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)

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

- Market testing (notices, draft commitments, etc.)
## Comparison (2)

<table>
<thead>
<tr>
<th>State aid</th>
<th>Antitrust</th>
<th>Mergers</th>
</tr>
</thead>
</table>
| • 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!

Jacques Derenne
Avocat aux barreaux de Bruxelles et de Paris
Partner
Global Co-Practice Group Leader, Antitrust & Competition

University of Liège & Brussels School of Competition
+32 2 290 79 05 - jderenne@sheppardmullin.com