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Between rational and realistic – the Market Economy Operator Test in European Union State aid law in times of economic downturn[1]

Między racjonalnym a realistycznym – test operatora rynkowego w prawie pomocy państwa Unii Europejskiej w czasach spowolnienia gospodarczego

Abstract

The State's involvement in the economy tends to increase as the economic situation worsens. At the same time there is an observable decline in private-sector investments. In this context, this paper aims to put forward a case for revision of the Market Economy Operator Test (MEOT) to better reflect these evolving market conditions. The analysis will seek to verify the initial assumption that the current interpretative approach to the MEOT may fail to recognize the difference between rational and realistic transactions and to determine whether improvements are possible, feasible and appropriate under the EU Treaties.

Keywords: State aid, market economy operator principle, *pari passu* investor; normal market conditions

JEL: K20, K21

Streszczenie

W czasach trudności gospodarczych rośnie zaangażowanie państwa w gospodarkę i jednocześnie daje się zaobserwować spadek inwestycji sektora prywatnego. W tym kontekście niniejszy artykuł ma na celu przedstawienie i ocenę postulatu, że test operatora rynkowego powinien zostać zmodyfikowany dla lepszego odzwierciedlenia realiów rynkowych. Analiza będzie służyć weryfikacji założenia początkowego, że obecne podejście interpretacyjne może prowadzić do zatarcia różnicy między tym, co jest teoretycznie racjonalne, a tym, co jest osiągalne w normalnych warunkach rynkowych i na tej podstawie posłuży ocenie, czy w świetle istniejących ram traktatowych zmiany są odpowiednie, realistyczne i dopuszczalne.

Słowa kluczowe: pomoc państwa, pomoc publiczna, test operatora rynkowego, inwestor *pari passu*, normalne warunki rynkowe

Introduction

Although once the initial economic shock of COVID-19 created by lockdowns and border closures passed the European economy was pushed onto a growth path giving the impression that the markets were finally on the road to recovery, the current outlook is again tilted to the downside and uncertain (Cuerpo, 2022, pp. 5–7; Emmerling et al., 2021, pp. 11–14; Jones, 2020, pp. 94–97). Industries across Europe are affected by the fallout of Russia's invasion of Ukraine (Federle et al., 2022, p. 16; Liadze et al., 2022, pp. 8–9). Generally, in times of uncertainty the State tends to take a more active role in the running of the economy. This is partly because, in addition to having less liquid capital available, in times of downturn or uncertainties private investors are more risk-averse and usually prioritize short-run returns (Markovitz, 1952, pp. 77 et seq.).

The factors outlined above raise the question that encapsulates the problem this article addresses: Should the approach to the Market Economy Operator Test (MEOT) be revised to reflect these market realities? The test in question – designed to distinguish between cases of aid within the meaning of Article 107(1) TFEU and States' commercial investments – assesses whether an intervention under review would have been acceptable to a hypothetical investor driven by purely economic considerations (Bacon, 2017, pp. 39–40; Säcker & Montag, 2016, p. 108; Verouden & Werner, 2017, p. 74). If yes, then it is assumed that State is not acting in the interventionist capacity, but rather as a commercial actor.[2] Consequently, such market-like

measures do not constitute State aid. However, whether this assessment should rely on a purely theoretical perception of economic rationality or take into account the actual, current market situation is becoming an increasingly salient issue as a result of the decrease in private sector investments and the corresponding increase in the governments' involvement in the economy.

Thus, the following initial assertions can act as a springboard for further discussion. The current approach to the notion of State aid is self-contradictory because on the one hand, for a measure to be deemed State aid within the meaning of Article 107(1) TFEU, it must confer advantage "unobtainable under normal market conditions".[3] On the other, however, passing the MEOT that is based on a purely theoretical counterfactual, not reflecting actual market situation, is interpreted that an advantage conferred by that measure would have been "obtainable under normal market conditions" and would thus not constitute State aid.[4] In other words, this approach to the MEOT fails to recognize the difference between theoretically rational and realistically attainable under the specific current market conditions. Based on the problem statement above, this paper puts forward the case for a revision of said approach.

Rational investment through means restricted to the State

The first issue that merit attention deals with the question of whether the mechanics of the Member States' (MS) interactions with beneficiaries should have any impact on the MEOT applicability, especially if the economic rationality is shown to be at least defensible. In the Author's opinion, it consist of two distinct but inextricably linked sub-problems: first of the instruments by which an intervention is carried out, and second, often overlooked, of how a return-on-investment would manifest itself.

With regard to the former, the current interpretative approach has been established by the landmark C-124/10 EDF case.[5] The case involved alleged aid for the French State-owned and State-run electricity distributor, where due to the government's policy, no private investor could exist. The State decided to support the company through a tax waiver The Court has annulled earlier decision where the European Commission (EC) had claimed that the MEOT is inapplicable to fiscal measures and asserted that "the Commission was under an obligation to ascertain the economic rationale for the investment in question by undertaking an assessment as to whether, in the same circumstances, a private investor would have invested a comparable amount" in a beneficiary.[6] By taking the beneficiary's perspective the Court further elaborated that their situation depends not on the means used to confer an advantage, but the amount it receives. Consequently, the Court claimed that a tax waiver should be regarded as a capital injection of equivalent amount.[7]

On appeal, the CJEU confirmed the overall line of reasoning and reemphasized that a distinction should be drawn between the different roles of the State (paras 79–85).[8] However, in case of many public undertakings of strategic nature such as networks operators, State interventions are usually simultaneously driven by economic and public policy considerations. In principle, the pursuit of public interest does not automatically preclude transaction to be considered economically rational.[9] Therefore, in practice, the necessary distinction boils down to excluding from the MEOT only these operations where business component is *prima facie* totally absent, since the public interest will be always present. The remaining part – the potential market investment – should then be assessed for its economic feasibility, regardless of the means by which it has been carried out Since, the CJEU reiterated, the beneficiary's situation depends on the amount received, not on the means used to confer such advantage (paras 91–92).

Although this line of reasoning, when seen alone, is logically defensible, however when assessed in a broader context of the MEOT's *raison d'être*, produce paradoxical results. The State can act as a private investor through instruments that would have been inaccessible to private investors. While this would not rule out economic rationality, but if the *acquis* has consistently held that a hypothetical private investor has to be in the same situation as the public authorities, then in this case hypothetical equals fictitious.[10] Also, since no private investor would ever have fiscal instruments at its disposal, any assessment of business rationality of their use would have been purely speculative, only justifiable economically at the most rudimentary level.

The second part of the problem presented in this section is well illustrated by the COVID-era SA.48171 Alitalia case where the EC has ordered recovery.[11] The apparent terminal decline of Alitalia is noteworthy because since the last assistance was clearly un-marketlike (see section 2.3 of the decision), the MEOT got relegated to the status of *obiter dicta*, and because of that it is easy to miss the point of a broader relevance discussed here – the return on investment's form.

It is now well established in the case law that being in a difficult financial situation does not automatically make the MEOT inapplicable.[12] Private investors could conceivably support ailing undertakings provided the assistance can realistically help restoring their long-term viability.[13] This is particularly the case with shareholders since they would be risking relatively more than previously uninvolved investors. These investors might reasonably subscribe capital to fund restructuring or protect brand image, or even to close down under the best possible conditions, thus merely to minimize losses.[14] In other words, shareholders' situation is unique.

In SA.48171 Alitalia case the EC correctly asserted that in the circumstances no private investor would even consider investing into Alitalia Notably, the EC rejected Italy's claim that that it acted as a market investor since, had it not intervened, the State would have been liable for costs due to, among others, of unpaid taxes (para 197). This rejected argument further ran that the investor-

shareholder – in a return to viability scenario – would have been able to obtain return on investment through tax revenues (paras 197–198 & section 4.1.4). In the same vein the EC rejected claim that – in a liquidation scenario – unpaid taxes would constitute losses that, in the normal circumstances, State would incur in its capacity as a shareholder of Alitalia (para 201 in relation to paras 197–198). The EC elaborated that in order to assess whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as a private operator, to the exclusion of those linked to its situation as a public authority, are to be taken into account (para 199). Since the State in levying taxes is exercising a public prerogative, thus preventing unpaid taxes is, therefore, not a consideration which the State could make as an investor (para 201).

Case SA.48171 Alitalia provides a good example of blurred lines between public interest and business considerations thus making it more difficult to differentiate clearly between them which is a *sine qua non* for the Market Economy Operator Test. It can be relatively safely assumed that preventing social costs linked to unemployment, negative spill-over effects on suppliers are public interest objectives.[15] Even ensuring the company's survival as a national heritage brand can somewhat arguably be classified into this category.[16] From a business perspective, preserving a valued brand name may also be justified provided there is a realistic prospect of restoring the undertaking to financial soundness and long-term viability.[17] In other words, for private investors, regardless of other considerations, some form of return – even if only to minimize losses – is a must.[18]

The strong emphasis on achieving high level comparability between hypothetical private and actual State investors may appear somewhat contrary to results produced by the EDF-derived case law (although the rhetoric is the same), because in SA.48171 Alitalia the EC essentially stated that State investors can only receive return through channels that would have been accessible to private sector investors (paras 197, 201). Whereas earlier the Court asserted that the beneficiary's financial situation depends on the amount it receives, not on the means used.[19] By implication, the same principle should also apply to the return on investment. While there can be no doubt that tax revenues fall within the public policy realm, however, when seen through the lens of the case law discussed earlier these earnings should (so it can be argued) simultaneously be classified as a business income. Especially considering that, when a clear distinction between the State's role as regulator and as market participant is difficult to draw – as it is the case here – the Court on numerous occasions asserted that public policy considerations does not rule out economic rationality.[20]

To conclude, the analysis of *acquis* carried out in this section has revealed inconsistencies which, in the author's view, are dangerously pushing the Market Economy Operator Test towards being – at least in some cases – a purely theoretical exercise. The State can act as a market investor through instruments that would have been unavailable to real private investors, but can receive return on investment only though channels that are also open to private-sector operators.

Sequence of measures – State aid followed by market investment

Another previously mentioned area where hypothetical investors may, under certain circumstances, become fictitious concerns multicomponent interventions consist of several elements where allegedly marketlike investment is preceded by State aid within the meaning of Article 107(1) TFEU. In this context, the general questions are: whether, and if so when, hypothetical shareholders and external investors can disregard previous State interventions, or conversely how these previous interventions – both marketlike and State aids – should impact subsequent MEOTs.

In principle, the fact that a company has received State aid do not exclude the application of the MEOT *per se*.[21] Thus, subsequent transactions can potentially be acceptable to a hypothetical private investor Importantly, however, State in this situation cannot be compared to that of a creditor seeking to minimise the losses to which it is exposed in the event of inaction but to that of an investor seeking to maximise its profit.[22] In other words, the amount granted as State aid should not be regarded as potential sunk costs. This position follows logically from well-established case law emphasising the need to distinguish between the State's role as regulator and as market participant.[23] Consequently, authorities granting State aid and investing commercially in the same undertaking should be viewed as separate, unrelated entities for the purpose of the MEOT's counterfactual.[24] If one look at the reasoning above from the standpoint of investors, the approach is logically defensible. The fact that someone else had previously granted funds to a company should not give subsequent, non-shareholders investors any legal title to these funds.[25] Thus, even though distinguishing between the different roles of the State can be problematic in practice, it seems relatively straightforward, at least in this area. Nevertheless, despite the generally positive assessments of the interpretative approach presented above, the finer points are debatable.

If both interventions – State aid and the subsequent allegedly market investment – are intended to serve the same purpose by implication it means that the earlier State aid has failed. Although at first glance it may appear that drawing parallels between the objectives of State aid and of seemingly commercial investment is somewhat misplaced, the contradiction is largely illusory. Regardless of the stated public interest goals, from the beneficiary's perspective State aid confer "advantage unobtainable under normal market conditions". In other words, economic advantage to the company serves as the vehicle to achieve authorities' objectives.[26] Non-market nature of

State aid (as compared to market investments) stems from the lack of viable return on investment, not from a lack of purely business advantage. This holds true, in principle, for every kind of aid, both horizontal and sectoral, notably for rescue and restructuring aid (as it was the case in T-386/14 FIH, C-124/10 EDF and SA.48171 *Alitalia* cases). The question about the reasons for failure is of more general relevance, not limited to the MEOT. The following implications arise:

Firstly, where the EC raised no doubts as regards the compatibility of the aid, but yet that measure has failed to achieve stated objective, shows that there must have been serious miscalculations as to the prospects of its success.[27] Of course, there is always a possibility that some unforeseen event will occur as all forecasts are uncertain by definition. Nevertheless such risk can be mitigated and it would have been well advised – as a matter of good practice – to conduct *ex post* evaluation to establish what went wrong.

Secondly and more directly linked to the MEOT, it could be argued that the fact a company has received State aid should nevertheless be factored in. Not in a way to result in ascribing creditor motivations to State investors, but rather as a risk factor associated with investing in a given undertaking. The underlying issue in this regard can be framed as a question, why a rational, profit-driven private operator would invest in a previously failed project? What has changed in the meantime to make it commercially viable? Especially considering that the earlier interventions were not business-like, thus constituted State aid.[28]

Doubts regarding the subsequent business feasibility are implicitly confirmed by the case law. On numerous occasions the Court emphasized the need to make a "global assessment" of all relevant factors.[29] These may include – among others – the situation of the beneficiary, the general economic conditions at the time, the relationship of the capital contribution to any earlier capital injections.[30] Notably in Hinkley Point C the EC stated that events prior to the date of adoption of the measure may be relevant if they shed light on the question of whether the measure confer unmarketlike economic advantage.[31] Moreover (although here the logical link is more tenuous), in T-305/13 SACE case the Court asserted that the inability to obtain comparable participation from private sector indicate that the MEOT is not satisfied.[32] When read together this *acquis* provide a set of indicators of increased likelihood of un-marketlike transactions which should require – as can be postulated at this point – correspondingly more rigid evidence standard for the subsequent MEOT.

Another situation that merits attention is somewhat atypical (thus relatively rare), yet potentially more damaging to the MEOT's reliability, if it occurs. State aid granted in the past may be the decisive reason why subsequent interventions have any chances of being acceptable to hypothetical private investors. This issue is not new to the EU State aid control and not in itself problematic. Oftentimes States are lending financial support with the intention to attract a strategic investor.[33] It becomes problematic, however, when only State is in a position to make that subsequent investment. This is often the case with public undertakings of strategic importance that cannot be privatized (even partially). Even though this by itself does not preclude the possibility for a transaction to be economically rational, but such a theoretically rational transaction will always be "unobtainable under normal market conditions". Also, if the market nature of subsequent transactions is entirely dependent on the prior State aid, these transactions should be assessed together.[34]

The Court has consistently emphasized the need to draw a distinction between cases where the State acts as a market participant and where it acts in the exercise of public powers (Bacon, 2017, pp. 38–39; Flynn et al., 2016, pp. 315–316; Hoffman & Micheau, 2016, pp. 105–122; Verouden & Werner, 2017, pp. 70–73 and cases quoted therein). Here, when looking at both operations, this is impossible. We, therefore, face a choice between two admittedly imperfect solutions: Either assess them separately and then the MEOT test would be fully applicable to the second transaction which then could be regarded as marketlike even though it would bear no relation to real market conditions. Or factor in the previously authorized State aid (what earlier EC's practice implicitly suggests), the subsequent transaction would then always be classified as State aid within the meaning of Article 107(1) TFEU and subsequently assessed as such.[35]

Compatibility with the EU Treaties

So far, the analysis has confirmed this paper's initial assertion. Before one can formulate evaluative judgement on the formulated proposals on limiting the MEOT's applicability it is necessary to assess whether they are legally possible under the EU Treaties.

When the question of potential differential treatment of public and private bodies emerge – that would have been the consequence of said postulate – the principle of neutrality enshrined in Article 345 TFEU emerges as a potential obstacle (Abbamonte, 1996, p. 258; Säcker & Montag, 2016, p. 109). However, looking the very broad, open-ended wording of that provision, its precise meaning and application remains somewhat unclear while literature and case-law are hardly available (Akkermans & Ramaekers, 2010, p. 293). According to the most common interpretation MS may organize as they thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.[36] The final part of this sentence is usually understood as containing the obligation of equal treatment of all undertakings regardless of their ownership structure (Säcker & Montag, 2016, p. 109).[37] The provision is, therefore, an expression of the underlying fundamental principle of non-discrimination (Klamert, 2019, p. 2048).

The author is of the opinion that the often presented argument that the introduction of *pari passu* requirement and the exclusion of instruments inaccessible to private-sector operators would deprive public bodies of their ability to make optimal investment decisions is based on a dubious oversimplified interpretation of Article 345 TFEU (compare Akkermans & Ramaekers, 2010, p. 293 with Säcker & Montag, 2016, p. 109). What seems to be overlooked is the fact that discrimination only occurs if there is no objective justification for unequal treatment.[38] Even more importantly, the implicit understanding of the underlying concept of equal treatment appears to be incorrect.

When the role and purpose of State aid law is placed in the context of the Internal Market objectives, notably the creation of a level playing field, then all changes to the MEOT should be assessed, in the first place, for their potential effect on competition Non-discrimination and equal treatment should be seen as the foundation and prerequisite for effective competition (Gerrardin, Layne-Farrar & Petit, 2012, p. 20). This claim is not only supported by the literal wording of Articles 119 and 120 TFEU but also endorsed by the CJEU (de Cecco, 2012, pp. 31–43).[39] The goal is then a situation in which undertakings are free to operate on the market and thus are protected from any obstacle arising from the behaviour of other agents, whether public or private.[40] All this translates into somewhat superfluous concept of fairness in competition (see Ayal, 2014, pp. 23–30; Gerber, 1998, pp. 334 et seq. and sources quoted therein).

In view of the above, if there is an undertaking in which, due to various circumstances, there are no *pari passu* investors and/or State is using instruments unavailable to normal market players, then in the author's opinion, disapplying the MEOT to such transactions should not to be regarded as constituting an infringement of the neutrality principle encapsulated in Article 345 TFEU. On the contrary, if that company is carrying out at least part of its business activities on competitive markets, then classifying as marketlike investments that would have never been available to competitors (to nobody in the private sector) is indeed discriminatory, but against them.[41] In this context, the reference to a level playing field can be read convincingly as an obligation to ensure that all market players – regardless of whether publicly or privately owned – will have the equal ability to seek and obtain capital funding.[42]

Claiming that the need for a real-life comparator, *pari passu* investor as well as the exclusion of measures unavailable to private sector operators, would infringe the neutrality principle directly implies that the actual market conditions are irrelevant to the MEOT's benchmark.[43] Whereas, in the author's opinion, the opposite is true. What level of investment funding is realistically obtainable under current market conditions should instead be used as the benchmark in assessing whether discrimination has occurred. To accept otherwise would entail paradoxical situation whereby it is the State that ultimately defines what amount to "normal market conditions". Whereas the MEOT, at the conceptual level, is designed to determine whether the MS *act in the same way as a private investor* (emphasis added) in the same situation would have.[44] In other words, for the MEOT to be satisfied, the State's behaviour must be consistent with what is observable on the market. Denying market nature to those transactions without *pari passu* comparators or carried out through measures restricted for authorities would result in equal treatment of all capital seekers.

As regards the case where the State is acting as sole shareholder, its situation is unique in the business sense, incomparable to uninvolved operators. Again, the key question pertains to the frame of reference. The previously used benchmark of all real investments does not accurately represent shareholders' specific position, as recognised by the case law.[45] Instead, if one would take as a benchmark and compare all sole shareholders intending to assign its capital, then the discussed postulate would create a situation whereby private shareholders would be able to support their companies as they see fit while public ones would only be able to grant State aid. From a legal standpoint such a comparison clearly demonstrate a discriminatory bias against public bodies.[46] Denying market nature to transactions would have been done exclusively on the grounds of investors' public ownership. Therefore, the last part of the postulate put forward at the beginning is unrealizable even though doubts can be raised about the relationship to true market conditions.

Conclusions – between rational and realistic or between desirable and possible?

The noticeable bias towards purely theoretical in the current approach to the MEOT is a symptom rather than the underlying problem of the effectiveness of State aid control. The fulfilment of postulates formulated earlier, should not be interpreted as an attempt to take away the tools by which States can intervene in their markets. It should be perceived instead as a step to ensure that interventions which do not reflect real market conditions are assessed though the lens of *ex ante* compatibility criteria as State aid within the meaning of Article 107(1) TFEU with associated increase in predictability and transparency.

Aside from statistically insignificant avoidance of aid cumulation, a question emerges whether there are interventions which neither could be authorized under one of the horizontal or sectoral State aid regimes, nor even directly under the Treaty and therefore must be presented as seemingly business-like investment? Over the years the EC has endeavoured to increase transparency and predictability in State aid policy and decision making by the growing reliance on secondary law and soft law instruments such as guidelines and frameworks (Bacon, 2017, pp. 103–104; Hoffman & Micheau, 2016, pp. 25–28). Assessments carried out directly under the unavoidably

general Treaty provisions should be reserved for atypical cases only.[47] Therefore, while falling outside the scope and conditions for applying secondary legislation can usually be explained by such atypical facts of a case, the inapplicability of the Treaty provisions should raise concerns Since the application of State aid provisions must be made within an EU rather than national context, a measure falling outside Articles 107(2), (3) and 93 TFEU does not contribute to achieving the European Union's objectives.[48] The paper's recommendations, therefore, seek to eliminate or at least reduce the occasions for and likelihood of the occurrence of such transactions, placed outside the ambit of State aid compatibility criteria due to their theoretical economic rationality.

The earlier discussion has shown that disapplying the MEOT in situations when the State is acting as a sole shareholder would amount to a violation of the neutrality principle encapsulated in Article 345 TFEU as well as of the principles of non-discrimination and equal treatment. Conversely, the remaining preliminary recommendations, namely to exclude the possibility of classifying as marketlike transactions, firstly, carried out through tools that would have been unavailable to private investors, and secondly, when there are no *pari passu* investors, raises no legal issues with respect to the EU Treaties.

Reversing case law allowing the MEOT for interventions carried out through State-restricted tools would have been relatively simple, since it would have no knock-on effect in other areas of the test or other spheres of State aid *acquis*. Also such tools are easily recognizable, so that no uncertainty or arbitrariness would be introduced.

As regards the latter postulate, the practical problems with implementation can be framed as a question of how to determine sufficient comparability. A simple statement that common, nomothetic, knowledge indicates that there is "a private company" capable of carrying out a given investment should not be deemed sufficient. Instead, it would be necessary to demonstrate scientifically valid methodology used in such comparability assessment and a selection of factors to be used in determining whether a real-life private sector undertaking is indeed comparable. Whether this company should be sought in the same country, region? Whether it should have similar i.e. turnover, production? How similar? Such questions can be multiplied *ad infinitum* and it just goes to show that *ex post*, case-by-case assessment will be unable to provide an adequate level of transparency and predictability (at least not until after the Court have established case law). The adoption of dedicated soft law setting out the assessment criteria must therefore be postulated. This recommendation would fit into the consistently emphasized (but not necessarily respected in practice) increased reliance on economic insights in State aid control, and similarly to the previous proposal will have no wider knock-on effect However, two caveats are in order here about recommendations feasibility: First, it is up to economics to provide an answer as to whether comparability test can be formulated, and then up to legislation experts whether these economic concepts can be translated into legal terms. Second, even though these changes can be initiated through legislative action it is ultimately up to the Court to decide whether the proposed approach will get any traction.

All in all, although the author is of the opinion that, in principle, revising the MEOT to better reflect real market conditions is desirable from the State aid control effectiveness standpoint, these are subject to the unavoidable limitations imposed by the primary law. In addition, all legally feasible proposals are subject to the law of diminishing returns. That is the increased effort in one field, at some point will no longer produce result proportionate to that effort. Therefore judging formulated proposals on a cost-benefit basis it can be said that presented inadequacy of the MEOT is "a problem", but not "the problem", because, statistically speaking, manifest itself in a relatively small number of cases. The proposed solutions due to their implementation simplicity and the lack of wider knock-on effect on the other areas of the EU *acquis*, in the author's opinion, seem to be proportional in relation to the result sought.

Notes/Przypisy

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[2] See eg. C-357/14 P Electrabel v Commission, EU:C:2015:642, para 144.

[3] C-39/94 SFEI and others v La Poste and others, EU:C:1996:285, para 60; C-533/12 P & C-536/12 P SNCM SA and France v Corsica Ferries France SAS, EU:C:2014:2142, para 30.

[4] Compare cases in the previous footnote with e.g. C-933/19 P Autostrada Wielkopolska S.A. v Commission and Poland, EU:C:2021:905, paras 104–105; C-244/18 P Larko Geniki Metalleftiki kai Metallourgiki v Commission, EU:C:2020:238, para 28.

[5] C-124/10 Commission v EDF, EU:C:2012:318.

[6] T-747/15 EDF v Commission, EU:T:2018:6, para. 37.

[7] C-124/10 EDF, paras 91–92.

[8] See inter alia 234/84 Belgium v Commission, EU:C:1986:302, para 14; C-160/19 P Comune di Milano v Commission, EU:C:2020:1012, para 106.

[9] T-228/99 & T-233/99 WestLB, para 315; T-186/13, T-190/13 & T-193/13 Netherlands v Commission, para 127.

[10] See inter alia C-124/10 EDF, para 79; C-214/12 P, C-215/12 P and C-223/12 P Land Burgenland et al and Austria v Commission, EU:C:2013:682, paras 57–60.

[11] Commission Decision (EU) 2022/795 of 10 September 2021 on State aid in favour of Alitalia SA.48171 (2018/C) (ex 2018/NN, ex 2017/FC) implemented by Italy, OJ 2022, L 141/53. The decision has not been challenged.

[12] C-303/88 ENI Lanerossi, para 21; T-126/96 & T-127/96 BFM & EFIM, para 80; T-296/97 Alitalia I, paras 165–169.

[13] T-565/08 Corsica Ferries, 84.

[14] C-276/02 Spain v Commission; T-186/13, T-190/13 & T-193/1 Netherlands and Others v Commission (SJB), EU:T:2015:447, para 127. This should be regarded as an exemption. As a rule, applicable to all non-shareholders investors, some profit is a must: T-228/99 & T-233/99 WestLB, para 314.

[15] See inter alia C-276/02 Spain v Commission, para 22; T-103/14, Frucona Košice, para 255.

[16] There are no directly analogous cases, although it is accepted that either protecting a brand (C-303/88 ENI Lanerossi, 21; C-533/12 P & C-536/12 P SNCM, paras 40–41) or protecting company's reputation (T-186/13, T-190/13& T-193/13 SJB, para 109) are valid investors' motivations.

[17] However, the question how to determine that a project is still recoverable and how far recovery efforts should go remain open for discussion (Leibenath, 2010, pp. 73–103).

[18] T-228/99 & T-233/99 WestLB, para 314.

[19] Compare C-124/10 EDF, paras 91–92 with SA.48171 Alitalia, para 195.

[20] T-228/99 & T-233/99 WestLB, para 315; T-186/13, T-190/13 & T-193/13 Netherlands v Commission, para 127. In reality cases where public interest considerations are totally absent are rare.

[21] T-11/95 BP Chemicals Ltd v Commission, EU:T:1998:199, para 170; T-386/14 FIH Holding A/S and FIH Erhvervsbank A/S v Commission, EU:T:2016:474, para 64.

[22] T-386/14 FIH, para 69.

[23] See 234/84 Belgium v Commission, para 14; C-160/19 P Comune di Milano, para 106.

[24] In certain cases, the applicability of the MEOT may even be presumed, on account of the very nature of the aid measure. See e.g. T-565/19 Oltchim v, EU:T:2021:904, para 230.

[25] See *per analogiam* T-386/14 RENV FIH Holding and FIH v Commission, EU:T:2019:623, paras 113–115.

[26] Otherwise State aid will neither have incentive effect (Flynn et al., 2016, pp. 54–60) nor would meet other compatibility criteria set out in Article 107(2) or (3) TFEU (see e.g. Bacon, 2017, pp. 91–108).

[27] See example of such cases: SA.25285 Kassel-Calden Airport, OJ 2009, C 97/1.

[28] The fact that a measure constituted State aid does not automatically mean that business motivation were totally absent, only that given conditions were unacceptable to hypothetical private investors.

[29] C-357/14 P Electrabel, paras 101–104; T-565/19 Oltchim, para 227.

[30] T-11/95 BP Chemicals, paras 170–180; T-305/13 SACE, para 178–179.

[31] Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 Hinkley Point C , 2015 OJ L 109/44, para 337. This point was not contested on appeal.

[32] T-305/13 SACE, paras 125–127 and 135–136.

[33] See inter alia Commission Decision of 22 July 2009 on State aid C 18/05 awarded by Poland to Stocznia Gdańsk, OJ 2010 L 81/19; Commission Decision (EU) 2021/69 of 24 February 2020 on State aid SA.43549 (2017/C) implemented by Romania for CFR Marfă, OJ 2021, L 32/1.

[34] It can also be pointed out that the aid measure have independent rationale, otherwise would not have been declared compatible with the Internal Market. But that does not change the key fact that the subsequent investment could not be carried out in the absence of State aid.

[35] See SA.26617, SA.26638 & SA.26673 – Fortis Banque Luxembourg, OJ 2009, C 80/7. Being a relevant factor does not in any way imply that these transactions should be assessed together as a part of one measure. An attempt to present a second transaction as MEOT-compliant may be driven by the need to avoid cumulation of aid.

[36] C-367/98 Commission v Portugal, EU:C:2002:326, para 28.

[37] C-303/88 ENI Lanerossi, paras 20–22.

[38] See inter alia 106/80 Sermide v Cassa Conguaglio Zucchero and others, EU:C:1984:394, para 28; C-267/88 to C-285/88 Gustave Wuidart and others v Laiterie coopérative eupenoise société coopérative and others, EU:C:1990:79, para 13; C-17/90 Pinaud Wieger Spedition v Bundesanstalt für den Güterfernverkehr, EU:C:1991:416, para 11.

[39] C-225/91 Matra v Commission, EU:C:1993:239, para 42; T-156/98, RJB v Commission, EU:T:2001:29, para 113.

[40] 56–64 & 58–64 Consten Grunding, para P.340.

[41] If there are no competitors, then impact on trade and competition is non-existent and a measure would not constitute State aid.

[42] See *per analogiam* SA.59985 Modification de la décision Aide d'État SA. 55869: Dispositif IR-PME pour les investissements dans les FCPI et FIP, OJ 2021 C 195/1; SA.61340.

[43] Contrary to *acquis* emphasizing that these conditions must be "as close as possible" to the real ones: See 234/84 Belgium v Commission, para 14; C-579/16 P FIH, para 56.

[44] See e.g. C-142/87 Belgium v Commission (Tubemeuse), EU:C:1990:125, paras 22–29; C-303/88 ENI Lanerossi, paras 20–24.

[45] See e.g. C-303/88 ENI Lanerossi, para 21; C-305/89 Alfa Romeo, para 20.

[46] See *per analogiam* case where bias against private bodies (in various contexts) has been deemed discriminatory in 182/83 Robert Fearon & Company Limited v Irish Land Commission, EU:C:1984:335, para 7; T-228/99 & T-233/99 WestLB, paras 192–196.

[47] See C-431/14 P Greece v Commission, EU:C:2016:145, paras 70–75; C-526/14 Tadej Kotnik and Others v Državni zbor Republike Slovenije, EU:C:2016:570, paras 41–43, 98..

[48] See T-254/00, T-270/00 & T-277/00 Hotel Cipriani and Others v Commission, EU:T:2008:537, para 295; T-369/06 Holland Malt v Commission, EU:T:2009:319, para 132.

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