules on State aid

Article 107(1) TFEU (ex 87(1) EC) / 61(1) EEA:

"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."

# The concept of State aid: 5 cumulative conditions:

- Transfer of State resources
- **An economic advantage (benefit) – the MEIP**
- Selectivity
- Adverse effect on trade
- (A threat of) distortion of competition
- Form of measure irrelevant, the “effect-based” approach – effect, not aims or causes, the concept of aid wider than the one of subsidy

# Article 345 TFEU v Article 107(1) TFEU

- The principle of neutrality does not deprive State aid rules from their effectiveness towards public undertakings
- The right to run a mixed economy cannot distort competition and a “level plying field” between public and private undertakings
- The principle of equal treatment of public and private undertakings – see also Article 106(1) TFEU (ex 86(1) EC) / 59(1) EEA)

UNIVERSITAS BERGENSIS

# How to distinguish between the two capacities of the state and prevent it from taking advantage of its position as a public authority when it competes with private market operators?

The answer is the Market Economy Investor Principle

(the Private Investor Test, PIT)

# The **Market Economy Investor Principle** – what (who) is it about?

If the state's intervention in favour of an undertaking corresponds to what a private shareholder, of a comparable size, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have done in similar circumstances and under normal market conditions, this intervention does not confer **an economic advantage** upon the recipient undertaking.

# The crux of the MEIP

Has the state behaved like a comparable market operator would have behaved in a given situation?

If yes, then

No economic advantage has been conferred – a normal commercial transaction

No aid under Article 107(1) TFEU has been granted

# The notion of the MEIP – origins and development

- Transparency Directive of 1980, see also Joined cases 188 to 190/80 France, Italy and the UK v Commission [1982] ECR 2545
- Endorsement by the Council and the Parliament in 1981
- **Commission Equity Holdings Communication of 1984**
- **The ECJ's approval: *Meura* and *Boch II* of 1986**
- **Commission Communication on Public Undertakings of 1993**
- Commission Communications and Notices on: aviation sector (1994), sales of land and buildings (1997), maritime transport (2004), airports (2005), broadband networks (2009), public service broadcasting (2009), state guarantees (2008), the return to viability of the financial sector in the current crisis (2009)
- Others: 23rd Report on Competition Policy of 1993, Staff Working Document on state aid-compliant financing, restructuring and privatisation of State-owned enterprises (2012)

# Thus, the MEIP …

- is a logical expression of the principle of equality of private and public undertakings
- ensures that the state can intervene as an entrepreneur, (non-discrimination of public investors/undertakings)
- safeguards a “level playing field” between undertakings (non-discrimination of private investors not being supported by the state, undistorted competition)
- has been established by the Commission, approved by the Court, the Council, the Parliament

# Moreover, it is a versatile legal instrument as …

- The process of its development and refinement resulted in many subtypes:
- Private investor test
- Private creditor test
- Private guarantor test
- Private vendor (seller) test (including privatisation)
- Private purchaser (buyer) test
- Private supplier test (see, e.g. *van der Kooy* of 1988)
- Der Company Group Test (e.g. the *Chronopost* cases – the problem of potentially competition distortive cross-subsidisation)

# Problems and challenges … to start with

- The distinction between the applicability and application of the MEIP – so far, not really taken seriously… (*Ryanair, EDF, ING, Buczek*)
- The applicability stage – can the MEIP be applied to a given state intervention?
- The application stage – how to verify the application of/compliance with the MEIP?
- “no” to the applicability question, the examination of application is futile

# Obviously, the MEIP does not apply to all state measures…

- *Ryanair* of 2008, para 85:

  "While it is clearly necessary, when the **State acts as an undertaking operating as a private investor**, to analyse its conduct by reference to the private investor principle, application of that principle must be excluded in the event that **the State acts as a public authority**. In the latter event, the conduct of the State can never be compared to that of an operator or private investor in a market economy".

- Still, how to determine in which capacity the state acts?

# The applicability of the MEIP (1)

- Until *Ryanair* of 2008 not really discussed

- Little doubt that the examined state interventions were of **economic** (**entrepreneurial, commercial**) nature

- E.g. a recapitalisation of an undertaking, granting a loan, a guarantee, or sale of land or buildings **could have been undertaken by a private investor/shareholder**

- Only a few cases of making a distinction between the two stages, see e.g. AG Lenz in *Meura* and *Boch II* of 1986, AG Slynn in *Van der Kooy* of 1988

# The applicability of the MEIP (1)

- The question of the MEIP was the question of the **application**, i.e. whether the examined state interventions were **economically wise, not economic**
- Thus, the question was **not** whether a private investor or a shareholder **could have intervened**, but whether it **would have intervened** in the same way in similar circumstances, under normal market conditions and when taking into account the objective of maximising profit (or minimising losses – the private creditor test)

# *Hytasa* of 1994 – has the ECJ shed any light on the problem of applicability?

- The Commission: capital injections in favour of three "chronically unprofitable" Spanish undertakings under privatisation were illegal and incompatible rescue aid
- Spain: the MEIP met since recapitalisation+privatisation was a more advantageous option than liquidation from the public owner's perspective
- the ECJ: followed AG Jacobs: in determining the presence of aid, one must consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount

# *Hytasa* of 1994 – has the Court shed some light on the problem of applicability? (2)

- For this purpose, **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**, see paras 21-22
- When applying the MEIP Spain took into account costs resulting from obligations that a private shareholder would not have assumed, i.a. unemployment benefits
- All three beneficiaries were limited companies
- However, the distinction between obligations was made for the purposes of verifying the application of the MEIP - a problem?

# The *Hytasa* formula in practice

- mostly applied at the stage of application of the MEIP
- a typical example: a shareholder has a choice between privatisation (often preceded by recapitalisation) and liquidation of an ailing undertaking ⇨ a cost analysis
- the scope of liability of a public shareholder is limited to the value of the subscribed capital
- costs of "social nature", like payments of unemployment benefits, (as a rule), cannot be taken into account when applying the MEIP, (but see social plans in *SNCM* and *Austrian Airlines*)
- unlimited in both duration and scope guarantees in favour of public banks, e.g. Ausfallhaftung (Austria), Anstaltslast and Gewährträgerhaftung (Germany), CDC IXIS (France), (see also ESA's decision on Landsvirkjun and Orkuveita Reykjavíkur, Dec. No. 302/09/COL)

# *Hytasa* – few cases of the applicability of the MEIP

- Three cases in which the Commission relied on the logic of *Hytasa:* "No market economy investor would have found itself in the situation of the public shareholder"
- *Linde* of 2000, *Koninklijke Schelde Groep (KSG)* of 2003 and *Hellenic Shipyards (HSY)* of 2008
- Actions that were taken in the past were politically, not commercially motivated, they generate losses and now trigger new state interventions – the LINK is decisive
- *Linde* – the CFI quashed the decision (2002), but did not rule on whether the 1993 privatisation amounted to aid
- *KSG* and *HSY* – Article 346 TFEU (ex 296 EC) – both military and commercial production – not separable

# *ING* – applicability of the MEIP to amendment to repayment terms of compatible aid?

- Joined cases T-29/10, T-33/10 Netherlands and ING v Commission [2012], under appeal
- Compatible aid granted in relation to 2008 financial crisis
- Amendment to repayment terms of an emergency recapitalisation measure of EUR 10 billion issue of Core Tier 1 securities
- The Commission: amendment was an additional aid of EUR 2 billion
- The GC: *BP Chemicals* approach and the MEIP applicable – a paradox or not really?

# One of the "common ground" assumptions on the applicability: the **exercise of public powers** by the state excludes the use of the MEIP

- One of the Commission's main arguments in *Ryanair* (2004), *EDF* (2003), (*Postbank* of 2008 – however, non-applicability as a secondary assessment and not revised by the Court)
- Both *Ryanair* and *EDF* quashed by the Court
- The Commission suggested that the exercise of public powers = performing the public authority obligations (*Hytasa*)
- *Ryanair* and *EDF* – what can / should be learnt from these cases?

UNIVERSITAS BERGENSIS

# *Ryanair* – decision in 2004, judgment in 2008 (not appealed)

- Ryanair's establishment at Charleroi airport (Brussels)
- 2001 two contracts - the Walloon Region, the owner of Charleroi, (i.a. a reduction in airport landing charges) and Brussels South Charleroi Airport (BSCA), a public undertaking controlled by the Walloon (i.a. discounts on ground handling services)
- The Commission: aid, some amount compatible, the MEIP inapplicable, applied as a secondary assessment to BSCA (failed)
- the roles of the WR as a public authority and of BSCA as a body managing the airport considerably mixed up

# *Ryanair* – the Commission's stance

- the organisation of the airport regulated by public law - fixing airport taxes by fell within the legislative and regulatory competence of the WR that acted as **a body regulating an economic activity and not performing it**

- the Commission subsequently qualified payments made by Ryanair as "fees" and not "taxes", although a link between the level of the charge and the service rendered to users was weak, but it did not change its stance on the inapplicability of the MEIP

# *EDF* – decision in 2003, judgments in 2009 and

- three measures granted to Electricité de France (EDF), a wholly state-owned undertaking engaged in production, transmission and distribution of electricity
- 1) a non-payment by EDF in 1997 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network, 2) an unlimited guarantee granted to the EDF, 3) certain provisions of a reform of the pension scheme for the electricity and gas industries
- the GC and the Court reviewed only the tax waiver, the others qualified as aid, but not challenged by France

# *EDF* – the Commission's stance

- the MEIP inapplicable since the state exercised its fiscal (regulatory) and only the state can adopt taxes
- state interventions resulting from obligations that the state assumed as a public authority, (*Hytasa*), was equated to the exercising public (regulatory) powers
- the non-applicability of the MEIP to fiscal measures was a "common ground" assumption
- however, see *DM Transport* of 1999 – the private creditor test and social security contributions

# The argument of the exercise of public powers

- Origins – 2nd Opinion of AG Léger in *Altmark* of 2003
- AG Léger: the existing case law allowed for concluding that the Court distinguished between state interventions that have an economic character and to which the MEIP applied, and those falling within the exercise of public powers to which the test did not apply
- NONE OF THE CASES SUPPORT AG Léger's conclusions
- Derived from Hytasa? No

# *Ryanair* – the CFI (2008)

- the WR and BSCA – one body under the MEIP
- the key question: not the exercise of public powers, but their engagement in economic activities
- the fixing of landing charges and the accompanying indemnity were directly connected with the management of airport infrastructure, which was an activity of an economic nature (see Aéroports de Paris judgments)
- the airport charges should be regarded as “fees” and not “taxes”
- the scheme for Ryanair could have been put in place by a private operator

# *Ryanair* – the CFI (2008) (2)

- “the mere fact of engaging regulatory powers did not deprive the activities in questions of their economic nature” – public body – public law (a decree in *Ryanair*)
- “When examining the measures at issue, the Commission should have differentiated between the economic activities and those activities which fell strictly under public authority powers”

# *EDF* – the stance of the GC (2009)

- first quotes AG Léger in *Altmark* of 2003 (!)
- "Interventions by the State which are intended to honour its **obligations as a public authority** cannot be compared to those of a private investor in a market economy"
- "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* – the GC's stance (confirmed by the ECJ - 2012)

- rejects the formalistic approach of the Commission
- form not relevant - see 107(1) TFEU!
- employment of exclusive prerogatives – not decisive
- relevant to the applicability: nature, subject-matter, rules governing the measure and the OBJECTIVE
- objective in *EDF* – "to restructure EDF's balance sheet and to increase its own funds", legal basis - "not tax provisions per se, but rather accounting provisions having tax implications"
- tax waiver was in fact a recapitalisation of EDF(?)
- the Commission must determine the applicability – see likewise *Buczek Automotive* of 2013
- OBS! neither in *Ryanair*, nor in *EDF* did the Court rule on the application/compliance with the MEIP

# Post-*EDF* – is the MEIP from now on applicable to ALL tax measures?

- Risks: opening floodgates of illegal aid, State aid control collapses, the MS: pleading ex post "excuses" etc.
- The Court **never** said that the MEIP applies to all tax measures – the EDF tax measure was "special" as:

  - France was EDF's only shareholder – a special relation, compare cases of private creditor test concerning social security contributions
  - Thus, France **could** have acted as the owner, not public authority (aim) Did it? That is a different story – application!
  - The amount of the tax debt was **fixed**, it existed, did not depend on some future, uncertain factors, like e.g. income

# The exercise of public powers and the applicability of the MEIP

- “the exercise of public powers” is merely a means by which interventions are undertaken – *Ryanair* and *EDF*
- just modus operandi that determines the form of a measure
- The form is irrelevant to the applicability – falling under Article 107(1) TFEU assessment

# The applicability of the MEIP and state resources

- The use of funds derived from taxes, but most of the state's income is generated by taxation – should one prohibit the use of funds raised in this way under the MEIP? What is left then? Borrow the money in the market? What happens to Article 345 TFEU?
- (What about the cost of capital - *EDF*? – a "short cut", but in application!)
- The necessary amount – *EFIM*: "effectively infinite financial resources" or "immeasurable financial resources"
- Back to basics: What is the MEIP about?

# Applicability v application of the MEIP

- The form
- The “effect-based” approach
- The objective (aim) of the state intervention
- Consequences of “yes” to both questions
- Legal certainty, State aid control, transparency
- State resources – origins, amount of state resources – limit, cost of capital, rate of return
- The MEIP as a part of the obligatory assessment under Article107(1) TFEU
- **Consequences to mixing these two – the Commission, ESA, MSs, a “level playing field”**

# Court cases and decisions referred to in the presentation:

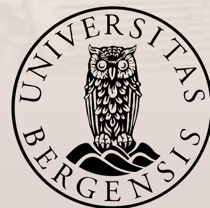
- Joined cases 188 to 190/80 France, Italy and the UK v Commission [1982] ECR 2545
- Case 234/84 Belgium v Commission (Meura) [1986] ECR 2263
- Case 40/85 Belgium v Commission (Boch II) [1986] ECR 2321
- Joined cases 67, 68 and 70/85 Van der Kooy [1988] ECR 219
- Joined Cases C-278/92 to C-280/92 Spain v Commission (Hytasa) [1994] ECR I-4103
- Case T-11/95 BP Chemicals v Commission [1998] ECR II-3235
- Case T-128/98 Aéroports de Paris v Commission [2000] ECR II-3929
- Case T-98/00 Linde v Commission [2002] ECR II-3961
- Case C-82/01 P Aéroports de Paris v Commission [2002] ECR I-929
- Joined cases C-83/01 P, C-93/01 P and C-94/01 P Chronopost and Others v UFEX and Others (Chronopost I) [2003] ECR I-6993 (see all "the Chronopost saga" rulings)
- Case C-280/00 Altmark Trans [2003] ECR I-7747
- Case T-196/04 Ryanair v Commission [2008] ECR II-3643
- Case T-156/04 EDF v Commission [2009] ECR II-4503
- Case C-124/10 P Commission v Électricité de France (EDF) [2012] ECR n.y.r.
- Joined cases T-29/10, T-33/10 Netherlands and ING v Commission [2012] ECR n.y.r.

# Court cases/decisions referred to in the presentation (2):

- Case 124/10 P Commission v EDF [2012] ECR n.y.r.
- Case C-405/11 P Commission v Buczek Automotive and Poland [2013] ECR n.y.r.
- 2009/611/EC: Commission Decision of 8.7.2008 concerning the measures C58/02 which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM), OJ L 225, 27.8.2009, pp. 180–237.
- Commission Decision of 28.8.2009 on State aid C 6/09 — Austria Austrian Airlines — Restructuring Plan, OJ L 59, 9.3.2010, pp. 1–38.
- Commission Notice pursuant to Article 93(2) of the EC Treaty to other Member States sand other parties concerned regarding aid which Italy has decided to grant to EFIM, C 38/92, OJ C 349 of 29.12.1993, pp. 2-7.
- 2000/524/EC: Commission Decision of 18.1.2000 on the State aid granted by Germany to Linde AG, OJ L 211, 22.8.2000, pp. 7–14.
- 2003/45/EC: Commission Decision of 5.6.2002 on the measures to restructure and privatise Koninklijke Schelde Groep implemented by the Netherlands, OJ L 14, 21.1.2003, pp. 56–75.
- 2009/610/EC: Commission Decision of 2.7.2008 on the measures C16/04 implemented by Greece in favour of Hellenic Shipyards, OJ L 225 of 27.8.2009, pp. 104–179.

# Thank you

for you attention!




UNIVERSITY OF BERGEN

*The Faculty of Law, UiB*