An overview of Market Economy Operator Principle and State Aid

State aid

State aid refers to financial or other assistance given by public authorities to entities carrying out economic activities. State aid is prohibited under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) where it distorts competition in the EU internal market, though there are exceptions and derogations from this principle. The primary purpose of the EU State aid regime is to prohibit subsidies which may distort competition on the EU internal market and to avoid damaging subsidies races. The Scottish Ministers, as a public authority, are required to observe the EU State aid regime when providing financial support to industry. When taking decisions, the Scottish Ministers look to the body of State aid law to determine how support can be structured in a compatible way.

Section 57(2) of the Scotland Act 1998 provides that Scottish Ministers have no power to act in a manner which is incompatible with EU law. It is therefore not open to Ministers to act in such a way.

The EU State aid rules contain certain derogations and exemptions: for example, the General Block Exemption Regulation permits aid for identified objectives of common interest, e.g. training aid and regional aid. In the context of the COVID 19 pandemic, the EU has adopted a suite of measures aimed at facilitating targeted aid to affected companies, to support certain areas of research and the production of medical equipment. Particular sectors, such as agriculture and fisheries, have their own regulations designed to meet wider policy objectives. It is also permissible to support ailing companies through rescue and restructuring aid. These exemptions and derogations are subject to certain conditions (e.g. the status / location / size of the beneficiary, the aid intensity, the amount of aid being offered) which means that any assessment must be based on the specific facts of each case. State aid advice will typically consider all available State aid routes.

Not all financial support falls to be considered a “State aid” within the terms of Article 107(1) TFEU. Measures which have a purely local effect, for example, are considered not to affect trade with the rest of the EU and are therefore not considered to be a State aid. Support for companies which takes the form of a commercial investment is also not considered to be State aid. This is articulated in the Market Economy Investor Principle discussed in more detail below.

Market Economy Investor Principle

The Market Economy Investor Principle or MEIP has been a cornerstone of state aid control since at least 1984 when the Commission published its communication on Government Capital Injections. It remains a key test of whether actions by public authorities represent state aid in the sense of Article 107(1) of the EC Treaty.1

The essence of the MEIP is that when a public authority invests in an enterprise on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a State aid within the terms of that Article. This requires an assessment, supported by appropriate
financial evidence demonstrating that the proposed investment is forecast to produce an acceptable commercial rate of return. This analysis does not take into account any wider policy objectives which may be achieved as a result of the intervention: only commercial considerations can be taken into account.

Consideration of possible support requires full regard to be had to the financial position of the undertaking in question. This will include consideration of the assets and liabilities of the business, its revenue and future plans and prospects. In addition consideration is required of other sources of support and the possible nature of support to be provided and of any security that may be provided. This will inform an assessment of whether a measure would satisfy the MEIP principle.

In the Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU at recital 76 - 80 states that:

76. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant whether the intervention constitutes a rational means for the public bodies to pursue public policy (for example employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable position compared to that of its competitors.

77. For the purpose of the MEO test, only the benefits and obligations linked to the role of the State as an economic operator — to the exclusion of those linked to its role as a public authority — are to be taken into account. Indeed, the MEO test is normally not applicable if the State acts as a public authority rather than as an economic operator. For example, if a State intervention is driven by public policy reasons (for instance, for reasons of social or regional development), the State’s behaviour, while being rational from a public policy perspective, may at the same time include considerations which a market economy operator would normally not consider. Accordingly, the MEO test should be applied leaving aside all considerations which exclusively relate to a Member State’s role as a public authority (for example social, regional or sectoral policy considerations).

78. Whether a State intervention is in line with market conditions must be examined on an ex-ante basis, having regard to the information available at the time the intervention was decided upon. In fact, any prudent market economy operator would normally carry out its own ex-ante assessment of the strategy and financial prospects of a project, for instance, by means of a business plan. It is not enough to rely on ex-post economic evaluations entailing a retrospective finding that the investment made by the Member State concerned was actually profitable.

79. If a Member State argues that it acted as a market economy operator it must, where there is doubt, provide evidence showing that the decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the profitability or economic advantages of the transaction.

80. Whether a transaction is in line with market conditions must be established through a global assessment of the effects of the transaction on the undertaking concerned without considering
whether the specific means used to carry out that transaction would be available to market economy operators. For instance, the applicability of the MEO test cannot be ruled out simply because the means employed by the State are fiscal in nature.