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State Aid and the MEIT

Can the State really be seen as a private investor?

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Summary

State Aid is prohibited according to European Union legislation since it has possible distortive effects on competition. Nevertheless, Member States intervene in the economy and play an important role in the full functioning and development of the economy and society. The European Commission investigates potential State Aid measures by comparing the behaviour of the State with the behaviour of a hypothetical private investor by applying the so-called Market Economy Investor Test. According to the Commission it is crucial that there is a profit opportunity as a part of the investment or measure in that without profit opportunity, said investment or measure would not be transacted by a private investor. This is unfortunate since States often do not have profit interests in mind when they are conducting business; rather, a State might simply want to increase the society's living standard, protect jobs or the environment, or promote other well-founded societal goals. Therefore, the current system might have a negative effect in the sense that States within the European Union shy away from entering into business since they know that they will fail the test solely on the ground that they cannot show speculative returns of the prospective investment. Accordingly, voices have risen for a new test by the Commission where aspects other than profitability would be taken into account – such as socioeconomic goals. Therefore, it has been suggested that the test benchmark should be changed from a “private investor” to a “reasonable investor”. However, this proposal is more easily contemplated than implemented because of the limited legislative powers of the Courts in State Aid cases. This thesis will show that the current system does not work flawlessly since the Commission and the Courts do not know what factors can and should be of importance within the assessment and that a change to a “Reasonable Investor Test” might increase legal certainty in this area of law. At the very least, a shift to a Reasonable Investor Test might make it easier for States and other State undertakings to safely plan their activities.

Preface

I samma stund som jag lämnar in denna uppsats så påbörjas ett nytt kapitel i mitt liv. Jag är stolt och tacksam över att ha utbildats vid Juridiska fakulteten, Lunds Universitet och jag vill tacka alla lärare som har varit en del av min vardag de elva terminer som jag har studerat där.

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Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EU law	European Union Law
ECHR	European Court of Human Rights
MEIT	The Market Economy Investor Test
OFT	The United Kingdom Office of Fair Trading
SAAP	State Aid Action Plan
SGEI	Service of general economic interest
TFEU	Treaty on the Functioning of the European Union
Union	The European Union

Introduction

1.1 Introduction and Aim of the study

State Aid is prohibited according to the Treaty. The Market Economy Investor Test (MEIT) has become a central part of assessments of State Aid. The Commission, which has a broad margin of discretion regarding State Aid, uses the test to determine whether the measures in question constitute State Aid, or if said measures have been enacted with legitimate reasons and thus should be allowed. The MEIT is also important for undertakings and States since it allows them to make their own evaluation of measures proposed to ascertain if they could be prohibited or not. However, they cannot reach a definitive conclusion since it falls within the Commission's competence. It is also hard to predict the outcome of the test since the Commission and the Courts evidently have had different opinions regarding what circumstances or elements should be considered in the assessment. The current view however is that the terms of the transactions must be satisfactory to a private investor so that he or she would have made the same investment decision during similar circumstances for the measures to pass the test and be lawful. But how and who decides if the information about a proposed transaction is adequate so that a private investor would make the same investment? My opinion is that the test is too subjective and that no real legal certainty therefore can be said to exist in this area. That is the conclusion I draw based on the relevant case law and doctrine. Specifically, I have found that the Commission is not always accurate in its decisions and often changes its opinion regarding the measures after its decisions have been appealed to the General Court – with the General Court often finding that the Commission was wrong in its assessment. I also reproduce different reasoning presented by the Courts for how to increase legal certainty by applying clear assessment criteria, such as “The Reasonable Investor Test”.

My research questions will be as follows:

1. What is the current state of the law in the State aid sector regarding the Market Economy Investor Test?
2. To what extent would a change from a “private investor” to a “reasonable investor” as benchmark in the test increase legal certainty?

1.2 Method and Materials

To be able to answer my research questions and provide the reader with the background information needed to understand this area, the thesis utilizes a traditional legal dogmatic approach. This means that the relevant legislation with its legislative work will be presented with related case law and doctrine to show the current state of law; this is done mainly by referential character. The case law I have chosen has either been part of the area’s emergence or the creation of the Test. It shows that the Commission is not always accurate in its assessment and thus cannot make use of the vital test flawlessly. I have also used articles written about the problem to illustrate the concerns that have been expressed about the test by other persons in the doctrine.

1.3 Limitation

This thesis will only focus on State Aid and The Market Economy Investor Test (MEIT). As the study will show, the MEIT is not the best applicable test for any measures under investigation since the State also can lend money and purchase. During those circumstances, the relevant benchmark should be a private creditor or purchaser but, as said, this thesis will only focus on the MEIT.

Since I do a critical analysis from a legal certainty perspective, I find it necessary to touch on this topic as well. I will however not go deeper into

the different types of State aid and how these affect the test nor the complaints opportunities.

1.4 Disposition

This thesis will start with a section on legal certainty (section 2) and how it is relevant on this area. The concept of legal certainty is wide and includes several different aspects but this thesis will only deal with those that are relevant for State Aid. In order to demonstrate the need of sufficiently clear State Aid legislation to increase legal certainty, I will in connection with the first section, touch upon the rules regarding time frames- and challenges of State Aid decisions as well as the judicial review by the Courts. The following section will give the reader some background information on how the subject has evolved over time through case law and how this area is affected by objectives of Union interest. The relevant legislation will also be presented in this section with possible derogations and relevant case law. Section 4 will deal with the Market Economy Investor Test where case law, which I find relevant for the research questions, is recited. This section will demonstrate for the reader the difficulties that the Commission and the Courts have when they are applying the test. The following section will deal with The Reasonable Investor Test and the elements, which have suggested being determinative when assessing State aid measures. The last section will be a summary of the study where I also answer the research questions and briefly give my opinion regarding the pros and cons of The Reasonable Investor Test.

2 Legal certainty

This section will describe the aspects of legal certainty and related issues of relevance for this thesis.

Legal certainty is a notion frequently used in debates concerning democracy and law since it concerns the legal relationship between the individual and the state; but, what does legal certainty mean? There is no explicit definition of what legal certainty is and it might be as broad and difficult as the question of the meaning of democracy or the rule of law.¹ Since legal certainty is a basic principle of law it cannot be expressed by definitions alone but one has to take various elements in consideration. There is however no doubt that it is a principle underpinning any legal system that aims to protect the individual from arbitrary interference from the State. It should however be noted that legal certainty has never been explicitly analysed in relation to the notion of State Aid but the lack of reflection on this point is offset by the fruitful debate on the type of judicial review to be exercised by the European judges in competition cases.²

In Nordic studies the principle of legal certainty has been analysed and suggests that the notion *sensu stricto* means that every citizen has the right to expect legal protection. This includes also that the courts are obliged to give legal protection in accordance with the law and justifiable legal decisions.³ The legal decisions must also be supported by a source of law and in hard cases must be supported by moral value statements. Lastly, one must be able to reconstruct legal decision-making as a logically correct process of reasoning.⁴ The concept of legal certainty *sensu largo* can be divided into formal and substantive aspects. The formal aspect of legal certainty requires that randomness be eliminated from the decision-making process, which is consistent with the principle of predictability. It is

¹ "Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law", *Legisprudence*, 2008: 2(1) p. 1

² "How Reasonable a Private Investor Can Be Assumed to Be? *Corsica Ferries France*", 52 *Common Market Law Review*, 2015: Issue 4 p. 11 fn. 59.

³ Raitio (in Bernitz, Groussot and Schulyok), 2013, p. 199.

⁴ *Ibid.*

important that courts behave in such a manner that citizens, entities and States are able to plan their activities on a rational basis, which is necessary for a functioning society.⁵ Regarding the need to eliminate randomness from the judicial decision making process requires legal reasoning which in turn requires that the courts support their decisions with legal norms. On the other hand, the courts must use proper interpretational methods to adapt legal norms to moral or teleological arguments and to the facts of the case. Furthermore, is it necessary that the decision outcome has utilized rational legal reasoning is in fact reasonable.⁶ The substantive aspect of legal certainty requires that the decision-making must be substantially right which is consistent with the concept of acceptability.⁷ Both of these aspects of legal certainty intertwine in judicial decision-making. In addition to the formal and substantive aspects, Raitio⁸ has added factual legal certainty, which is concerned with Legal Realism. Factual legal certainty means that the validity of norms is based on systemic, factual and axiological validity and is a part of the broader conception of substantive legal certainty.⁹ Paunio¹⁰ has reached further trying to emphasize the importance of substantive legal certainty by analysing the decisions of the multilingual CJEU. In her view, substantive legal certainty relates to substantive acceptability of legislation adjudication and she claims that coherence in legal reasoning promotes legal certainty in substantive form.¹¹

Since the European Union recognizes the Member States' legal, cultural and historically divergences at the same time that it attempts to unite them, one can understand the potential difficulty to systemize and interpret EU law and find common views on the meaning of legal certainty.¹² The CJEU has however in its case law acknowledged the principle of legal certainty as one

⁵ Ibid. p. 200.

⁶ Ibid.

⁷ "Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law", *Legisprudence*, 2008: 2(1), p. 2 and Peczenik, 1995, p. 89-100.

⁸ Juha Raitio, Professor of European Law, University of Helsinki.

⁹ Raitio (in Bernitz, Groussot and Schulyok), 2013, p. 200.

¹⁰ Lawyer linguist, European Court of Justice and doctoral student, member of the Centre of Excellence in Foundations of European Law and Polity, University of Helsinki Faculty of Law.

¹¹ Raitio (in Bernitz, Groussot and Schulyok), 2013, p. 200-201.

¹² Ibid. 201 see also Raitio, 2003, p. 347.

of the general principles of EU law¹³ and has classified 5 fields where legal certainty is at stake:

1. Principle of legitimate expectations¹⁴,
2. Non-retroactivity of EU legislation¹⁵,
3. Principle of acquired rights¹⁶,
4. Requirement of procedural time-limits¹⁷, and
5. Demand of understandable language¹⁸

Furthermore, The CJEU has debated whether other aspects also should belong to the principle of legal certainty such as: that authorities must abide by their own rules, that the basic rights not be adjudicated more than once for the same act, and that one not be punished without a clear and unambiguous legal basis.¹⁹

2.1.1 General Principles of EU law

As mentioned earlier, the CJEU has in its case law established that legal certainty should be recognised as a general principle of EU law. The general principles of EU law have many functions and could, for example, be used as an aid to interpret EU law. This means that EU law cannot be interpreted without respect to the general principles of EU law and thus legal certainty. Member States and Union citizens may challenge Union action, either to annul or invalidate acts of the institutions or to challenge inaction on the part of the institutions when the general principles of EU law have been infringed. The general principles can also be used to challenge actions taken by a Member State, to support a claim for damages against the union and the

¹³ De Geus en Uitdenbogerd v Bosch and Others, C-13/16, EU:C:1962:11, para. 52.

¹⁴ Töpfer v Commission, C-112/77, EU:C:1978:94, paras. 18-19 and Meridionale Industria Salumi and Others, Joined Cases-212-217/80, EU:C:1981:270, para. 10.

¹⁵ Racke v Hauptzollamt Mainz, C-98/78, EU:C:1979:14, para. 15 and Meridionale Industria Salumi and Others, Joined Cases-212-217/80, EU:C:1981:270, paras. 9-10.

¹⁶ Klomp v Inspectie der belastingen, C-23/68, EU:C:1969:6 and Belbouab, C-10/78, EU:C:1978:181.

¹⁷ Netherlands v Commission, C-59/70, EU:C:1971:77, paras. 15-19.

¹⁸ Farrauto v Bau-Berufsgenossenschaft, C-66/74, EU:C:1975:18, para. 6.

¹⁹ “Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law”, *Legisprudence*, 2008: 2(1) p. 3.

CJEU can also employ the general principles when they fill gap in the EU law.²⁰

Even if the general principles are respected within EU law and should be used as an instrument to fill gaps in law or to interpret law, one may wonder why the general principles are "principles" and not "rules". The term "principle" is, according to the Treaty, indicative of the fundamental nature of certain provisions. This, together with the absence of successful pleas based on the infringements of the general principles of EU law in case law, indicates that "principles" might be inferred to represent a general aim or ideal rather than a right.²¹

I will mainly focus on the principles of predictability, legitimate expectations and non-retroactivity since I find these the most relevant in light of the studies of legal certainty I aim analyse and interpret in my thesis. The principle of legitimate expectations applies primarily to individual decisions but can, under certain circumstances, apply to the exercise of a more general power and thus to the EU legislation regarding State Aid as well.²²

2.1.2 Predictability

As mentioned previously, it is difficult to exhaustively explain the meaning of legal certainty; but, most would agree that predictability is an important inherent element in this notion. There are however different opinions regarding how much focus one should put on the literal interpretation of case law. This is partly due to the fact that there is, in some cases, hardly any applicable written norm or precedent on which a literal interpretation could be based.²³ Therefore, Raitio has suggested that when analysing the case law of the CJEU one should not merely quote the facts of the case and

²⁰ Raitio, 2003, p. 101-103.

²¹ Ibid.

²² Craig and De Búrca, 2015, p. 537-538.

²³ Raitio, 2003, p. 347.

then subsume the facts to the relevant norms and finally declare the judgement as if it were an inevitable outcome. He is convinced that in numerous cases, the literal interpretation of the norms at issue would not lead to the best possible outcome and, therefore, that there is a need to describe how the various approaches to EU law can be combined in the interpretation of case law.²⁴ According to Raitio, one should not focus on the general historical framework of the politics of the era since those conclusions are of speculative nature. Nevertheless, the composition of the Court can be of significance as well as the legal cultures in which the Judges have been educated. This may illuminate the certain “unpredictable” judgements from the European courts that later have turned out to be leading and therefore “acceptable” in certain fields of EU law.²⁵ The Van Gend en Loos case²⁶ illustrates this concept effectively, and concerned the applicability of national rules in breach of EU law. In sum, the case concerned a Dutch company Van Gend en Loos that had imported a quantity of ureaformaldehyde from Germany to the Netherlands and was charged 8% by the Dutch customs. Van Gend en Loos objected by arguing that this violated the free movement of goods adopted by the EEC Treaty. Therefore the importer claimed reimbursement of the sum before the Dutch court which in turn requested a preliminary ruling of the CJEU asking whether Article 30²⁷ TFEU had direct application in national law in the sense that nationals of Member States could lay claim to rights which the national courts were obliged to protect. In its judgement the CJEU held that the relevant Article produces direct effects and creates individual rights, which national courts must protect.²⁸ The judgement gave rise to the direct effect doctrine of EU law and was based on the teleological interpretation of the EEC Treaty confirming that the provision was interpreted by its end or objective.²⁹ The judgement might have been relatively unpredictable at the time when it was published but, at the same time it increased predictability in the future since this judgement established that EU law has direct effect.

²⁴ Ibid.

²⁵ Ibid. p. 348.

²⁶ Van Gend en Loos v Administratie der Belastingen, C-26/62, EU:C:1963:1.

²⁷ Ex Article 12 EEC.

²⁸ Van Gend en Loos v Administratie der Belastingen, C-26/62, EU:C:1963:1 paras. 3-5.

²⁹ Raitio, 2003, p. 349.

Raitio does not think the judgement was in breach of the principle of legal certainty but it should be noted that the principle of legal certainty was not mentioned in the text of the Van Gend en Loos case, possibly because the term and concept of legal certainty has been applied more often in the case law of the 1990s than earlier.³⁰ In the subsequent Intertanko case³¹, the CJEU clarified the content of legal certainty as follows: “The general principle of legal certainty, which is a fundamental principle of Union law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.”³² With regard to this statement by the CJEU, it seems like that the predictability aspect of legal certainty is more relevant than the more casuistic acceptability aspect.³³ However, it should be noted that the CJEU did not aim to define legal certainty with the Intertanko judgement.

Some critics have argued that the CJEU has created rather than interpreted law in some cases. This concerns, for example the Van Gend en Loos case where it gave direct effect to EU law and thus should also apply to the MEIT. But it should be noted that it is the legislator’s task to create new law, not the court, from the perspective of the traditional doctrine of separation of powers offered by Montesquieu.³⁴ However, one reason for this could be that the Commission used to be weaker than it is today and could not defend the common market as effectively as the CJEU. From the anti-literalist perspective one can argue that the CJEU increased legal certainty by its judicial activism since it strengthened its own competence and the effect of EU law within the Union.³⁵

³⁰ Ibid. p 349, 364.

³¹ Intertanko and Others, C-308/06, EU:C:2008:312.

³² Ibid. para. 69 & Belgium v Commission, C-110/03, EU:C:2005:223 para. 30.

³³ Raitio (in Bernitz, Groussot and Schulyok), 2013, p. 204.

³⁴ Raitio, 2003, p. 351.

³⁵ Ibid.

2.1.3 Legitimate expectations

It is not uncommon that people and/or legal systems connect the principles of legitimate expectations and legal certainty, although their content may vary and the former principle, with the principle of non-retroactivity, can be said to constitute a secondary principles to the legal certainty principle.³⁶

The principle of legitimate expectations aims to protect those who act reasonably and in good faith according to the law and who should not suffer from disappointment of those expectations.³⁷ This is a basic principle of law in the Member States and can be found in the EU legislation as well as in the Courts case law stemming from the European Court of Human Rights (ECHR). This principle became legally binding through the enforcement of the Charter of Fundamental Rights of the European Union at the Nice European Council summit in December 2000.³⁸ The principle of legitimate expectations corresponds somewhat with the principle of non-retroactivity since a basic tenet for the two principles are that people should be able to plan their lives with knowledge of the legal consequences of their actions. The principle of non-retroactivity can further be divided into two categories: Actual Retroactivity and Apparent Retroactivity.³⁹ The former covers the situation where a rule is introduced and applied to events that have occurred before the introduction of the rule and the latter covers situations where legislative acts are applied to events which occurred in the past, but which have not yet been definitely concluded.⁴⁰

2.1.4 Actual retroactivity

Even if the principle of non-retroactivity constitutes one of the cornerstones of the rule of law and is prohibited in Article 7.1 of the European Convention on Human Rights, the Court has made exceptions in case law

³⁶ “Retroactive legislation in a European Perspective – On the Importance of General Principles of Law”, *Scandinavian Studies in Law*, 2000: vol. 39 p. 51(9).

³⁷ *Ibid.*

³⁸ Jones and Sufrin, 2014, p. 103.

³⁹ Craig and De Búrca, 2015, p. 533, 535.

⁴⁰ *Ibid.*

where retroactive measures are valid.⁴¹ The prohibition in the ECHR is, however, limited to criminal law and the exception concerns particularly the agricultural sphere where such rules are necessary to stabilize the market or where they put the individual in a more favourable position. The court will, in procedural terms, treat clauses as retroactive only if this is clear from the wording of the rule or from the objectives of the general scheme of which they are a part.⁴² In substantive terms the Court will allow retroactive measures if there is a pressing Union objective that demands such an allowance or where the legitimate expectations of those affected by the measure cannot be duly respected.⁴³ However, as said, this applies only under specific circumstances. The general presumption is still that retroactive measures are unlawful and the Court has established that “in general, the principle of legal certainty precludes a Union measure from taking effect from a point in time before its publication”.⁴⁴ It is a fundamental aspect of law that one shall not be deemed to be guilty for a previous act if said act was not unlawful at the time the act actually occurred. This concerns particularly criminal penalties but also commercial activities since entities must be able to plan their activities and enter into important transactions without the risk of upsetting the presumptions that the transactions were based on.

The Fedesa case⁴⁵ exemplifies in a good way when retroactive measures can be accepted. The case concerned a Directive that the applicants argued was in breach of the principle of non-retroactivity since it was adopted on 7 March 1988 and stipulated that its effects should be in force by 1 January 1988 at the latest. The Court found that the Directive did not impose any criminal liability as such and did not breach the principle of non-retroactivity since it had been adopted to replace an earlier directive, which

⁴¹ *Medici Grimm v Council*, T-7/99, EU:T:2000:175.

⁴² *Meridionale Industria Salumi and Others, Joined Cases-212-217/80*, EU:C:1981:270 ; *Belgium v Commission*, C-110/03, EU:C:2005:223.

⁴³ *Meiko*, C-224/82, EU:C:1983:219 ; *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, C-331/88, EU:C:1990:391 & *Craig and De Búrca*, 2015, p. 534.

⁴⁴ *Racke v Hauptzollamt Mainz*, C-98/78, EU:C:1979:14, p. 86.

⁴⁵ *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, C-331/88, EU:C:1990:391.

had been annulled. What the applicants considered to be retroactive measures was necessary to avoid a legal vacuum.

Even if it was established case law that derogations from the principle of non-retroactivity can be legitimate, there has been no adequate answer to the question of when and under what circumstances the Court would allow actual retroactivity of rules.⁴⁶

2.1.5 Apparent Retroactivity

Cases concerning apparent retroactivity tend to be difficult for the Court to interpret decide upon, and present explanations in legal terms with regard to whether a particular case concerns actual or apparent retroactivity.⁴⁷

Apparent retroactivity is present where legislative provisions are applied to events which occurred in the past but which have not definitely concluded yet. For example, the Court has accepted changed conditions of repayment in already granted licenses but before the actual exportation.⁴⁸ A reasonable supplementary question can be posed with regard to which law governs the area of export refunds - the old legal rules applicable when the license was granted or the legislation that is current at the time of the exportation.⁴⁹ The Court has established that “according to a generally accepted principle, the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law”.⁵⁰ This also applies to the disadvantage of the persons concerned if the change in legal position affects their interest in a negative way.⁵¹

⁴⁶ Schwarze, 2006, p. 1124.

⁴⁷ Craig and De Búrca, 2015, p. 554.

⁴⁸ “Retroactive legislation in a European Perspective – On the Importance of General Principles of Law”, *Scandinavian Studies in Law*, 2000: vol. 39 p.11 & Schwarze, 2006, p. 1121.

⁴⁹ Schwarze, 2006, p. 1121.

⁵⁰ *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker*, C-1/73, EU:C:1973:78. p. 729.

⁵¹ Schwarze, 2006, p. 1122.

2.2 Time frames and challenge of decisions

It is important that the European State Aid control is based on sufficiently clear legislation so that entities and Member States know what they are allowed to do and thus can plan their activities. This is of special importance since the judicial and administrative phases of State Aid control tend to be time consuming and very expensive. Competitors or other third parties that claim that an aid measure distorts competition will also have to show that it has standing to challenge a Commission decision with the challenge based on legitimate reasons. This is clearly not always easy to demonstrate. There is however still many State Aid cases reaching the Union courts and rulings by the lower courts that continues to be appealed to the higher court. If the higher Court finds that the General Courts ruling is wrong the latter court has to decide the case anew. This in turn can lead to the General Court finding that the Commission failed in its original decision and thus is annulled which forces the Commission to adopt a new decision. The second decision made by the Commission can also be appealed to both courts. Therefore the procedures concerning State Aid can be very lengthy and sometimes extend over a decade.⁵² There have been cases where the parties have criticized the long time frames and argued that such delays are in breach of Article 47 of the European Charter of Fundamental Rights, which entitles the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time. There is however some possibilities for the courts to expedite procedures when the parties have applied for it and even to grant interim measures suspending a Commission decision – although this rarely happens. The Commission is also capable of adopting interim injunctive measures to require that an aid measure be suspended before it has completed its assessment but this similarly is not very common. The Commission has introduced a new simplified notification procedure and best practices guideline in 2009 covering certain types of aid

⁵² Ibid. p. 12-13.

to speed up the administrative process.⁵³ The Commission has also published a notice, which obligates the Member States to recover unlawful aid. Further case law⁵⁴ has established that the Member States, in cases where the national procedural rules enable recovery, must take steps to put the necessary mechanisms in place so that unlawful aid can be recovered.

During the circumstances that a complainant has notified the Commission about an aid measure, no deadlines apply with regard to a timeframe for when the investigation should be completed. This has been subject to complaints from parties concerned with a long lasting investigation from the Commission. Specifically, these complaints stress that such open-ended investigations breach Article 41 of the European Charter of Fundamental Rights, which stipulates that every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the Union. The courts have however not condemned said investigations as breaches of the fundamental principle even where the investigations have lasted longer than four or five years.⁵⁵ On the other hand, the Courts have held that, where a preliminary investigation lasted over 28 months, the Commission did not conduct the administrative procedures within a reasonable time. This does not however establish any trust with applicants, as the Courts have not accepted unreasonable delay as a ground to set aside a decision. Further, the Courts have not accepted unreasonable delay as evidence, to the requisite legal standard, that the Commission is faced with serious difficulties and should begin the formal investigation procedure under Article 108(2) TFEU.⁵⁶

2.3 Judicial review

Since State Aid is a legal concept and must be interpreted on the basis of objective factors, it is established that the Courts of the Union in principle

⁵³ Ibid.

⁵⁴ Commission v France, C-214/07, EU:C:2008:619.

⁵⁵ Hancher, Ottervanger and Slot, 2012, p. 13.

⁵⁶ Ibid. p.14 & Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission, T-95/03, EU:T:2006:385.

have full jurisdiction when it comes to determining whether the measures constitute State Aid.⁵⁷ Therefore, a decision made by the Commission where it has classified a transaction as State Aid according to Article 107(1) TFEU can always be fully reviewed by the Courts. There are however some exceptions to this general rule where the Commission is recognised as enjoying a broader discretion: assessments concerning the derogations where the aid is compatible with the common market within the meaning of Article 107(3) TFEU. During those circumstances, the judicial review by the Courts is limited to determining whether the Commission's decision is vitiated by manifest error or misuse of powers.⁵⁸ The Commission also enjoys a broader discretion in cases where it has established the existence of aid through a complex technical or economic assessment. In these cases, the review is limited to verify that there is no manifest error or misuse of powers.⁵⁹ The Courts cannot in these cases substitute its own economic assessment for that of the Commission; rather it must check that the data used by the Commission for the assessment of the complex economic situation actually support the decision the Commission reached.⁶⁰ In the Scott Case⁶¹, the CJEU repealed the decision made by the General Court because they exceeded its review jurisdiction when it found that the Commission should have doubted the evidence on which the calculations at issue were based?⁶²

In another case⁶³, The Court of First Instance ruled: “by virtue of Article 87(3) (read 107(3)) EC, the Commission has a wide discretion the exercise of which involves complex economic and social assessments which must be made in a Union context. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure

⁵⁷ See, to that effect, *France v Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248 para. 25 & *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, para. 111.

⁵⁸ See for example, *Portugal v Commission*, C-88/03, EU:C:2006:511 para. 99; *Italy v Commission*, C-66/02, EU:C:2005:768, para. 135; *France v Commission*, C-456/00, EU:C:2002:753 para. 41 & *Italy v Commission*, C-310/99, EU:C:2002:143 para. 46.

⁵⁹ *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757 para. 114; *Italy and SIM 2 Multimedia v Commission*, Joined Cases C-328/99 and C-399/00 EU:C:2003:252 para. 39 & *Belgium v Commission*, C-56/93, EU:C:1995:298 para. 11.

⁶⁰ AG opinion in *Commission v Scott*, C-290/07 P, EU:C:2010:78 para. 103 & *Spain v Lenzing*, C-525/04 P, EU:C:2007:698 paras. 56-58.

⁶¹ *Commission v France*, C-232/05, EU:C:2006:651.

⁶² *Hancher, Ottervanger and Slot*, 2012, p. 15.

⁶³ *SIDE v Commission*, T-348/04, EU:T:2008:109.

and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers. In particular, it is not for the Union court to substitute its economic assessment for that made by the institution which adopted the decision.”⁶⁴ The Commission must, when it is exercising its discretion, ensure that the aims of free competition and those of the derogation are reconciled, whilst complying with the principle of proportionality.⁶⁵

⁶⁴ Ibid. para. 96.

⁶⁵ Ibid. para. 98.

3 State Aid

State Aid means that the State favours a selected undertaking compared to others and is prohibited since the principle of equal treatment between private and public undertakings shall apply.⁶⁶ State Aid can take many forms and can be used to restructure an undertaking, rescue an undertaking or to help it with operation costs. The Market Economy Investor Test (MEIT) has become a central part in the assessments of State Aid even if it has been invented through case law and thus has no explicit provision in the Treaty.

The first case⁶⁷ where the concept of State Aid was mentioned the European Court of Justice (CJEU) stated “subsidies or aids granted by the States are incompatible with the common market because they constitute an obstacle to one of its essential aims”.⁶⁸ The CJEU also found that State Aid “obstructs the establishment of normal competitive conditions”.⁶⁹ Case law⁷⁰ shows that it is not the intention or aim that is crucial when the Commission is evaluating if a subsidy or aid may be viewed as State Aid or not; they look at its effects.

The financial crisis in the United States in 2008, Lehman Brothers’ collapse and its aftermath prompted the Commission to develop this area but the fact is that the Commission had been planning a reform of this the area of law as far as back as 2005 when it set up its State Aid Action Plan (SAAP). It consists of four pillars of reform: less and better targeted aid, a more refined economic approach, more effective procedures and shared responsibility between the Union and Member States.⁷¹

⁶⁶ Italy v Commission, C-303/88, EU:C:1991:136 paras. 19-20.

⁶⁷ De gezamenlijke Steenkolenmijnen in Limburg v High Authority, C-30/59, EU:C:1961:2.

⁶⁸ Ibid. para. 20.

⁶⁹ Ibid. para. 20(3).

⁷⁰ See, for example De gezamenlijke Steenkolenmijnen in Limburg v High Authority, C-30/59, EU:C:1961:2 & Italy v Commission, C-173/73, EU:C:1974:71.

⁷¹ Hancher, Ottervanger and Slot, 2012, p. 3, 7.

3.1 SAAP and a refined economic approach

A more refined economic approach gained the most attention because it involved an innovative approach; the public was less enthusiastic about the proposal to give the Member States Courts more responsibility and especially a larger role in assessing the compatibility of particular State measures. The suggestion to give national authorities more power gained the most negative response. The UK Office of Fair Trading (OFT), which used to be an eminent competition authority within the European Union, gave in its response to the SAAP its view on the Unions current State Aid control and its substantive rules. The OFT was critical to the Commission's then-current approach which it found inadequate in that it permitted some aid that distorted competition significantly and prohibited some aid that only had a minor effect on competition. The OFT stated that a more economic approach was required when considering distortion to competition. It stressed that the mere fact that aid which fell within Article 107(3) TFEU (and thus could be considered to be lawful) and that also fell within a Commission guideline could be permitted even if it distorted competition. On the other hand, aid that fell within Article 107(3) TFEU but outside a Commission guideline could be considered to be unlawful even if it created a very low level of distortion to competition. The OFT's opinion was that a correct assessment of aid could only be done by a setting up a system that approved aid based on an economic view of distortion to competition and not like the existing guidelines that set ceilings on the amount of aid that could be given relative to the amount of investment being undertaken. The OFT argued that this is only a very rough approximation of the potential for subsidies to distort competition.⁷² The Commission's "refined economic approach" has been embraced in the Guidelines concerning state aid that have been revised since the publication of the SAAP in 2005 with exception of the financial sector. Banks within the Union have received large amounts of aid since the financial crisis in 2008 but yet there have been no real

⁷² OFT Response to the European Commission's Action Plan on State Aid Reform, September 2005, paras. 2.2, 2.9 & 2.11.

attempt to apply the “refined economic approach”, nor has it been mentioned in any temporary guidelines in this sector. A possible explanation for this absence could be that Member States would not have been able to prevent a crisis in their banking sectors if they were bound to apply the “refined economic approach” and that is why it is absent. Another explanation could be that the Commission in its assessment in cases concerning the financial sector has relied on Article 107(3b) TFEU, which allows aid where it remedies a serious disturbance in the economy of a Member State.⁷³ In this way the Commission made it possible for banks to be restructured or resolved according to State Aid legislation which increased financial stability and integrity within the internal market because the banking system could continue to provide credit to the real economy.

The “passive” role the Commission has played concerning aid in the financial sector can be found in other areas where there have been objectives of Union interest. The Commission in June 2011 produced a report on “State aid contribution to Europe 2020 Strategy” in conjunction with the Europe 2020 Strategy for smart, sustainable and inclusive growth. This report presents a number of sectors that will be prioritised and for which State Aid instruments can be used. The analysis since the publication of that report shows that the Commission is very unlikely to give negative decisions or require repayment of aid that has already been given in these sectors. In fact almost every national support measure or scheme that has been made in these prioritised sectors has fallen within the scope of the block exemption and thus have been disbursed without prior Commission authorisation. This report, together with what is said regarding the financial sector above, confirms that State Aid control is an effective and important tool in achieving the Unions stated policy goals and that the Commission would rather welcome more than less aid to fulfil the “flagship priorities” laid down in the Europe 2020 Strategy.⁷⁴ This also indicates that while other areas where State aid may exist are being investigated according to the

⁷³ Hancher, Ottervanger and Slot, 2012, p. 8.

⁷⁴ Hancher, Ottervanger and Slot, 2012, p. 10-11.

“refined economic approach” prioritised sectors in the Europe 2020 Strategy and the financial sector and aid concerning the rescue or restructuring of banks have been assessed according to the crisis-specific rules adopted in 2008-2009. Further, these assessments have progressively been adapted and tightened in order to reflect changing market conditions and the recovery of the financial sector.⁷⁵

3.2 State aid legislation

The first part of Article 107 TFEU sets out a general prohibition and states that

”[...] 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.”⁷⁶

Four cumulative conditions must be fulfilled for a measure from a Member State to contravene Article 107 TFEU;

First of all, a measure shall constitute aid. Neither the Article nor the Lisbon Treaty define the concept of aid but the CJEU and the Commission has taken a very broad view and the crucial point in deciding on whether it is aid or not is that it must confer an advantage on the recipient. The Commission has published a non-exhaustive list of what shall constitute aid and which includes direct subsidies, tax exemptions and preferential interest rates as illustrative of the circumstances that might be found incompatible with the aims of the Union. Since the list that the Commission has published is merely illustrative, many situations can fall within this prohibition. Case law also shows that the aid does not have to be of a

⁷⁵ Ibid. p. 2.

⁷⁶ Article 107(1) TFEU.

positive character as subsidies; it is enough that the charges that the beneficiary would normally bear are mitigated.⁷⁷

Secondly, the aid should be granted by a Member State or through State resources. Case law⁷⁸ shows that it is not enough that an undertaking has received State Aid; rather, it must be shown that the State actually exercised control over the undertaking and was involved in the measure. The Van der Kooy Case⁷⁹ demonstrates this criterion in a good manner. The case addressed a Dutch company, Gasunie, where the Dutch government held 50 % of its shares and the Commission made a decision that the tariffs charged by the undertaking to certain firms constituted aid. The applicants argued that the tariff was not imposed by the State and consequently should fall under the second criteria in the relevant Article in the Treaty. The court however ruled that since the undertaking was controlled directly or indirectly by the Dutch State, the tariffs had to be approved by the Minister for Economic Affairs and the undertakings had on two occasions given effect to the Commission's appeal to amend of the tariff, the measure constituted State Aid.⁸⁰ Advocate General Slynn made, in this case, one of the first comments about the private investor test (which this paper will examine in more detail in section 3) when he said that: "It is of the essence of State aid that it is non-commercial in the sense that the State steps in where the market would not. The State may have its reasons for doing so but they are not commercial in the ordinary sense of the word. Thus the State may subscribe for shares in a company or lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting aid which falls within Article 87 (read 107) if the tests of that provision are satisfied."⁸¹

Thirdly, the aid has to distort or threaten to distort competition, which in many cases is relatively easy to demonstrate. The Commission will examine

⁷⁷ Enirisorse, C-237/04, EU:C:2006:197.

⁷⁸ France v Commission, C-482/99, EU:C:2002:294.

⁷⁹ Netherlands v Commission, Joined Cases 67-70/85, EU:C:1988:38.

⁸⁰ Ibid. paras. 36-38.

⁸¹ Ibid. para. 251 & Bacon, 2009, p. 41.

if the position of the beneficiary has been strengthened after it received aid compared to its position before.⁸²

The fourth and final condition to be met is that there should be an effect on inter-State trade. If the beneficiary's financial position is strengthened compared to others within the Union, inter-State trade is affected. Even though the recipient is a relatively small company and does not get a large amount of aid, it can affect the trade within the Union since it might be harder for undertakings from other Member States to penetrate the relevant market. Therefore, as earlier mentioned, it is not necessary that the Commission prove that trade actually is affected; it is enough for them to show that it might be.⁸³

3.3 Derogations from the prohibition

3.3.1 Article 107(2) and (3)

There are some exceptions where State aid is not seen as an obstacle but rather as an instrument to generate net benefits for society that can promote the development of certain economic areas or activities. The second part of Article 107 TFEU states that the following aid shall be compatible with the internal market,

- (a) "[...] aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into

⁸² Italy v Commission, C-173/73, EU:C:1974:71.

⁸³ Craig and De Búrca, 2015, p. 1093.

force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.”⁸⁴

The third and last part of Article 107 TFEU allows the Commission to permit aid where its effects are more beneficial to the Union than anti-competitive to the internal market; this could be

- “(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment,[...]
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”⁸⁵

By studying case law it appears that the Commission is not too generous with regard to its acceptance of aid under Article 107(3) TFEU if it is not vital for the achievement of the objectives that the relevant Article mentions. The CJEU stated in the Philip Morris case⁸⁶ that Member States were not allowed to “make payments which would improve the financial situation of the recipient undertaking although they were not necessary for the attainment of the objectives specified in Article 87(3) (read 107(3)).”⁸⁷ In another case⁸⁸, the Court of First instance ruled that “the Commission is entitled to refuse the grant of aid where that aid not induce the beneficiary

⁸⁴ Article 107(2) TFEU.

⁸⁵ Article 107(3) TFEU.

⁸⁶ Philip Morris v Commission, C-730/79, EU:C:1980:209.

⁸⁷ Ibid. para. 17.

⁸⁸ Graphischer Maschinenbau v Commission, T-126/99, EU:T:2002:116.

undertakings to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 87(3) (read 107(3))”.⁸⁹ Both judgements demonstrate an important principle regarding state aid: that the aid must be necessary for it to be allowed. If it is not necessary the transaction will only reduce the cost of the beneficiary undertaking and be a waste of public resources.⁹⁰

It is however important to remember the limited judicial review by the Courts and the discretion enjoyed by the Commission and which establishes that even if the case law cited above stresses that aid be necessary for it to be compatible with Article 107(3) TFEU, it is not set in stone.

3.3.2 The Block Exemption Regulation

The normal procedure when a State wants to give aid to an undertaking is that it must notify the Commission⁹¹. That does not apply to aid that complies with Article 107(2) TFEU and thus does not affect the internal market. However, to make the process more effective and increase the legal certainty for undertakings, the Commission have made a Block Exemption Regulation⁹² for situations where the aid does not have to be approved before it is given, provided that certain conditions are met. The Commission adopted a revised State aid General Block Exemption Regulation in May 2014 in which they expanded the scope of the regulation. The Block Exemption Regulation operates on the basis of individual notification thresholds, which establishes that the aid can only enjoy the “safe harbour” of the Block Exemption Regulation provided said aid does not exceed the threshold amount. If the aid measure does not comply with the provisions of the Block Exemption Regulation, the aid is not prohibited *per se* but the Commission will then have to make an individual assessment of the measure.

⁸⁹ Ibid. para. 34.

⁹⁰ Nicolaidis, P. (2008) *Essays on Law and Economics of State Aid*. Doctoral, Maastricht University. p. 14.

⁹¹ Article 108(3) TFEU.

⁹² Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

3.3.3 The Commission Guidelines

In addition to the Block Exemption Regulation and the basic legal framework governing State aid in Articles 107 and 108 TFEU, the Commission has issued guidelines⁹³ when aid can be acceptable, including that viability is restored, that aid is in proportion to the restructuring costs and benefits, that undue distortions of competition are avoided, and that the restructuring plan is fully implemented.⁹⁴ The Guidelines should be accepted and applied according to the principle of equal treatment to ensure that similar cases are treated similarly or consistently; but there might be instances of dissimilar or inconsistent treatment since since the Guidelines are not binding on the Union Courts.⁹⁵

3.4 The Commission's assessment

The current State aid control is based on a “three-tiered” system: block exemption, standard assessment and detailed assessment. Regarding the detailed assessment, the Commission must examine whether the aid measure is aimed at an important objective of common interest that is necessary to establish a functional market or if the aid measure focus has other, equity-related objective and thus distorts competition.⁹⁶ After this the Commission has to identify whether there is a better solution or if the aid measure is the most appropriate policy instrument; they shall thus examine whether the State aid is making the beneficiary act in a way it otherwise would not have done. The final step consists of a proportionality test where the Commission evaluates the different interests regarding the aid and subsequently apply the so-called “balancing test”. The Commission will only evaluate aid, which falls outside the scope of regulations and guidelines, or aid, which, although it might fall within relevant regulations or guidelines, consists of large amounts. When the Commission assesses the

⁹³ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01).

⁹⁴ Craig and De Búrca, 2015, p. 1085.

⁹⁵ Ibid. p. 1086.

⁹⁶ Hancher, Ottervanger and Slot, 2012, p. 7.

aid measure it uses its Guidelines to decide whether it is compatible with the internal market or not.

4 MEIT – a hypothetical test

When the Commission is investigating a measure it uses a principle or test that has become known as the Market Economy Investor Test⁹⁷ (MEIT). The reason behind the MEIT's name is because in the beginning the MEIT was mainly used in cases concerning capital investments.⁹⁸ This principle has been established and developed through the CJEU's case law and thus does not stem from legislation. The principle has been a result of the fact that the Treaty does not intervene in national property laws and therefore state owned or controlled undertakings must be treated in the same way as private companies.⁹⁹ Advocate General Slynn was one of the first commentators with regard to the market economy investor principle but the principle was mentioned for the first time in 1984 within the Commission's communication on Government Capital Injection. The notion of the principle has since then developed through Commission texts, decisions and Court judgements to give it further precision in the various circumstances in which State Aid control has been examined.¹⁰⁰ Because of the different ways the State can intervene in the economy (e.g. governmental capital injections, loans guaranteed by the state sales of government assets and privatisation) and not always acts like an investor, the principle has been refined and developed and the Courts have extended the test to embrace a "private creditor test" and a "private purchaser test".¹⁰¹ Drawing a clear line between, for example, the private investor and creditor tests, with differing meanings and functions, can be difficult in cases where the State acts both like an investor and a creditor.¹⁰² Even if the State or a public authority have lent money, the MEIT can be applied but only where the issue is the initial grant of a loan and the terms on which it is provided. Where the question concerns the later rescheduling or waiver of the debt, the relevant

⁹⁷ Some refer to it as a test, others as a principle but it has the same function.

⁹⁸ Bacon, 2009, p. 42.

⁹⁹ Hancher, Ottervanger and Slot, 2012, p. 104.

¹⁰⁰ "The Market Economy Investor Principle", Competition Policy Newsletter, 2002: Issue 2.

¹⁰¹ Hancher, Ottervanger and Slot, 2012, p. 104.

¹⁰² Ibid.

comparator is with a private creditor.¹⁰³ Advocate General Maduro gave his view on the different tests in the Tubacex case where he said “[...] it should be noted that the State did not act as a public investor whose conduct must be compared to the conduct of a private investor laying out capital with a view to realising a profit in the relatively short term [...] On the assumption that, as the Commission acknowledges, the fact that the sums advanced by Fogasa to pay the wages of Tubacex's employees are not State aid has been established, it follows that in restructuring the conditions for repayment of those advances, Fogasa must be held to have acted as a public creditor which, like a private creditor, seeks to recover sums due to it and which, to that end, concludes agreements with the debtor, under which the accumulated debts are to be rescheduled or paid by instalments in order to facilitate their repayment.”¹⁰⁴

This study will however focus on the MEIT since it is the most highly utilized and debated – and further, because the other aforementioned tests have developed from the MEIT and its principles.

4.1 The Tubemeuse case

The first case¹⁰⁵ in which the MEIT was used concerned the acquirement of the shares of a Belgian company named Tubemeuse; which was bought by the Belgian Government following financial difficulties. The Belgian Government started by acquiring 72% of the capital holding, which was subsequently approved by the Commission. The aid did however not help the undertaking to overcome its crisis so the Government decided to acquire the remaining shares and initiated during the following years a series of measures designed to increase its capital. The Government notified the Commission about the measures according to Article 108 TFEU but did not wait for its approval. The Commission found the measures to constitute State Aid and requested the Government to recover the aid. Belgium

¹⁰³ Ibid. p. 46.

¹⁰⁴ Spain v Commission, C-342/96, EU:C:1999:210 para. 46.

¹⁰⁵ Belgium v Commission, C-142/87, EU:C:1990:125.

however argued that their measures did not constitute State aid and claimed that the measures that they had enacted were the normal reaction of any investor whose initial investment was at risk. The CJEU started by stating that the relevant criterion to decide if the measures constitute State aid or not is whether Tubemeuse could have obtained the amounts in question on the capital market from a private investor.¹⁰⁶ They continued by contesting that the financial difficulties that the undertaking had been suffering from had made almost all of the private shareholders to withdraw from the undertaking and that, together with the reduced demand on the world market, made it clear to them that Tubemeuse would not have been able to “induce private investors operating under normal market economy conditions to enter into the financial transactions in question” and for that reason the measures constituted State Aid.¹⁰⁷

4.1.1 Assessment criteria for the MEIT

After the judgement in the Tubemeuse case the CJEU and the Commission have continued to apply the MEIT. Its aim, as the judgement reproduced above shows, is to determine whether a private investor would have entered into the transaction on the same conditions as the public investor and if there is a profit opportunity at the end - which is crucial for private investors. If there is no opportunity for profit, the measure will be considered State Aid.¹⁰⁸ The MEIT, as previously mentioned, has continued to develop in case law and to make the test more precise and effective by assuming that the hypothetical private investor should be of the same size as the public body in question.¹⁰⁹ You can also look at the terms and see if a private investor would have entered the transaction and, if not, what terms with which the investor would have been satisfied.¹¹⁰ It is also of importance that the private investor can obtain the same financial information about the

¹⁰⁶ Ibid. para. 26.

¹⁰⁷ Ibid. paras. 27-29.

¹⁰⁸ Craig and De Búrca, 2015, p. 1090, Italy v Commission, C-303/88, EU:C:1991:136 & Westdeutsche Landesbank Girozentrale v Commission, Joined cases T-228/99 and T-233/99, EU:T:2003:57.

¹⁰⁹ Italy v Commission, C-305/89, EU:C:1991:142 para. 19.

¹¹⁰ Cityflyer Express v Commission, T-16/96, EU:T:1998:78 para. 51.

undertaking as that available to public authorities.¹¹¹ When applying the test one must consider the measures in the context of the period when the measure was actually taken. A measure cannot be considered State Aid simply because the investment proved not to not be prudent after the fact.¹¹²

4.2 The Altmark case

In a subsequent case the Court developed and extended the test to also apply to services of general economic interest (SGEI) which can constitute State Aid and thus be prohibited under Article 107(1) TFEU. In the Altmark¹¹³ case, the CJEU established four cumulative criterion that, when fulfilled, permit measures that might otherwise constitute State Aid and thus does not have to be notified. The criteria that have to be met for these measures not to constitute State Aid are:

1. The recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined;
2. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. The compensation cannot exceed what is necessary to cover all or part of the cost incurred in the discharge of the public service obligation, taking into account the relevant receipts and a reasonable profit; and
4. Where the undertaking is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the Union, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.¹¹⁴

¹¹¹ France v Commission, C-482/99, EU:C:2002:294 para. 70.

¹¹² Ibid. para. 71.

¹¹³ Altmark Trans and Regierungspräsidium Magdeburg, C-280/00, EU:C:2003:415.

¹¹⁴ Ibid. paras 89 et. seq.

There have been a number of cases concerning compensation for the performance of SGEI since the Altmark case where the criteria established in Altmark have been clarified. The fourth criteria expresses the key feature when it comes to assessing compensation in this area which mean that the compensation for SGEI must remain limited to the costs of an efficient company or which represents the least amount of costs to the Union.¹¹⁵ The four conditions laid down in the Altmark judgement are however, as said, cumulative which mean that when all of the conditions are not fulfilled, the public service compensation will be examined under State Aid rules.

The fourth criteria in the Altmark case has become known as a benchmark, which in practice aims to show that a private investor would have behaved in the same way as the State did. Case law¹¹⁶ shows that the best means of satisfying this benchmark is to establish that a private investor made a significant contribution on the same terms and at the same time as the public authority. It is, however, not satisfactory to show mere private participation in the measures for it to avoid State Aid rules. In the Seleco case¹¹⁷, the CJEU stated that even a significant participation by private investors is not sufficient in itself to exclude aid but rather account must be taken of all relevant economic and legal facts.¹¹⁸ In absence of a private investor or an available public benchmark, such as commercial rating for the borrower, is it always difficult to tell if a private investor would have entered into the transactions or what conditions the investor would be satisfied with since their priorities and objectives vary. It appears that the Commission as a general rule, tends to view every measure that puts the beneficiary undertaking in a better financial position as aid, regardless the conditions that made the State act in the way it did. This is not desirable since it disregards the individual circumstances in each case and puts the government investor in a different position than a private investor who may

¹¹⁵ BUPA and Others v Commission, T-289/03, EU:T:2008:29 paras. 246, 249.

¹¹⁶ Alitalia v Commission, T-296/97, EU:T:2000:289 para. 81.

¹¹⁷ Italy and SIM 2 Multimedia v Commission, Joined Cases C-328/99 and C-399/00, EU:C:2003:252.

¹¹⁸ Hancher, Ottervanger and Slot, 2012, p. 105.

have other objectives with the investment such as to restore lost capital, waive or acquire debt, or convert debt into equity.¹¹⁹

4.3 Limitation of the MEIT

The State may participate in the economy in different ways and the fact that state resources have been utilized does not automatically mean the measures are regarded as State Aid within Article 107(1) TFEU. It is not uncommon that the State own shares in an undertaking and the fact that it has used public funds to invest in that undertaking does not automatically mean that the measures constitute aid. It is, therefore, important to distinguish the two separate roles of the State when it intervenes in the economy: is the intervention through its prerogative powers or through ownership or control of certain assets? Consequently, is the MEIT not the best instrument in every situation to determine State Aid and it should not be extended to apply to situations where the state is acting in the exercise of its public power such as taxation or social security.¹²⁰ During those circumstances, the relevant State aid test is whether the measure is “selective” or “specific”.¹²¹ Settled case law¹²² establishes that when the State is acting as a public authority, it is not possible to compare the behaviour of the State with that of a private operator since no private actor is present in this area and thus the MEIT is not applicable. With regard to this approach, the CJEU did however alter its position with the EDF¹²³ judgement in 2012 – which will be addressed in the following section – where the Court stressed that the MEIT could be utilized in cases concerning the exclusive powers given to the Member States such as the waiver of taxes. In fact, this Court ruling held that, during such circumstances, the Commission is obligated to use the principle in their assessment. As mentioned previously, the two separate roles of the State

¹¹⁹ Ibid. p. 106.

¹²⁰ Hancher, Ottervanger and Slot, 2012, p. 104 – 105.

¹²¹ “The Coming of Age of EC State Aid Law: A Review of the Principal Developments in 2002 and 2003”, European Competition Law Review, 2004: Issue 4, p. 2.

¹²² See, for example Belgium v Commission, C-234/84, EU:C:1986:302 para 14; Spain v Commission, Joined Cases C-278-280/92, EU:C:1994:325, para. 22 & Germany v Commission, C-334/99, EU:C:2003:55, para. 134.

¹²³ Commission v EDF, C-124/10 P, EU:C:2012:318.

must be distinguished where it intervenes in the economy and, again, the EDF case was the first time the CJEU actually made an attempt to set criteria in order to distinguish the two roles.

5 Legal certainty concerning the MEIT

There is no mechanical or formal assessment of measures that the Commission and/or undertakings can use to see if the investment in question constitutes State Aid or not. The relevant factors may vary from case to case and to make a correct assessment the Commission will therefore analyse all the relevant factors. These may include: the situation of the beneficiary and the relevant market at the time when the decision was made to make the investment¹²⁴, the liquidity of the investment¹²⁵ and a comparison between the internal rate of return on the investment and the minimum rate which a private investor would require¹²⁶.

The tasks of the Commission vary much and it is therefore required to have broad knowledge in many fields, not least in economics. It is uncertain if the Commission indeed has enough economic expertise, data, and analytical tools to undertake the financial assessments required to determine whether or not a measure constitutes State Aid. Thus, the question becomes: does legal certainty exist in this area? And does the Commission understand when and how it should apply the MEIT? The case law presented in the following chapter suggests opposite negative response to both questions.

5.1 The EDF case

The case¹²⁷ concerned a Directive¹²⁸, which stipulated that publicly owned companies, governed by national law (French law in the case) and active in the electricity market had to be privatised to comply with the common rules for the internal market. The EDF used to be a publicly owned company that,

¹²⁴ Ibid.

¹²⁵ *Westdeutsche Landesbank Girozentrale v Commission*, Joined Cases T-228/99 and T-233/99, EU:T:2003:57, paras. 328-329.

¹²⁶ *Alitalia v Commission*, T-296/97, EU:T:2000:289, paras. 98-100.

¹²⁷ *Commission v EDF*, C-124/10 P, EU:C:2012:318.

¹²⁸ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

during the privatisation process, enjoyed benefits such as a guarantee against possibility of the undertaking going bankrupt as well as grantor rights that were allocated directly to the capital injections item without flowing through the profit and losses account. This led, in turn, to the company's lack of obligation to pay corporation tax, an advantage estimated at 888,89 million EUR. The EDF and the French authorities argued that the transaction was a shortcut for a longer and equivalent transaction and that the restructuring of the undertakings accounts could be regarded as a capital injection of an amount equivalent to the partial tax exemption. The Commission however held that the MEIT could not apply on transactions where the State exercised its regulatory powers since a private investor could never hold a tax claim against an undertaking. The Commission's approach to the transaction was however appealed and rejected by the General Court.¹²⁹

5.1.1 The General Court

The General Court found that it is not necessary that a private investor could be in a same situation as the authority for the MEIT to be applied. The crucial point is to establish whether a private investor, in the same circumstances, would have taken a comparable investment decision. Thus, the argument made by the Commission that a private investor never could hold a tax claim was not of any relevance.¹³⁰ Following this, the Commission brought an appeal before the CJEU, which followed neither the Commission's approach, nor the General Court's.

5.1.2 The Court of Justice

The CJEU started by stressing the importance of distinguishing "the roles of the State as a shareholder of an undertaking, on the one hand, and of the State acting as a public authority on the other"¹³¹ since "in order to assess

¹²⁹ Commission v EDF, C-124/10 P, EU:C:2012:318, paras. 2-17.

¹³⁰ Ibid. paras. 30, 33-37.

¹³¹ Ibid. para. 80.

whether the same measure would have been adopted in normal market conditions by a private investor 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 shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account.”¹³² The ”applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it.”¹³³ The CJEU stressed that it is for the Member States to prove that measures have been enacted in its role as a shareholder and thus that the MEIT apply. This can be done by showing that the decision to approve the transaction is based on economic calculations comparable with what is expected to be made by a private investor, in a situation as close as possible to that of the State, in order to determine its future profitability.¹³⁴ “By contrast, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that 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, or on subsequent justifications of the course of action actually chosen.”¹³⁵ The Court continued by stating that if the State provides the Commission with the requisite evidence it is for the Commission to then determine whether the State took the measure in its capacity as shareholder or public authority taking into account the nature and subject-matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject. Therefore, the General Court was correct in its finding that the objective pursued by the French State could be taken into account for the purposes of a determination of what role the State had acted.¹³⁶ Regarding whether the MEIT was applicable or not in the case due to the fiscal nature of the means employed by the State, the CJEU recalled

¹³² Ibid. para. 79.

¹³³ Ibid. para. 81.

¹³⁴ Ibid. paras. 82, 84.

¹³⁵ Ibid. para. 85.

¹³⁶ Ibid. paras. 86-87.

that Article 107(1) TFEU prohibits any aid in any form whatsoever that affect or is capable to distorting competition. Further, the CJEU held that the intention of the MEIT is to prevent the recipient public undertaking from being placed in a more favourable position than that of its competitors. The economic position of the recipient undertaking does not depend on what kind of aid it has received but rather the amount that the undertaking ultimately receives. Therefore, the General Court was correct when it focused on if EDF's financial situation had improved and the effects of the measure on competition rather than on the fiscal nature of the means.¹³⁷

“Accordingly, it follows from all of the foregoing that, in view of the objectives underlying Article 87(1) EC (read Article 107(1) TFEU) and the private investor test, an economic advantage must — even where it has been granted through fiscal means — be assessed inter alia in the light of the private investor test, if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it.”¹³⁸ The Court continued, “in the present case, therefore, application of the private investor test would have made it possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable with that of EDF, an amount equal to the tax due”¹³⁹ and “the possibility that there might be a difference between the cost to the private investor and the cost to the State as investor does not preclude application of the private investor test. Rather, that test makes it possible to address precisely that point, that is to say, to establish, inter alia, that such a difference exists and to take it into account when assessing whether the conditions laid down by that test are met.”¹⁴⁰

¹³⁷ Ibid. paras. 88, 90-91.

¹³⁸ Ibid. para. 92.

¹³⁹ Ibid. para. 95.

¹⁴⁰ Ibid. para. 96.

5.1.3 The Commission re-launch of the investigation

After the Commissions legal setback in both the General Court and the CJEU it had to re-launch the formal investigation, this time more carefully analysing the economic rationality and whether or not there existed an advantage for EDF by taking into account those issues that had been identified by the CJEU:

1. The Member State must establish on the basis of objective evidence that the measure was implemented by it acting as a shareholder.
2. The evidence must show that the Member State concerned took the decision to make an investment at the time the measure was implemented.
3. The decision must be based on economic evaluations comparable to those which a rational private investor would have had carried out, before making the investment, in order to determine its future profitability.
4. The Commission may refuse to examine evidence established after the investment was made.
5. The nature of the measure is relevant in that regard.
6. The application of the MEIT must make it possible to determine whether a private shareholder would have injected a similar amount.¹⁴¹

The Commission did not find that the French government acted as a shareholder or that any studies regarding the profitability of the investments had been made before the investment. Even though EDF presented a study trying to show that the French State's behaviour was economically rational the Commission dismissed it since it found that it was too complex to have been carried out before the investment.¹⁴² The Commission, however, examined whether the French State could expect to profit on its investment

¹⁴¹ Summarised in Commission Decision, [2016], OJ L34/152 para. 126. See also, "A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands (C-224/12)*", *European Competition Law Review*, 2014: vol. 35, issue 10.

¹⁴² Commission Decision, [2016], OJ L34/152, paras. 128-130, 140-142 & 144.

and identified that the EDF had to pay a fixed dividend of 3% and that the reduction in the amount of debt for EDF enabled EDF's ability to acquire cheaper access to financing from the markets which consequently would lead to a larger profit for EDF. This led the Commission to the conclusion that "the vast majority of the evidence described above clearly shows that France did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an investment in EDF by way of the tax exemption. Accordingly, the prudent private investor in a market economy principle does not appear to be applicable to this measure. The considerations set out below on the application of the private investor test are therefore provided in the alternative."¹⁴³ The Commission first investigated a realistic return of the investment by estimating EDF's future net revenue. The result was in the range of 2,94% to 4.64%, which had to be compared to a benchmark rate - for example, the rate that a private investor would have demanded. The Commission used two benchmarks to increase the accuracy of the assessment: the "risk-free benchmark" and the "benchmark with risk margin".

The risk-free benchmark

Regarding the first benchmark in order to determine the profitability of the investment the Commission compared the net revenue with long-term French government bonds, which was 6.35% and thus higher than the return from the income of EDF which also was more risky. The Commission also took into account the differences in costs between a private investor and the State by deducting from the higher estimate of the rate of return of 4.64% a tax of 42%, which would reduce the return to 2.7%. Accordingly, the Commission found that a "prudent" private investor would have found that the expected rate of return was "insufficient" to justify the investment.¹⁴⁴ The Commission then went deeper into its analysis by examining "whether the evidence and information dating from the time of the decision to reclassify the provisions without levying the tax submitted by France

¹⁴³ Ibid. para. 154.

¹⁴⁴ Ibid. paras. 162-163.

contain additional information which would have convinced a prudent private investor to make the alleged investment notwithstanding the apparent very low rate of return. These details may relate in particular to the capacity of EDF (i) to increase its long-term operating income; (ii) to improve its operating results through efficiency gains; (iii) to increase the net value of the productive assets of the undertaking; or (iv) to provide a steady and adequate remuneration for its shareholder. These are factors which have the potential to create long-term value for the shareholder with a positive outlook, but destructive of value with a negative outlook.”¹⁴⁵ The Commission could not find evidence to corroborate that any of the possibilities stated above was likely to materialise. Rather, the Commission found that policy objectives of the State (which indicated that the French government supported the supply of cheaper electricity to increase the competition of French industry and French regions) undermined the credibility of the claim that it acted as a private investor since it was not consistent with the aim of maximising profits.¹⁴⁶

The benchmark with risk margin

The second benchmark the Commission used in its assessment derives from the Capital Asset Pricing Model (CAPM) which estimates the rate of return required by an investor which is given by the sum of the risk-free rate, multiplied by a parameter which varies with the level of risk of the undertaking invested in. By using this benchmark the Commission arrived at a rate of return ranging between 11.7% and 13.4% with a median of 12%. The Commission also investigated how much return EDF could generate with its income over different periods of time and under different assumptions. The internal rate of return was -13% and accordingly the investment in EDF would break even only if the discount rate was negative which occurs when future values are lower than today’s values. The fact that -13% was much lower than the expected 12% rate by private investors and even lower than the 6.35% net revenue that could be earned by investing in

¹⁴⁵ Ibid. para. 164.

¹⁴⁶ Ibid. para. 166.

with long-term French government bonds.¹⁴⁷ This led the Commission to the conclusion that the conversion of the tax liability in new capital was State Aid incompatible with the internal market and therefore instructed France to recover it.¹⁴⁸

5.1.4 Lessons to learn from EDF case

The judgement from the CJEU in the EDF case indeed changes the view of when the MEIT should be made use of. The Commission cannot automatically exclude the applicability of the test where it appears that the State has acted within its power as public authority. Regardless of the means used by the State, the Commission will have to go through a global assessment to determine in what role the State acted. This can be difficult in practice since these interests often are mixed and the State may easily pretend it is pursuing a purely economic goal when it has other covert or less-transparent goals, for example, elections approaching.¹⁴⁹ The method proposed by the Commission in its first investigation, which tried to ensure equality between public and private undertakings, seems not to be respected by the Courts in that they want to distinguish between the two. That solution will probably lead to more administrative work for the Commission and might decrease the legal certainty in this area as well as distancing private and public undertakings in the EU.¹⁵⁰ Neither does the EDF case make the State Aid area of law any more clear since it expands the applicability of the test while it previously had been criticised as inadequate or as impracticable. This is because the State will inevitably be in a different position from any hypothetical private investor since it has almost unlimited resources and thus a higher credit rating than most other economic actors.¹⁵¹ Therefore, States can most often obtain and offer better financial conditions than any private investor. When it comes to the profitability analysis in the

¹⁴⁷ Ibid. paras. 183-188 & “How to Apply the Market Economy Investor Principle and what Mistakes to Avoid: The Long-running Case of EDF”, 2016, Available via: <http://stateaidhub.eu/blogs/stateaiduncovered/post/5433>.

¹⁴⁸ Commission Decision, [2016], OJ L34/152, para. 189.

¹⁴⁹ “The EDF judgement of the CJEU in case C-124/10 P: towards a public investor test in EU State aid law?” 2012, Available via: <http://europeanlawblog.eu/?p=827>.

¹⁵⁰ Ibid.

¹⁵¹ Hancher, Ottervanger and Slot, 2012, p. 105.

assessment, it is therefore necessary to focus on different parameters. WestLB¹⁵² was the first case where General Court addressed the issue regarding the financial difference between the State and a hypothetical private investor but the Court failed to suggest a better approach. The Court, however, stressed that the MEIT has its origin in the principle of equal treatment, which prohibits like cases from being treated differently. The Court said “[a] public investor is not in the same situation as a private investor [who] can count only on his own resources in order to finance his investments and is liable, up to the limits of those resources, for the consequences of his decisions. The public investor, on the other hand has access to resources flowing from the exercise of public power, in particular from taxation. Consequently, as the situations of those two types of investors are not the same, there is no discrimination against the public investor if the conduct of an informed private investor is taken into account in order to assess the conduct of the public investor.”¹⁵³ Consequently, the contribution of certain assets to WestLB by the government majority shareholder was State Aid since the contribution was not remunerated at the average rate of return in the German banking industry - which in the future will have impact on asset contributions by public majority shareholders.¹⁵⁴

The assessment made by the Commission when it re-launched its investigation is an excellent example of how to carry out a detailed analysis of the possible application of the MEIT since it indicates all of the questions that should be asked and the methodologies that can be used to calculate the expected return of a private investor.¹⁵⁵

Nevertheless, the MEIT is an important instrument and a useful tool for Member States and undertakings since it enables them to make their own assessment of the prospective measure so that not every commercial activity by the State would have to be notified to the Commission and awaiting its

¹⁵² Westdeutsche Landesbank Girozentrale v Commission, Joined cases T-228/99 and T-233/99, EU:T:2003:57

¹⁵³ Ibid. para. 272.

¹⁵⁴ “The Coming of Age of EC State Aid Law: A Review of the Principal Developments in 2002 and 2003”, European Competition Law Review, 2004: Issue 4.

¹⁵⁵ “How to Apply the Market Economy Investor Principle and what Mistakes to Avoid: The Long-running Case of EDF”, 2016, Available via: <http://stateaidhub.eu/blogs/stateaiduncovered/post/5433>.

approval. This could seriously disturb and paralyse the Member State's economies, affecting measures such as purchases or sales of land or assets and contracts for services.¹⁵⁶

5.2 The Ryanair case

In the Ryanair case¹⁵⁷, the Commission found in its decision¹⁵⁸ that the MEIT was not applicable in the case since the agreement contained fixing of landing charges which in its view falls within the legislative and regulatory competence of the State. It was in 2001 that Ryanair entered into two separate agreements, one with the Walloon Region, which owns the Charleroi Airport and the other with BSCA, a public sector company controlled by the Walloon Region, which managed and operated the airport. In the first agreement, Ryanair was granted 50% reduction of landing charges compared to other operators and in the second agreement, Ryanair received contribution to the costs incurred by them in establishing its base. These measures were not notified to the Commission; however, after it received complaints from competitors in 2002, the Commission initiated the procedure provided for in Article 108(2) TFEU. Regarding the first agreement, the Commission rejected the application of the MEIT since it found that landing charges is an exclusive competence of the Walloon Region and is not an economic activity that can be assessed by reference to a private investor. The agreement, therefore, consisted of an unlawful advantage within the meaning of Article 107(1) TFEU.¹⁵⁹ Regarding the second agreement with the BSCA, the Commission applied the MEIT and found that the advantages granted by BSCA to Ryanair also constituted aid within the meaning of Article 107(1) TFEU¹⁶⁰ and observed that when BSCA decided to invest, "it did not carry out an analysis consistent with all the hypotheses of the contract envisaged with Ryanair and Ryanair alone. In

¹⁵⁶ "The Coming of Age of EC State Aid Law: A Review of the Principal Developments in 2002 and 2003", European Competition Law Review, 2004: Issue 4.

¹⁵⁷ Ryanair v Commission, T-196/04, EU:T:2008:585.

¹⁵⁸ Commission Decision, [2004], OJ L 137.

¹⁵⁹ Ibid. recitals 137 – 160.

¹⁶⁰ Ibid. recitals 161 – 238.

so acting, BSCA took risks that a private investor acting in a market economy would not have taken. Those risks relate both to data essential to the business plan and to other parameters concerning relations between BSCA and the Walloon Region.”¹⁶¹ The Commission stressed that the advantages were granted to Ryanair only, involving the transfer of State resources in favour of Ryanair which distorted competition not only on one or more routes but also on the whole of the network served by Ryanair”.¹⁶² However, the Commission concluded that parts of the second agreement could be declared compatible on the basis of the exemptions provided in the Treaty since aid for the opening of new routes, where the amount does not exceed 50% of the start-up costs and the duration is less than 5 years is compatible with the common market.¹⁶³ Ryanair appealed the Commission decision and argued that the MEIT should be used in the assessment of the measures. The General Court found that “the provision of airport facilities by a public authority to airlines, and the management of those facilities, in return for payment of a fee the amount of which is freely fixed by that authority, can be described as economic activities; although such activities are carried out in the public sector, they cannot, for that reason alone, be categorised as the exercise of public authority powers. Those activities are not, by reason of their nature, their purpose or the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority.”¹⁶⁴ Therefore, the MEIT could and should be applied with regard to the measures. Accordingly, the Commission had to reopen the case in order to take the General Court’s judgement into account. The Commission did at the same time extend the scope of its investigation to State Aid that was not covered by its original investigation; aid in favour of the BSCA granted by the Walloon Region and “Sowaer” - the owners of airport land and infrastructure – as well as the additional provisions to the original agreements from 2001 that had been introduced in 2004, 2005 and 2010. In its reopened in-depth investigation, the Commission applied the

¹⁶¹ Ryanair v Commission, T-196/04, EU:T:2008:585, para. 16 & Commission Decision, [2004], OJ L 137, recitals 184-185.

¹⁶² Ryanair v Commission, T-196/04, EU:T:2008:585, para. 18.

¹⁶³ Ibid. paras. 19-20.

¹⁶⁴ Ibid. para. 91.

MEIT regarding the first agreement and found that a number of measures granted to BSCA by the State under the form of a concession fee were too low compared to what a private investor would have demanded and thus constituted State Aid. Worth mentioning is that new Aviation Guidelines came into force in 2014 which prohibited measures such as those present in the case. Thus, the Commission required the State to put an end to those aid measures by increasing the concession fee paid by BSCA to the same amount that a private investor would have required but also that BSCA should repay the amount made pursuant to those aid measures since the adoption of the new guidelines. Regarding the second agreement, the Commission applied the MEIT in line with the principles drawn by the General Court and thus found that the measures were not State Aid since either the measures were not imputable to the State or because the State and BSCA acted like an private investor.¹⁶⁵

5.2.1 Impact of the Ryanair case

The Ryanair case demonstrates, just like the EDF case, that it is necessary to distinguish between the roles that a state body can have when making investments and that the Commission in fact had problems with regard to the application of the MEIT to BSCA since its financial structure was closely linked to the State. The General Court emphasized the importance of taking the commercial transaction as a whole to determine if the public company and the entity that controls it together acted as rational operators in a market economy. Thus, the Commission was wrong in initially finding that the close financial relationship between BSCA and the State eliminated the possibility to apply the MEIT; rather, BSCA and the State should have been regarded as a single entity for the purpose of the application of the MEIT.¹⁶⁶

¹⁶⁵ European Commission Press release. State aid: Commission adopts a package of decisions regarding public support to airports and airlines in Belgium, Germany, Italy and Sweden. IP/14/1065. (Brussels, 1 October 2014.)

¹⁶⁶ Hancher, Ottervanger and Slot, 2012, p 108.

5.3 The ING case

The ING case¹⁶⁷ concerned a capital injection that ING received from the Dutch State in November 2008 via the creation of one billion ING securities at a price of €10 each. The securities were either to be repurchased at €15 or converted into ordinary shares after three years. The parties amended their deal in October 2009 with new terms, which made it possible for ING to repurchase up to half of the securities at the issue price €10, rather than €15. If ING decided to do this it would have to pay accrued interest plus an early-redemption penalty of up to €705 million. In November 2009 the Commission adopted a Decision which said that the amendment itself constituted additional State Aid, valued at €2 billion, on top of the capital injection. In December 2009, ING exercised the option available under the amended deal and repaid half of the capital injection by redeeming half of the States securities at a price of €10, plus the interest and the early-redemption fee. The State had now earned approximately a 15% internal rate of return on its investment in one year. In January 2010, ING and the Dutch government appealed the Commission's Decision claiming that the amendment to the repayment terms did not result in additional €2 billion of aid and therefore the Decision should be annulled. In March 2012, the General Court ruled in favour of ING and the Dutch State and the judgement was confirmed by the CJEU in April 2014.

5.3.1 The essential parts of the parties' arguments

The Commission viewed the amendment of the deal as granting an advantage to ING since it consisted of a lower redemption premium than established in the original terms. The Commission also argued that the MEIT was not applicable in circumstances where an existing restructuring aid is being amended. ING and the Dutch State argued that the State had agreed on the amended deal with an attractive return, which made it possible

¹⁶⁷ Commission v Netherlands and ING Groep, C-224/12 P, EU:C:2014:213.

for them to swiftly receive half of the original capital injection by ING, plus a premium. They questioned how this could be viewed by the Commission as €2 billion of new aid when it actually was ING repaying existing aid ahead of time. The appellants claimed that in the original terms there was nothing to encourage ING to repay early while the ING share price was below €15, the redemption premium of 50% was therefore remote and uncertain. ING and the Dutch government argued that the State had behaved in the same manner as a private investor would, making an amendment that exchanged a speculative return of 50% for a certain return of between 15-21,5% and that the Commission should have noticed it by using the MEIT. The Commission argued however that the MEIT should not apply and even if it did, it would fail the test. The Commission looked at what prices the ING shares had been traded in recent years and saw that it already had risen from €2.50 to over €11 and that it had traded at €43 in 2001. Because of this analysis, the Commission held that it was certainly possible that the share price could rise to €15 and therefore a private investor would not accept the lower return of the amended repayment option.

5.3.2 The Court of Justice

The CJEU stated that the General Court was correct in holding “that the Commission could not evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constitutes State Aid.”¹⁶⁸ The CJEU continued by stating that the Commission is only in a position to conclude if an advantage within the meaning of Article 107(1) TFEU has been granted after such an assessment. The Court also stated that it is not the way in which the advantage was conferred, but “the classification of the intervention as a decision adopted by a shareholder of the undertaking in question that is decisive for the applicability of the private investor test to a public intervention.”¹⁶⁹ The CJEU went on to say, “any holder of securities, in

¹⁶⁸ Ibid. para. 37.

¹⁶⁹ Ibid. para. 31.

whatever amount and of whatever nature, may wish to agree to renegotiate the conditions of their redemption. It is consequently, meaningful to compare the behaviour of the State in that regard with that of a hypothetical private investor in a comparable position [...] What is decisive in the context of that comparison is whether the amendment to the repayment terms of the capital injection has satisfied an economic rationality test, so that a private investor might be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of that injection.”¹⁷⁰

5.3.3 Lessons to learn from the ING case

The ING judgement deserves further consideration since it 1) singles out two different stages within the MEIT assessment, 2) concerns the debated question in which cases concerning consecutive public measures should be assessed as a single intervention, and 3) substantially broadens the range of considerations which should be taken into account for the purpose of the application of the MEIT by referring to the comparison embodied in the test as an “economic rationality test”.¹⁷¹

As mentioned previously, the MEIT has two dimensions. The first one, referred to as the economic dimension, aims to assess whether the measures do not overly depart from economic reality. The second one, which is more of a legal dimension, requires the economic rationality to be accommodated into legal rationality and thus correspond with principles such as legal certainty. The wide discretion enjoyed by the Commission in the assessment of State Aid measures have led to a clear imbalance towards the economic dimension of the test and thereby decreased legal certainty, which has been criticized.¹⁷² In the EDF case, the CJEU tried to frame the Commission assessment by implying procedural steps to be followed in the MEIT. The

¹⁷⁰ Ibid. paras. 35-36.

¹⁷¹ “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands* (C-224/12)”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 5.

¹⁷² Ibid.

starting point is that the test “is among the factors which the Commission is required to take into account for the purpose of establishing the existence of an aid”¹⁷³. This indicates that the Commission is under a duty to use the MEIT and thereby is forced to request from the Member State concerned, and later examine, the relevant information to determine whether the MEIT is applicable to the case under consideration.¹⁷⁴ The Commission is also required to carry out a “global assessment” and take into account all the other relevant information and evidence that have not been provided by the Member State.¹⁷⁵ Precedent demands that it is important to distinguish between the two stages of assessment implied by the MEIT, namely applicability and application.¹⁷⁶ The ING judgement clarified that the relevant question to be answered regarding the applicability of the test is whether the State’s conduct is such that it can meaningfully be compared with the behaviour of a private operator. If the outcome is positive, the application of the MEIT involves assessing whether the same action was determined by circumstances which are relevant only or at least primarily to the State in its capacity as public authority or the action might have been taken in comparable market conditions by a private operator in a situation as close as possible to that of the State.¹⁷⁷ Recent case law seems to reflect an attempt by the European judges to undertake a “proceduralisation” of the MEIT, which should be encouraged as long as it builds towards the achievement of a more satisfactory balance between the two dimensions of the MEIT.¹⁷⁸

¹⁷³ Commission v EDF, C-124/10 P, EU:C:2012:318, para. 103.

¹⁷⁴ Ibid. para. 104.

¹⁷⁵ Ibid. para. 86.

¹⁷⁶ “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in European Commission v Netherlands (C-224/12)”, European Competition Law Review, 2014: vol. 35, issue 10. p. 5.

¹⁷⁷ AG Opinion in Commission v Netherlands and ING Groep, C-224/12 P, EU:C:2013:870 para. 35. See also, “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in European Commission v Netherlands (C-224/12)”, European Competition Law Review, 2014: vol. 35, issue 10. p. 6.

¹⁷⁸ “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in European Commission v Netherlands (C-224/12)”, European Competition Law Review, 2014: vol. 35, issue 10. p. 6.

5.3.3.1 Consecutive State measures as a single intervention

In the ING case, the Court was forced to settle the legal question of whether the MEIT could be applied to the amendment to the repayment terms. The Court started by recalling that the applicability depends on whether the measures in question serves an economic aim which also could be pursued by a private operator and that the Commission must request the Member States to provide them with relevant information. The Court continued by stating that the applicability of the MEIT cannot be compromised merely because the relevant measure is an amendment to the conditions for the redemption of securities. The Court concluded their reasoning concerning the applicability of the MEIT by stating that the test is applicable since a private holder of securities also might potentially be in the position where he or she wishes to agree to amend the conditions of their redemption. The Court has been criticized for its judgement in the ING case since it fails to recognise the major legal issue at stake – that is, whether consecutive State measures must be regarded as a single intervention or as separate measures for the purpose of the MEIT assessment.¹⁷⁹ The MEIT is not applicable if the amended repayment terms are to be viewed as a an integral part of the injection and thus be assessed on the same basis as the original terms since the capital injection was made by the State in its capacity as a supreme public authority. On the contrary, the MEIT is applicable and should be made use of if the amendment to the repayment terms is to be considered as a separate measure because case law has established that when it is possible the conduct of the State should be compared with that of a private investor in a comparable situation.¹⁸⁰ It should however be noted that the Advocate General in its Opinion stated that the choice between the two approaches significantly changes the outcome of the dispute; but, since the Commission in fact had adopted the second approach, there was no real need to determine which of the two approaches was correct.¹⁸¹ Since the Court in the present case did not chose to deal with the different approaches, it leads

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ AG Opinion in *Commission v Netherlands and ING Groep*, C-224/12 P, EU:C:2013:870, para. 39.

to the conclusion that every public measure must to be subjected to an individual assessment as far as the applicability of the MEIT is concerned.¹⁸² This does not however match the Draft Commission Notice on the Notion of Aid¹⁸³, which recites case law and states that several consecutive measures of State intervention may be regarded as a single intervention if the measures are closely linked to each other. Relevant factors in this respect are their chronology, their purpose and the circumstances of the beneficiary at the time of the interventions at issue.¹⁸⁴ Therefore, the Court in the recent case should have considered this legal issue and if the Court aimed at developing a new and innovative approach different from the current practice, it should have been better articulated in the judgement.¹⁸⁵

However, CJEU's judgement in ING is welcomed since it reduces the unpredictability inherent in the MEIT by clearly determining the procedural steps for the Commissions assessment – namely, the applicability and the application of the test.¹⁸⁶ However, the Court failed in its assessment regarding the applicability of the MEIT to the amendment to the repayment terms and whether consecutive State measures must be deemed as a single intervention. If the European judicature intended to imply that the application of the MEIT must be individually determined for every single public measure, it should have more clearly explained it and the reasons for its finding.¹⁸⁷ This leads to the conclusion that the applicability of the MEIT to Member States consecutive interventions remains uncertain. However, the recent case law concerning the application of the MEIT and characterization in terms of an “economic rationality test” is a welcomed step towards a better alignment of the principle with the current economic

¹⁸² “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands* (C-224/12)”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 7.

¹⁸³ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU. Available on http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf.

¹⁸⁴ *Ibid.* para. 84.

¹⁸⁵ “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands* (C-224/12)”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 7.

¹⁸⁶ *Ibid.* p. 9.

¹⁸⁷ *Ibid.*

reality.¹⁸⁸ It seems like this is the first time the European judges have defined the assessment inherent in the MEIT in that way by referring to an “economic rationality test”. By doing so the Court imply that other considerations than the possibility to obtain the repayment of the capital injection with accrued interest are not the only considerations to be taken into account when applying the MEIT.¹⁸⁹ Consequently, it opens doors of the MEIT to also take considerations of social nature into account in the assessment; just like the former Advocate General Van Gerven suggested when he invented the notion of “reasonable investor” in *Alfa Romeo* (which will be dealt with in the next section).¹⁹⁰ The difference between the two tests is that “reasonable investors” or “stable investors” are not only guided by prospects of profitability over a longer period of time than ordinary investors but also by “considerations of employment and economic development in a given region or sector”¹⁹¹ Even though the “reasonable investor test” was dismissed by the Court in *Alfa Romeo*, the test is especially interesting after the Lisbon Treaty entered into force since it seeks to bridge the gap between the social and economic dimension of European integration.¹⁹² Since the reasonable investor also takes social, environmental and regional-policy considerations into account, a shift of the benchmark within the test would potentially make sense. The General Court’s judgement in *Corsica Ferries* also endorses this approach regarding the “economic rationality test” where it stated “it should also be noted that, in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop. The challenges relating to social responsibility and the entrepreneurial context are, in actual

¹⁸⁸ Ibid.

¹⁸⁹ “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands (C-224/12)*”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 7.

¹⁹⁰ Ibid.

¹⁹¹ AG Opinion in *Commission v EDF, C-124/10 P, EU:C:2011:676* & “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands (C-224/12)*”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 8.

¹⁹² See, for example Article 3 and 9 TFEU and “A Further Step Towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgement of the Court of Justice (Grand Chamber) of April 3, 2014, in *European Commission v Netherlands (C-224/12)*”, *European Competition Law Review*, 2014: vol. 35, issue 10. p. 8.

fact, capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor. The long-term economic rationale of a reasonable private entrepreneur's conduct cannot therefore be assessed without taking into account such concerns"¹⁹³.

¹⁹³ *Corsica Ferries France v Commission*, T-565/08, EU:T:2012:415, para. 82.

6 Desire for a refined test to increase legal certainty

There is no doubt that the MEIT is essential with regard to the assessment of potential State Aid and that the Commission enjoys wide discretionary powers in its application of the test. Dissimilarly, while the Commission is afforded discretion, the Courts' discretionary powers are limited to a review of the Commission's assessment to evaluate whether the decision is based on relevant and correct facts. As stated above, however, the Commission does not always come to accurate conclusions, which is undesirable in that the notion of State Aid is an objective legal concept upon which Member States must be able to rely. There have therefore recently been cases where the Courts have tried to map a framework for the discretion of the Commission by establishing the procedural steps in the MEIT and what factors to take into account in the MEIT assessment.¹⁹⁴

6.1 The Corsica Ferris case

The Corsica Ferris case¹⁹⁵ concerned aid (€76 million) that France, in 2002, planned to grant to Société Nationale Corse-Méditerranée ("SNCM") which is a shipping company operating the passages from France to Corsica, North Africa and Sardinia. SNCM was, at that time, owned by two state controlled companies, Société nationale des chemins de fer, which owns 20% of the shares and Compagnie générale maritime et financière ("CGMF") controlling the remaining 80% of the shares.¹⁹⁶ The Commission approved the whole amount of aid with some conditions attached one year later, but the decision was appealed. The Commission had found that the aid was compatible with the Union Guidelines for rescuing and restructuring firms in difficulty but the General Court held that the Commission's decision was

¹⁹⁴ "How Reasonable a Private Investor Can Be Assumed to Be? Corsica Ferries France", 52 Common Market Law Review, 2015: Issue 4, p. 1.

¹⁹⁵ Corsica Ferries France v Commission, T-565/08, EU:T:2012:415.

¹⁹⁶ Ibid. para. 2.

not compatible with the Guidelines because of the stipulation that the aid must be limited to the minimum needed to enable the restructuring to be undertaken.

In 2006, Butler Capital Partner and Veolia Transport (two private operators) acquired 38% and 28% respectively of SNCM leading CGMF only to own 25% of the company with the remaining 9% of the shares held by CGMF's employees. The French State had to enact the following measures for the deal to go through: 1) sell SNCM at a negative price of €158 million by making a capital contribution of €142,5 million and pay of the costs of mutual benefit societies in the amount of €15,5 million, 2) contribute €38,5 million to finance a possible social plan enacted by the purchasers, and 3) increase its capital contribution in the amount of €8,75 million to which CGMF had to subscribe jointly with the €26,25 million contributed by the purchasers. In its decision in 2008, the Commission assessed all three measures. Regarding the capital investment in 2002 made by CGMF, the Commission found it constituted unlawful State Aid to an amount of €53,48 million but that it could be justified and thereby was compatible with the common market under Articles 106(2) and 107(3c) TFEU. The later measure in 2006, where Butler Capital Partner and Veolia Transport acquired SNCM ("the 2006 privatisation plan"), was found by the Commission not to constitute aid within the meaning of Article 107(1) TFEU.¹⁹⁷ A competitor, Corsica Ferries, who wanted the decision annulled, appealed the Commission decision to the General Court.

6.1.1 The General Court

The General Court found that the Commission had not been correct in its decision where it approved the measures. The General Court stressed that the Commission should have compared the behaviour of the State with a private operator regarding the recapitalisation and sale of SNCM; would a private investor make large investments in the context of the sale of the

¹⁹⁷ Ibid.

undertaking rather than liquidate it?¹⁹⁸ In the assessment made by the Commission, it had included the additional redundancy payments in the hypothetical overall cost of liquidation even though that cost was not necessary under statutory obligations or according to the privatisation agreement. The General Court stated that payment of additional redundancy can during certain circumstances, constitute legitimate practice with a view to fostering peaceful social dialogue and safeguarding the company's brand image and as a result those costs could be included in the assessment of the State's conduct. The General Court did however stress that costs exceeding legal and contractual obligations without economic rationale must be regarded as State Aid.¹⁹⁹ The General Court also criticised the Commission for its failure to define the sectorial and geographical economic rationale behind the French State's behaviour as well as for failure to present evidence that the payment of additional redundancy benefits was 'sufficiently well-established practice' or a 'settled practice' among private investors. Further, the Commission was criticized for its failure to show that the French State's conduct was motivated by a reasonable probability of achieving an indirect material benefit.²⁰⁰

The French State and SNCM appealed the judgement by the General Court claiming that the sale of SNCM at a negative price did not constitute State Aid and that the court had gone beyond its powers in requiring the Commission to carry out sectorial and geographical analysis, demonstrate well established practice, and demanding a high standard of evidence regarding the probability of an indirect material benefit.

6.1.2 Advocate General Opinion

Advocate General Wathelet's Opinion²⁰¹ in 2014 stressed that case law did not prevent the General Court from observing that a geographic or sectorial

¹⁹⁸ Commission Decision, [2008], OJ L 225/180 para. 78.

¹⁹⁹ Ibid. para. 84.

²⁰⁰ Ibid. paras. 86-87.

²⁰¹ AG Opinion in *SNCM and France v Corsica Ferries France*, C-533/12 P, EU:C:2014:4.

analysis could be relevant for the purposes of evaluating the long-term economic rationale of the State's conduct, especially since redundancy payments vary considerably depending on the markets or sectors concerned.²⁰² He continued by stating that the MEIT involves the assessment "whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size" and thus would it be necessary to define the activities of the State at a geographical and sectorial level to do this comparison.²⁰³ Regarding the lack of evidence that the payment of additional redundancy benefits was common practice among private investors, the Advocate General opined that the General Court had not introduced a new requirement going beyond what is necessary for the application of the MEIT. Whatelet recalled that the payment of additional redundancy payments must be assessed in the context of the private investor test, with a view to determining whether the cost of winding up SNCM would exceed the cost of disposing of it at the negative price of €158 million; in other words, the assessment whether a private investor in the State's position would have gone ahead with that disposal.²⁰⁴ Therefore, it is necessary to determine whether the cost of liquidation would include the additional payments at issue, which would be the case if law or collective agreements provided them for. The Advocate General continued by stating that since the redundancy payments greatly exceeded those requirements, the only reason for taking them into account when calculating the cost of liquidation would be that this was sufficiently well established practice.²⁰⁵ The appellant's argument that the General Courts demand for evidence that the French State's conduct was motivated by a reasonable probability of obtaining indirect material benefit and thus amounted to an excessive burden of proof for the Commission was also rejected by the Advocate General. In his view, this was not a too far-reaching requirement; rather, it merely requires the Commission to explain the nature of the damage of issue and specify the stakeholders in relation to whom the brand

²⁰² Ibid. para. 45.

²⁰³ Ibid. paras. 46-47.

²⁰⁴ Ibid. para. 52.

²⁰⁵ Ibid. para. 53.

image of CGMF and the French State would be affected. He stressed that the Commission had not even tried to quantify the damage suffered in their decision, which additionally, must have been compared with the estimated cost of the additional redundancy payments for which it constitutes the justification.²⁰⁶ Whatelet expressed further that the General Court had never dismissed that the protection of the brand image of a Member State as a global investor in a market economy could constitute a sufficient justification for the long-term rationale of a State's conduct.²⁰⁷ This led to the final conclusion that the protection of the brand image of a Member State as a global investor in the market economy can constitute sufficient justification for the State measures under specific circumstances with particularly cogent reasons; however, this did not concern CGM. This was because the company did not have any other asset in the maritime transport sector and, therefore, gave ample justification for the CJEU to dismiss the appeal.²⁰⁸

6.1.3 The Court of Justice

The CJEU started by recalling case law regarding the MEIT and stated that an assessment must be made with regard to whether a private company in a situation as close as possible to the state would have adopted the same measures in normal market conditions. In order to make this assessment, it was necessary to distinguish between the roles of Member States as shareholders of an undertaking and when it is acting as a public authority. If it is not possible to compare the situation of a public authority with that of a private undertaking, the normal market condition must be assessed by reference to the objective and verifiable elements that are available.²⁰⁹ Regarding the requirement imposed by the General Court, the Commission should have defined the geographic and sectorial economic activities of the State in order to assess the indirect material profit in the long term. The

²⁰⁶ Ibid. para. 66.

²⁰⁷ Ibid. paras. 78-79.

²⁰⁸ Ibid. paras. 91, 143.

²⁰⁹ *SNCM and France v Corsica Ferries France*, C-533/12 P, EU:C:2014:2142, paras. 29-34.

CJEU found that those requirements are not absolute but could be useful to identify a private investor comparable to the public undertaking.²¹⁰ Therefore, the General Court did not impose specific requirements with regard to the nature of the evidence with which it may have demonstrated that a rational private investor would have made the same investment in a comparable situation as the appellants had argued. Since the Commission had not defined the French State's economic activities with which it was necessary to assess the economic rationale of the measures, it was not possible for the General Court to review the long-term economic rationale of the negative sale price.²¹¹ The CJEU continued by stating that the General Courts ruling did not prohibit the protection of the brand image of a Member State, under specific circumstances and with particularly cogent reason, where the Member State could justify the long-term economic rationale of the assumption of additional redundancy payments. It is however not enough to demonstrate summary references to the brand image of a Member State as a global player to support a finding that there is no aid.²¹² The CJEU also found that the General Court had not imposed an excessive standard of proof regarding the prospect that the behaviour of the State should be motivated by a reasonable probability of obtaining a material benefit, even in the long term. The mere statement by the Commission that the brand image of the French State would be affected by social problems was not enough to support a finding of no aid. Finally, the CJEU rejected the appellant's argument that the General Court had not stated reasons in that it did not define the terms "sufficiently well-established practice" or "settled practice" since those terms are "clear and refer to a factual assessment, and that it is easy to see that only one or a few examples do not constitute a 'sufficiently well-established practice' or a 'settled practice'."²¹³ Accordingly, the grounds for appeal were rejected in their entirety.²¹⁴

²¹⁰ Ibid. paras. 35-36.

²¹¹ Ibid. para. 37.

²¹² Ibid. paras. 40-41.

²¹³ Ibid. para. 45.

²¹⁴ Ibid. para. 46.

6.1.4 Lessons to learn from the Corsica Ferris case

In this case, the General Court stressed that the Commission is not bound to find reasons of profitability in their assessment for the MEIT to apply, which has previously been a key factor in the applicability of the test. Rather, the Commission should also take into account whether the measures have been influenced by social, regional-development or environmental concerns. The CJEU chose not to deal with this reasoning made by the General Court but merely stated it's reasoning should be kept in highest regard but rejected the applicability of the legal framework the lower instance had created. The reasoning made by the General Court whether objectives other than profitability should be of importance in the assessment of State Aid seems to be a consequence of the Lisbon Treaty, which emphasizes the importance of a balance between the economic and social dimensions within the Union. Therefore, voices have risen about the desire for a refined MEIT where considerations other than profitability, with specific reference to the private actor, should be considered and weighed as a part of the MEIT.

6.2 The “reasonable investor” as an alternative benchmark

The main legal question, after reading the Corsica Ferris case, is whether and to what extent non-economic considerations such as the avoidance of social disorder and the promotion of social dialogue should be taken into account within the application of the MEIT.²¹⁵ After an analysis of the case law, it seems apparent that the CJEU has changed its view regarding this matter over the years and, it is clear that the Court has struggled with this question before. In the first case where the CJEU dealt with the question, the Court stated that all social, regional-policy and sectorial considerations

²¹⁵ “How Reasonable a Private Investor Can Be Assumed to Be? Corsica Ferries France”, 52 Common Market Law Review, 2015: Issue 4, p. 6.

should be left out of the assessment²¹⁶ and in a subsequent case the Court declared that only the obligations that the State must assume as a shareholder fall within the scope of the MEIT²¹⁷. In Alfa Romeo, the CJEU however somehow changed their previous attitude by recognizing that evaluations carried out by investors can inherently differ because of who the investor is (holdings, groups of undertakings or “ordinary” investors) and that the MEIT therefore should reflect the different motivations that inspire the conduct of the former actors.²¹⁸ This was later elaborated upon where the CJEU accepted that a parent company bear the losses of a subsidiary for a limited period in order to enable it to cease business under the best possible conditions. This lead to the conclusion that considerations other than profitability should be taken into account when applying the MEIT on the condition that those aspects are ultimately functional to the pursuit of profitability. The impacts of Corsica Ferris remain to be seen since the CJEU has refused to extend the findings of the General Court beyond the boundaries of the specific factual background of the case.²¹⁹

6.2.1 Assessment criteria for the Reasonable Investor Test

The General Court statement in Corsica Ferris that the State’s behaviour should be compared with a “reasonable private investor” parallels the notion of a “reasonable investor” that was expressed by the Advocate General in Alfa Romeo. The “reasonable investor test” would include in the assessment actors other than the ordinary investor such as holding companies and groups of undertakings. These categories of investors often have other interests and considerations than just profitability, for example, employment and economic development in a given region or sector. A reasonable investor would also, as the General Court stated, take into account its responsibility towards the stakeholders in the company and the development

²¹⁶ Belgium v Commission, C-234/84, EU:C:1986:302, para. 14.

²¹⁷ Spain v Commission, Joined Cases C-278-280/92, EU:C:1994:325, para 22.

²¹⁸ AG Italy v Commission, C-305/89, EU:C:1991:4, para 20.

²¹⁹ “How Reasonable a Private Investor Can Be Assumed to Be? Corsica Ferries France”, 52 Common Market Law Review, 2015: Issue 4, p. 7.

of the social, economic and environmental context in which it continues to develop. However, it remains to be seen as to what extent this reasonable investor will apply in the assessment of future cases since the CJEU in *Corsica Ferris* only expressed that these considerations could be of interest but not necessarily considered as a part of the assessment. The fact the General Court in *Corsica Ferris* made use of the notion, even if the CJEU in *Alfa Romeo* dismissed the reasonable investor test that was utilized by Advocate General Van Gerven in his reasoning, increases this uncertainty. Clearly, the introduction of the Treaty of Lisbon might have strengthened the social dimension of the European integration, establishing new objectives of Union interest such as a highly competitive social market economy, a horizontal social clause, and the possibility of reappraisal of service of general interest by a new EU competence that motivates the lower instance to include other concerns within the test.²²⁰ For these “new” objectives to be met, the assessment cannot merely rely on references to a hypothetical private investor driven only his own short-term economic self-interest; rather, the Court should consider the hypothetical private investor to similarly hold non-economic concerns to be of importance as long as the ultimate aim is profit in the long-term. One can argue that these concerns already are a part of the assessment made by today’s investors, since it is not unlikely that investors have non-economic concerns beyond short-term profitability in mind while making investment decisions provided that these concerns are functional to the achievement of profits in the longer term.²²¹

Procedural steps according to the *Corsica Ferris* case

For the Commission to be able to assess the measures at stake, it first has to define the economic activity of the State in order to determine the long-term rationale with the measure. It also has to identify the sectorial and geographical sphere that will be affected of the measures to see if there is an investor of a comparable size against which the actions of the State can be assessed. Secondly, the Commission has to identify the short-term non-

²²⁰ Ibid. p. 8.

²²¹ Ibid.

economic concern, which may be the reason for the measure. Case law shows that as long as the non-economic short-term concerns go hand in hand with objectives of the Union's interest, the measures are unlikely to be found to be not compatible. Thus, a determination has to be made with regard to whether the measures at stake are being enacted with a long-term or short-term perspective. The Commission must ascertain if the behaviour is well established practice among referenced investors for it to conclude that it is a long-term economic rationale and if that is not possible it must show that the measures were motivated by reasonable probability to profit in the long term. In addition to this, the damage that is being prevented with the measure must be explained and the stakeholders that would suffer from these damages must be pointed out. When this step is completed, the Commission has to accomplish a balancing test between the damages that would occur if the measure were not accepted and the cost of the state measures. The costs arising from the State measures must be lower than that would be incurred if the MEIT were to apply.

7 Conclusion

As the previous sections of this thesis and its referenced case law establish, State Aid assessment is an important and effective tool for the continued implementation of EU goals but at the same time is a somewhat unclear and unpredictable area of law. The fact is that the Commission enjoys broad discretion in the assessment of State aid measures yet regularly faces difficulty in said assessment because of lack of clear knowledge with regard the important and/or controlling elements which should be investigated in its implementation of the MEIT. This is not actually surprising since there is neither an explicit provision in the Treaty establishing the procedural steps inherent in the assessment nor a listing of factors that should be of importance. Consequently, the assessment of State Aid and implementation of the MEIT is an area of law that constantly evolves as new cases are decided and I am sure we have not yet seen the end of this evolution.

In this section, I will answer my research questions:

1. What is the current state of the law in the State aid sector regarding the Market Economy Investor Test?
2. To what extent would a change from a “private investor” to a “reasonable investor” as benchmark in the Test increase legal certainty?

When the Commission is investigating State Aid measures, the investigation is conducted by comparing the behaviour of the State with the behaviour of a hypothetical private investor and the principle or test is therefore referred to as the Market Economy Investor Test. If the State’s conduct is normal in the sense that it would be meaningful for a private investor to conduct the same behaviour, the Commission will not regard the measures as State Aid. If the State is acting in a way that a private investor would not for example, by taking high risks in the investment, lending money without or with a very small interest rate, or not seeking a profit opportunity as a part of the investment the MEIT is not fulfilled and the measure will be regarded as

State Aid. It is important that one compares the behaviour of the public body with the behaviour of a hypothetical private investor of the same size and in a comparable situation. However, one should be aware that it is not enough to show that private investors in fact also have contributed in the investments in the undertaking for the State measures not to constitute State Aid. Even if such a circumstance might constitute good evidence that the MEIT is fulfilled, the Commission will assess the whole measure regardless. It is also of importance that the hypothetical private investor can obtain the same financial information about the undertaking as that available to public authorities.

The profitability aspect of the investment has been the key factor for the Commission in its assessment of whether the MEIT is fulfilled or not, even if the Courts have stressed that the Commission should not only judge the transaction by an assessment of its profitability. The Commission is also bound to look at the measures in the context of the period when said measures were actually executed; just because the investment afterwards turned out not to be prudent does not indicate that the measure automatically shall be regarded as State Aid. However, it appears evident that the Commission, as a general rule, tends to view every measure that puts the beneficiary undertaking in a better financial position than previous as State Aid.

The previous view by the Commission was that the MEIT does not apply to measures where the State is acting of its prerogative powers since it is not possible for a private investor to be in a comparable situation and enact the same investment. Therefore, it is important to distinguish the two separate roles of the state when it intervenes in the economy and case law shows that the Commission has trouble applying the MEIT to transactions where the recipients financial structure is closely linked to the State. The CJEU has however established that the Commission cannot reject the application of the MEIT merely because it appears that the State has acted within its power as public authority. Regardless of the means used by the State, the

Commission will have to go through a global assessment to determine what role the State acted in. When doing so, the Commission also has to take into account all the other relevant information that has not been provided by the Member State concerned. The CJEU has in its case law also extended the test to apply to services of general economic interest (SGEI) meaning that when the four cumulative criterion established by the Court are fulfilled the aid does not constitute State Aid.

It is still uncertain whether consecutive State measures must be regarded as a single intervention or as separate measures regarding the MEIT assessment, which the CJEU has been criticized for not addressing or clarifying. The Draft Commission Notice on the Notion of Aid states that several consecutive measures of State intervention may be regarded as a single intervention if the measures are closely linked to each other. However, the Commission has applied the MEIT to the amendment of a deal since case law has established that when it is possible, the conduct of the State should be compared with that of a private investor in a comparable situation. This leads to the conclusion that every public measure needs to be subject to an individual assessment as far as the applicability of the MEIT is concerned.

As said, the former and even current perception by the Commission is that private investors are motivated by profitability and if there is not a potential profit opportunity, said measure will not satisfy the MEIT. Recently, however, the Courts have referred to the MEIT as an “economic rationality test” rather than a private investor test, implying that considerations other than the possibility of profit should be taken into account. In my opinion, this makes sense since I think that private investors can be interested in objectives other than just profitability when they are entering into business transactions. Accordingly, voices have called for a refined test by the Commission where it would consider not only profit opportunities but also socioeconomic aspects such as social, regional-development and/or environmental concerns. This seems to be a consequence of the Lisbon

Treaty, which emphasizes the importance of a balance between the economic and social dimension within the Union. However, it remains uncertain whether these other, non-economic, considerations should be of importance in the assessment since the CJEU has not dealt with it or established the procedural steps within the MEIT nor what factors that should be of importance in the assessment. The CJEU has merely stated that considerations other than profitability can be of importance when applying the MEIT but not that said considerations are obligatory. The Court's approach has changed over time since it earlier stated that all social, regional-policy and sectorial considerations should be left aside off the assessment. This lead to the conclusion that aspects other than profitability should be taken into account when applying the MEIT on the condition that those aspects are ultimately functional to the pursuit of profitability.

Whether a change from a private investor to a reasonable investor as a benchmark in the test would increase legal certainty in the State Aid area is difficult to determine. However, it is certain that the current system with the MEIT does not work flawlessly. This is probably the reason why the Courts recently have proposed the procedural steps within the MEIT and tried to frame the Commissions discretion in the assessment. However, the clauses governing the judicial review by the Courts limit them from establishing the procedural steps and/or framing the Commissions discretion: they can merely judge if the Commission has based its decision on the right grounds. Something however needs to be done, as the current State aid control is too vague and unpredictable for entities and States to be able to safely plan their activities. The current criterion regarding profitability is not desirable since States often do not have a profit interest underlying their investment decisions; rather, the State is, for example, interested in a full functioning society where everyone can live by the same standard. As example, if the Swedish State want to give the whole population access to broadband and invest money in Telia for it to be able to implement it, the State will be interested in increasing the living standard rather than profit from the investment. Accordingly, the current system might prevent States from

enacting measures that might benefit society but might fail the MEIT because there is no potential for profit and thus no ability to present complex economic evaluations of the speculative returns so as to serve as a comparator. At the same time, one can argue that a change to a reasonable investor test would decrease the legal certainty in the area since more factors will be taken into account in the assessment, making it even more vague and unpredictable. However, I think that this concern is of minor importance and that the benefits of a change to a reasonable investor test had considered the drawbacks, mainly because of greater opportunities for States and undertakings to implement measures. States and undertakings will not have to structure their transactions solely to show profitability opportunities: they can have other interests in mind such as industrial, environmental and regional concerns which inevitably is a part of what today's investors have in mind when they are entering into business transactions.

I think that by changing the benchmark in the test, the legitimate expectations and predictability aspect of legal certainty would increase since, as the current system works, one must be careful of what conclusions to draw from case law. This is due to the fact that the Commission has viewed State Aid measures differently depending on which area or sector it concerns. Measures that have been enacted within prioritised areas have been assessed more lightly and have not had to be assessed according to the "refined economic approach" which does not match the legal certainty criterion that one should be able to reconstruct legal decision-making as a logically correct process of reasoning. It also breaches case law since the CJEU has stressed that the MEIT has its origin in the principle of equal treatment, which prohibits that like cases are treated differently. One could possibly also argue that, when like cases are treated differently, it breaches not only the principle of equal treatment, but also the principle of non-retroactivity because the MEIT has been established and developed through case law and is not referenced in an explicit provision in the treaty. Consequently, the developed case law alone governs this determination of State Aid. If Member States or undertakings plan their measures accordingly

in light of merely case law and where the transactions have been consummated based on said case law only to face a subsequent State Aid claim from the Commission, one could argue that transactions are judged within a constantly evolving (at best) or chaotic and inconsistent (at worst) set of criterion that can be applied retroactively by the EU's enforcement system. This is not desirable since legal certainty and especially legitimate expectations aim to protect the concept that those who act reasonably and in good faith according to the law should not suffer from disappointment of those expectations. I am afraid that the State Aid area will be too complex for undertakings and States to make their own evaluations of their intended measures if the decision makers do not decide to change the benchmark in the test. This will probably lead to a costly and lengthy process since there only will be a few professionals that are sufficiently versed in the topic to make accurate assessments, similar to Common Law countries. Another reason for a change is that the State inevitably will be in a different position from any hypothetical private investor since it has almost unlimited resources and thus a higher credit rating than most other economic actors. Consequently, States can obtain and offer better financial conditions than any private investor, which leads me, and obviously the Courts involved in the cases of EDF and ING (to mention just a couple), to question the meaning of such a comparison.

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