

How to distinguish state aid from normal market transactions 1/39/24



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What is the market economy operator principle?

The market economy operator principle (also known as the 'private investor test') is an analytical tool the European Commission uses to prevent companies from obtaining advantages through the State intervening in a particular market. This requires a complex economic analysis and legal justification to assess whether a hypothetical private investor would make a comparable intervention in the particular market on the same conditions as the State. If the answer is yes and the transaction is consistent with the market, this is unlikely to be considered state aid because the other party (company) has not obtained an economic benefit it would not have obtained under normal market conditions.

How to assess whether equivalent activity is possible in the market

The Commission (and the State – the provider of aid) should put itself in the recipient company's shoes and assess whether the advantage obtained (e.g. credit guarantee, capital injection or debt write-off) could also be offered by other companies in this market. If the answer is yes, the market economy operator principle should be applied and a further assessment carried out.

It's especially important to consider whether a transaction is economically, commercially and financially sound at the time of being carried out, given its short-term or long-term prospects of profitability and other commercial or economic interests concerned. According to the CJEU case law, any *ex post* economic assessments retrospectively demonstrating the profitability of an investment are not sufficient.¹

Any costs and benefits of the State as a government agency that are related, for instance, to employment levels or an increase in national revenue, social or regional development and other policy considerations, should be ignored in applying this principle. This is because a hypothetical market operator being used for comparison would ignore such considerations at the time of making an investment.

Tests applied to assess particular cases

Each separate case warrants the use of different tests aimed at comparing the State measure in question in the most appropriate manner, especially considering its nature, with a measure that a private market operator could take in a similar situation and under normal market conditions.²

The CJEU settled case law offers four tests³ (see the image below):

1

The private investor test applies to state measures such as capital investment

2

The private debtor test

3

The private creditor test applies to relief measures debt repayment

4

The private seller test applies to measures associated with supplies of goods or services

How to determine whether a transaction is consistent with the market

According to the CJEU case law and the European Commission's decisions, there are several ways to determine whether a transaction is consistent with normal market conditions, divided into two main categories.

The market nature of a transaction is determined directly by using its market information.



***Pari passu* transaction:**

- Public subjects and private investors are taking part in a transaction on equal terms with an equally significant contribution.
- The purchase and sale of assets, goods and services (or another comparable transaction) is taking place under a competitive, transparent, non-discriminatory and unconditional tender procedure meeting the principles of public procurement.



The market nature of a transaction is assessed by using a comparative analysis or other methods of assessment.



Comparative analysis means applying a reference transaction performed by a comparable private operator in a comparable situation.



Other methods of assessment are selected according to the situation, such as the market situation, availability of data or type of transaction. Several different methods are normally applied, such as the internal rate of return (IRR) and the net present value (NPV) calculation.

Conclusion

PwC experts have vast experience in representing government agencies and private companies across all aspects of applying the state aid rules, including the market economy operator principle. If you need any help with these matters, our experts are happy to advise and support you.

¹ CJEU ruling of 5 June 2012, Commission/EDF, C-124/10 P, ECLI:EU:C:2012:318, paragraph 85

² In this meaning see CJEU ruling of 6 March 2018, Commission/FIH Holding and FIH Erhvervsbank, C-579/16 P, EU:C:2018:159, paragraphs 52 and 55

³ CJEU ruling of 17 November 2022, Volotea SA and easyJet Airline Co. Ltd/European Commission, on joint cases C-331/20 P and C-343/20 P, ECLI:EU:C:2022:886, paragraph 110 and the case law mentioned in it