FACULTY OF LAW

Lund University

Frosti Haraldsson

The Failing Firm Defence:
Are the Failing Firm Defence Criteria Formal Conditions or a Tool to Help Assess Overall Effects of a Merger?

JAEM03 Master Thesis

European Business Law

30 higher education credits

Supervisor: Julian Nowag

Term: Spring 2019

Table of content

SUMMARY III

ABBREVIATIONS AND GLOSSARY IV

1. INTRODUCTION 1

1.1. RESEARCH QUESTION AND THE PURPOSE OF THE THESIS 2
1.2. METHODS AND MATERIAL 2
1.3. DELIMITATIONS 3
1.4. OUTLINE 3

2. HISTORY AND DEVELOPMENT OF MERGER CONTROL 5

2.1. THE EARLY STAGES OF MERGER CONTROL 6
2.2. MERGER REGULATION 4064/89 7
2.3. MERGER REGULATION 139/2004 9
2.3.1. APPRAISAL OF MERGERS 10
2.3.1.1. Market Definition 10
2.3.1.2. Market Power in the Relevant Market 12
2.3.1.3. Countervailing Factors and Counterfactual Analysis 14
2.3.2. SUMMARY 16

3. THE FAILING FIRM DEFENCE IN THE UNITED STATES 17

3.1. DEVELOPMENT OF THE FAILING FIRM DEFENCE IN THE UNITED STATES 17
3.2. THE FLAILING FIRM DEFENCE 19
3.3. ACADEMIC DEBATE 21

4. FAILING FIRM DEFENCE IN THE EUROPEAN UNION 24

4.1. FORMULATION OF THE FAILING FIRM DEFENCE CRITERIA 24
4.2. THE INITIAL APPROACH IN FAILING DIVISION CASES 29

4.3. Reformulation of the Failing Firm Defence 32
4.4. Increased Emphasis on Counterfactual Analysis 39
4.5. Relaxing the Conditions for Failing Division Defence? 42

5. CONCLUSION 51

BIBLIOGRAPHY 53

Summary

The failing firm defence is an exception to the underlying philosophy of merger control. When the failing firm defence is applied successfully mergers that have anti-competitive effects are approved, due to the fact that the competitive structure would deteriorate in a similar fashion in the absence of the merger. This thesis examines the Commission´s approach in appraising such mergers under the Merger Regulations.

The failing firm defence was first accepted in the case of *Kali und Salz* where the Commission established the criteria for the assessment of the defence. The criteria were later reformulated in the *BASF/Eurodial/Pantochim* decision. This thesis argues that the Commission has moved from a formalistic approach in applying the failing firm defence criteria, which was similar to the approach that is used in the United States, towards a more effect-based approach where an overall counterfactual analysis plays a larger role than it did before.

In some cases, a so-called failing division defence has been invoked. This happens when the entire firm is not failing but only a division of it is not profitable so the firm might have a strategic incentive to close the division. The Commission required a higher standard of proof in its earlier cases so that it not be a mere management decision to close down the division in question. The defence was first successfully invoked in 2013 in the *Nynas/Shell* merger. This thesis argues that the Commission has not relaxed the evidentiary standards for the acceptance failing division defence but rather applies the defence in a more flexible manner, where strategic incentives of the firms in question and the overall effects have been given more weight in the Commissions assessment.

Abbreviations and Glossary

EU	European Union
FTC	Federal Trade Commission
Merger	Merger and Concentration are used interchangeably
TFEU	Treaty on the functioning of the European Union
U.S.	United States

1. Introduction

The Commission assesses notified mergers on an ex-ante basis to ensure that no competitive harm arises from the proposed transaction. This thesis will explore the failing firm defence, which may be applicable where the proposed transaction would normally be considered to have anti-competitive effects, but when the competitive structure is deteriorating in spite of the transaction, the transaction may be approved.

The majority of mergers notified to the Commission are not problematic and do not raise significant concerns. Around 90% of notified mergers are cleared by a first phase decision with or without commitments. Other proposed mergers may need a more in-depth investigation but the majority of those are cleared by a decision with or without commitments.

The failing firm defence is an exception to the general philosophy of merger control. The defence is applied in borderline cases, where the mergers are likely to be problematic. Out of over 7300 notified mergers, the Commission has only in 29 cases prohibited a proposed concentration. In at least 5 of those prohibition decisions, the Commission discussed the failing firm defence but rejected it.[1] If one of the merging parties is failing, the Commission may decide to declare a merger compatible with the common market,[2] if the merger is not the cause of the deterioration of the competitive structure.

The Commission has established criteria for the failing firm defence. In order for the failing firm defence to be accepted, three criteria should be met. The failing firm will be forced out of the market if not for the merger, there is no less anti-competitive alternative purchaser, and the assets of the company will inevitably leave the market. The assessment is done by a counterfactual analysis to establish a lack of causal link between the market deterioration and the merger.

---

[1] European Commission, ´Merger Statistics´ <http://ec.europa.eu/competition/mergers/statistics.pdf> accessed 5th April.

[2] Michele Giannino , 'There Is Always a First Time: The European Commission Applies the Failing Firm Defence to an Unprofitable Division in NYNAS/Shell/Harburg Refinery' (2014) 1. <https://ssrn.com/abstract=2544084> accessed 21 February 2019.

1.1. Research Question and the Purpose of the Thesis

The research question is: Are the failing firm defence criteria formal conditions, or are the criteria a tool to help the Commission assess the overall competitive effects of a proposed merger?

The purpose of this thesis is to explore how the failing firm defence doctrine has developed, if and how the application of it has changed, and whether there is a difference in approach between a failing firm and a failing division. The main objective is to explore if the defence is an absolute defence in the EU, like the failing firm defence in the U.S., or a tool to assess if there is lack of causality between the proposed transaction and the deterioration of the market.

1.2. Methods and Material

To answer the research question a legal dogmatic method is applied. The method consists of analysing various sources from the legal system, such as legislation, case law and legal doctrines and clarifying the meaning and significance.[3] A comparative method will also be used in assessing the difference between the application of the failing firm defence in the European Union and the United States.

Academic literature such as articles, books and journals by authors and experts in the field of merger control and competition will be used. The most relevant Union legislation in this thesis are the Council Regulation (EC) No 139/2004 of 20 January 2004;[4] its predecessor, the Council Regulation (EEC) 4064/89 of 21 December 1989[5] and the Commission´s notices regarding the application of those regulations.

---

[3] See e.g. Peter Whalgren, ´On the Future of Legal Science´ [2000] 40 Stockholm Institute for Scandinavian Law 515, 519-520 <http://www.scandinavianlaw.se/pdf/40-20.pdf> accessed 27 May 2019.; Alexander V. Petrov and Alexey V. Zyryanov, ´Formal-Dogmatic Approach in Legal Science in Present Conditions´ Journal of Siberian Federal University [2018] 968, 968-973. <http://elib.sfu-kras.ru/bitstream/handle/2311/71664/Petrov.pdf;jsessionid=F981D54F7FFC943C054C751DD421BC77?sequence=1> accessed 27 May 2019

[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

[5] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L257/13.

The thesis is largely based on case study. The study is mainly based on analysis of the relevant decisions of the Commission of the European Union, as cases regarding the failing firm defence have not often come before the European Court of Justice,

1.3. Delimitations

For higher quality and suggested length of the thesis the study will be limited to the Commission´s decisional practice related to the failing firm defence under the European merger regulations. The term *"merger"* can have a different meanings. However, it usually refers to a transaction or an agreement that unites two or more entities.[6] The European merger regulation[7] refers to concentration,[8] which is, in essence, a change of control on a lasting basis. Excluded from this thesis will be all other defences that may be used in order to get a merger approved, as well as any connections that Article 101 and Article 102 of the Treaty on the Functioning of the European Union may have to the subject. EEA´s national merger laws and practice of their national competition authorities will also be excluded. The practice in the U.S. will be briefly touched upon but will be limited to the three cases of the Supreme Court of the United States that are considered to be the main precedents regarding the failing firm defence.

1.4. Outline

The thesis is divided into 3 main chapters. The first substantive chapter (Chapter 2) starts with a brief overview of merger control development and an exploration of how the European Commission appraises mergers. The second substantive chapter (chapter 3) will then explore the failing firm defence, as it is applied in the United States, for the purposes of comparing compared to its application in the EU. The third substantive chapter (chapter 4) is the main focus this study where Commission decisions regarding

[6] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2016),1085; Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015) 853; Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 1.01.

[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 (henceforth: merger regulation 139/2004).

[8] In this thesis, it will be refered to concentration and mergers interchangeably.

the failing firm defence will be explored in detail, how the failing firm defence criteria has developed and how it is and has been applied in the EU.

2. History and Development of Merger Control

There are two main theories of harm that cause concerns by the competition authorities in mergers, non-coordinated effects (unilateral effects) and coordinated effects.[9] Unilateral effects concerns arise from an individual incentive for the merged entity to raise prices post-merger.[10] Coordinated effects concerns arise where there is an increased risk of tacit collusion post-merger.[11]

Modern Competition law is generally held to emanate from the United States[12] with the passing of the Sherman Act, in 1890.[13] which prohibits cartels and monopolization of trade. The Sherman Act did not specifically state anything regarding mergers. However, in 1904 in the case of *Northern Securities Co. v. United States* the U.S. Supreme Court ruled that a merger to monopoly violated the Sherman Act.[14]

In 1914 the Clayton Act[15] was adopted where there was a provision specifically for mergers.[16] Alongside the Clayton Act, the Federal Trade Commission Act[17] was also passed which established the Federal Trade Commission (hereafter FTC) which has the purpose of enforcing antitrust law and prevent unfair methods of competition. With the

---

[9] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, para. 17.

[10] Mathew Olczak, 'Unilateral versus Coordinated Effects: Comparing the Impact on Consumer Welfare of Alternative Merger Outcomes', 2. <http://competitionpolicy.ac.uk/documents/8158338/8256105/CCP+Working+Paper+10-3.pdf/c7e5f86d-14b4-4c7a-b2fa-cf1b19e45816> accessed 15 January 2019.

[11] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 8.01.

[12] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2016) 29.

[13] The Sherman act, codified in 15 U.S.C. §§ 1–7

[14] Northern Securities Company v United States, 193 US 197 (1904).

[15] The clayton act, codified in15 U.S.C. §§ 12-27, 29 U.S.C 52-53.

[16] 15 U.S.C. §§ 18.

[17] The Federal Trade Commission Act, codified in 15 U.S.C. §§ 41-58.

passing of the Hart-Scott-Rodino antitrust improvements Act[18] in 1976, a pre-merger notification system was introduced allowing the FTC to assess mergers beforehand.

Merger control in Europe took longer to develop. The 1951 Treaty of Paris[19] included some competition law provisions that prohibited abuse of economic power and cartels for the steel and coal sectors.[20] With the Treaty of Rome in 1957,[21] the competition provisions were expanded to cover all of the sectors of the economy. They were however not enforced until 1962 when Council Regulation 17/62[22] was adopted. These provisions in the Treaty were article 85 EEC, that prohibited collusion that restricts competition, and article 86 EEC,[23] that prohibited abuse of a dominant position. However, there were no specific provisions that dealt with mergers.

2.1. The Early Stages of Merger Control

In the case of *Continental Can*[24] the Commission found that a takeover bid by a dominant undertaking, for a smaller competitor, constituted an abuse under article 102 TFEU. The Court of Justice annulled the Commission's decision due to inaccurate market definition. However, the court confirmed the Commission´s view that article 102 TFEU could apply in situations where an undertaking was abusing its position by acquiring competitors to strengthen its dominant position.

[18] The Hart-Schott-Rodino antitrust improvement act, codified in 15. U.S.C. §§18a.

[19] *Treaty establishing the European Coal and Steel Community. Paris, 18 April 1951.*

[20] See articles 66 and 67 of the Treaty of Paris.

[21] Treaty Establishing the European Community.

[22] Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed Series I Chapter 1959-1962/87.

[23] Now articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU); henceforth refered to articles 101 and 102 instead of the articles 85 and 86 EEC.

[24] Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 215.

It was commonly believed that article 101 TFEU could not apply to mergers and the Commission had admitted as much.[25] However, in the *Philip Morris*[26] case the Commission had approved an agreement for the acquisition by Philip Morris of 30% share of Rothmans. The court held that an acquisition of an equity interest in a competitor may serve as an instrument for influencing commercial conduct that may restrict or distort competition under article 101 TFEU,[27] but did not in this case.

After this judgement, the member states were more receptive towards a merger regulation. It was evident that the Commission had difficulties carrying out an effective merger control since there was no legal basis for requiring a pre-notification for mergers and the ex-post evaluation of mergers had proven to be insufficient.[28]

2.2. Merger Regulation 4064/89

The notion of a merger regulation in the EU was nothing new. In 1973 the first draft for a merger regulation had been submitted to the Council of Ministers and over the years it had been amended six times.[29] Finally, in 1989 the Council of Ministers adopted the first European merger regulation 4064/89,[30] which came into force on the 21st of September 1990.

With this regulation a so-called *"one-stop-shop"* was introduced, that had the purpose of giving the Commission exclusive competence to evaluate mergers with a community dimension[31] on an ex-ante basis. Under this regulation the compatibility of a proposed concentration was evaluated by a so-called dominance test, i.e. a proposed

[25] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 2.16.

[26] Cases C-142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487.

[27] Ibid. para 37.

[28] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 2.23.

[29] Ibid. pt.2.29.

[30] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L257/13. (henceforth: Merger Regulation 4064/89).

[31] Recital 8 in the Merger Regulation 139/2004.

concentration would be deemed incompatible with the common market if it would *"create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it."*[32]

It was under this regulation that the failing firm defence was first accepted in European merger control in the case of *Kali und Salz*. However, the failing firm defence was only accepted in one other case under this regulation.

The dominance test was considered rather formal and insufficient to catch all possible negative effects on competition. The test examined both the possibilitiy of coordinated and non-coordinated effects, but focused on the creation or strengthening of a dominant position. This left *"a gap"* for non-coordinated effects that could arise without the creation of a dominant position as was evident from the Airtours case.[33] Airtours had launched a takeover bid for First Choice. The Commission blocked the merger as it considered that the three main operators would become collectively dominant. The Court of First Instance established three conditions necessary for a collective dominance:

> *"First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. [...] There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;*
>
> *second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; [...]*
>
> *third, to prove the existence of a collective dominant position [...] the Commission must also establish that the foreseeable reaction of*

[32] Article 2(3) of the Merger Regulation 4064/89.

[33] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.“[34]

The court annulled the decision as the Commission had not proved that the three conditions for finding collective dominance were present.[35]

Scholars have pointed out, that the language used in the Commission's decision[36] indicates that the Commission was trying to prevent non-coordinated effects by its refusal. The Commission considered that the post-merger market operators would be able to exercise market power unilaterally without the need to act in a coordinated manner that would reduce competition between them. As the merger neither satisfied the conditions for collective nor single firm dominance, it has been argued the Commission was trying to fill *"the Gap"* in the application of the dominance test, as it did not cover all unilateral effects under these circumstances.[37] This judgment is commonly held to be one of the main reasons for the creation of the second Merger Regulation No 139/2004.

2.3. Merger Regulation 139/2004

The main change that the new regulation brought was the replacement of the dominance test. There had been some debate as to what type of test ought to be used to assess mergers, some suggested the SLC test (Substantial lessening of competition), which is used in the United States.

However, the new merger regulation introduced a new test. The significant impediment to effective competition (SIEC) test,[38] a mixture of the SLC test and the dominance test. This test is outlined in article 2(3), stating that *"a concentration which would significantly*

---

[34] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585 para. 62.

[35] Ibid. para. 294.

[36] *Airtours/First Choice* (Case No IV/M.1524) Commission decision [1999] para 54.

[37] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015) 907-908; Ioannis Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 3.36.

[38] Claes Bengtsson; Josep Maria Carpi Badia and Massimiliano Kadar, *'Mergers'* in Jonathan Faull and Ali Nikplay (Eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2014) 5.09.

impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

The creation or strengthening of a dominant position remains as the principal example.[39] However, the wording was mainly chosen as to preserve the Commission´s decisional practice and CJEU´s jurisprudence. The SIEC test allows the Commission to focus more on conduct and to address non-coordinated effects more comprehensively in oligopolistic markets and thereby remedying *"the gap"*.[40]

2.3.1. Appraisal of Mergers

In order to for the failing firm defence to be accepted by the European Commission the proposed concentration must be compatible with article 2(3) of the Merger Regulation 139/2004, which depends on the Commission´s substantive appraisal of the merger. How the Commission assesses a proposed concentration will now be explored, as it is important to understand the logic of the appraisal process relating to the failing firm defence.

2.3.1.1. Market Definition

When assessing mergers, the Commission begins by defining the relevant markets. Market definition is a tool to identify the boundaries of competition between firms.[41] The market definition includes both the relevant product market and the relevant geographical market.[42]

[39] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 3.77.

[40] Claes Bengtsson; Josep Maria Carpi Badia and Massimiliano Kadar, *'Mergers'* in Jonathan Faull and Ali Nikplay (Eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2014) 5.09; See also recital 25 and 26 in the merger regulation 139/2004

[41] Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para. 2.

[42] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 10.

The Court of Justice has confirmed, *"that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition."*[43] As the merging entities may have more than one product in more than one region, there may be more than one market affected, as was the case in *Bayer/Aventis Crop Science*[44] where the Commission considered 130 markets to be affected.[45]

In cases of horizontal mergers, competition is almost always lost to some extent. The assessment aims to identify whether the merger causes significant competitive constraints or not. A firm cannot have a significant impact on the prevailing market prices their customers are able to switch easily to alternative products.[46] When the undertakings in question mainly compete against each other, the new entity may be able to raise prices or reduce without the fear of losing customers, i.e. non-coordinated effects.[47] A horizontal merger may also leave fewer competitors on the market which could make it easier for them to coordinate their behaviour, i.e. coordinated effects.[48]

There are three main sources of competitive constraints. These are demand substitutability, supply substitutability, and potential competition.[49] Demand substitutability is considered the most important single factor when defining the relevant market.[50] It entails a determination of the range of products which are viewed

---

[43] Cases C-68/94 and C-30/95 *France and others v Commission* [1998] ECR *I-0137, para* 143.

[44] *Bayer/Aventis Crop Science* (Case No. COMP/M.2547) Commission Decision (2004/304/EC) [2002] OJ L 107/1.

[45] European Commission,´Commission clears Bayer´s acquisition of Aventis Crop Science, subject to substantial divestitures´ Commission press release <http://europa.eu/rapid/press-release_IP-02-570_en.htm> accessed 15 May 2019.

[46] Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para. 13.

[47] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford 2014) pt. 7.08.

[48] See e.g. Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford 2014) pt. 8.01-811.

[49] Ibid. para 13.

[50] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015) 32; Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 6.12.

as substitutes by the consumer.[51] This is usually assessed through a so-called SSNIP Test (Small but Significant Non-transitory Increase in Price) which is a hypothetical test where a small (usually 5-10 per cent) permanent increase in the price of a good leads to increased purchases of another good that renders the price increase unprofitable. If it does the two goods are considered to be on the same market.[52]

However, the SSNIP test cannot always be relied on, e.g. in case of the so-called *"Cellophane Fallacy"*, where the price has been raised so high by monopolists that if it were raised further customers might cease to buy the product at all.[53] Potential competition is not a part taken into account when defining the market but may be considered at a later stage.[54] Supply substitutability may be relevant to market definition in some special circumstances but is normally assessed at a later stage.[55]

2.3.1.2. Market Power in the Relevant Market.

Market definition is just the first step of the analysis. It is not an end in itself, but a tool to identify and prevent transactions that create or enhance market power to such a degree that it may cause competitive harm.[56]

Competition authorities and courts must rely on numerous of concepts and tools to discern if the degree of market power, that is likely to be a result from a proposed merger, is likely to be harmful for competition.

Market share is one of the concepts that must be looked at to assess market power. Small market shares, e.g. concentrations that do not exceed 25% are not considered to

---

[51] Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para. 15.

[52] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015) 31.

[53] Ibid. 32.

[54] Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para. 24.

[55] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015), 31; see also Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, paras. 20-23.

[56] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014), pt. 6.01.

be liable to impede effective competition.[57] Large market shares, i.e. 50% or more may be considered evidence of the existence of a dominant market position.[58] Smaller market shares can also be considered problematic, especially if the merged entity would lead to it having a much larger share than its biggest rival, even if it were not to exceed 50%.[59] Market shares can also indicate Oligopolistic problems, i.e. the clearance of a merger would leave so few undertakings on the market that they would become collectively dominant or be able to coordinate their commercial conduct.[60]

Another approach is to use the Herfindahl-Hirschman Index (HHI) which is used by many competition authorities, including the Commission. This is done by taking the market shares of each firm in the relevant market, squaring them and adding the results together.[61] An example is a hypothetical market with a total of four undertakings: Firm one market share = 35%; Firm two market share = 30%; Firm three market share = 20%; Firm four market share = 15%. The HHI would be calculated as: HHI = $35^2 + 30^2 + 20^2 + 15^2$ = 1,225 + 900 + 400 + 225 = 2,750. This would be considered a highly concentrated market or even an oligopolistic market.

According to the horizontal mergers guidelines the Commission is not likely to have competition concerns in a market where the HHI below 1000 post-merger.[62] In a merger with a post-merger HHI between 1000 and 2000 and the change in the HHI does not exceed 250 the Commission is unlikely to raise concerns or a merger with a post-merger HHI above 2000 and the change in HHI is below 150, except in special circumstances.[63]

---

[57] recital 25 in the merger regulation 139/2004; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 18.

[58] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 17.

[59] Ibid. para. 17.

[60] See e.g. Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford 2014) pt. 8.11-8.20.

[61] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 16.

[62] Ibid. para. 19.

[63] Ibid. para 20.

However, the HHI does not reflect dynamism and innovation and its role is mainly to screen out mergers that do not raise competition concerns.[64] For example, there may be so-called maverick firms, i.e. firms that are typically small[65] and that are inherently different from their rivals on the market and can constrain market coordination.[66] Mavericks might not have much market share or market power, but eliminating them *via* merger could help facilitate tacit collusion.[67] Other factors that reflect dynamism must also be considered for the Commission to assess the actual competitive effects of a proposed concentration.

2.3.1.3. Countervailing Factors and Counterfactual Analysis

The market definition and the market shares do not give the whole picture. Their importance is limited in assessing the actual effects that a merger will have on competition. Other factors must also be considered,[68] factors which may counteract the merged firm's ability to exercise market power, such as countervailing buyer power or new entry.[69] Efficiencies and alternative causes for deterioration of competitive structure must also be considered.

Buyer power is "*the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.*"[70] Buyer power can take a variety of forms, e.g.

---

[64] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press, 2015), 46.

[65] Joseph Bromfield and Matthew Olczak ´The Role of the Maverick Firm Concept in European Commission Merger Decisions´ (2018) 14(2) Journal of Competition Law and Economics 179, 185.

[66] Ibid. 179.

[67] See e.g. *LINDE/BOC* (Case No. COMP/M:4141) Commission decision [2006].

[68] See article 2(1) of the merger regulation 139/2004.

[69] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2016) 1085.

[70] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 64.

potential ability to sponsor entry to new suppliers or self-supply. It can also have a positive impact on the sustainability of tacit collusion.[71]

When new entry to "*a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk.*"[72] Entry barriers give the undertakings already operating on the market an advantage. They can take various forms, e.g. restricted number of licences; tariff and non-tariff barriers; preferential access to essential facilities and natural resources; intellectual property rights; consumer loyalty; importance of promotion and advertising; etc.[73] Therefore, the Commission must examine whether the barriers to entry are too high for a new market operator to be sufficiently swift and sustained to deter or defeat the exercise of market power.[74]

According to article 2(1) of the merger regulation 139/2004 the Commission should take into account in its appraisal the development of technical and economic progress which allows the Commission to look at efficiency claims. *"It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition."*[75] However, for the Commission to take account of efficiency claims in its assessment of the merger, three conditions need to be fulfilled cumulatively, i.e. be a benefit to consumers, be merger specific, and be verifiable.[76]

The Commission must also, in accordance with the SIEC test, assess and consider if the proposed concentration causes the deterioration of the competition or not. Mergers

---

[71] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford 2014) pt. 11.81.

[72] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 68.

[73] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 71.

[74] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 74.

[75] Recital 29 in the merger regulation 139/2004.

[76] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 78.

should be cleared even if the competition is reduced in the market, if it is estimated that a similar anti-competitive effects would follow in case of a prohibition a concentration, i.e. causality must be established.[77]

Although causality is not a new concept in legal theory and practice, it has special relevance in the Commission´s assessment when failing firm arguments are invoked, since lack of causality between the merger and the deterioration of competition needs to be established for the failing firm defence to be accepted by the Commission.

The Commission performs a so-called counterfactual analysis to determine whether causality exists or not. The Commission looks at two scenarios. The first scenario looks at what the effects on the competition are if the concentration is cleared. The Second scenario looks at how the market conditions would evolve in the absence of the merger. This is done in order to identify specific effects that the merger might cause in comparison to the changes that would take place in absence of it.[78]

Counterfactual analysis is usually carried out between pre-merger and post-merger scenarios. In cases involving failing firms the counterfactual analysis differs. Since one of the firms will be exiting the market in any event it is unlikely that the pre-merger market conditions will prevail in the absence of the concentration. Therefore, the counterfactual analysis involving failing firms is carried out between the post-merger scenario and the scenario where the failing firm has already exited the market.[79]

2.3.2. Summary

Compatibility of a merger depends on the Commission´s substantive appraisal of the proposed merger. Market definition, market power and other factors all play a role but counterfactual analysis will play a more important role in failing firm scenarios as will be discussed in greater detail in chapter 4.

---

[77] See Cases C-68/94 and C-30/95, France and others v Commission, EU:C:1998:148, paras. 110-116.

[78] Damien Geradin and Ianis Girgenson, ´The Counterfactual Analyisis in EU Merger Control´ [2013] 1-5 <https://ssrn.com/abstract=2357026> accessed 22 May 2019.

[79] Ibid. 5-8.

3. The Failing Firm Defence in the United States

The failing firm defence is applied in several different competition law jurisdictions. However, the approach may differ between jurisdictions. The basic principles of the failing firm defence can be traced to the United States in 1930.

3.1. Development of the Failing Firm Defence in the United States

The case of *International Shoe v. FTC*[80] is commonly regarded as the first case where the failing firm defence was accepted. International Shoe was the largest shoe manufacturer on the market. International Shoe acquired stock in W. H. McElwain Company who was the 6th largest on the market. The Federal Trade Commission had found this acquisition incompatible with section 7 of the Clayton Act which forbade acquisitions that might substantially lessen competition. The FTC ordered divestiture of all of International Shoe´s capital stock in the McElwain company.

The decision of the FTC was appealed to the U.S. Supreme Court. The failing firm had to show that its *"resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure"*.[81] The court assessed competitive strength under two scenarios. In the first scenario, the failing firm was acquired by a competitor, whereas in the second scenario no merger took place and the assets of the failing company were liquidated. The Court´s conclusion was that the merger was less distortive in that case. The case has been criticised for taking in private and social values and not purely analysed from a competition law perspective.[82]

In the *Citizen Publishing*[83] case the owners of the only two newspapers in Tucson, Star and Citizen, had extended a joint operating agreement between themselves. The

[80] International Shoe Co. v. FTC, 280 U.S. 291 (1930).

[81] Ibid. 302.

[82] See e.g. Troy Paredes, ´Turning the Failing Firm Defense into a Success: A Proposal to Revise the Horizontal Merger Guidelines´ [1996] 13 The Yale Journal on Regulation 347, 350; 355-362; Roger B. Kaplan, ´All the King's Horses and All the King's Men: The Failing Company Doctrine as a Conditional Defense to Section 7 of the Clayton Act´ 4[1976] Hofstra Law Review 643, 668-669.

[83] Citizen Publishing Co v United States, 394 U.S. 131, 138-139 (1969).

agreement imposed three types of controls, price fixing, profit pooling and market control. It furthermore provided for an option for Citizen´s shareholders to acquire Star´s stock, which they did. They were charged for a number of anti-competitive acts and were ordered to divest and modify the joint operating agreement to eliminate price fixing, market control and profit-pooling provisions. The parties invoked the failing firm defence. The Supreme Court rejected their arguments and formulated a three-part test that must be met for the failing firm defence to be applicable, restricting merging companies´ abilities to invoke the failing firm defence.[84] The test is similar to the one that is now incorporated in the U.S. Horizontal merger guidelines.

> *"(1) the allegedly failing firm would be unable to meet its financial obligations in the near future;*
>
> *(2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and*
>
> *(3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger."*[85]

The U.S. Horizontal merger Guidelines also recognises a so-called failing division defence, i.e. where a division of an otherwise healthy firm is failing. The basic principles that apply to the analysis of the failing firm defence and the failing division defence are the same but with two additional conditions that need to be met for the agencies to credit such claims:

> *"(1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm*

[84] Ioannis Kokkoris, ´Failing Firm Defence under the Clayton Act´ [2007] 28 (3) European Competition Law Review 158, 164.

[85] U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued August 19, 2010, section 11.

by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.“

Should the parties cumulatively prove these requirements, an otherwise anti-competitive merger is approved.[86] The FTC has firmly held that the defence should only be applied strictly and narrowly and only be accepted if all conditions are met.[87]

The merger guidelines consider *"any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer."*[88] The failing firm defence is held by most to be an absolute defence and, if sustained, ends the inquiry into the transactions.[89]

3.2. The Flailing Firm Defence

In 1974 The Supreme court acknowledged in the case of *General Dynamics*[90] that weakened, but not failing, status could affect the competitive impact of a merger. The case regarded the acquisition of United Electric, a strip-mining coal producer, by General Dynamics, a deep mining coal producer.

---

[86] Ignatious Nzero, ´Interpretation and Application of the Failing Firm Doctrine in Merger Regulation in South Africa and the US: A Comparative Analysis´ [2014] 77 Journal of Contemporary Roman-Dutch Law 440, 442.

[87] Debbie Feinstein and Alexis Gilman, ´Power shopping for an alternative buyer´ [2015] Bureau of Competition <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/power-shopping-alternative-buyer?utm_source=govdelivery> accessed 20 May 2019.

[88] U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued August 19, 2010, section 11.

[89] Troy Paredes, ´Turning the Failing Firm Defense into a Success: A Proposal to Revise the Horizontal Merger Guidelines´ [1996] 13 The Yale Journal on Regulation 347; see also Ignatious Nzero, ´Interpretation and Application of the Failing Firm Doctrine in Merger Regulation in South Africa and the US: A Comparative Analysis´ [2014] 77 Journal of Contemporary Roman-Dutch Law 440, 442).

[90] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

The transaction did not meet all the requirements of the failing firm defence since United Electric was a healthy firm. However, United Electric *"did not have sufficient reserves to compete effectively for long-term contracts."*[91] The acquisition was upheld as it would not substantially lessen competition.

This case is said to have established a so-called *"flailing firm defence"* or a "*weakened competitor defence".* The flailing firm defence is applicable in situations where the target firm is not in imminent danger of insolvency but is unlikely, in the future, to represent a significant competitive constraint due to its financial or economic weakness.[92] However, in determining whether the merger will substantially lessen competition a firm´s financial weakness is just one relevant factor among many to be considered.[93]

This has caused some confusion in the U.S. as courts and agencies have struggled in applying the defence[94] and have taken differing approaches as to how much consideration to give a firm's weakened financial condition.[95] Commissioner Rosch stated that when invoking the defence *"Parties need to explain and present evidence that their financial difficulties are serious and durable, will adversely affect their long-term competitiveness, and can only be resolved by the proposed merger."*[96] The courts

[91] United States v. General Dynamics Corp., 415 U.S. 508. (1974)

[92] OECD,´*Roundtable on Failing Firm defence* ´ (2009), 23. <http://www.oecd.org/competition/mergers/45810821.pdf> accessed 1 May 2019.

[93] Directorate for Financial and Enterprise Affairs Competition Committee ´Failing Firm Defnese´ (Roundtable on failing firm defence – Contribution by the United States, DAF/COMP/WD(2009)99, 6 Oktober 2009), para 21.

[94] William A Roach Jr. ´The Weakened Competitior Justification: How Weak Is Weak Enough?´ [2012] American Health Lawyer Association, 13 <https://www.winston.com/images/content/1/2/v2/1216/AHLAConnections7-12-Feature.pdf>

accessed 23 May 2019.

[95] Remarks of J. thomas Rosch, Commissioner, Federal trade Commission, before the George Mason Law Review's 14th annual Symposium on antitrust Law, *Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission*, Feb. 9, 2011, at 12-13.

[96] Ibid. 13.

and the agencies have not rejected the flailing firm defence but disfavoured it as they consider that it could expand the failing firm defence, which has strict limits.[97]

3.3. Academic Debate

Some scholars raised concerns[98] regarding the defence, while others defended it. One of the scholars that have defended the failing firm defence is *Campbell.* He noted that some commentators, on the failing firm defence, failed to take into consideration the reduction on economic welfare that a departure of a failing firm would have.

He noted that competition and economic welfare would be lost anyway, regardless of the acceptance of a rescue merger or not.[99] He was the first to attempt a detailed economic analysis of the defence,[100] by producing a series of economic models to illustrate the efficiencies and positive effects on welfare that the approval of the failing firm defence has.

---

[97] William A Roach Jr., ´The Weakened Competitior Justification: How Weak Is Weak Enough?´ [2012] American Health Lawyer Association, 12 <https://www.winston.com/images/content/1/2/v2/1216/AHLAConnections7-12-Feature.pdf> accessed 23 May 2019.

[98] *See e.g. Philip Sotiroff, ´Federal Antitrust Law--Mergers--An Updating of the Failing Company Doctrine in the Amended Section 7 Setting´ [1963] 61 Michigan Law Review 566, 577-578, where he listed out his concerns: "(a) [The acquisition] would enable a dominant firm to move quickly and cheaply into a new market by acquisition of a failing company [...]. (b) By increasing the acquiring firm's capacity to fill orders which it would otherwise be unable to accept, the company could strengthen its position in the market and prevent competitors from handling the overflow of business that would otherwise result; (c) By removing productive facilities from the market, a potential entrant might be forestalled from entry since he would face the increased cost of building new facilities and having these new facilities swell the total productive capacity of the market. (d) The acquiring firm would probably obtain less of the business of the defunct company if the latter experienced total business collapse than if it effectively stepped into the shoes of the failing company and appropriated the remaining good will plus valuable customer lists, price data and other important business information.(e) [...] a large enterprise could vertically integrate by purchasing a failing company and thereby eliminate a customer of or supplier to other competitors, depending on whether the integration was backward or forward, respectively, which might result in a substantial lessening of competition in the relevant market (f) Such an acquisition might give the acquiring firm an increased percentage of the market and increased market dominance, which has in itself been viewed as an undesirable result."*

[99] Thomas J. Campbell, ´The Efficiency of the Failing Company Defense´[1984] 63 Texas Law Review 251, 261-263.

[100] Fred S. McChesney, ´Defending the Failings-Firm Defense´ [1986] 65 Nebraska Law Review 1, 2.

His emphasise was on the importance of maintaining aggregate capacity on the market. He argued that a failing firm´s resources should not depart from the market, as it would be economically inefficient devoting them to *"their next best use"*.[101] If a failing firm were acquired by a pre-existing price-setting dominant firm, its production capacity would remain on the market which would allow the dominant firm to produce more which would result in lower prices.[102] However, he was ready to admit that economic efficiency could be lost, if an acquisition of a failing firm would lead to a market structure that resembled a monopoly. The dominant firm in such a scenario would not have the incentive to maintain the total output on the market, as it could instead reduce production and increase prices.[103]

McChesney was another defender of the failing firm defence. He did not agree with Campbell´s assessment but rather argued that when the firm that was already doomed to failure anyway, the small likelihood that merger or acquisition will be harmful goes to zero, then the acquisition of a failing firm is always efficient.[104] He reasoned that the only issue presented was whether the remaining monopolist wished to acquire the failing firm´s assets and whether the law would permit it to do so. The remaining monopolist would only be interested in an acquisition when it would lead to lower costs.[105]

Paredes argued that agencies should move away from the *per se* or absolute failing firm defence that had been incorporated into the Guidelines and instead incorporate a rule of reason failing firm defence with the focus on market realities.[106] He noted that the acquiring firm is likely to gain more of the failing firm´s market share by a merger than

[101] Thomas J. Campbell, ´The Efficiency of the Failing Company Defense´[1984] 63 Texas Law Review 251, 257.

[102] Thomas J. Campbell, ´The Efficiency of the Failing Company Defense´[1984] 63 Texas Law Review 251, 264.

[103] Ibid. 260-264.

[104] Fred S. McChesney, ´Defending the Failings-Firm Defense´ [1986] 65 Nebraska Law Review 1, 3

[105] Ibid. 10.

[106] Troy Paredes, ´Turning the Failing Firm Defense into a Success: A Proposal to Revise the Horizontal Merger Guidelines´ [1996] 13 The Yale Journal on Regulation 347, 389.

if the failing firm were to exit the market. Blocking a merger might lead to the remaining competitors dividing the assets and market share of the failing firm more evenly.[107] He also notes that approval of the failing firm defence, in markets where there is excess capacity, may distort competition by protecting inefficient assets. He argues that in such circumstances it is better to let the assets exit the market as it would promote efficiency and competition by reallocating the resources to their most productive uses.[108]

[107] Troy Paredes, ´Turning the Failing Firm Defense into a Success: A Proposal to Revise the Horizontal Merger Guidelines´ [1996] 13 The Yale Journal on Regulation 347, 365-366.

[108] Ibid. 370-371, 378-379.

4. Failing Firm Defence in the European Union

The first European Merger Regulation 4064/89 did not contain any reference to the failing firm defence. However, while that regulation was in force the failing firm defence was invoked several times.

4.1. Formulation of the Failing Firm Defence Criteria

The first case where the Commission faced arguments regarding a failing firm was in the decision of *Aerospatiale-Alenia/De Havilland*.[109] The case concerned a proposal by Aerospatiale and Alenia to acquire De Havilland, a Canadian division of Boeing.[110] The Commission concluded that, in the market for 20 to 70-seat commuter aircraft, the proposed concentration would increase its market share from 29 to 50% worldwide and from 49 to 65% within the EU and would create a dominant position.[111] The parties argued that Boeing would have to close down De Havilland if the transaction did not go through. The Commission did not agree with the parties as it considered De Havilland not to be in any imminent threat of failing as well as there were other less dominant potential buyers who had expressed interest.[112] Therefore, the Commission prohibited the transaction.

It should be noted that the case did not really regard a failing firm but rather a failing division of Boeing which was a healthy firm. The case did not give much insight as to whether the defence could be used in the EU or not. However, in 1993 the failing firm defence was accepted, in the *Kali und Salz*[113] decision, where the commission discussed the defence in-depth and established three-fold criteria for the defence to be accepted under European merger control.

---

[109] *Aerospatiale- Alenia/De Havilland* (Case No. IV/M.053) Commission Decision (91/619/ EEC) [1991] OJ L 334/42.

[110] Ibid. paras. 4-5.

[111] Ibid. para. 52.

[112]Ibid. para. 31.

[113] *Kali und Salz/MdK/Treuhand* (Case No. IV/M.308) Commission Decision (94/449/EC) [1994] OJ L 186/38.

The *Kali und Salz* decision concerned a joint venture, MdK, between Kali und Salz and Treuhand, with the intent of combining the potash and rock-salt activities of Kali und Salz and MdK, which was owned by Treuhand. The Commission initiated phase II proceedings as the merger raised serious doubts as to the compatibility with the common market.[114]

The Commission found that Kali und Salz´s takeover of MdK would lead to the creation of a market-dominating duopoly. These concerns were resolved with commitments by the parties.[115]

In the German market, the Commission considered Kali und Salz already to be in a dominant position and that the merger would strengthen its position and lead to a *de facto* monopoly as the Kali und Salz and MdK had a combined 98% market share pre-merger.[116]

The parties argued that MdK was on the verge of bankruptcy and in absence of the merger, MdK would be forced out of the market soon and their market shares would essentially go to Kali und Salz.[117] The Commission considered this argument and reasoned that although a merger that would create or reinforce a dominant position would usually be prohibited, a failing firm defence could be accepted in circumstances where the competitive harm would also follow in case of a prohibition decision, i.e. if the transaction would not be the cause of the deterioration of the competitive structure.[118]

The Commission created three-fold criteria in order to assess causality between a merger and the deterioration of the competitive structure in order for a concentration to be accepted under European merger control:

---

[114] *Kali und Salz/MdK/Treuhand* (Case No. IV/M.308) Commission Decision (94/449/EC) [1994] OJ L 186/38, para. 2.

[115] Ibid. paras. 62-68.

[116] Ibid. para. 46.

[117] Ibid para. 70.

[118] Ibid. para. 71.

> *"a merger generally is not the cause of the deterioration of the competitive structure if it is clear that:*
>
> *- the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,*
>
> *- the acquiring undertaking would take over the market share of the acquired undertaking if it were forced out of the market,*
>
> *- there is no less anticompetitive alternative purchase."*[119]

The Commission found the first criterion to be met as it found there to be sufficient degree of probability that MdK would exit the market in the near future if not acquired, due to its fall in sales which was attributed to the collapse of the Eastern European market and the unification of Germany.[120]

The second criterion regarded Kali und Salz acquisition of MdK market share. The Commission found it reasonable to suppose Kali und Salz would acquire MdK´s market share in the German market if it were to exit the market and therefore concluded the second condition to be fulfilled.[121]

The third criterion was also met as they had shown that they had extensively searched for an alternative purchaser but no viable option had been found.[122]

The Commission concluded that the proposed merger would strengthen the dominant position of Kali und Salz in the German market. However, since it did not consider the merger to be the cause of the of Kali und Salz´s reinforced dominant position the concentration was held to be compatible with the common market.[123]

The French Government along with EMC Group and its subsidiary SCPA, and the main competitor on the common market outside of Germany, appealed the Commission´s

---

[119] *Kali und Salz/MdK/Treuhand* (Case No. IV/M.308) Commission Decision (94/449/EC) [1994] OJ L 186/38, para 71.

[120] Ibid. paras. 73-77.

[121] Ibid. paras. 78-79.

[122] Ibid. para. 81-85.

[123] Ibid. para. 95.

decision and applied for annulment *inter alia* on the grounds that it is incompatible with the common market and that the Commission had applied the merger regulation and failing firm defence incorrectly. The French Government argued that the Commission had applied the failing firm defence doctrine incorrectly as it had not considered all requirements used in the U.S. antitrust law. [124]

The Court of Justice was not swayed by the French Government's arguments. The Court held that although the criteria used by the Commission differed, from the one used in the United States, it was not ground in itself to contest the validity of the decision. Furthermore, the criteria, set by the Commission, was held to be relevant and that the Commission had applied it correctly. However, the Court of Justice went further than the Commission regarding causality between the merger and the deterioration of competition.[125]

The Court held that a merger can be considered a rescue merger "*if the competitive structure resulting from the concentration would deteriorate in a similar fashion if the concentration did not proceed."*[126] In other words, the concentration does not need to be better in terms of competition but neutral effects will suffice.[127]

The next case that followed was *Saint-Gobain/Wacker-Chemie/NOM*[128] which concerned a joint venture in the silicon carbide sector between three firms; SEPR, a subsidiary of Saint-Gobain Group; ESK, a subsidiary of Wacker-Chemie Group; and NOM, a private investment and development company, owned by the Dutch state.

---

[124] Cases C-68/94 and C-30/95, France and others v Commission, EU:C:1998:148, paras. 90- 91.

[125] Ibid. paras. 110-116.

[126] Ibid. para. 115.

[127] Cases C-68/94 and C-30/95, France and others v Commission, EU:C:1998:148, paras. 110-116; see also *BASF/Eurodial/Pantochim* (Case COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45, para. 139.

[128] *Saint-Gobain/Wacker-Chemie/NOM* (Case No. IV/M.774) Commission Decision (97/610/ EC) [1997] OJ L 247/1.

The Commission was of the opinion that this joint venture would bring together the two largest producers of silicon carbide (SiC) that would result in a dominant position.[129]

The parties invoked the failing firm defence and argued that ESK was in financial difficulties and would exit the market if not for this joint venture. The Commission rejected their arguments by referring to the Kali und Salz criteria.[130]

The Commission did not find it probable that ESK would exit the market and even if it were to exit the market, Saint-Gobain would not be able to acquire all of ESK´s market share. The Commission further stated, that if ESK were to close down its plants, the structure would be less anti-competitive than the structure resulting from the merger and that Saint-Gobain would not be able to capture all of ESK´s market share[131]

The Commission also claimed that there were other viable alternative purchasers for ESK than Saint-Gobain. The parties did not manage to show that any of the criterion, set out in the Kali und Salz decision[132], were met and thus the merger was blocked. [133]

Kokkoris notes the Commission had defined the conditions, necessary for a successful failing firm defence, very narrowly which would be hard to meet in practice as merely establishing lack of causality did not suffice. According to the Kali und Salz criteria, there has to be no causal link between the merger and deterioration of the competitive market structure.[134] I tend to agree with his opinion especially since Saint-Gobain would have acquired most of ESK´s market share. The criterion for acquiring all of the failing firm´s market share seems overly demanding which may have been the reason for the Commission´s amendment of that criterion in its later decisional practice.

---

[129] *Saint-Gobain/Wacker-Chemie/NOM* (Case No. IV/M.774) Commission Decision (97/610/ EC) [1997] OJ L 247/1, para 161.

[130] *Saint-Gobain/Wacker-Chemie/NOM* (Case No. IV/M.774) Commission Decision (97/610/ EC) [1997] OJ L 247/1, para. 247.

[131] Ibid. para. 247- 254.

[132] Ibid. para. 255-259.

[133] Ibid. para. 265.

[134] Ioannis Kokkoris, ´Failing firm defence in the European Union. A panacea for mergers?´ [2006] 27(9) European Competition Law Review 494, 500.

4.2. The Initial Approach in Failing Division Cases

In some cases, a division of the firm, which is considered not to be performing well, might make it necessary to close that part of the firm down. The difference between a failing firm and a failing division is that the firm or the group that owns the entity in question is financially healthy and not in danger of going into bankruptcy.

The *Blokker/Toys 'R' Us* case was examined by the Commission at the request of the Dutch government. The case regarded a franchise agreement where Blokker, the dominant market operator in the specialized toy retail outlets in the Netherlands, would take over the Dutch division of Toys 'R' Us.

The Commission found that the merger would strengthen Blokker´s dominant position. The Dutch Toys 'R' Us operation had had little market success and was in a difficult financial position and invoked the failing firm defence.

The Commission recited the criteria from Kali und Salz and emphasized that the defence *"is based on lack of causality between the concentration and the creation or strengthening of a dominant position."*[135]

The Commission came to the conclusion that the gain in market share, and the potential of Toys 'R' Us as part of the Blokker group, would lead to the deterioration of the competitive situation and the disappearance of the Toys 'R' Us´s operations would not lead to the same results as the merger.[136] It was also evident that there were other alternative more pro-competitive solutions than the merger and that Toys 'R' Us had selected *"the strongest player on the market"*.[137]

The failing firm defence was therefore rejected and the merger was found to be incompatible with the common market. As part of the agreement between the parties had been implemented, the Commission ordered Blokker to divest the assets it had

---

[135] *Blokker/Toys R Us* (Case No. IV/M.890) Commission Decision (98/663/EC) [1998] OJ L 316/1, para. 111.

[136] Ibid. para. 112.

[137] Ibid. para. 113.

already acquired from Toys 'R' Us. The case regarded a failing division of Toys 'R' Us but for some reason, the commission did not address its assessment.

The failing division defence was however addressed one year later in the case of *Bertelsmann/Kirch/Premiere.*[138] The case regarded a proposed concentration in the pay-TV market. CLT-UFA was a joint venture between Bertelsmann and Audiofina SA. CLT-UFA and Canal+ owned 37,5% each in Premiere and Kirch owned 25%.

The parties proposed that Canal+ would divest their shareholding and CLT-UFA and Kirch would increase their share in premiere to 50% each and at the same time Kirch would transfer its pay-Tv channel´s, DF1 and DFS, assets to Premiere by sublicensing agreement of its pay-TV and pay-per-view rights.[139]

The Commission found that the proposed concentration would lead to the creation or strengthening of Premiere´s dominant position as it would result in a *de facto* monopoly on the pay-TV market in Germany as Premiere and DF1 were the only pay-TV suppliers on the market. [140] The parties argued along the lines of Kali und Salz case, stating that DF1 had had limited success and would otherwise be forced to close down. As Premiere would then be the only operator on the market, the concentration would therefore not affect competition.

The Commission pointed out that the case differed from Kali und Salz, since DF1 formed only a part of Kirch´s business and should be regarded as a failing division. The Commission stated:

> *"Even if Kirch completely abandoned its pay-TV business the position would not be comparable with that in the Kali and Saltz case since Kirch as a whole would not be dissolved. It would merely relinquish a part of its extensive business. In this instance Kirch's abandonment of the pay-TV market is simply* ***a management decision to give up an***

[138] *Bertelsmann/Kirch/Premiere* (Case No. IV/M.993) Commission Decision (1999/153/EC) [1999] OJ L 053/1.

[139] Ibid. para. 8.

[140] Ibid. paras. 29-30.

> ***area of its business which has not lived up to the management's expectations.*** *Where the 'failing division defence' and not the 'failing company defence' is invoked,* ***particularly high standards must be set for establishing that the conditions for a defence on the grounds of lack of a causal link have been met.*** *If this were not so, any concentration involving the disposal of an allegedly unprofitable area of a business could be justified for merger-control purposes by a declaration on the part of the seller that, without the merger, it would be necessary to close down the seller's business in that area."*[141] [emphasis added]

The Commission was of the opinion that the parties' arguments did not suffice to establish lack of a causal link as the parties had failed to produce evidence that the DF1 division was likely to exit the market. The parties had not shown that there were no alternative purchasers for DF1.

The Commission further believed that, even if Kirch were to decide to close down DF1, the market shares would not fall to Premiere. DF1 exit from the market would enable new competitors on the market as they could acquire Kirch´s rights for distribution and enter the pay-TV market.[142] The transaction was thus declared incompatible with the common market.

In the *Rewe/Meinl* decision[143], Rewe proposed an acquisition of all of the shares of the Austrian Julius Meinl AG. The Commission found that this would create or strengthen a dominant position.

The parties invoked the division defence, arguing that Meinl was experiencing severe competitive disadvantages vis-à-vis larger competitors. Although Meinl´s financial situation had deteriorated, the parties did not submit any evidence that suggested that

---

[141] *Bertelsmann/Kirch/Premiere* (Case No. IV/M.993) Commission Decision (1999/153/EC) [1999] OJ L 053/1, para. 71.

[142] Ibid. paras. 71-76.

[143] *Rewe/Meinl* (Case No. IV/M.1221) Commission Decision (1999/674/EC) [1999] OJ L 274/1.

Meinl was already, or about to become, insolvent.[144] The parties could not show that any of the Kali und Salz criteria were met.

The decision is consistent with the previous *Bertelsmann/Kirch/Premiere* decision in putting higher standards of proof in establishing a lack of a causal link in cases of a failing division. The commission emphasized that if Meinl would exit the market or downsize it would be a management decision. However, the merger was eventually cleared with commitments.

4.3. Reformulation of the Failing Firm Defence

Since approving the failing firm defence in *Kali und Salz* the Commission had interpreted the defence strictly. No proposed concentration had been able to satisfy the Commission´s criteria for the failing firms defence.

However, in 2001 in the *BASF/Eurodial/Pantochim*[145] decision, the Commission took a significant step in developing the failing firm defence further. The case concerned BASF´s acquisition of two Belgian chemical production companies, Eurodiol and Pantochim, owned by SISAS, an Italian company. BASF had world-wide activities in the production and distribution of chemicals.

The proposed concentration raised concerns in several markets. The new entity would be the only producer of a certain chemical in the EEA.[146] The merger was considered likely to create a dominant position in several markets.[147]

BASF argued that the conditions for the failing firm defence were met in this case, as it would gain a comparable position in the absence of the merger and that the assets of the businesses would inevitably exit the market. [148]

---

[144] *Rewe/Meinl* (Case No. IV/M.1221) Commission Decision (1999/674/EC) [1999] OJ L 274/1. para. 66.

[145] *BASF/Eurodial/Pantochim* (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45.

[146] Ibid. para. 88.

[147] Ibid. paras. 100, 118, 134.

[148] Ibid. para. 135.

As the Commission assessed those claims and held that *"the economic effects would be similar to a take-over of the failing firms themselves by an alternative purchaser"*[149] and that *"it needs to be established in addition to the first two criteria, that the assets to be purchased would inevitably disappear from the market in the absence of the merger."*[150] Thus, the Commission presented a reformulated failing firm defence criteria:

> *"(a) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,*
>
> *(b) there is no less anti-competitive alternative purchase, and*
>
> *(c) the assets to be acquired would inevitably exit the market if not taken over by another undertaking."* [151]

Both of the Belgian companies were under pre-bankruptcy regime and their parent company SISAS, was in bankruptcy proceedings. It was clear that if a buyer were not found, for Eurodiol and Pantochim, the firms would inevitably be declared bankrupt and forced out of the market.[152] The first criterion was therefore fulfilled.

BASF further argued that there was no alternative buyer for the two firms. The Commission´s inquiries led to the conclusion that there was no less anti-competitive solution available.[153] Thus, the second criterion was fulfilled.

When it came to the third criterion, BASF argued that acquiring the whole market share had not been recognized by the Court of Justice and that it was sufficient that the acquiring company would only need to acquire part of the market share.[154] The

---

[149] *BASF/Eurodial/Pantochim* (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45. para. 141.

[150] Ibid. para. 141.

[151] *BASF/Eurodial/Pantochim* (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45, 142; The criteria is now confirmed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, 90.

[152] *BASF/Eurodial/Pantochim* (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45, para. 144.

[153] Ibid. para. 146.

[154] Ibid. para. 149.

Commission did not expect that BASF would have acquired all of the market shares in the absence of the merger as their main competitors were likely to gain a significant part of the share as well.[155]

The Commission recognized that the assets of the failing firm would exit the market and that such an exit would likely lead to a considerable deterioration of market conditions and with a disadvantage to consumers.[156] The Commission held "*that these elements are equally relevant for the application of the rescue merger concept.*"[157] Thus, the Commission held the third criterion to be fulfilled.

After concluding that the formal failing firm defence criteria were satisfied the Commission proceeded to do a separate counterfactual analysis, which it had never done in its previous decisional practice where the failing firm defence had been considered.

The Commission assessed the competitive structure resulting from the merger where the Commission found that "*the exit of the assets and production capacities of Eurodiol and Pantochim would cause a significant capacity shortage for products which [were] already offered on the market under very tight capacity constraints*" [158] and that in the absence of the concentration there would be a supply shortage with the result of increased price on the market. The Commission therefore concluded that the approval of the merger was better than the bankruptcy scenario.

The next case that followed was *Newscorp/Telepiù*. The proposed concentration occurred in the Italian pay-TV market.[159] The global media company Newscorp intended

[155] *BASF/Eurodial/Pantochim* (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45, para. 151.

[156] Ibid. para. 151.

[157] Ibid. para. 151.

[158] Ibid. para 157.

[159] *Newscorp/Telepiù* (Case No. COMP/M.2876) Commission Decision [2003] OJ L 110/73, paras. 47-48.

to acquire the sole control over two undertakings on the market, Telepiù and Stream, and combine the two entities.[160]

The Commission considered this a problem as Telepiù was considered to be already in a dominant position on the market[161] and Stream to be the only real contender.[162] If Newscorp were to acquire the companies there would have been *"virtually no competition left"* post-merger[163] and the concentration would have created a *de facto* monopoly on the market.[164]

Stream was partly owned by two companies, Telecom Italia and Newscorp.[165] Newscorp argued that the failing firm defence should apply. Newscorp argued that, if not for the merger, Stream´s assets would inevitably exit the market.[166] Stream would be forced to close down as it could not become profitable on its own and it would be cheaper for the parent companies to shut it down rather than continuing to operate it.[167]

The Commission referred to the *Rewe/Meinl* decision and pointed out that the parties were invoking a failing division defence. The Commission stated that proving lack of causality was even more important in failing division cases and that it could be argued that the parties *"might have strategic reasons to keep its failing division alive even if the merger were to be prohibited"*[168] The Commission concluded that Steam´s withdrawal from the market would be *"a management decision to abandon a business activity that had not lived up to the expectations of the firm´s managing board."*[169]

---

[160] *Newscorp/Telepiù* (Case No. COMP/M.2876) Commission Decision [2003] OJ L 110/73, para. 10.

[161] Ibid. paras. 79-81.

[162] Ibid. para. 180.

[163] Ibid. para. 103.

[164] Ibid. para. 114.

[165] Ibid. para. 9.

[166] Ibid. para. 210.

[167] Ibid. para. 213.

[168] Ibid. para. 212.

[169] Ibid. para. 214.

The first criterion was therefore not fulfilled. The parties did not fulfil the second criterion either, as there was no proof that there was no less anti-competitive purchaser as the parties had not actively tried to find a less anti-competitive solution than the merger.[170]

The Commission did not go into the third criterion as neither of the first two conditions had been met,[171] nor did it perform a counterfactual analysis of the likely outcomes in the absence of the merger. That could, however, be attributed to the fact that the parties invoked the defence very late in the process.[172] However, the merger was approved with commitments, with the main objective to lower entry barriers.[173]

The *Andersen cases* are interesting as the Commission did the opposite of what it had done in the *Newscorp/Telepiù* decision. The commission did not go into the failing firm criteria but rather did a counterfactual analysis between mergers and exit scenarios. Arthur Andersen was one of the *"big five"* accounting firms. Following the Enron scandal in 2001, where Arthur Andersen LLP had acted as its auditor, Andersen´s worldwide reputation was damaged which led to its inability to continue its International Practice in coordinating the global development of its member firms. This led to national Andersen companies seeking to merge with the other *"big five"* accounting firms.

Although the Commission did not address the failing firm defence, some have argued that the cases were decided on the basis of the failing firm defence.[174] However, the Commission did a counterfactual analysis in those cases to establish that there was no causal link between the reduction in the number of competitors and the mergers.

---

[170] *Newscorp/Telepiù* (Case No. COMP/M.2876) Commission Decision [2003] OJ L 110/73, paras. 216-217.

[171] Ibid. para. 220.

[172] Ibid. para. 215.

[173] Ibid. paras. 222-261.

[174] See e.g. Ioannis Kokkoris, ´Failing firm defence in the European Union. A panacea for mergers?´ [2006] 27(9) European Competition Law Review 494, 503.

In *Deloitte & Touche/Andersen UK*[175] decision Deloitte & Touche would acquire various assets owned by Andersen UK as well as offering partnership or employment to around 260 existing Andersen UK partners and around 3,500 Andersen UK employees. The Commission initially had some concerns as to the creation of an oligopolistic dominance. The parties argued that Andersen was no longer an effective top-tier audit competitor and therefore the reduction from five to four competitors was inevitable.[176]

The Commission did a counterfactual analysis and concluded that there was no causal link between the proposed merger and any possible deterioration of the competitive structure in the market as well as there being no realistic alternative to the proposed merger that would be less harmful for competition.[177]

In the *Ernst & Young /Andersen Germany*[178] decision, the market structure differed from the situation in the UK. Two undertakings had close to 80% combined market share.[179] The Commission did not find that the proposed merger was likely to cause competitive harm, but rather it might strengthen competition as the merging parties would become the third largest undertaking on the market with a market share around 15% and could become a countervailing force to the two largest undertakings and might enhance competition on the market.[180]

The *Ernst & Young/Andersen France*[181] decision was similar to the *Deloitte & Touche/Andersen UK* decision. The Commission considered that the merged entity was likely to gain the largest market share but that it did not reflect actual market power and therefore not an issue of single dominance.[182]

---

[175] *Deloitte & Touche/Andersen UK* (Case No COMP/M.2810) Commission Decision [2002].

[176] *Deloitte & Touche/Andersen UK* (Case No COMP/M.2810) Commission Decision [2002], paras. 45-46.

[177] Ibid. para. 61.

[178] *Ernst&Young /Andersen Germany* (Case No. COMP/M.2824) Commission Decision [2002].

[179] Ibid para. 62.

[180] Ibid. paras. 63-69.

[181] *Ernst&Young/Andersen France* (Case No. COMP/M.2816) Commission Decision [2002].

[182] Ibid. para. 70.

Like in the *Deloitte & Touche/Andersen UK* decision the Commission found that the reduction from five to four global accounting networks was inevitable[183] and did counterfactual analysis.[184] However, it concluded that the alternative scenarios were not less harmful than the proposed merger and that there was no causal link between the risk of collective dominance and proposed merger.[185]

I find it unlikely that the cases would have satisfied the failing firm criteria. The firms were not in financial difficulties so it is uncertain that they could have satisfied the first criterion. Regarding the second criterion the firms could have merged with any of the other *"big five"* but it did not seem that the other possible mergers would have been worse, or at least not by much. It is also unlikely that the third criterion would have been satisfied as the assets in question were mostly regarded educated and skilled workers of the Andersen companies and they would most likely have been divided between the remaining undertakings in absence of the mergers, so they would have remained in the market.

It seems more practical, in these cases, to evaluate these mergers based on counterfactual analysis instead of addressing the failing firm as the competitive structure would have deteriorated in any event.

These cases were assessed under merger regulation 4064/89 and therefore evaluated under the dominance test. As these cases did not raise many concerns regarding single dominance, the Commission would have had to establish Collective dominance. The Airtours criteria for establishing collective dominance is quite strict so the Commission was unable to do so. Blocking the merger because the failing firm defence would not have been satisfied could have proved counterproductive as letting the workers be divided between the remaining competitors could have enhanced coordination between the remaining firms and would be more likely to lead to tacit collusion.

---

[183] *Ernst&Young/Andersen France* (Case No. COMP/M.2816) Commission Decision, Paras. 76-79.

[184] Ibid. see paras. 80-89.

[185] Ibid. para. 90.

If merger regulation 139/2004 had been in force the Commission would not have had to establish a collective dominance. I find it unlikely this regulation would have made much difference, since the counterfactual analysis revealed that non-merger scenarios were more anti-competitive than the merger scenarios. However, as there was still risk of competitive harm, perhaps the Commission would have required commitments, if it had been evaluated under that merger regulation.

4.4. Increased Emphasis on Counterfactual Analysis

The Commission had started doing a separate counterfactual analysis in the BASF decision after concluding that the failing firm defence was met. It did however not do so in the following case of Newscorp.

In 2004 the new merger regulation had been implemented with the SIEC test as the method of evaluating the compatibility of a merger. The horizontal merger guidelines were also introduced that year, where the Commission stressed that factors, such as the failing firm defence, are not to be mechanically applied in each and every case but rather the competitive analysis should be based on an overall assessment in light of the relevant factors and conditions.[186]

The *JCI/Fiamm*[187] decision is another case that demonstrates how counterfactual analysis can lead to a rescue merger being cleared without fulfilling the formal failing firm defence criteria. The case concerned a proposed concentration where VB, an automotive battery joint venture between JCI and Bosch, would acquire sole control of Fiamm SBB, the automotive starter battery business of Fiamm.[188] The Commission´s analysis led to the conclusion that this would create a dominant position in the Slovak markets that would significantly impede effective competition in the common market.[189]

---

[186] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 12-13.

[187] *JCI/Fiamm* (Case No. COMP/M.4381) Commission decision [2007].

[188] Ibid. para. 1.

[189] Ibid. paras. 687-688.

The parties invoked the failing firm defence, arguing that Fiamm´s lack of available funding would lead to its insolvency in the absence of the merger. The Commission found the first criterion of the defence to be satisfied as it considered it likely that, without the sale of SBB, Fiamm would become bankrupt and exit from the market.[190]

The parties also managed to convince the Commission that the second criterion was fulfilled. Fiamm´s search for other buyers had been limited due to the imminence of insolvency proceedings and most of those who had shown interest could not really be considered potential buyers due to their small size. The Commission concluded that there were no alternative less anti-competitive purchasers.[191]

However, the parties did not manage to satisfy the third criterion. The Commission was of the opinion that the assets of SBB, including machinery, production lines and brands, could be purchased in during the liquidation process and could be brought back to the market.[192] Thus, not all of its assets would inevitably exit the market.[193] Therefore, the Commission dismissed the fulfilment of the formal failing firm criteria. However, the Commission stated that:

> *"The overall criterion for assessing whether "an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm" is whether the proposed transaction has to be considered to be the cause of the significant impediment of effective competition. This requires a comparison to be made between the "merger scenario" and the "liquidation or failed-firm scenario", that is to say, even if not all of the three criteria regarded as especially relevant for the assessment of the 'failing firm defence' are satisfied, the Commission has to take due account of the concrete likelihood that FIAMM would enter into one of the liquidation*

[190] *JCI/Fiamm* (Case No. COMP/M.4381) Commission decision [2007], para. 720-721.

[191] Ibid. paras. 722-736.

[192] Ibid. para. 749.

[193] Ibid. para. 750.

> *procedures if the merger does not go through, and therefore has to assess the effects of such liquidation in the context of the appropriate merger counterfactual."*[194]

The Commission concluded that the merger scenario was likely to have negative effects on the market structure but the negative effects of letting the firm fail instead were mostly short-term. Thus, without remedies, the merger would be likely to be significantly worse than the non-merger scenario.[195] However, the merger was approved in the end with commitments.[196]

The *Martinair/KLM* decision regarded a proposed acquisition of Martinair where KLM would gain sole control. Both were Dutch airlines active in the transport of passengers and cargo. The Commission noted that Martinair had suffered losses in the long-haul passenger business in recent years and the measures taken to mitigate their substantial losses would not suffice to overcome their worsening financial position without a significant investment in their fleet, which was unlikely to come from a third party.[197]

The Commission´s counterfactual analysis lead to the conclusion that:

> *"Martinair's specific situation makes it likely that the competitive constraint exerted by Martinair will be eroded in the foreseeable future [...] it can therefore be concluded that the merger-specific effects of the proposed concentration with respect to the parties' passenger air transport activities are likely to be limited."*[198]

Rather than applying the failing firm defence, the Commission assessed the merger by a counterfactual analysis which showed that the competitive strength of Martinair had decreased and to regain its competitive strength the company relied on an agreement with KLM.

---

[194] *JCI/Fiamm* (Case No. COMP/M.4381) Commission decision [2007], 751.

[195] Ibid. paras. 814-816.

[196] Ibid. para. 912.

[197] *KLM/Martinair* (Case No. COMP/M.5141) Commission decision [2008], Paras 164-169.

[198] Ibid. para. 175.

Clark and Foss note that this case suggests that firms with failing or declining business divisions should focus on explaining why there is no causal link between any adverse effects on competition and the merger or if there is, explaining that it is not appreciable due to the declining competitive significance of one of the merging parties instead of relying on the strict failing firm defence.[199]

4.5. Relaxing the Conditions for Failing Division Defence?

In February 2013 the Commission was notified of a merger involving the acquisition of Shell´s Hamburg refinery assets, a base oil manufacturing plant (BOMP), by Nynas.

The Commission identified the relevant markets affected to be the sale of naphthenic base, process oil and transformer oils (TFO). Nynas and Shell were considered the largest two suppliers of those products. The Commission´s assessment lead to the conclusion that Nynas would be the only supplier of naphthenic base and process oil and the largest producer of TFO in the EU. The only real competitor would be Ergon, a U.S. based firm with no production in the EU.

The Commission assessed the proposed merger under the failing firm criteria. Shell had publicly stated that, failing a divestiture, it would close the Harburg refinery assets. Shell managed to show that the Harburg refinery in its current set-up was not profitable and established that its business strategy was to focus on larger scale activities and it would close the Harburg refinery in any event, absent of the merger.[200] The Commission concluded that, due to *"their poor financial performance and Shell´s strategic focus on other activities,"*[201] the assets would in the near future be forced out of the market acquired by another undertaking.[202] As it would have been economically rational for

[199] Emily F. Clark and Celia E Foss, ´When the Failing Firm Defence Fails´[2012] 3(4) Journal of European Competition Law & Practice 317, 327.

[200] *Nynas/Shell/Harburg Refinery* (Case No. COMP/M.6360) Commission Decision [2013], para 312-326.

[201] Ibid. para. 327.

[202] Ibid. para. 327.

Shell to close down the refinery, the first criterion of the failing firm defence was fulfilled.

The parties argued that Nynas was the only undertaking that was seriously interested in acquiring the Harburg refinery assets. In 2008-2010 Shell had engaged in a series of failed negotiations with several parties to sell the entire Harburg refinery.[203] Since those negotiations fell through, Shell decided to retain part of the site and convert it into a terminal and target niche base oil producer for the sale of the Harburg BOMP.[204] The only interested buyers for the Harburg BOMP were Ergon and Nynas. In 2011 Shell entered into unsuccessful negotiations with Ergon.[205] Following the adoption of the statement of objections in the case, Shell sent a letter to Ergon in July 2013 enquiring about their interest in acquiring the Harburg refinery assets, which resulted in short negotiations that led nowhere.[206]

The Commission noted that Ergon had little or no incentive to buy the assets since it still had unused capacity at its US-based plant in Vicksburg and any interest Ergon might have would diminish in case of a prohibition decision which would result in the assets exiting the market. The Commission concluded that Nynas was most likely the only undertaking that had serious interest, ability and incentive to take over the Harburg refinery assets in absence of the notified transaction and no prospect of a less anti-competitive alternative purchaser. The Commission considered that rebuilding the Harburg refinery assets would take a long time and doing it elsewhere would be expensive and would, therefore, most likely exit the market.[207] Thus, the second and third criterion were fulfilled.

The Commission then proceeded to do a separate counterfactual analysis on the effects on competition of the merger, compared to the effects in case of a closure of the assets.

---

[203] *Nynas/Shell/Harburg Refinery* (Case No. COMP/M.6360) Commission Decision [2013], para. 331-333.

[204] Ibid. para. 334.

[205] Ibid. paras. 335-341.

[206] Ibid. paras. 342-344.

[207] Ibid. paras. 345-362.

The Commission concluded that in absence of the merger, there would be a significant reduction of supply capacity on the EEA market and increased import from outside the EEA with additional import costs which would most likely lead to increases in prices.[208] In its analysis, the Commission believed that Nynas would be able to expand its EEA sales if Harburg refinery assets exited the market. However, by allowing the merger there were likely to be some efficiency gains as Nynas would have the ability and probably the incentives to partly pass on the cost savings to consumers which would be of greater benefit to the consumer and more likely to lower prices.[209]

It should be noted that the Commission never specifically referred to the failing firm defence in its decision, nor to the fact that this was actually a failing division defence. While this was the first time the Commission accepted the failing division defence, it did however not refer to its earlier decisional practice, regarding the special importance of proving lack of causality in failing division defence cases and that a withdrawal from the market may be considered a management decision to abandon a business activity that has not lived up to the expectations of the firm´s managing board.[210]

Fountoukakos and Geary Note that this case demonstrates a more flexible approach compared to its strict approach requiring the parties to demonstrate that the entire group´s financial position would be endangered, but rather based on the financial position of the assets and the strategic plans of the parent company. They are of the opinion that this case is not a relaxation of the evidentiary standards that needs to be met but rather an application of the criteria in a more flexible way, with focus on evidence and the counterfactual.[211]

---

[208] *Nynas/Shell/Harburg Refinery* (Case No. COMP/M.6360) Commission Decision [2013], paras. 422, 442.

[209] Ibid. paras. 470-472.

[210] See e.g. *Rewe/Meinl* (Case No. IV/M.1221) Commission Decision (1999/674/EC) [1999] OJ L 274/1; *Newscorp/Telepiù* (Case No. COMP/M.2876) Commission Decision [2003] OJ L 110/73.

[211] Kyriakos Fountoukakos and Lisa Geary ´The Failing Firm Defence – Some Further Thoughts Post Nynas/Shell and Aegean/Olympic II´ [2015] Competition Policy international, 5-6 <https://www.competitionpolicyinternational.com/assets/Europe-Column-May-2015.pdf> accessed 22 May 2019.

I tend to agree with their opinion, as this case does not necessarily indicate a relaxed application of the evidentiary standards of the failing division defence criteria. Shell had made serious attempts to divest its assets due to its lack of profitability and had shown that it was serious about closing down the refinery. The Commission has shown that it is ready to accept arguments, based on evidence that shows that it is not strategical to continue operations of a certain division.

In 2013 the Commission cleared Aegean Airlines acquisition of Olympic Air, both Greek air carriers, after having blocked it in 2011. This was the first time that the Commission cleared a merger after having previously prohibited it.[212] The failing firm defence was invoked both in *Olympic Air/Aegean Airlines* and in *Aegan/Olympic II.*

In the first *Olympic Air/Aegean Airlines* decision the Commission concluded that the proposed merger would have led to a quasi-monopoly on nine routes.[213] So the parties invoked the failing firm defence.

When the Commission assessed the first criterion, whether the company would likely be forced off the market, it gave considerable weight to the financial strength of Marfin, Olympic's sole shareholder. The Commission noted that Marfin had a significant cash reserve[214] and had the ability to support Olympic. The Commission further noted that Marfin often invested in distressed companies in order to restructure them and make them profitable for resale. [215]

The Commission considered Marfin´s acquisition of Olympic to be consistent with that strategy. The Commission considered that Marfin was not facing overall financial difficulties and the incurred losses by Olympic Air did not endanger the whole Marfin Group.[216] Furthermore, no company in Marfin´s portfolio had ever been put into

[212] Assimakis Komninos and Jan Jeram, ´Changing Mind in Changed Circumstances: Aegean/Olympic II and the Failing Firm Defence, [2014] 5 (9) Journal of Competition Law & Practice 605, 605.

[213] European Commission, ´Mergers: Commission blocks proposed merger between Aegean Airlines and Olympic Air´ (IP/11/68, 2013) <http://europa.eu/rapid/press-release_IP-11-68_en.htm> accessed 2 May 2019.

[214] *Olympic/Aegean Airlines* (Case No. COMP/M.5830) Commission Decision [2011], para. 1966.

[215] Ibid. paras. 1970-1974.

[216] Ibid. para. 1986.

bankruptcy[217] and the Commission considered Marfin to have financial incentives to avoid bankruptcy. The exit cost would be considerable and would be likely to have negative effects on Marfin´s credit ratings and would make it harder for Marfin to raise equity funds.[218] The Commission concluded that the parties were unable to provide evidence that Olympic Air would likely be forced out of the market. [219]

Regarding the second criterion, the Commission considered Marfin not to have seriously considered any other less anti-competitive alternatives and that the parties could not establish that there was no other potential buyer.[220]

When the third criterion was assessed, the Olympic Air´s brand and logo and its slot and bilateral rights were considered its main assets, as well as aircraft Leased by them.[221] The parties argued that the Olympic brand was not an asset that could sustain a business by itself.[222] However, the Commission´s market investigation demonstrated that the brand was a significant asset in the Greek air transport market with a high brand recognition and appeal[223] which would make that asset appealing for a potential buyer who could use it to operate in the Greek market and would therefore unlikely exit the market.[224] The bilateral rights would revert to the State in case of ceased traffic and would therefore not exit the market.[225] As the aircraft were leased it would not be part of the bankruptcy estate which would allow other Greek companies to operate the

[217] Ibid. para. 1974.

[218] *Olympic/Aegean Airlines* (Case No. COMP/M.5830) Commission Decision [2011], paras. 2035-2039.

[219] Ibid. para. 2070.

[220] Ibid. paras. 2071-2087.

[221] Ibid. paras. 2089-2090.

[222] Ibid. para. 2092.

[223] Ibid. para. 2102.

[224] Ibid. para. 2106.

[225] Ibid. paras. 2110-2111.

aircraft.[226] Thus, the Commission concluded that the assets of Olympic Air would not inevitably exit the market.[227]

By 2013, Olympic had continued to incur significant losses and had only survived due to the continuous cash injections of its parent company, Marfin.[228] Furthermore, by 2013, Marfin´s financial position had taken a hit. Marfin was suffering substantial financial losses and its annual accounts indicated uncertainty regarding its ability to continue as a Group.[229]

Before assessing the proposed concentration the Commission stated that "*the legal status of the failing business has been of limited importance for its classification as a failing firm or a failing division"*[230] but classified Olympic as a failing division of Marfin which forms a *"part of the first criterion of the failing firm analysis."*[231] The Commission then went on, stating:

> *"it does not also have to be established that Olympic would endanger the viability of the whole Marfin Group. Such an approach would not correspond to the rationale underlying the failing firm analysis, namely that because of the failure of the acquired company (and not necessarily of its parent) the competitive situation post-merger would not be worse than absent the merger.*
>
> *Nevertheless, even if the non-viability of the whole Marfin group does not have to be proven as such, it becomes apparent that Marfin's ability and incentive to support Olympic is conditioned by its own*

[226] *Olympic/Aegean Airlines* (Case No. COMP/M.5830) Commission Decision [2011], paras. 2113, 2117.

[227] Ibid. para. 2119.

[228] *Aegan/Olympic II* (Case No. COMP/M6796) Commission decision [2013], para. 669.

[229] Ibid. para. 674.

[230] Ibid. para. 686.

[231] *Aegan/Olympic II* (Case No. COMP/M6796) Commission decision [2013], para. 687; This statement seems misleading or even contradictory as the commission stated in the previous paragraph that the classification of a failing firm or a failing division had limited importance.

financial situation, and thus the latter must be taken into account when assessing the first criterion of the failing firm analysis."[232]

The Commission then went on to assess the first criterion of the defence. The Commission found that, due to Marfin´s difficult financial position, Marfin would unlikely be able to continue to finance Olympic. Marfin also had no incentive to do so, since Marfin´s other subsidiaries also had funding requirements but offered better investment opportunities.[233] The Commission found that to cease supporting Olympic and shut it down would be a rational decision and concluded that it was more likely than not that Olympic would be forced out of the market in the near future.[234]

Regarding the second criterion, the Commission seems to have done a complete turnover in its assessment. The decision does not show that Marfin had actively looked for an alternative purchaser for Olympic. Marfin stated that it was not aware of any interest in Olympic.[235] The Commission looked at the attempts to sell Olympic that had been unsuccessful before Marfin had purchased it,[236] and furthermore, reached out to 24 European airlines, inquiring if there was any interest in acquiring Olympic. None of the 20 airlines that responded showed any interest.[237] The only third party that showed any interest was the U.S. based company Chrysler Aviation, which had shown some interest before. This potential purchase interest seemed very unlikely to go through since Chrysler Aviation had way smaller turnover and had in the past not been able to show evidence of financial backing or banking support, as well as not being allowed, under article 4(f) of regulation 1008/2008[238], to acquire a majority stake or control of

---

[232] Ibid. paras. 688-689; These statements do not seem consistent with the decision in 2011 and the Commission´s previous decisional practice.

[233] *Aegan/Olympic II* (Case No. COMP/M.6796) Commission decision [2013], paras. 751-752.

[234] Ibid. paras. 803-805.

[235] Ibid. para. 807-808.

[236] Ibid. para. 809.

[237] Ibid. para. 811.

[238] Regulation of the European Parliament and of the Council (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.

Olympic.[239] Thus, the Commission concluded that an alternative purchaser was unlikely to be found in the immediate future.[240]

When assessing the third criterion, the main assets were the Olympic brand, bilateral traffic rights to non-EU countries, and its leased aircraft. The Commission did a market investigation which showed that none of the 20 European airlines that responded to the Commissions inquiries had any interest in acquiring the Olympic brand[241] and no third party was interested in taking over the bilateral traffic rights nor its leased aircraft. Thus, the Commission concluded that Olympic´s assets would inevitably exit the market and that the merger satisfied the failing firm criteria.

It should be noted that the financial situation of the firm was significantly worse than before and so the circumstances had changed. The Commission´s comments seem to indicate a relaxed perspective towards failing divisions for the assessment of the first criterion. Furthermore, it seems that the conditions were almost the same regarding the second and third criterion in the 2011 and 2013 decisions. Looking at the attempts to sell Olympic before Marfin´s acquisition of it and the unlikelihood of Chrysler Aviation acquiring Olympic suggests that the Commission could have reached this conclusion in the previous decision. The brand name was state property and would have reverted back to the state both in 2011 and 2013 and the bilateral agreements would revert back to the governments as they are considered each state´s property. Thus, the Commission seems to have made a complete turnaround between the 2011 and 2013 decisions in assessing the first and second criterion.

Komninos and Jeram noted that the extensive analysis of the competitive situation on the market was unnecessary. Since the examination of a failing firm entails that competition would not be restricted as one of the merging parties would not survive, in their opinion, it makes no sense to proceed to any analysis of alleged anti-competitive

---

[239] *Aegan/Olympic II* (Case No. Comp/M.6796) Commission decision [2013], paras. 815-816.

[240] Ibid. para. 817.

[241] *Aegan/Olympic II* (Case No. Comp/M.6796) Commission decision [2013], para. 822.

effects of the merger, since such anti-competitive effects would not be the result of the merger but rather of the inevitable exit of one of the parties.[242]

However, in the case of BASF the Commission also did a counterfactual analysis after concluding that the failing firm criteria were fulfilled. Since the BASF decision, the Commission has, with the exception of the Newscorp/Telepiù where the failing firm defence was invoked late in the process, done a separate counterfactual analysis or based its decision solely on counterfactual analysis comparing the proposed merger to the exit of the firm or division scenario. This suggest that the Commission is not only relying on the formal failing firm defence criteria but analyses the overall competitive effects to ensure lack of a causal link between the deterioration of the competitive structure and the merger.

[242] Assimakis Komninos and Jan Jeram, ´Changing Mind in Changed Circumstances: Aegean/Olympic II and the Failing Firm Defence, [2014] 5 (9) Journal of Competition Law & Practice 605, 612.

5. Conclusion

Since the acceptance of the failing firm defence in *Kali und Salz* the Commission has been consistently held, in its decisional practice, that the parties must establish lack of causality between the merger and the deterioration of the competitive structure for the the defence can be accepted.

The Commission has established formal criteria which parties to a proposed concentration should generally meet. The criteria were applied in a formalistic way in the Commission´s early decisional practice, where lack of causality could be established only by fulfilling the conditions of the criteria. Which was similar to the way that the defence is applied in the United States.

The Commission´s assessment has become more effect based over the year. After the *BASF/Eurodial/Pantochim* decision, where the Commission first did an overall counterfactual analysis decision, it continued to evaluate rescue mergers by doing an overall counterfactual analysis, by comparing a merger scenario and a scenario where a firm will exit the market.

The case of *JCI/Fiamm* is a good example, where the formal failing firm criteria could not be satisfied but the Commission proceeded to do an overall counterfactual analysis. It could be argued that the Flailing defence in the United States resembles the Commission´s overall counterfactual assessment. However, Competition authorities and courts in the U.S. have been reluctant to use it and continue to uphold a stringent application of the failing firm defence.

In regards to the failing division defence, the Commission required higher standard of proof regarding lack of causality. In decisions like *Rewe/Meinl* and *Bertelsmann/Kirch/Premere* the Commission insisted that abandonment of a business activity should not be a mere management decision.

In the cases of *Aegan/Oliympic II* and *Nynas/Shell/Harburg Refinery* the Commission does not seem to have relaxed its evidentiary standard but rather applied the defence

in a more flexible way, accepting strategic incentives of the parent companies to stop funding unprofitable divisions or subsidiaries.

The current application of the failing firm defence seems to indicate that the Commission uses the failing firm defence criteria as a tool for establishing a lack of causal link between the deterioration of a competitive market structure. If an overall counterfactual analysis can establish the lack of causal link between the deterioration of the competitive structure and proposed merger, it should be cleared without satisfying the formal criteria.

Bibliography

Cases and Decisions

The U.S. Supreme Court cases

Citizen Publishing Co v United States, 394 U.S. 131, 138-139 (1969).

International Shoe Co. v. FTC, 280 U.S. 291 (1930)

Northern Securities Company v United States, 193 U.S. 197 (1904).

United States v. General Dynamics Corp., 415 U.S. 486 (1974).

Cases of the Court of Justice of the European Union

Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

Cases C-142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487.

Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 215.

Cases C-68/94 and C-30/95 *France and others v Commission* [1998] ECR I-0137.

Commission Decisions

Aegan/Olympic II (Case No. COMP/M6796) Commission decision [2013].

Aerospatiale- Alenia/De Havilland (Case No. IV/M.053) Commission Decision (91/619/EEC) [1991] OJ L 334/42

Airtours/First Choice (Case No IV/M.1524) Commission decision [1999].

BASF/Eurodial/Pantochim (Case No. COMP/M.2314) Commission Decision (2002/365/EC) [2002] OJ L 132/45.

Bayer/Aventis Crop Science (Case No. COMP/M.2547) Commission Decision (2004/304/EC) [2002] OJ L 107/1.

Bertelsmann/Kirch/Premiere (Case No. IV/M.993) Commission Decision (1999/153/EC) [1999] OJ L 053/1.

Blokker/Toys R Us (Case No. IV/M.890) Commission Decision (98/663/EC) [1998] OJ L 316/1.

Deloitte & Touche/Andersen UK (Case No COMP/M.2810) Commission Decision [2002].

Ernst&Young /Andersen Germany (Case No. COMP/M.2824) Commission Decision [2002].

Ernst&Young/Andersen France (Case No. COMP/M.2816) Commission Decision [2002].

JCI/Fiamm (Case No. COMP/M.4381) Commission decision [2007].

Kali und Salz/MdK/Treuhand (Case No. IV/M.308) Commission Decision (94/449/EC) [1994] OJ L 186/38.

KLM/Martinair (Case No. COMP/M.5141) Commission decision [2008].

LINDE/BOC (Case No. COMP/M:4141) Commission decision [2006].

Newscorp/Telepiù (Case No. COMP/M.2876) Commission Decision [2003] OJ L 110/73.

Nynas/Shell/Harburg Refinery (Case No. COMP/M.6360) Commission Decision [2013].

Olympic/Aegean Airlines (Case No. COMP/M.5830) Commission Decision [2011].

Rewe/Meinl (Case No. IV/M.1221) Commission Decision (1999/674/EC) [1999] OJ L 274/1.

Saint-Gobain/Wacker-Chemie/NOM (Case No. IV/M.774) Commission Decision (97/610/ EC) [1997] OJ L 247/1.

Legislation

EU Legal Instruments

Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed *S*eries I Chapter 1959-1962/87.

Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L257/13.

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7.

Regulation of the European Parliament and of the Council (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.

Treaty on the Functioning of the European Union

Treaty Establishing the European Coal and Steel Community. Paris, 18 April 1951.

Treaty Establishing the European Community, Rome Treaty, 25 March 1957

U.S. Legislation and Guidelines

The Sherman act, codified in 15 U.S.C. §§ 1–7

The Clayton Act, codified in15 U.S.C. §§ 12-27, 29 U.S.C 52-53.

The Federal Trade Commission Act, codified in 15 U.S.C. §§ 41-58.

The Hart-Schott-Rodino antitrust improvement act, codified in 15. U.S.C. §§ 18a.

U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued August 19, 2010, section 11.

Secondary Sources

Articles

Bromfield J and Olczak M, ´The Role of the Maverick Firm Concept in European Commission Merger Decisions´ (2018) 14(2) Journal of Competition Law and Economics 179.

Campbell TJ, ´The Efficiency of the Failing Company Defense´[1984] 63 Texas Law Review 251.

Clark EF and Foss CE, ´When the Failing Firm Defence Fails´[2012] 3(4) Journal of European Competition Law & Practice 317.

Feinstein D and Gilman A, ´Power shopping for an alternative buyer´ [2015] Bureau of Competition <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/power-shopping-alternative-buyer?utm_source=govdelivery> accessed 20 May 2019.

Fountoukakos K and Geary L, ´The Failing Firm Defence – Some Further Thoughts Post Nynas/Shell and Aegean/Olympic II´ [2015] Competition Policy international, <https://www.competitionpolicyinternational.com/assets/Europe-Column-May-2015.pdf> accessed 22 May 2019

Geradin D and Girgenson I, ´The Counterfactual Analyisis in EU Merger Control´ [2013] <https://ssrn.com/abstract=2357026> accessed 22 May 2019

Giannino M, 'There Is Always a First Time: The European Commission Applies the Failing Firm Defence to an Unprofitable Division in NYNAS/Shell/Harburg Refinery' (2014) <https://ssrn.com/abstract=2544084> accessed 21 February 2019.

Kaplan RB, ´All the King's Horses and All the King's Men: The Failing Company Doctrine as a Conditional Defense to Section 7 of the Clayton Act´ 4[1976] Hofstra Law Review 643.

Kokkoris I, ´Failing firm defence in the European Union. A panacea for mergers?´ [2006] 27(9) European Competition Law Review 494.

Kokkoris I, ´Failing Firm Defence under the Clayton Act´ [2007] 28 (3) European Competition Law Review 158.

Komninos A and Jeram J, ´Changing Mind in Changed Circumstances: Aegean/Olympic II and the Failing Firm Defence, [2014] 5 (9) Journal of Competition Law & Practice 605.

McChesney FS, ´Defending the Failings-Firm Defense´ [1986] 65 Nebraska Law Review 1.

Nzero I, ´Interpretation and Application of the Failing Firm Doctrine in Merger Regulation in South Africa and the US: A Comparative Analysis´ [2014] 77 Journal of Contemporary Roman-Dutch Law 440.

Olczak M, 'Unilateral versus Coordinated Effects: Comparing the Impact on Consumer Welfare of Alternative Merger Outcomes'

<http://competitionpolicy.ac.uk/documents/8158338/8256105/CCP+Working+Paper+10-3.pdf/c7e5f86d-14b4-4c7a-b2fa-cf1b19e45816> accessed 31 January 2019.

Paredes T, ´Turning the Failing Firm Defense into a Success: A Proposal to Revise the Horizontal Merger Guidelines´ [1996] 13 The Yale Journal on Regulation 347.

Roach WA, ´The Weakened Competitior Justification: How Weak Is Weak Enough?´ [2012] American Health Lawyer Association <https://www.winston.com/images/content/1/2/v2/1216/AHLAConnections7-12-Feature.pdf> accessed 23 May 2019.

Sotiroff P, ´Federal Antitrust Law--Mergers--An Updating of the Failing Company Doctrine in the Amended Section 7 Setting´ [1963] 61 Michigan Law Review 566.

Whalgren P, ´On the Future of Legal Science´ [2000] 40 Stockholm Institute for Scandinavian Law 515 <http://www.scandinavianlaw.se/pdf/40-20.pdf> accessed 27 May 2019.;

Petrov AV and Zyryanov AV, ´Formal-Dogmatic Approach in Legal Science in Present Conditions´ Journal of Siberian Federal University [2018] 968 <http://elib.sfu-kras.ru/bitstream/handle/2311/71664/Petrov.pdf;jsessionid=F981D54F7FFC943C054C751DD421BC77?sequence=1> accessed 27 May 2019

Books

Bengtsson C, Badia JMC and Kadar M, *'Mergers'* in Faull J and Nikplay A (Eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2014).

Jones A and Sufrin B, *EU Competition Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2016).

Kokkoris I and Shelanski H, *EU Merger Control: A Legal and Economic Analysis* (Oxford University press 2014).

Whish R and Bailey D, Competition Law (8th edn, Oxford University Press, 2015).

Other secondary sources

Directorate for Financial and Enterprise Affairs Competition Committee ´Failing Firm Defnese´ (Roundtable on failing firm defence – Contribution by the United States, DAF/COMP/WD(2009)99, 6 Oktober 2009))

European Commission, ´Merger Statistics´ <http://ec.europa.eu/competition/mergers/statistics.pdf> accessed 5th April.

European Commission, ´Mergers: Commission blocks proposed merger between Aegean Airlines and Olympic Air´ Commission press release <http://europa.eu/rapid/press-release_IP-11-68_en.htm> accessed 2 May 2019.

European Commission,´Commission clears Bayer´s acquisition of Aventis Crop Science, subject to substantial divestitures´ Commission press release <http://europa.eu/rapid/press-release_IP-02-570_en.htm > accessed 15 May 2019.

OECD,´*Roundtable on Failing Firm defence* ´ (2009), 23. <http://www.oecd.org/competition/mergers/45810821.pdf> accessed 1 May 2019.

Rosch JT, ´Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission´ remarks before the George Mason Law Review's 14th annual Symposium on antitrust Law [2011] <https://www.ftc.gov/sites/default/files/documents/public_statements/theoretical-and-practical-observations-cartel-and-merger-enforcement-federal-trade-commission/110209georgemasoncartelsmergers.pdf> accessed 15 May 2019.