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)

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<th>State aid</th>
<th>Antitrust</th>
<th>Mergers</th>
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| • No structured procedure | • No structured procedure  
  • Only best practices  
  • No strict deadlines  
  • No specific guidelines  
  • Remedies without legal basis  
  • "cooperation" procedure outside cartel leniency  
  • Market testing (notices, draft commitments, etc.)  
  • No ex post evaluation studies  | • Structured procedure  
  • Strict deadlines  
  • Strong market testing  
  • Ex post evaluation studies |
| • No strict deadlines | • No strict deadlines  
  • No specific guidelines  
  • Remedies without legal basis  
  • "cooperation" procedure outside cartel leniency  
  • Market testing (notices, draft commitments, etc.)  
  • No ex post evaluation studies | |
| • No specific guidelines | • No specific guidelines  
  • Remedies without legal basis  
  • "cooperation" procedure outside cartel leniency  
  • Market testing (notices, draft commitments, etc.)  
  • No ex post evaluation studies | |
| • No systematic market testing  
  • formal investigation not suitable)  
  • RFI not suitable either | • Remedies without legal basis  
  • "cooperation" procedure outside cartel leniency  
  • Market testing (notices, draft commitments, etc.)  
  • No ex post evaluation studies | |
| • No commitment (in lieu of infringement decision) | | |
| • No settlement | | |
| • No "cooperation" | | |
| • Remedies sometimes quite distinct from measure examined | | |
| • Effects-based? | | |
## Comparison (2)

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| • Comp. UFEX  
  • systematic examination  
  • recovery obligation  
  • More effective powers to restore competition  
  • no fine (except on MS after two CJEU judgments)  
  • But:  
    • recovery, injunction  
    • support to private enforcement | • UFEX 102 case: Commission remains competent to address persistent effects of an infringement having ceased  
• Strong private enforcement  
• Judicial review | • Judicial review?  
• Private enforcement? |
Thank you for your attention!

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