

State aid remedies

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Outline

- Definition
- Procedure
- Typology
- Comparison with antitrust & merger control



Definition

- "Prospective remedies: compatibility assessment tool
 - "Conditions imposed" to declare an aid compatible ("conditional decision")
 - "Obligations" on the Member State
 - "Commitments" by the Member State
 - "Measures to limit distortion of competition" (tailor-made to address the distortions identified)
- Restorative (curative) remedies: aim to restore competition (*restitutio in integro*)
 - Recovery
 - Other judicial remedies
 - Commission v Member State
 - Competitor v Member State
 - Competitor v Beneficiary
 - Beneficiary v Member State



Procedure

- Prospective remedies
 - No specific procedure
 - Article 108(2) TFEU – Regulation 2015/189
 - Formal investigation (Art. 4(4) & 6)
 - Request for information
 - Member State concerned (Art. 5)
 - Other sources (Art. 7)
 - Article 9(4) Regulation 2015/1589
 - Ex post evaluation (see Best Practice Code)
 - The specific case of existing aid
 - "Proposal of appropriate measures" (Art. 22 & 23)
 - Sector enquiries
 - Non-compliance (Art. 28 – Articles 108(2) and 260 TFEU)
- Restorative remedies
 - See relevant judicial review procedure
 - Recovery (Art. 16 and relevant case law)



Typology (1) – prospective remedies (structural)

- Mainly in R&R cases
- Beneficiary
 - Balance-sheet reduction
 - Divestment of non-core profitable assets & core assets
 - In concentrated markets with entry barriers
 - Division, take-overs
 - Privatisation
 - "One time last time" (R&R)
- Member State
 - Commitments
 - Opening up of the market
 - Legislative measures
 - Exemptions, issue guidelines, remove legislation, adopt legislation, etc.
 - e.g. *Malta SA 33.889*; *France Telecom Retirement, C25/2008*
 - *Regulated electricity tariffs in France, SA.21.918* – obligation on EDF to sell nuclear power to its competitors on the wholesale supply market



Typology (2) – prospective remedies (behavioural)

- Beneficiary
 - Own contribution / burden sharing (moral hazard)
 - Commitments
 - Restraints
 - Management
 - Price leadership
 - Balance-sheet growth
 - Publicity, Internet
- Member State
 - *Deggendorf* principle
 - Privatisation
 - Commitments



Typology (3) – restorative remedies

- Interim relief
- Injunctions (suspension)
- Prohibition
- Recovery obligation
- Damages (national courts)
 - v Member State
 - v Beneficiary
- Annulment
- Other national actions



Typology (4) – Alstom case 2004 – one example of far-reaching remedies (i)

(see also, e.g., *Dexia*, C9/2009)

- Divestments (restructuring plan) and list of determined assets to be sold to independent buyers + target of turnover to be divested
- Member State's withdrawal from Alstom's capital within twelve months of the company obtaining an investment grade rating
- Monitoring trustee
- Obligation to conclude industrial partnerships, without involving State undertakings
- JV for Hydro business (joint control)
- Confidential divestment commitments by Alstom and the State
- Average margins report in the transport sector – prevention of predatory pricing
- Alstom's corporate acquisitions in the transport sector (EEA) not to exceed a total of €200 million for a period of four years



Typology (5) – Alstom case 2004 – one example of far-reaching remedies (ii)

- Opening up measures by France in the French rolling stock market
 - Reports and various communications to Commission
 - RFF and SNCF safety certificates and technical files
 - private contracts between SNCF, RATP and Alstom
 - contracts and framework agreements awarded to Alstom following an invitation to tender
 - Draft ‘rolling stock’ decree, deadline, reports on contracts, standards
 - Withdrawal of the legal obligation to consult the SNCF on the issuing of safety certificates
 - Indicate the reasons why negotiated procedure used without prior invitation to tender
 - Implement Directive 2004/17/EC
 - Information for each contract or framework agreement how the technical specifications were formulated (Directive 2004/17/EC)
 - Adopt precontract referral arrangements in accordance with Directive 92/13/EEC
- Restructure Alstom’s Marine sector (profitability threshold down)
- No other aid for two years following the decision
- Very detailed monitoring obligations

Comparison (1)

State aid	Antitrust	Mergers
<ul style="list-style-type: none">• No structured procedure• No strict deadlines• No specific guidelines• No systematic market testing<ul style="list-style-type: none">• formal investigation not suitable)• RFI not suitable either• No commitment (in lieu of infringement decision)• No settlement• No "cooperation"• Remedies sometimes quite distinct from measure examined• Effects-based?	<ul style="list-style-type: none">• No structured procedure<ul style="list-style-type: none">• Only best practices• No strict deadlines• No specific guidelines• Remedies without legal basis<ul style="list-style-type: none">• "cooperation" procedure outside cartel leniency• Market testing (notices, draft commitments, etc.)• No ex post evaluation studies	<ul style="list-style-type: none">• Structured procedure• Strict deadlines• Strong market testing• Ex post evaluation studies

Comparison (2)

State aid	Antitrust	Mergers
<ul style="list-style-type: none">• Comp. UFEX<ul style="list-style-type: none">• systematic examination• recovery obligation• More effective powers to restore competition<ul style="list-style-type: none">• no fine (except on MS after two CJEU judgments)• But:<ul style="list-style-type: none">• recovery, injunction• support to private enforcement	<ul style="list-style-type: none">• UFEX 102 case: Commission remains competent to address persistent effects of an infringement having ceased• Strong private enforcement• Judicial review	<ul style="list-style-type: none">• Judicial review?• Private enforcement?

Thank you for your attention!

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