



When Does a Hospital Receive State Aid? The Private Investor and Private Creditor Test in Management Practice

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Abstract

Motivation: The Polish healthcare system has long faced financial challenges, prompting public entities to support hospitals through recapitalization, debt forgiveness, or guarantees. However, under EU law, state aid is generally prohibited if it distorts competition. The private investor test and private creditor test assess whether public entities act as rational market operators. Conducting these tests for hospitals presents legal and managerial challenges.

Aim: This article examines the practical difficulties in developing private investor and private creditor tests in hospital financing. It focuses on methodological challenges, considering both legal and economic aspects, with emphasis on assessing the rationality of public financial decisions. The article uses a case study on the regulations in question based on the authors' practical experience. The content of The Private Investor and Private Creditor Test

in Management Practice is discussed, taking into account possible difficulties from the perspective of medical entities

Results: The article provides a structured approach to evaluating public support for hospitals against market criteria, ensuring compliance with state aid regulations. It highlights key challenges such as the lack of market benchmarks, complex hospital financing, and the need for an integrated legal-economic perspective. The findings offer practical insights for policy-makers, hospital managers, and financial experts, enhancing financial decision-making and regulatory compliance.

Keywords: state aid; hospital financing; private investor test; private creditor test; financial distress; management in health care

JEL: I11; I19; K23

1. Introduction

Public hospitals in Poland, regardless of their legal and organisational form, are facing serious financial difficulties. The most common structures are independent public health care institutions (SPZOZ), which account for 27.7% of the sector, and limited liability companies with the participation of the State Treasury or local government units, which account for 35.5% (Rynkometr, n.d.). The indebtedness of these entities often requires intervention by public bodies exercising ownership control – i.e. founding bodies in the case of SPZOZ, and shareholders or partners in the case of commercial companies. This support takes the form of subsidies, debt guarantees or capital injections. However, financial support from public authorities may be subject to restrictions under state aid rules. Such support may be classified as illegal state aid. This is because the granting of public aid that distorts competition and affects trade within the European Union's single market is prohibited. In particular, doubts of interpretation arise with regard to independent public health care institutions, whose legal status does not always allow a clear determination of whether they qualify as undertakings. However, if they carry out activities of an economic nature, the support they receive may be considered as state aid and therefore subject to the requirements of EU law.

The specific nature of the public health sector, which consists of health entities managed by public authorities exercising ownership control, significantly complicates the assessment of the compatibility of financial support with State aid rules. A fundamental problem is that public authorities operate simultaneously in two different spheres: the dominium, as founders, shareholders or partners of healthcare entities, and the imperium, as managing authorities bound by public law obligations, including the principles of non-discrimination and the prohibition of unlawful State aid. The convergence of these roles creates a structural risk that actions taken in an ownership capac-

ity may, either unintentionally or deliberately, infringe the rules of fair competition applicable in the European Union, even if their objective remains the continuity of healthcare services and the pursuit of the public interest.

Against this background, the development and proper application of the private investor and private creditor tests become essential tools in assessing whether the intervention of a public body exercising ownership control falls within the bounds of permissible market conduct. Conversely, the outcome of these tests is pivotal in determining whether financial support constitutes unlawful state aid, which could result in an obligation to return the granted aid, along with substantial penalties. Notwithstanding the significance of this issue, the doctrine evinces a discernible lacuna, as there is a paucity of studies that address the practical application of these tests, particularly in relation to the particularities of the healthcare sector. The present research endeavour is, therefore, driven by the objective of addressing this lacuna by means of an exhaustive examination of the methodological and interpretive challenges inherent to the subject. The purpose of this article is to identify the main challenges associated with the development and application of these tests in the management of health care entities, with a particular focus on the methodological and interpretive difficulties that arise at the intersection of law and economics. The analysis takes into account the specific characteristics of the public healthcare sector, where the risk of support being challenged as unlawful state aid is systemic.

2. Literature review

The prohibition of State aid is laid down in Article 107(1) of the Treaty on the Functioning of the European Union, which states that any aid granted by a Member State or through State resources which distorts competition by favouring certain undertakings and affects trade between Member States is incompatible with the internal market. Under European Union law, the concept of an undertaking is broad and functional. It includes any entity engaged in economic activity, i.e. offering goods or services on the market, regardless of its legal form, organisational structure or source of financing (Banaszewska & Modro, 2015, pp. 121–122; Raduła, 2015, pp. 210–212).

According to the European Commission, an entity may be considered an undertaking even if it operates in a public law form, provided that it offers services for remuneration on the market (European Commission, 2016, Section 2.1). With regard to the healthcare system, it is pointed out that hospitals offering healthcare services for remuneration – including those financed by public funds – may be classified as undertakings within the meaning of Article 107(1) TFEU (European Commission, 2016, Section 2.4). This position has been confirmed by the case law of the Court of Justice of the European

Union (CJEU, C-180/98-C-184/98, 2000; CJEU, C-222/04, 2006). Accordingly, public hospitals may be considered undertakings within the meaning of Article 107(1) TFEU when they engage in commercial activities consisting in the provision of health services on market terms, outside the statutory health insurance system and outside the scope of financing under contracts with the National Health Fund, which implements the principles of a solidarity-based health care model. These are services provided for full remuneration, accessible to an unlimited number of recipients in an open market in which foreign entities may also operate. If such activity is not properly separated in organisational and financial terms, there is a risk of cross-subsidisation of commercial activity with public funds, which may result in the support being classified as state aid (UOKiK, n.d.).

Therefore, in the case of healthcare entities operating in the form of capital companies with the participation of the State Treasury or local government units, as well as in the case of independent public healthcare institutions, there is a real risk that certain forms of support granted by public entities may be classified as unlawful State aid. These forms of support may include, in particular, the granting of loans to finance the purchase of new medical equipment, the modernisation or expansion of infrastructure, the acquisition of shares in increased share capital or the provision of guarantees for liabilities. The risk of unlawful aid also arises in situations where such entities have existing debts to public bodies, in particular where the claims are of a public law nature, such as taxes or local charges, and the public body, acting simultaneously as creditor, decides to write off, defer or reschedule such obligations. In this context, particular attention should be paid to the operation of SPZOZ, in relation to which Article 59(2) of the Act on Medical Activity allows the founding body to cover their net losses. This mechanism, when applied to entities engaged in commercial activities, may lead to market distortions and have characteristics of state aid (Gonet, 2020, pp. 227–228, 240–241).

State aid may also arise in connection with the implementation of an arrangement approved in a restructuring procedure governed by the Act of 15 May 2015 – Restructuring Law. The content of the arrangement may include various measures relating to the debtor's obligations, such as the financing of ongoing operations, debt-to-equity conversion, partial debt write-offs, deferral of payment deadlines or instalment repayment plans (Zimmerman, 2024). The solutions adopted in the arrangement proposals may therefore lead to situations where public funds are used in a way that requires assessment under state aid rules (Article 140 of the Restructuring Law). It should be noted, however, that legal scholars have different views on whether independent public health care institutions have the legal capacity to undergo restructuring under the above-mentioned Act. The core issue is whether these entities qualify as entrepreneurs within the meaning of the Civil Code (Article 4 of

the Restructuring Law in conjunction with Article 431 of the Civil Code), which is a prerequisite for the application of the provisions of the Restructuring Law (Głód & Langer, 2022, pp. 394–396). Due to the scope and complexity of this issue, it will not be further analysed in this article.

3. Methods

The present study employs a formal-dogmatic method, consisting of the analysis of EU legal provisions and the case law of the Court of Justice of the European Union (CJEU) and the General Court (GC). Furthermore, a case study approach is employed to illustrate the practical application of the private investor and private creditor tests in the healthcare sector. The amalgamation of these methodologies facilitates the identification of both legal and economic challenges that emerge when assessing the rationality of public financial interventions in the context of hospitals.

In order to assess whether the actions of a public body constitute State aid, analytical tools known as the private investor test and the private creditor test are applied. These tests determine whether, in comparable circumstances, a market-oriented entity would have taken the same decision as the public authority.

The private investor test applies to situations where public intervention takes the form of a capital injection, such as the acquisition of shares or equity, the provision of capital injections or the transfer of assets. The decisive criterion is whether a private investor, acting under market conditions and guided by a rational assessment of the risks and rewards, would be willing to enter into the same transaction. The assessment takes into account, among other things, the information available at the time the decision was taken, the transparency of the decision-making process, the expected return on the investment and the existence of alternative options. It is also essential that the conduct of the public authority does not deviate from the commercial standards observed in the market (European Commission, 2016, section 4.2; European Commission, 2024, paragraphs 5-7; CJEU, C-482/99; CJEU, C-124/10).

The private creditor test applies when a public entity is acting as a creditor and is considering measures such as debt write-offs, conversions or deferrals. The key question is whether a private market operator, in possession of the same information and in a comparable situation, would have accepted similar terms for the rescheduling of debt. This test involves an analysis of, *inter alia*, the likelihood of debt recovery under alternative scenarios (such as judicial enforcement), the value of the collateral, and the overall balance of risks and potential losses or benefits (European Commission, 2016, section 4.3; European Commission, 2024, para. 5; GC, T-268/08 and T-281/08).

Based on the principles presented regarding the application of the private investor test, a hypothetical case study will be presented to identify the main challenges associated with its implementation. It is assumed that a healthcare entity will undertake an investment project involving the purchase and installation of a digital X-ray machine at a total cost of PLN 1.5 million. The entity operates in the form of a limited liability company, with a public body as its sole and principal shareholder. Due to the healthcare entity's inability to generate sufficient free cash flow to finance the investment, the public owner has decided to cover these expenses through a capital injection into the company.

4. Results

The question of the application of the private investor and private creditor tests in the context of public healthcare entities remains largely unexplored in academic literature. Existing research has been found to focus either on general principles of State aid or on specific case studies involving commercial undertakings, without addressing the distinct operational and structural features of public medical providers. Despite the fact that certain studies have examined these tests in the context of restructuring law, particularly in relation to insolvency proceedings (e.g., Piątek & Konat-Staniek, 2018), there is a paucity of practical guidance on how to prepare and apply such tests in standard financial decision-making processes within the healthcare sector.

This absence of direction engenders a state of uncertainty for public authorities and healthcare managers, particularly when evaluating compliance with State aid regulations in scenarios involving capital injections, debt restructuring, or the allocation of public resources. The findings presented in this article demonstrate that the implementation of both market economy tests necessitates not only legal and economic expertise, but also sector-specific benchmarks and procedural clarity.

In the context of the situation described, it is necessary to prepare a private investor test. According to the adopted assumptions, which should be further specified in detail, the test should focus on answering the question of whether the capital injection into the company is justified and whether a private investor, in the position of the public owner, would have acted in a similar manner.

In consideration of the authors' practical experience in the application of state aid rules in the healthcare sector, it is proposed that the private investor test prepared for the case under analysis should focus on the following aspects:

- the characteristics of the planned investment project in terms of its implementation, operation, and impact on the local and regional medical services market;

- the assessment of the current and projected financial situation of the healthcare entity;
- the financial evaluation of the planned investment project;
- the identification of risk factors associated with the investment project and the recommended preventive measures.

The elements of the private investor test presented above, together with the description of the necessary substantive actions and potential challenges, are summarised in the table 1 in the Appendix.

The selected aspects of the individual elements of the private investor test presented in the table may provide the basis for in-depth analyses in the future due to the paucity of comprehensive studies in this area at present. It is evident that the specificity of the planned investment activities exerts a considerable influence on the configuration of the analyses. Nevertheless, the fundamental elements that have been delineated constitute the underlying foundation of these analyses.

The sequence of proposed and required analyses in this area is fairly standard. They primarily concern the projected financial position of the healthcare provider, with the revenue and cost implications of the planned investment activities then superimposed on this forecast. Given the changing conditions affecting the healthcare sector in Poland, these activities require scenario planning.

In addition to the private investor test, the private creditor test may also be relevant in certain cases. The application of this test is contingent upon the existence of claim held by a public body against a debtor. In such cases, the relevant public body may consider a range of measures, including but not limited to: partial write-off, deferral, instalment repayment, or conversion of the debt. The purpose of the assessment is to determine whether, in comparable circumstances, a private creditor, acting in its own financial interest and in possession of the same information, would have consented to terms for modifying or reducing the debt that are similar to the present terms.

In the healthcare sector, this issue is particularly complex due to the frequent overlap of roles: the same public authority may simultaneously act as the owner (or founding body) of the healthcare provider and as a public-law creditor, for instance in relation to tax or local charges. In such cases, financial decisions on debt restructuring may blur the line between ownership responsibility and creditor autonomy, which significantly complicates the impartial application of the private creditor test.

The reliability of such an assessment is contingent upon a structured analysis of the debtor's payment capacity, the value and enforceability of existing collateral, and the potential for recovery under alternative legal or enforcement scenarios (including insolvency proceedings). The evaluation process must also encompass a comprehensive assessment of the total risk

exposure, and a comparative analysis of the potential outcomes under various approaches, including the enforcement of legal proceedings.

In practice, the effective implementation of this test in the healthcare sector is hindered by a lack of market benchmarks and the coexistence of financial and public-service objectives (Hancock, 2020; Sepetis, 2019; Tabish, 2024). As has been demonstrated in the extant literature, effective financial restructuring in the healthcare sector necessitates analytical consistency, appropriate categorisation of liabilities, and organisational readiness to execute coordinated and transparent financial decisions (e.g., Głód, 2010; Gabutti, Colizzi & Sanna, 2023).

In this context, the preparation of a credible private creditor test should include, at minimum, the following elements:

- identification of all liabilities subject to potential modification, with classification according to their legal nature (e.g. public-law claims, secured debts, unsecured obligations),
- proper categorisation of liabilities and assignment to appropriate creditor groups,
- formulation of reasonable debt modification terms (e.g. deferral, write-off) specifically for the public-law creditor,
- valuation of the debtor's assets listed in the inventory and estimation of realisable value based on liquidation scenarios,
- verification that adequate material and financial resources are available to support the execution of the adopted recovery measures.

These steps are essential to ensure that the decision taken by the public body reflects the logic of a rational creditor acting under market conditions, rather than the preferences of a public administrator fulfilling policy objectives.

5. Conclusion

The present article has explored the legal and managerial challenges associated with applying the private investor and private creditor tests to publicly controlled healthcare entities. The analysis confirms that despite the formal role of these tests in State aid assessment, there is a lack of sector-specific methodologies to support their effective implementation. In view of these findings, it is recommended that practical guidance and standardised procedures be developed to assist public authorities in preparing reliable test documentation. . This is a significant issue in light of the calls for the implementation of objective mechanisms for evaluating investments in the healthcare system in Poland (Skwira, 2024) and Europe (Locurcio et. al., 2022). The utilisation of comparative insights from other regulated sectors, such as energy or transport, has the potential to facilitate this process. It is evident that

further interdisciplinary research is required in order to address these gaps and to support sound financial decision-making in the healthcare sector.

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Supplementary information: -

Note: the results of this study were presented in another form, such as an abstract at a conference.

Appendix

Table 1. Elements of the Private Investor Test with an Assessment of Practical Implications

Element of the private investor test	Content description	Identified issues
Characteristics of the planned investment in terms of its implementation, operation, and impact on the local and regional healthcare services market.	– description of the planned investment with substantive (medical) justification; – time schedule of the planned investment; – description of the local/regional market of medical services in the context of the activity conducted by the medical entity; – estimation of the operating costs of the investment (costs of current maintenance – operating and service costs; possible employment of additional people, adopted depreciation rates in accordance with the category of fixed assets).	– the possibility of obtaining a different purchase price for a fixed asset as a result of a tender procedure; – difficulties in obtaining detailed information on the activities of competing companies on the local/regional market of medical services – in the field of more replacement investments, this will not significantly increase the supply of X-ray services.
Assessment of the current and projected financial situation of the healthcare entity.	– performing a classic financial analysis of a medical entity for the period of the last 3 years – analysis of medical services provided with the use of an X-ray machine for the period of the last 3 years.	– the need to organize detailed data on the settlements of medical services with the National Health Fund and possible commercial services.
Financial evaluation of the planned investment project.	– preparation of assumptions for the calculation of basic indicators in this area, i.e. NPV/IRR; – determination of the discount rate needed to calculate the updated value of cash flows; – due to the replacement nature of the investment, indication of possible opportunity costs in the event of lack of access to the services of the X-ray machine, i.e. the use of outsourcing or the inability to perform/settle some medical services.	– determining the interest rate used for calculations in a proper manner (using the published base rate of the European Commission through the Office of Competition and Consumer Protection); – the need to organize detailed data on the settlements of medical services with the National Health Fund and possible commercial services related to the use of the X-ray machine in the performance of medical procedures (ICD-9); – identification of outsourcing costs in the field of X-ray services.
Identification of risk factors associated with the planned investment and recommended preventive actions.	– preparation of a risk register for the planned investment; – determination of significant factors affecting the projected financial situation of the healthcare entity in terms of its business.	– dilemmas in the field of forecasting the financial situation in the face of the unstable situation in the Polish healthcare sector (the issue of the amount of contracts, payment for the so-called overperformance, regulations on the minimum wage in health care.

Source: author's own research.

