

Summary in English

The present study examines the applicability and application of the Market Economy Investor Principle («MEIP»), also known as the private investor test («PIT»). The MEIP is a well-established yardstick for determining whether a given state measure amounts to aid within the meaning of Article 107(1) TFEU. It constitutes aid if it confers an economic advantage upon a recipient undertaking, which it would not have obtained under normal market conditions. Consequently, granting such advantage, and thus aid, may be ruled out if the said intervention corresponds to a normal commercial transaction. This is, when it would have been undertaken by a comparable private market operator in similar circumstances under normal market conditions. If such an intervention does qualify as aid, however, under certain circumstances, the MEIP may allow for quantifying its amount.

This examination of the MEIP has five main objectives and these are as follows. Firstly, establishing how one should make a distinction between the two capacities (or dimensions) of the state by applying the MEIP. Secondly, providing an in-depth analysis of the applicability of the MEIP. Thirdly, establishing and, if necessary, clarifying rules that govern the application of the MEIP as such, and constructing the possibly most appropriate model of the MEIP, which is referred to as the test of a «rational», «prudent» or «profit-oriented» investor without explaining what these terms actually mean. Fourthly, supplementing the general rules on the application of the MEIP with guidelines concerning its particular subtypes, i.e. the private creditor, guarantor, lender, borrower vendor, purchaser or supplier. Fifthly, answering whether the MEIP lives up to the ultimate aim of its existence and application in EU law, i.e. addressing the problem of the dual nature of the state by safeguarding that the economic engagement of the state does not distort competition and a «level playing field». This study seeks to verify whether the MEIP allows for a credible and reliable assessment of state interventions under Article 107(1) TFEU or whether it is a subjective, politically-motivated and based on paradoxes tool that is used by the Member States or the Commission as it suits them.

The present examination of the applicability and application of the MEIP is undertaken in seven parts. Part I presents the thesis' objections, delimitations and methodology.

Part II provides introductory remarks on the notion of the MEIP. In this respect, Chapter 2 explains the challenges resulting from the state's dual nature and the role of the MEIP in this respect. As the notion of the PIT is derived from the concept of aid, Section 2.2 outlines its content and interpretation under Article 107(1) TFEU, but only to the extent that is necessary for the purposes of examining the MEIP. Section

2.3 elaborates on the origins of the test and its endorsement by the ECJ. In particular, it presents the guidelines in which the Commission presented its approach to the MEIP and how it intends to apply it. Section 2.4 explains how the key criterion of an economic advantage should be understood in cases of granting aid and in cases of investing in accordance with the MEIP.

Part III deals with the applicability of the MEIP. In this regard, Chapter 3 provides introductory remarks on its distinctiveness from the application of the test. Chapter 4 presents landmark cases in which the ECJ endorsed the use of the test, i.e. *Meura* and *Boch II* of 1986, and draws attention to the Opinions delivered by AG Lenz in those cases. Chapter 5 analyses in detail the so-called *Hytasa* formula in which the ECJ explained how a distinction between the public authority and the entrepreneurial dimension of the state for the purposes of the MEIP ought to be made. In this respect, the interpretation and application of *Hytasa* are discussed in relation to both the application and applicability of the MEIP, in Sections 5.4 and 5.5, respectively. In particular, Section 5.4.2 analyses the use of *Hytasa* in identifying aid in favour of the restructured/recapitalised and/or privatised undertaking while Section 5.4.3 discusses it in identifying aid in favour of the purchaser of public property. Chapter 6 discusses the essential relation between the fulfilment of obligations, which the state assumed acting in its role of public authority, and the exercise of public powers. In this respect, it analyses in detail the judgments of *Ryanair* of 2008 and *EDF* of 2009 and 2012. Also, it examines the correctness of AG Léger's approach to the applicability of the MEIP, as discussed in *Altmark* of 2003. As demonstrated, his Opinion has apparently determined the Commission's stance on the applicability the MEIP and has significantly influenced the so-called common ground in this regard. Chapter 7 examines the applicability of the MEIP post-*EDF*. In this respect, it explains what conclusions one should draw from the judgments delivered in *EDF* and how they should be interpreted in light of the pre-existing case law and Commission decision practice on the applicability of the PIT. In particular, Section 7.10 proposes a formula according to which one should determine whether the MEIP is applicable to a given state intervention or not. Chapter 8 analyses the correctness of this formula by testing it against state measures adopted in relation to the 2008 financial crisis while Chapter 9 verifies it in cases of financing the provision of (SGEIs).

Part IV deals with the application of the MEIP as such. In this regard, Chapter 10 explains the importance of constructing the proper benchmark of the test. Chapter 11 analyses what objectives the state must, must not and may pursue under the MEIP. Chapter 12 discusses the question of the perspective from which one should verify the profitability of state intervention under the PIT and what conclusions may be drawn from choosing between the perspective of the grantor and the recipient. Chapter 13 addresses the problem of profit, i.e. the question of what return is required under the MEIP and how it should be calculated. In particular, Section 13.4 considers the

criterion of «the average rate of return in the sector concerned» in the case of capital investments. Chapter 14 clarifies what factors and circumstances should be taken into account when constructing a possibly most appropriate model of the MEIP in a given case. Chapter 15 establishes when the profitability analysis under Article 107(1) TFEU must be undertaken and why. In particular, Section 15.4 draws attention to misinterpretations of the rule of making an *ex ante* assessment not only by the state, but also the Commission, ESA and the Court. Section 15.5 examines a rather new challenge under the MEIP, the so-called option agreements under the private vendor test. Chapter 16 discusses the test of concomitance for the purpose of compliance with the MEIP. This discussion includes an analysis of the question of whether the case of risk capital measures undertaken *pari passu* with private market operators may be considered a special case of the MEIP (Section 16.4).

Part V deals with specific factors and circumstances that must be properly taken into account while applying the different subtypes of the MEIP. In this respect, Chapter 17 elaborates on the tests of the private creditor (Section 17.2), guarantor (Section 17.3), lender (Section 17.4), borrower (Section 17.5), vendor (Section 17.6), purchaser (Section 17.7), supplier (Section 17.8) and market player or operator (Section 17.9). The «efficiency criterion», which is considered here a special subtype of the MEIP and applied to compensation for the provision of SGEIs, was discussed in Chapter 9.

Part VI deals with judicial review aspects relevant to the present study. In this respect, Chapter 18 discusses the extent of judicial review of Commission decisions concerning the MEIP. In particular, Section 18.2 clarifies why it raises difficulties, Section 18.3 explains the consequences of differentiating between a complex economic appraisal and a review of information of economic nature, Section 18.4 verifies the scope of the Commission's discretion in applying the MEIP and stresses the importance of the limited judicial review in such cases.

Part VII deals with the criticism addressed against the MEIP and provides final observations and conclusions. Chapter 19 scrutinises different arguments that have been raised against the test as such and against the way in which it has been applied. In this respect, Section 19.2 recalls the argument of contradiction with Article 345 TFEU. Section 19.3 verifies whether the MEIP undermines the system of State aid control by depriving the «one time, last time» principle of its efficiency. Section 19.4 addresses the argument according to which the PIT compels the state to behave as an idealised, hypothetical model of a non-existing entrepreneur. Section 19.5 discusses the argument of the «obvious» incomparability of the state and private market operators. Chapter 20 provides the overall conclusions on the MEIP that one may draw from its examination in this study.