Another Turn in the MEOT-Burden of Proof Saga or Just Clarification of the MEOT-Stages?

Annotation on the Judgment of the Court of Justice of 7 May 2020 in Case C-148/19P *BTB Holding Investments SA and Duferco Participations Holding SA v European Commission*

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When applying the market economy operator test the Commission is required to conduct the examination procedure for the measures in question carefully and impartially in order to take its final decision on the existence and, where applicable, incompatibility or illegality of the aid on the basis of information which is as complete and reliable as possible. This case, read in context with other recent case law and Commission decisions shows that the Commission still has to prove an actual advantage and, on the other hand, the Member State may submit ex-post (e)valuations that could prove that no advantage was conferred on the beneficiary.

I. Introduction

This case[1] seems to shed light on the burden of proof in relation to the application of the Market Economy Operator Test (MEOT) and, especially, on *what* must be proved. While it appears that the Court of Justice's (CJ) considerations are just a continuation of prior case law, since it refers to those prior cases, it deviates from recent judgments of the General Court (GC) in cases like *Larko*[2] and *Real Madrid Futbol Club*[3]. I will also refer to the recent CJ's judgment on appeal in the *Larko* case[4], which reinforces the impression that this case shifts the burden of proof, as compared to the GC's judgments in *Larko* and *Real Madrid*, to the Commission again. The question is whether that is true.

II. Background

The case concerns the appeal of BTB Holding Investments SA (BTB) and Duferco Participations Holding SA (DPH) against the GC's judgment of 11 December 2018 by which the GC dismissed the appeal against the Commission Decision of 20 January 2016 holding that certain measures by the Belgian State constituted incompatible aid and ordering Belgium to recover the aid granted.

The beneficiaries of the aid are several entities of the Duferco-group, that produces and sells steel and whose activities in Europe were mainly concentrated in Belgium and Italy. The group was also active in Switzerland, Luxembourg and France, among others.

Between 2003 and 2011 three transactions (as far as relevant for this case) took place in which the Walloon Region of Belgium, by means of its financial holding company FSIH, played a role.

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1 Case C-148/19P BTB *Holding Investments SA and Duferco Participations Holding SA v European Commission* [2020] ECLI:EU:C:2020:354 ('*BTB*'). At the time of writing no English version of the judgment was available. This annotation is based on a translation from the French and Dutch versions. The decision involved is Commission Decision (EU) 2016/2041 on State aid granted by Belgium to Duferco SA.33926 2013/C (ex 2013/NN, 2011/CP) [2016] OJ L 314/22.

2 Case T-423/14 *Larko Geniki Metalleftiki kai Metallourgiki AE* [2018] EU:T:2018:57. See on this case: M Cyndecka, 'The MEOP in the Larko Case – The State Acting as a Prudent Shareholder?' (2019) 18(2) EStAL 180-185.

3 Case T-791/16 *Real Madrid Club de Fútbol* [2019] ECLI:EU:T:2019:346.

4 Case C-244/18 P *Larko Geniki Metalleftiki kai Metallourgiki AE* [2020] ECLI:EU:C:2020:238.

Measure 1 concerned the sale in 2006 by FSIH of its 49.9% stake it had held in Duferco US since 2003 to the parent company of Duferco US, for an amount of $125.85 million (approximately €95 million).

Measure 2 concerned the sale in 2006 by FSIH to the former ultimate parent company of the Duferco group (that was succeeded by BTB), of the approximately 25% stake it held in DPH, parent company of several Duferco subsidiaries, since 2003 for an amount of $105.42 million (approximately €84 million).

The next measure, in the CJ's judgment referred to as Measure 4, concerned the granting of a €100 million bullet loan, to the former parent company of Duferco group (which became later BTB). This loan was made available in two installments, the first in September 2009 amounting to €30 million and the second in December 2009 amounting to €70 million. The interest rate of the loan was set at 2.052%, ie the 12-month Euribor basis at that time, with a surcharge of 75 basis points. According to the information submitted by the Belgium, the interest rate actually applied was 2.04% when the first tranche was made available and 1.99% when the second tranche was made available. The entire loan was repaid early on 30 June 2011.

On 20 January 2016, the Commission adopted the contested decision in which the Commission held that six measures constituted aid and should be recovered. Since the appeal that BTB c.s. lodged with the GC only concerned three measures, referred to as Measures 1, 2 and 4, I will discuss only these measures.

In its decision the Commission took the view that these three measures did not comply with the market economy operator principle. As regards Measure 1 the Commission held that FSIH's participation in Duferco US should have been valued at $141.09 million. Since FSIH sold its stake at $125.85 million, the aid in favour of the buying entity was $15.24 million (approximately €11.58 million).

As regards Measure 2, the Commission found that FSIH's participation in DPH should have been valued at a minimum of $131 million. Since FSIH's stake was sold at $105.42 million the amount of aid in favour of the buying entity was $25.58 million (approximately €20.36 million).

Finally, as regards Measure 4, the Commission found that no private creditor would have granted a loan of €100 million to the parent company of the Duferco Group on the same terms. In the Commission's view, the interest rate of the loan should have been set at the 12-month Euribor, with a mark-up of 220 basis points, ie at 3.502%.

Since an early repayment of the loan was agreed in June 2011, the Commission established, on the basis of a simplified discounting calculation, that the aid amount to Ultima for this loan was approximately €2.08 million.

The Commission ordered the recovery of the aid.

BTB and DPH lodged an appeal against the decision with the GC, essentially stating that the three measures did not entail an advantage for the entities that bought FSIH's stake and the borrowing entity respectively.[5] By judgment of 1 February 2018 the GC dismissed BTB's and DPH's action in its entirety.

III. Judgment of the Court of Justice

In this annotation I will focus on the CJ's finding as regards the substance of the case and therefore will leave out the CJ's findings as to the admissibility of the appeal, since these do not concern points that are important form a specific state aid law perspective.

BTB and DPH put forward one plea in two parts, the first based on infringement of the rules on the burden of proof and the second on the principle of equality of arms and the right to a fair trial.

By the first part of the single plea, BTB and DPH claimed, in short, that the GC reversed the burden of proof by contending that it was up to the applicants to adduce evidence sufficiently convincing to deprive the complex economic assessment of the facts contained in the contested decision of plausibility.

Secondly, BTB and DPH argued that the GC implicitly considered that, if any doubt remains after the Commission's examination of the measures concerned, this doubt will benefit the latter, since the latter may base its assessment on simple 'plausible' elements of which it should not establish the veracity.

The CJ started with recalling that for a measure to qualify as State aid all criteria of Article 107(1) TFEU must be fulfilled.[6] It continued with pointing out that the definition of 'aid', cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circum-

5 *BTB* [28-30].

6 *BTB* [44].

stances which correspond to normal market conditions and considering that the assessment of the conditions under which such an advantage was granted is therefore made, in principle, by applying the private operator principle.[7]

The CJ considered that the private operator principle is one of the aspects that the Commission must take into account in determining whether aid is involved and therefore *does not constitute an exception* which applies only at the request of a Member State when it has been found that the constituent elements of the concept of 'State aid', are met.

Referring to its judgment in the case *MTU Friedrichshafen*[8], the CJ held that the Commission should not presume that an undertaking has benefited from an advantage constituting State aid simply by assuming a negative presumption based on the lack of information leading to the contrary conclusion, in the absence of any other information which could demonstrate the existence of such an advantage.[9] Therefore, the CJ held, the Commission must at least ensure that the information available to it, even if incomplete and fragmentary where appropriate, constitutes a sufficient basis for establishing that an undertaking has benefited from State aid, when applying the MEOT.[10] This means that the Commission is obliged to base its decisions on data of a certain degree of reliability and consistency which can support the conclusions which it has drawn.[11] The CJ follows the GC where it held that the Commission is required to conduct the examination procedure for the measures in question carefully and impartially in order to take its final decision on the existence and, where applicable, incompatibility or illegality of the aid on the basis of information which is as complete and reliable as possible.[12]

The CJ dismissed BTB and DPH's argument that it followed from the GC's judgment that it is sufficient for the Commission to base its economic assessment on simple 'plausible' allegations of which it is not required to demonstrate its verity.[13] The CJ points out that the GC held that the burden of proof that the conditions of application of the MEOT are satisfied rests with the Commission, and that this is all the more true where the decision is not based on the failure to supply the information requested by the Commission to the Member State concerned, but on the finding that a private investor's behaviour would not have been the same as that of the authorities of the Member State, which presupposes that the Commission has had all relevant information at its disposal necessary to prepare its decision.[14]

BTB and DPH also put forward that the GC held that it was incumbent on them to provide evidence in order to demonstrate that the measures in question did not constitute State aid. Concerning that argument the CJ considered that the GC essentially held that, where the Commission applied the criterion of the private operator, it carried out its analysis and concluded in its decision that the measures in question constitute State aid, and that it is for the applicant to demonstrate a manifest error in the assessment of the facts carried out by the Commission.[15]

The CJ pointed out that that this is only a consequence of the principle established in settled case-law of the CJ concerning the control which the Union Courts exercise over the complex economic assessments made by the Commission. This control is necessarily limited to the verification of compliance with the rules of procedure and statement of reasons, as well as the material accuracy of the facts, the absence of a manifest error of assessment of the facts and misuse of powers.[16]

The CJ continues with dismissing BTB's and DPH's claim that the GC infringed the principle of equality of arms and the right to a fair trial.

As regards the level of evidence required to demonstrate a manifest error in the application of the private operator principle, the CJ noted that the GC required the applicants to demonstrate the existence of an error serious enough to undermine the Commission's complex economic assessment. The CJ added that it does not appear either that the applicants should demonstrate the absence of State aid,

7 *BTB* [46], with reference to Case C-579/16 P *Commission v FIH Holding and FIH Erhvervsbank* [2018] EU:C:2018:159, [45].

8 Case C-520/07 *Commission v MTU Friedrichshafen* [2009] EU:C:2009:557, [58].

9 *BTB* [48].

10 *BTB* [49], with reference to C-520/07 *Commission v MTU Friedrichshafen* [56].

11 *BTB* [50], with reference to C-520/07 *Commission v MTU Friedrichshafen* [55].

12 *BTB* [51]. See also Case C-290/07 P *Commission v Scott* [2010] EU:C:2010:480, [90] and Case C-559/12 P *France v Commission* [2014] EU:C:2014:217, [63].

13 *BTB* [53].

14 *BTB* [52].

15 *BTB* [55].

16 *BTB* [56].

or that the Commission could rely on simple plausible allegations in order to demonstrate the existence of State aid, nor that the applicants should entirely refute the Commission's economic analysis.

The CJ pointed out that a manifest error can be demonstrated by means of elements which deprive the assessment of the facts adopted by the Commission in its decision of plausibility. On the other hand, the plea alleging manifest errors must be rejected if, despite the evidence put forward by the applicants, the assessment in question does not appear to be vitiated by such an error, the CJ held.[17]

Thus, the CJ considered, the possibility of attacking the plausibility of the assessment of the facts adopted by the Commission in its decision is established for the benefit of the applicants and, contrary to what BTB and DPH maintained, the terms used by the GC in the contested judgment in no way implies that, in the present case, the applicants were obliged to provide evidence whose probative force was higher than that attached to the evidence on the basis of which the Commission had based its assessment of the facts. Therefore, according to the CJ, the GC assessed whether the allegations of BTB and DPH were sufficient to deprive the assessments of the facts used by the Commission in the contested decision of plausibility and considered that that was not the case.[18]

The CJ noted furthermore that the Commission, when applying the principle of the private operator, does not rely on the assumption that the facts established cannot be explained otherwise than on the basis of the existence of anti-competitive behaviour. Instead, it performs, in principle, a complex economic assessment in order to determine whether the undertaking concerned has benefited from an advantage constituting aid of State.[19]

Concluding, the CJ notes that the GC did not breach either the principle equality of arms or the right to a fair trial, in the present case, in considering that,

> [...] in order to establish that the Commission committed a manifest error in the assessment of the facts likely to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to deprive the assessment of the facts contained in the decision in question of plausibility.[20]

IV. Comments

This case perhaps could have been dealt with by the CJ in a quite simple way: BTB's and DPH's argument that the GC reversed the burden of proof eventually was dismissed by the CJ by referring to the principle established in settled case law that the control which the Union Courts exercise over the complex economic assessments made by the Commission is necessarily limited to the verification of compliance with the rules of procedure and statement of reasons. It is therefore for the appellants to provide evidence sufficiently convincing to deprive the complex economic assessment of the facts of plausibility. Nevertheless, before the CJ came to that conclusion it considered the distribution of the burden of proof with respect to the MEOT. In my opinion, this judgment, read in conjunction with the GC's judgment *and* the Commission Decision, may shed some light on how to deal with the application of the MEOT and valuations that were executed afterwards.

As pointed out by Cyndecka, as regards the MEOT a distinction must be made between the applicability of the test and the application of it.[21] The present case is essentially about the question who has to proof what with regard to the *application* of the MEOT. With respect to the applicability the GC already upheld the European Commission's implicit view that the MEOT was applicable.[22]

The answer to the question concerning the burden of proof with regard to the application of the MEOT should start with answering the question *what* should be proved and that concerns, ultimately, the question what the MEOT really is. Does a Member State have to prove that its transaction is sufficiently prepared, by gathering all the information needed to decide on the conditions of the transaction (eg, in this case, the sales price for the stake in the Dufreco-companies), or should the evidence focus on the possible advantage for the other party involved in the transaction? In other words: should evidence relate

17 *BTB* [72].

18 *BTB* [74].

19 *BTB* [75].

20 *BTB* [76].

21 M Cyndecka, ''Reversed', 'Excessive' or Misconstrued? The Controversy About the Burden of Proof in MEOP Cases' (2019) 18(2) EStAL 157.

22 Cf ibid 163.

to the *procedure of decision making*, or to the *effect* of that decision? I will explain this by giving a simple example: a public authority sells a plot of land against, let us say, €1.5 million, without any valuation prior to the transaction, without any reference to its real estate strategy, without reference to comparable transaction it did recently, and without any additional information whatsoever. Clearly, this could not pass the MEOT if that test concerns the question whether a decision to sell a certain good (stock, real estate) or a decision concerning whatever transaction is properly prepared or not (whether the authority gathered sufficient information). But, what if a valuation conducted afterwards, for instance because the Commission started an investigation, results in a market value for this piece of land of €1 million? In that case one could hardly argue that the buyer of this plot of land received an advantage in the sense of Article 107(1) TFEU. If this transaction would be considered aid because the public authority did not inform itself sufficiently prior to the transaction and therefore did not fulfil the requirements of the MEOT, the MEOT essentially has become a test whether *the principle to state reasons* has been complied with by the Member State. If, on the other hand, State aid law is about the *effects* a measure or transaction may have on competition, in this example, a valuation afterwards may equally well prove that the measure does not contain State aid.

At first sight, however, considering an ex-post valuation seems at odds with the Union Courts' case law. If we look, for instance, at the GC's judgment in the *Real Madrid* case, we see that the GC upheld the Commission Decision. In it the Commission held that if a Member State argues a particular transaction is in line with the MEOT, where there is doubt, it must provide evidence showing that the decision to carry out the transaction was taken, at the time, on the basis of sound economic evaluations comparable to those which, in similar circumstances, a rational private operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the transaction's profitability or economic advantages. The Commission stressed in its Decision:

> For this purpose, evaluations made *after* the transaction was entered into, based on a retrospective finding that it was actually economically rational, or on subsequent justifications of the course of action actually chosen, are irrelevant.[23]

As for the statement that evaluations afterwards are irrelevant, the Commission refers to the judgment of the CJ in *EDF*.[24] In that case the CJ held that for the purposes of showing that the Member State took a decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable. It is enough neither to rely on subsequent justifications of the course of action actually chosen.

The question is, therefore, what the MEOT encompasses. In the present case the Commission carried out an evaluation of an ex-post valuation conducted by the Belgian authorities after the Commission's opening decision. On the basis of this evaluation, the Commission held that, by not acting as a private investor, FSIH granted an economic advantage to DII that it would not have obtained under normal market conditions. In the absence of evidence from Belgium that an ex-ante evaluation of Duferco US resulted in the sale price that was actually paid, the Commission undertook its own evaluation of the valuation of 49.99% of Duferco US (stake held by FSIH).

The question then shifts to what is the relevance of such an ex-post valuation, if economic evaluations made after the advantage was conferred on the beneficiary, cannot prove that the transaction concerned was in line with market conditions. The only purpose of such an ex-post evaluation can be, in my view, to assess what the advantage has been for the beneficiary, if it is not fit for deciding whether or not the prior transaction was in line with the MEOT. One of the probable outcomes of such an ex-post (e)valuation may be that there was no such advantage, even if the transaction itself was not in compliance with the MEOT. This means that after it has been established that (the preparation of) the transaction itself did not meet the criteria of the MEOT and therefore should be considered to confer an advantage to the beneficiary, it still must be proved what that advantage was. This may be done with a valuation afterwards, albeit that valuation must be about the circumstances (like, for instance, the reasonable expec-

23 Commission Decision 2016/2393 on the State aid implemented by Spain for Real Madrid CF, SA.33754 (2013/C) (ex 2013/NN) [2016] OJ L 385/85.

24 Case C-124/10 P *Commission v EDF* [2012] ECLI:EU:C:2012:318, [85].

tations regarding an investment, based on the known facts at the moment of that investment) at the moment of the transaction, not about the actual results of the investments.

In this approach the valuation the Commission made afterwards is necessary to prove the advantage.

If this approach is sound, it means that the MEOT is threefold. First, it starts with answering the question whether the MEOT is applicable. Second, the question must be answered whether the conduct involved was prepared in such a way that it meets the MEOT. And third, if it did not, it must be established whether this conduct indeed conferred an advantage on the beneficiary.

This approach, in my view, fits well with what the CJ held in the *Larko* judgment on appeal. In that case in the CJ held:

> Given that the aim of the recovery of the aid at issue from the beneficiary is to eliminate the distortion of competition brought about by a certain competitive advantage and, thus, to re-establish the status quo before the aid was granted, the Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage.[25]

It follows from this consideration of the CJ that it is for the Commission to prove that actual advantage.

This recent case law – the present case as well as the *Larko* judgment – does not shift the burden of proof as concerns the application of the MEOT. However, in my opinion, it does clarify two points. On the one hand, that if the Member State involved did not carry out a preparation of the transaction that meets the requirements of the MEOT, the Commission still has to prove an actual advantage. And on the other hand, that a Member State may submit ex-post (e)valuations to prove that no advantage was conferred on the beneficiary.

25 C-244/18 P *Larko* [70].