

LAW SCHOOL

Master's Program: Commercial Law

Specialization: Competition Law and Intangible Goods

Academic Year: 2024-2025

THESIS

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RESTRUCTURING MERGERS – FAILING FIRM DEFENSE

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Athens, January 2025

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Οι απόψεις και θέσεις που περιέχονται σε αυτήν την εργασία εκφράζουν την συγγραφέα και δεν πρέπει να ερμηνευθεί ότι αντιπροσωπεύουν τις επίσημες θέσεις του Εθνικού και Καποδιστριακού Πανεπιστημίου Αθηνών

Abstract

This dissertation provides an in-depth examination of how competition law responds during periods of economic instability and prolonged recession. In the context of a globalized free market, which has faced many global economic crises affecting almost all states and now strives to stabilize under continued uncertainty and constant change, there has been significant advocacy for the establishment of a protective legal framework for businesses in distress. The European Union is committed to rigorously upholding free competition, with its primary focus being the protection of consumer welfare, while at the same time, it remains cognizant of the need to provide appropriate support measures for companies struggling financially. The need for a more accommodating approach to merger control is ever more prominent, particularly in relation to firms facing severe financial difficulties due to economic crises, an issue the EU knows from firsthand. Hence, the Failing Firm Defense (FFD) emerged as a concept which enables such companies to use a defense in merger cases where the failing firm is likely to exit the market regardless of the merger.

The dissertation explores the possibility and benefits of expanding the application of the FFD through a more flexible interpretation of its traditionally stringent criteria, comparing the different approach adopted in the EU and the U.S.A., both of which crystalized this defense. These, difficult to satisfy, criteria may be reassessed considering the financial difficulties firms possess, allowing for greater leniency by the competition authorities in approving mergers which might otherwise be blocked as anticompetitive. The study delves into the legal arguments of the FFD assessing firstly the relevant EU regulations and Guidelines regarding the merger and acquisitions policy, focusing particularly on the horizontal mergers, and the issues stemming from them. There will be an attempt to identify the way the competition authorities view it, both through their regulatory frameworks and through a review of relevant case law which shapes their attitudes towards this defense. These Guidelines are pivotal in the shaping of how mergers are evaluated, especially when there is a possibility of the market structures being significantly affected and competition hindered in any way.

The research not only contours the key main legal principles embedded in the Commission's approach to merger control but also provides a comparative evaluation of the EU and the U.S. approach and frameworks to merger control under competition law, establishing the differences in the diverse treatment those two jurisdictions adopt when dealing with distressed firms in M&A, shedding light on the broader implications of their respective policies for the economy.

Finally, the reforms in the Greek competition legal framework will be analyzed, particularly following the introduction of Law 3959/2011. This law introduced substantial changes to the

way mergers are regulated in Greece, especially in the context of an economy that has been significantly affected by a very important financial crisis.

The thesis also seeks to map the current landscape of merger control, incorporating insights from key international discussions. Notably, it draws on the proceedings of the 2009 OECD Roundtable on Competition Policy, which explored how merger control should be adapted during economic crises. By analyzing the Commission's evolving stance on merger control in recent cases, the research offers critical insights into how competition law may continue to develop in response to economic challenges.

Ultimately, this dissertation concludes by reflecting on the potential future direction of merger control policy in the EU, particularly in light of the ongoing challenges posed by economic instability. It argues that while the FFD remains an exceptional legal argument, its relevance and applicability may increase as competition authorities seek to strike a balance between maintaining competitive markets and preventing widespread business failures. As the global economy continues to face uncertainties, the role of competition law in fostering both economic resilience and market fairness will be increasingly significant, making the careful application of the FFD an important tool in safeguarding market stability.

Abbreviations

Competition Authority (CA)

Competition & Markets Authority (CMA) in the UK

Court of Justice of the European Union (CJEU)

Department of Justice (DOJ)

European Economic Community (EEC)

Failing Firm Defense (FFD)

Federal Trade Commission (FTC) DOJ

Hellenic Competition Commission (HCC)

Office of Fair Trading (OFT)

Sherman Antitrust Act (SAA)

Substantial Lessening of Competition (SLC)

Treaty on the Functioning of the European Union (TFEU)

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A. Introduction

Under the conditions of the economic crisis we are experiencing, the global community, as a whole, witnessed the sudden collapse of banking institutions, with the Lehman Brothers, and other business giants, which in turn dragged the entire economy into a recessionary trajectory. The spread of the economic crisis, as has historically been the case, was accompanied by intense skepticism regarding the identification of its causes, as well as the search for effective ways to neutralize and limit it. In the context of discussing about addressing the crisis, the question whether competition policy is effective in its implementation or whether a temporary "relaxation" of competition rules might be necessary until the economy returns to normalcy, was raised. It would not be an exaggeration to claim that most people became aware of the exact meaning credit crunch and credit crisis after 2007, through the relentless global economic crisis, that has unfolded since then¹. The spread of the crisis, as has historically been the case, was accompanied by intense skepticism regarding the identification of its causes and the discovery of effective ways to neutralize and limit it.

The economic crisis that gradually erupted across the world, beginning with the collapse of the subprime mortgage market and the subsequent bankruptcy of the investment bank Lehman Brothers, had a clear impact on the functioning of the free market, the viability of businesses, and consequently on the regulatory framework of mergers in Europe². As stated in an ECB Colloquium *"these escalating tensions culminated in the bankruptcy of Lehman Brothers in September 2008, an event which triggered an unprecedented surge of volatility across mature-economy financial markets and a broad-based decline of asset prices. With this, an adverse feedback between the condition of the financial system and real economic performance was unleashed, contributing to a sharp economic slowdown across the developed economies"*³. The need to adapt the existing legal framework for mergers is precisely what we will attempt to thoroughly investigate here, taking into account the necessity and evaluating the effectiveness of the measures deemed necessary to reverse the negatively shaped economic climate and

¹ "Timeline Credit crunch to downturn" BBC 7 August 2009 (available at <http://news.bbc.co.uk/2/hi/business/7521250.stm>) (last accessed 15 September 2024).

² Cassola N. Hortaçsu A. and Kastl J. (2013) "THE 2007 SUBPRIME MARKET CRISIS THROUGH THE LENS OF EUROPEAN CENTRAL BANK AUCTIONS FOR SHORT-TERM FUNDS" *Econometrica* 81(4) 1309–1345 (available at <http://www.jstor.org/stable/23524179>).

³ European Central Bank (2012) "The Great Financial Crisis Lessons for Financial Stability and Monetary Policy" ECB Colloquium (available at <https://www.ecb.europa.eu/pub/pdf/other/greatfinancialcrisisecbcolloquiumpapademos201206.en.pdf>), p. 7.

normalize the functioning of the real economy. In the context of this discussion on how to address the crisis, the question arose whether competition policy is effective in its application, or if perhaps, a temporary "relaxation" of competition rules is needed until the economy is restored to normalcy.

In this context, focused on the field of mergers, this paper aims firstly to approach the concept of "rescue mergers" between "problematic" companies and to assess whether the criteria of the "Failing Firm Defense" ("FFD"), as used in case law from both the EU (and also specifically Greece), and the U.S.A., are capable of contributing to the rescue of businesses and the stabilization of the crisis, which, facing the risk of exiting the market due to insolvency, consider the possibility of an acquisition or merger with competing companies that can contribute to their survival and financial recovery. *"While there is no theoretical or empirical basis for departing from the basic principles of competition policy during general economic downturns, financial distress at the industry or company level is certainly relevant to antitrust analysis... [A]ntitrust enforcement should take account of real-world economic conditions"*⁴. We will see that the European Union deemed it necessary to strengthen the framework for the control of business mergers in Europe to save a significant portion of these businesses and help them emerge from the crisis with the least possible impact on the market. Secondly, the research will scrutinize rescue mergers between Greek companies and then provide a comparison with the American system, for a more whole-rounded viewpoint on the FFD.

After the collapse of the free market and the inability of businesses to survive without a protective legal framework, the call for state activity, as opposed to state passivity, resurfaced, along with the demand for a clear protective legal framework at the state, union, or even international level. Economic crises of such magnitude, like the one that preceded in 2007 and continues to unfold globally, raise concerns. These are undoubtedly exceptional cases in which the fate of businesses is directly dependent on the course of the economy as a whole. The unstable economic conditions make it more likely for a firm to exit the market due to insolvency, it becomes more difficult to ascertain whether the firm's 'failure' is inherent in the firm's fundamentals, and therefore inevitable, or is caused by a temporary lack of financing⁵. It is therefore reasonable to call for the formation of a legal framework that could guarantee the

⁴ Remarks of Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, Prepared for Delivery to ABA Antitrust Symposium, Competition as Public Policy, Competition Policy in Distressed Industries, May 13, 2009 ("Shapiro Remarks"), p. 12.

⁵ Niels G. (2009) "Failing or just flailing? The failing-firm defence in mergers" Oxera Agenda March (available at <https://www.oxera.com/wp-content/uploads/2018/03/Failing-firm-defence-3.pdf>).

survival of businesses, playing a crucial role during similar severe economic crises. As disproportionate strictness in merger controls that leads to excessive state intervention would be problematic, and equally dangerous would be any uncritical relaxation of competition regulations in favor of certain sectors or businesses, conversely, the demand for leniency and relaxation of the framework primarily concerned businesses in economic distress due to the crisis.

Hence, the calls for changes to the legal framework were varied. Although it may seem paradoxical and contradictory, the economic and legal world made demands in both directions: toward tightening oversight and toward relaxation. The call for stricter regulations was undeniably aimed at preventing similar phenomena in the future, especially regarding the peculiar sector of financial institutions. However, there is a serious risk that the desired outcomes may not be achieved if the response to the scientific community's calls for tightening or loosening merger oversight is uncritical. In the latter case, as history has shown, we would once again face distortions in the domestic and international economy, leaving businesses unprotected in the event of future economic difficulties. There is a question about the nature and substance of such intervention, which may involve either a more lenient interpretation of the rules in favor of businesses or the acceleration of pending case reviews. There is also a pressing need for a more relaxed framework for approving collaborations between potential businesses, with swift responses from competition authorities to facilitate and expedite their exit from unfavorable economic conditions. Therefore, it is worth examining and evaluating the possibilities and conditions under which a corrective state or union intervention (as outlined above) in the nature and application of competition law is deemed necessary to enhance economic activity.

The argument for rescue mergers, the FFD, is an exception to the underlying philosophy of merger control. When this argument is applied, mergers with anti-competitive effects may be approved, as the structure of competition would deteriorate similarly without the merger taking place. This report examines the Commission's approach to evaluating such mergers according to the Merger Regulation (EC 139/2004)⁶. The failing firm defense was first accepted in the Kali und Salz case, where the Commission established the criteria for its application, with them later reiterated in the BASF/Eurodial/Pantochim decision. In some cases, this defense is applied to a unit of a business, meaning that while the entire company may not fail, a particular

⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 Official Journal of the European Union (L 24) 1.

unprofitable division might, leading the company to strategically shut down that troubled section.

Rescue mergers sit at the crossroads between reorganization and competition law. Reorganization is a costly process, and both shareholders and creditors suffer losses. If troubled companies choose and manage to go through reorganization and liquidation, they cease operations and liquidate their assets. This inevitably leads to the loss of competitive advantage, as well as the loss of productivity and jobs. An alternative strategy for dealing with financial difficulties, and one of the ways to implement a successful debt restructuring process, is through rescue mergers. These are typically accompanied by necessary efficiencies, as a defense to offset any potential anti-competitive consequences of the merger, and have as their primary purpose and motivation the improvement of the company's viability and profitability. However, in times of economic crisis, the question of whether these conditions remain stable or whether a more favorable regime is applied to facilitate the rescue of troubled companies. This report argues that the Commission has not relaxed its criteria for the failing firm defense and the approval of rescue mergers, but rather applies them in a more flexible manner, considering the strategic motives of these companies and their economic efficiency. The Guidelines on Horizontal Mergers provide initial guidance on rescue mergers, outlining the conditions and criteria under which such a merger can be approved.

The importance attributed to modifying the framework specifically regarding the provisions on business mergers lie precisely in the fact that the result, the purpose of a merger, is to reduce competition between the participants in the merger, or often as a consequence, to reduce costs through increased efficiency, leading to lower prices and increased market shares. Given that businesses have long been at the heart of the modern economy, it seems clear that their survival is rightfully the primary concern and challenge for governments and, by extension, the legal and economic world.

B. The failing firm defense under the EU legislative framework

I. Defining the of the legislative framework

There are many reasons that lead companies to mergers and acquisitions. Among other things, businesses aim to maintain or improve their profitability and to increase their productivity and innovation. Mergers and acquisitions result in the consolidation of assets, both tangible and intangible, as well as their overall business activities⁷. In competition law, by concentration we refer to the process where two or more independent companies merge, or one company acquires control over another. This process leads to the consolidation of business activities and, thus, capital concentration, and are a common aspect of business strategies aimed at increasing market share, gaining efficiency, or reducing competition. However, the purpose of merger control legislation is to maintain an efficient and competitive market by preventing mergers and acquisitions that may have adverse effects on the functioning of effective competition and lead to a monopoly or oligopoly.

Nevertheless, the Commission may determine that the merger, which would otherwise further strengthen the market position, may still be compatible with the common market, if one of the participating businesses is facing financial difficulties, such as those leading to its exit from the market (e.g., an imminent suspension of payments). A key condition is that there must be no causal link between the merger or acquisition and the worsening of competition conditions in the market. On the contrary, it must be assessed that even without the merger, the structure of competition in the relevant market would deteriorate to at least the same extent. This is a forecast, *ceteris paribus*, for the hypothetical, future market developments, made by the Commission based on available empirical data⁸. This process may be necessary for the survival and growth of businesses in a competitive and dynamic economic environment, as well as potentially improving the efficiency of the economy and ensuring social welfare.

However, it can also lead to monopolies or oligopolies, as previously mentioned, where a few companies hold significant market control, thus affecting competition and creating challenges and barriers for new businesses entering the market. For this reason, competition law is designed to ensure healthy competition in markets and to empower competition authorities to set limits and restrictions on businesses to prevent excessive concentration and the creation of monopolies that could restrict competition.

⁷ Tzouganatos, D. (Ed.). (2020). *Law of Free Competition: Substantive Law of Free Competition*. (Vol. 1, 2nd ed.) Nomiki Vivliothiki., p. 1031.

⁸ Trianta Triantafyllakis, G. D. (2020). *Free Competition Law* (4th ed.). Nomiki Vibliothiki.

The roots of competition law can be found in national laws. In Europe as industrialization led to the rise of monopolies and trusts the need for a legal framework to protect it was evident. The first modern competition laws were enacted in the United States with the Sherman Act of 1890⁹. While Europe did not immediately follow, concerns about market dominance grew in individual European countries, with Germany being one of the first countries in Europe, with the 1923 Cartel Law¹⁰, aimed at regulating cartels and monopolistic practices. The first Treaty setting the European standards for competition law was the Treaty of Rome in 1957¹¹. The formal development of European competition law began with the Treaty of Rome, which established the European Economic Community (EEC). This treaty laid the foundations for the EU approach to competition and included critical provisions ensuring free movement of goods, services, people, and capital, all vital elements of EU law. Articles 85 and 86 of the Treaty (now Articles 101 and 102 TFEU¹²) became the cornerstone of EU competition law, with article 101 prohibiting agreements between companies that restrict competition, including cartels, and article 102 prohibiting the abuse of a dominant position by companies in the market.

As article 102 TFEU focuses on the behavior of companies and the existing market, merger regulation focuses on the future shape of the market, examining the potential effects of any proposed merger or acquisition. Hence, it was deemed necessary to establish a new legal framework, a Regulation, to ensure more effective control over all concentrations based on their impact on market competition. Thus, Regulation 4064/1989¹³ was the first European regulation of merger control and it was succeeded by the updated and improved 139/2004 Regulation¹⁴. This Regulation, which primarily aims to ensure effective competition in the EU's internal market, introduced various procedural and substantive amendments, the most significant of which concerned the new evaluation test (SIEC test) and certain issues related to the simplification of the evaluation process¹⁵.

⁹ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1890).

¹⁰ Kessler W.C. (1936) "German cartel regulation under the decree of 1923" *The Quarterly Journal of Economics* 50(4), pp 680-693, Oxford University Press (available at <https://www.jstor.org/stable/1891098>).

¹¹ Treaty Establishing the European Economic Community (Treaty of Rome), March 25, 1957, 298 U.N.T.S. 11.

¹² Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47.

¹³ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1989 O.J. (L 395) 1.

¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1.

¹⁵ Triantafyllakis, G. D. (2020). *Free Competition Law* (4th ed.). Nomiki Vibliothiki, 248-249.

II. Forms of mergers and their categorization

The concept of concentration is interpreted broadly to cover all actions that result in a permanent change in the control of the participating companies, and consequently, in the structure of the market. By concentration we mean the permanent consolidation of two or more independent businesses, creating one de facto or de jure common financial unit under centralized administration¹⁶. The Commission, for its part, systematically classifies the concentrations notified to it, categorizing them accordingly in order to determine the occurrence of concentration and assess whether they are compatible with the Common Market and competition law. From a market level perspective we have horizontal and non-horizontal (vertical) mergers and from a legal perspective and according to the Merger Control Regulation (EC 139/2004)¹⁷ and the provisions of Articles 5 and following of Law 3959/2011, as currently in force, two categories of concentrations are distinguished: a) concentrations that occur through the merger of two previously independent companies, and b) concentrations that take place through the acquisition by one company of direct or indirect control over all or unit of another company.

A concentration typically takes the form of one company absorbing another, where the absorbing company retains its legal identity, while the absorbed company ceases to exist as a legal entity. A concentration in the form of a merger may also occur when two or more companies, while maintaining their legal personalities, establish joint economic management through a contract or adopt the structure of a company listed on two stock exchanges. If such a contract results in a de facto merger of the participating companies into a single economic entity, this action is considered a concentration¹⁸.

Regarding the second category of concentrations, it is important to briefly address the concept of control, as defined in Article 3(2) of Regulation 139/2004 and Article 5(3) of Law 3959/2011. Specifically, control stems from rights, contracts, or other means which, either individually or in combination with others, and taking into account the relevant factual or legal circumstances, provide the ability to exert decisive influence over a company's activities, particularly through, firstly, ownership or usage rights over all or part of the company's assets, and secondly through rights or contracts that enable decisive influence over the composition, meetings, or decisions

¹⁶ Triantafyllakis, G. D. (2020). *Free Competition Law* (4th ed.). Nomiki Vibliothiki, p. 250.

¹⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1.

¹⁸ Triantafyllakis, G. D. (2020). *Free Competition Law* (4th ed.). Nomiki Vibliothiki, pp. 250-253.

of a company's governing bodies¹⁹. Control is acquired by individuals or companies that hold these rights or are beneficiaries of these contracts; or are entitled to exercise the rights derived from these, even without holding the rights or being beneficiaries of the contracts.

As mentioned before, legally, a concentration may take the form of either joint or exclusive control over all or part of one or more companies. Joint control exists when two or more companies or individuals can exercise decisive influence over a joint company, typically when they hold veto power over actions that determine the company's commercial strategic behavior²⁰. Joint control is also characterized by the ability to create a deadlock, due to one or more parent companies having the power to reject proposed strategic decisions.

In contrast, exclusive control refers to the power of a single shareholder to determine a company's strategic decisions. As masterly explained by Triadafyllakis, exclusive control can be acquired on a legal (de jure) or factual (de facto) basis and it can be further divided into positive exclusive control, where the controlling company has the authority to set the commercial strategic decisions of the controlled company, and negative control, where a single shareholder can veto such decisions but may also impose them on its own. In summary, in the case of acquiring exclusive control on a legal basis, the company acquires the majority of the voting rights, ensuring control. Legal exclusive control may also occur in cases of minority ownership when accompanied by special rights, such as preference shares with specific privileges, or other rights that allow minority shareholders to determine the controlled company's strategic commercial behavior, like veto rights or the ability to appoint more than half of the board of directors. Similarly, a minority shareholder may exercise exclusive control on a de facto basis if there is a high probability of securing a majority in the general assembly. In this determination, the level of shareholder participation in the company's collective bodies, as well as the presence of other shareholders in these bodies, must be taken into account.

III. The EU Guidelines of Horizontal Mergers²¹

Due to the existence of various different legal systems, a common approach regarding the interpretation of EU competition law in the assessment of a merger cannot be guaranteed. The

¹⁹ Tzouganatos, D. (Ed.). (2020). *Law of Free Competition: Substantive Law of Free Competition*. (Vol. 1, 2nd ed.) Nomiki Vivliothiki, p. 1034.

²⁰ Triantafyllakis, G. D. (2020). *Free Competition Law* (4th ed.). Nomiki Vibliothiki, p. 257-259.

²¹ European Commission. (2004). Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. Official

Guidelines assist in identifying points of convergence and divergence, particularly in the different approaches to market definition, market conditions, coordinated and non-coordinated effects analysis, and the treatment of efficiency concepts. The guidelines assess potential effects harmful or obstructive to market competition due to certain transactions known as horizontal mergers. The elimination of potential competitive barriers through horizontal mergers allows the acquiring company to increase prices, without necessarily being correlated with the reaction of its competitors, thus leading to non-coordinated effects. Additionally, horizontal mergers may result in coordinated effects, creating conditions conducive to substantial tacit collusion, thereby reducing competition's effectiveness and driving up prices.

Hence, the Guidelines provide a way for the Commission to establish the desired approach to horizontal mergers, providing for the direct application of the Regulation regarding concentrations and clarifying the economic analysis the Commission follows when examining horizontal mergers. The Guidelines encompass both the theoretical basis and methodology for assessing any potential outcomes that affect free and substantive competition arising from horizontal mergers. As a clear objective of the Guidelines is the establishment of predictability in ensuring the legal security of the involved parties, the Commission places great importance to improve the reasoning based on a more economic analysis, as the Guidelines focus on the quality of the required analysis to identify the competitive constraints that the involved parties place on one another.

The Regulation aims to ensure the smooth, effective functioning of the internal market without structural changes that could have anti-competitive effects. Horizontal mergers inherently eliminate existing competition between the merging parties and reduce the number of competitors in the market. Beyond this limitation, it is highly likely that market competition conditions will be significantly affected, leading to a deviation from consumer benefit and efficiency goals, even without violations of competition law.

In short, the Commission wishes to ensure that an otherwise anti-competitive merger is justified based on an inevitable worsening of competition conditions, regardless of whether the merger proceeds or not. If it is sufficiently proven that the future market structure would be equally or even more harmful to competition regardless of the successful outcome of the notified merger, there is no causal link between the merger and the worsening of competition, and thus no justification for prohibiting the merger.

Journal of the European Union, C31/5. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205(02)).

The Commission, relying on the case law of the CJEU, will address the "Failing Firm Defence" when used for justifying mergers. In markets characterized by intense competition, mergers involving troubled companies can have positive effects by increasing the efficiency of existing productive forces, repurposing those forces, and aiming for more socially oriented goals, such as job retention and other socially beneficial impacts. Additionally, there are other positive economic aspects of such mergers, such as economies of scale and scope, or other types of efficiencies. These benefits would not only disappear if the desired agreement were prohibited but would also cause new harmful economic and social effects on competition.

The Commission has emphasized the exceptional nature of applying the theory of failing firm mergers and the necessity of the aforementioned causal link in the case of *Kali & Salz*²². In general, a merger that threatens to harm and worsen competition would be prohibited in principle. The burden of proof lies with the interested parties to show that the circumstances of the notified merger allow for the exceptional application of the FFD. The burden of proof rests with the party invoking the existence of a failing firm merger. If one of the parties involved in the merger is problematic and would inevitably exit the market, the merger should not be considered as significantly impeding competition.

To ensure a safe assessment of the impact of a proposed merger and, consequently, a decision that benefits the market and consumers, multiple factors must be considered, such as the market shares of the merging companies, the existence and degree of actual and potential competition, supply and demand, market entry barriers, the purchasing power of consumers of the relevant goods and services, the interests of intermediaries and end consumers, and the evolution of technical and economic progress, provided that it benefits consumers and does not hinder competition. Additionally, the efficiency resulting from the merger and the existence of troubled companies among the involved parties must be considered.

IV. The Concept of Rehabilitation and the Legislative Framework of Rehabilitation Law

Before starting the analysis of the concept and criteria of rehabilitation-related consolidations, it is appropriate to make a brief reference to the concept of rehabilitation, reorganization and its legislative framework.

The rehabilitation process itself aims to prevent the dissolution of an over-indebted, but viable, business and to rescue it. In this way, not only the debtor benefits, but also the creditors. When the business continues to operate, the creditors may be satisfied to a greater extent as compared

²² Joined cases C-68/94 and C-30/95, *Kali und Salz AG v. European Commission*.

to the option of selling the debtor's assets; employees, who do not lose their jobs; and, in any case, the economy itself, which does not lose a productive unit. This is the main difference from enforcement law is that the latter primarily aims to satisfy the creditors without a provision for the economic consequences, viability, and general interests of the business²³. This can be achieved through a set of specific provisions that regulate the conditions for the reorganization of a business in financial crisis, with the immediate aim of ensuring the survival of the business itself and the indirect aim of rehabilitating the national economy²⁴.

Greek law regarding the rehabilitation of businesses has entered a period of privatization since 1990²⁵. It involves the privatization of distressed businesses that were nationalized under Law 1386/83, as well as other enterprises in the broader public sector. Already from the “Development” Law 2601/1998²⁶, the legislation aimed at developing investments in Greece, and through them, increasing jobs, business competitiveness, restructuring sectors and production branches, exploiting entrepreneurial opportunities, and protecting the environment. To achieve these goals, the abovementioned law gave the possibility to certain financially troubled businesses of significant importance to the country's economic development to be subject, under certain conditions and given their adverse position, to a special regime of rescuing and restructuring business plans, so that they could manage to rehabilitate and recover. Criteria for a business to enter a rehabilitation process were, on the one hand, the viability of the plans and, on the other hand, the competitiveness of the products to be produced and the increase in employee employment.

According to Law 4738/2020²⁷, adapted in line with Directive 1023/2019, the rehabilitation process constitutes a collective pre-bankruptcy process, which aims at the preservation, utilization, restructuring, and recovery of the business through the ratification of the agreement, provided that the principle of non-deterioration of the position of creditors is met. In this way, the principle of non-deterioration of the position of creditors is satisfied, firstly, in the case

²³ Perakis, E. (2017). *Bankruptcy Law* (3rd ed.). Nomiki Vivliothiki, p. 11.

²⁴ Kotsiris, L., & Chatzinikolaou-Angelidou, R. (2006). *Law of Restructuring and Liquidation of Insolvent Enterprises* (3rd ed.). Sakkoulas Publications, p. 1.

²⁵ European Commission. (2011). The Economic Adjustment Programme for Greece: Fourth Review – Spring 2011 (Occasional Paper No. 82). Directorate-General for Economic and Financial Affairs (available at https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp82_en.pdf), p. 15-16.

²⁶ Law 2601/1998 (Government Gazette A' 81/15.04.1998)

²⁷ Law 4738/2020 (Government Gazette A' 207/27.10.2020), art 31.

where it does not place any non-consenting creditor, or any creditor whose consent is implied by law, in a worse financial position than they would be in the event of the debtor's bankruptcy; and, secondly, when it does not result in any non-consenting creditor who holds ownership of an asset or is an assignee of claims—particularly in the context of financial leasing or factoring—and who has the right to satisfy their claims against the debtor from such assets, being required to receive amounts less than what they would have received or will receive by exercising their contractual rights in relation to those assets.

Any natural or legal person with bankruptcy capacity, who has their center of main interests in Greece and is in a present or imminent inability to fulfill their overdue monetary obligations in a general manner, can be subject to the rehabilitation process, according to the Greek legal framework. From the combined application of the above legislation, it becomes clear that the pre-bankruptcy rehabilitation process is the entirety of judicial and extrajudicial actions provided for by law that a debtor, with bankruptcy capacity and their center of main interests in Greece, who is in a present or imminent inability to fulfill their overdue monetary obligations in a general manner, may undertake. This may be achieved to reach, with the legally required majority of their creditors, a rehabilitation agreement, secure its ratification by the bankruptcy court, thereby avoiding bankruptcy, and save their business, provided that the collective satisfaction of their creditors is not adversely affected.

C. Economic crisis and competition law

The ongoing economic crisis has introduced into the discussion of competition law the question of whether, during times of economic uncertainty, the strict criteria of rescue mergers still fulfill their purpose in their current form, or if their modification toward a more lenient approach is warranted. In 2009, the European Commission²⁸ responded to questions about how to address the economic crisis by stating its intention to continue applying the existing merger rules, including the FFD. It was stated that “*the Commission is committed to continue applying the existing rules, taking full account of economic environment. That means the Commission can and will take into account the evolving market conditions and, where applicable, the failing firm defense*”. This intention was confirmed by a series of recent decisions by the Commission and national competition authorities, in which the evaluation of the three criteria remained unchanged, such as in the *Aegean/ Olympic* and *Nynas/ Shell/ Harburg Refinery* cases.

To provide a substantiated response without being swayed by the admittedly poor economic circumstances, it would be necessary to look back at historical instances where lawmakers intervened to “correct” by relaxing competition rules during similar downturns. One of the most notable examples of such intervention was the American “National Industrial Recovery Act”²⁹, which was enacted to mitigate the effects of the 1929 economic crisis. Under this law, businesses were allowed to make agreements with competitors that although restricted competition, they were deemed lawful. Nevertheless, its economic outcomes showed that this regulation was ultimately harmful to the economy³⁰. It is clear that under current conditions of massive contraction in entire sectors of the economy, rejecting a merger with a competitor that could help reduce production costs for a “troubled” company and simultaneously restore the acquiring company's production capacity could cause damage. On the other hand, we must not underestimate the potential cost to competition if a merger strengthens a company's market power. In times of crisis, the entry of competitors is more likely, and it should not be ruled out by mergers that permanently alter negatively the existing competitive structure.

Those who support this expansion of the FFD argue that competition authorities should not ignore the financial difficulties of small businesses, particularly in obtaining financing from the banking system. The expansion of the scope of restorative mergers to include failing firms is

²⁸ Kroes, N., Dealing with the current financial crisis, Brussels, SPEECH/08/498, p. 3, (available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_498).

²⁹ National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933).

³⁰ Cole H.L. and Ohanian L.E. (2004) “New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis” *Journal of Political Economy* 112(4) 779–816 (available at <https://doi.org/10.1086/421169>).

based on the logic that companies facing difficulties today may become "failing" tomorrow. While these problems are real and understandable, it is important to remember that even under these conditions, some businesses have managed to maintain a satisfactory level of profitability and remain viable. Therefore, it would be unfair for competition law to grant such a strong competitive advantage to "failing firms" at the expense of sustainable entrepreneurship. It may be argued that state aid to troubled sectors of the economy also gives competitive advantages to non-profitable businesses, however, such a comparison should be dismissed because there is a difference between short-term financial assistance, that temporarily affects market competition, and the approval of mergers, that permanently alters the market structure.

In conclusion, the Failing Firm Defense, as it stands today, can fulfill its intended purpose of reorganizing troubled businesses in a neutral way for competition. The fact that many companies have unsuccessfully tried to use FFD during the economic crisis does not mean that more relaxed criteria should be adopted. Competition authorities must be fully aware that a more lenient application of the criteria may lead to short-term positive effects for the economy, by supporting failing companies, while the long-term impact on the competitive structure will undoubtedly be negative. Therefore, competition law, whether in times of economic prosperity or recession, should not deviate from its fundamental goal, which is the protection of competition as a means to improve consumer welfare.

I. The impact of the economic crisis on the merger of financial institutions

The concept of an economic crisis is not a newly coined term, as it has been widely established in both every day and scientific discourse in recent years. The most recent example is the 2007 crisis, characterized by the subprime mortgage crisis in the U.S. alongside the bankruptcy of Lehman Brothers. Specifically, as previously mentioned, the deflation in prices, combined with the default on mortgages classified as high-risk, as well as the devaluation of secured securities, caused losses among banks and other financial institutions. The complexity of the claims involved created widespread uncertainty, regarding both the extent of the damage and its distribution among financial institutions.

The ensuing collapse of banking institutions significantly affected internal lending capabilities, resulting in reduced access to available capital and risk-taking, thereby critically impacting production. Consumers limited their spending due to the prevailing financial situation and rising unemployment, leading to a drop in demand. These factors naturally shifted attention toward the investigation of the causes of an economic recession and the methods of recovery. It is important to note that the financial crisis was linked, to some extent, to the general economic mindset prevailing until then, which was associated with the ideas of market self-

regulation and profit as the primary goal. These were believed to have contributed to the emergence of the crisis.

During periods of severe economic crisis, the way in which mergers are evaluated is also affected, and competition authorities, which are responsible for merger control, face multiple challenges, such as the lack of financing in the markets. This may affect healthy businesses, which may encounter significant problems due to the difficulty in obtaining the capital needed to continue their activities in the market and may consequently be forced to exit. However, if a business with high demand for its products leaves the market due to issues in financial markets, this is not favorable for consumers or competition, which would be restricted. In this context, competition authorities face great difficulty in evaluating proposed mergers amid significant and rapid changes in market conditions. It is common, therefore, during times of economic crisis to observe a tendency towards a relaxation in the application of competition rules in general, and specifically in the control of mergers involving distressed firms that face severe financial difficulties and are at risk of insolvency or bankruptcy.

In this context, the role of competition is rather balancing. Specifically, under normal conditions, a drop in demand will lead to a corresponding drop in prices, forcing businesses that are unable to adapt to the reduced demand to exit the market. By protecting competition, free economic activity is ensured for both businesses and consumers, through the application of rules designed to contribute to consumer welfare and, as far as possible, to economic efficiency.

A key area of action for a banking institution is the granting of loans to businesses, individuals, or the public sector, which is facilitated through the borrowing of funds from depositors. This operating model is crucial for the functioning of banks, as it leads to a high degree of leverage, which manifests in the assumption of debt to develop business activities. At the same time, to make this operational model feasible, banks ensure continuous access to liquidity, whether it comes from deposits, market financing, or the Central Bank³¹. Moreover, credit institutions are characterized by three fundamental features that govern the banking system. Firstly, there are bank runs, which occur during times of economic crisis, with the mass withdrawal of deposits by depositors due to the fear of impending bankruptcy. To cope with this extensive withdrawal, a bank may resort to liquidating assets, often at a price lower than expected, leading to insolvency. Secondly, there is the excessive risk-taking, which is linked to agency theory, this refers to the divergence of interests between shareholders and management in a corporation, where managers may take excessive risks to maximize their compensation. Finally, there is the

³¹ Rokas, I., & Gortsos, C. (2012). *Elements of Banking Law*. Nomiki Vivliothiki, p. 7.

contagion risk, a significant parameter due to the increased interconnectedness between banking institutions, heightening the risk of exposure to systemic dangers³².

Regarding the application of competition law to credit institutions, there are diverse opinions. Some argue for the exemption of credit institutions from this legal framework, citing their role as entities managing services of general economic interest, making them a matter of economic policy for member states and thus falling under the exception of Article 106(2) TFEU³³. According to case law, it is up to the member states to demonstrate whether they fulfill the criteria for providing services of general economic interest, allowing competition rules to be applied to banking activities. It is rather important to analyze the compatibility of the conditions of a rescue merger in cases of banking mergers or acquisitions. Initially, the application of this theory appears inapplicable to systemically important credit institutions, given the avoidance of their collapse and efforts to rescue them through state aid. Additionally, such a merger might exacerbate the crisis for the acquiring company, making it also inevitable.

On the other hand, a balance between worsening and improving competition can justify approving a merger compared to the scenario of state aid or keeping a failing bank operational. The consolidation of credit institutions, especially during a financial crisis, may ensure interbank lending under more favorable conditions, prevent mass deposit withdrawals, and avoid the "bailout" phenomenon. In any case, competition authorities play a key role in evaluating mergers, aiming to protect competition while ensuring systemic stability.

³² OECD. (2009). Competition and Financial Markets: Key Findings. OECD Publishing (available at <https://www.oecd-ilibrary.org/docserver/c32e99af-en.pdf>, pp. 34-36.

³³ “1. *In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

3. *The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”*

In Greece, the first efforts to tackle the financial crisis with a focus on strengthening the economy began in 2008 with the passing of Law 3723/2008³⁴, which enabled the state to participate in bank recapitalizations, provide state guarantees, and issue public debt securities. Additionally, Law 3864/2010³⁵ established the Hellenic Financial Stability Fund. Furthermore, in 2011, the EU Summit adopted an economic support program, which included private sector involvement in bond exchanges, resulting in a 50% nominal reduction of Greek debt held by private investors. Through this program, Greek banks exchanged government bonds for new ones, increasing their capital needs and causing significant losses for banking institutions³⁶. This development led to the provision of state aid from the Hellenic Financial Stability Fund to the four systemic banks³⁷.

The severity of the economic crisis triggered a wave of mergers in the banking sector, drastically changing the landscape as it had been shaped up until that point. From 2012 to 2014, an excessive number of mergers took place, involving credit institutions facing financial difficulties, under state intervention following the involvement of the Bank of Greece, such as Piraeus Bank and Eurobank. It is important to note that the mergers that occurred during this official period were not evaluated based on the criteria of a "rescue merger" but rather within the framework of general merger control. However, they were included in the relevant discussion since they involved "troubled" banking institutions. Similarly, corresponding phenomena of mergers also occurred in Europe, with significant state intervention aimed at rescuing large systemic banks, according to the following cases.

³⁴ Law 3723/2008 (Government Gazette A' 250/09.12.2008).

³⁵ Law 3864/2010 (Government Gazette A' 119/21.7.2010).

³⁶ Bank of Greece, (2012) Report On The Recapitalisation And Restructuring Of The Greek Banking Sector, (available at https://www.bankofgreece.gr/Publications/Report_on_the_recapitalisation_and_restructuring.pdf), p. 13.

³⁷ European Commission, Press release, State aid: Commission temporarily approves aid to Alpha Bank, EFG Eurobank, Piraeus Bank and National Bank of Greece; opens in-depth investigations, (available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_12_86/IP_12_86_0_EN.pdf).

1. The Lloyds/HBOS³⁸ case

A notable example is the *Lloyds/HBOS case*, where the Secretary of State for Business intervened on public interest grounds, bypassing the usual procedure which required notification before the UK's competition authority (Office of Fair Trading) and a potential referral to the Competition Commission if there was a concern about restricting competition. In reviewing Lloyds' request, the competition authority was tasked with evaluating the conditions for a rescue merger. The authority rejected the relevant claim and, in its examination of the merger, highlighted that state aid to HBOS was a more likely scenario due to its systemic importance. The intervention was considered temporary, as the state's stake was expected to be sold off. Ultimately, the authority concluded that the merger should be referred to the Competition Commission due to its anticipated negative impact on competition. However, the merger was approved by the Secretary of State for Business on grounds of public interest, arguing that nationalizing HBOS would hinder its operation under competitive conditions. This decision faced significant criticism, as it was later observed that the post-merger banking institution continued to face solvency issues and repeatedly sought state aid.

2. The Soffin/Hypo Real Estate case³⁹

Another case that sparked discussion around rescue mergers was *Soffin/Hypo Real Estate*. Soffin was a state-controlled entity tasked with boosting the capital of German banks in an effort to stabilize the banking system. To achieve this, it had the tools to acquire shares, provide debt guarantees for banks, and temporarily purchase assets. Leveraging the German legal framework, Soffin attempted to acquire shares in Hypo Real Estate, a credit institution in crisis, with the acquisition being classified as a merger since it would give Soffin de facto exclusive control.

In evaluating the merger, one of the legal issues was the jurisdiction of the Commission due to the entity's activity in the public sector. Specifically, the Commission noted that Soffin was under the control of the Financial Market Stabilization Fund Agency, both of which were overseen by the Federal Ministry of Finance. As a result, considering overall control, the

³⁸ Lloyds TSB Group plc and HBOS plc Merger Inquiry (2008), Office of Fair Trading, United Kingdom, (available at https://assets.publishing.service.gov.uk/media/5592bba440f0b6156400000c/LLloydstsb.pdf_sessionid_4EBCDA0A4B36535AF8355B90D18E00A2.pdf).

³⁹ Case No. COMP/M.5508 - Hypo Real Estate Holding AG v. Federal Republic of Germany (Soffin).

Commission examined the turnover of the banking institution Kreditanstalt für Wiederaufbau, which was controlled by the Federal Ministry of Finance, and attributed a European dimension to the merger. Ultimately, the Commission approved the merger, as the market share remained at a low level, even after the acquisition.

II. Mergers between banking institutions in the Greek market

In the climate of uncertainty and instability the financial crisis created, the Greek banks began seeking alliances to ensure their sustainability. Thus, in 2012, a massive wave of concentrations began, radically changing the structure of the banking sector in Greece. Until that time, 62 credit institutions were operating within the Greek banking system, either headquartered or with branches in Greece⁴⁰, while the concentration ratio remained relatively high without any noticeable decline in the competitiveness of the credit institutions, which may be seen in the decision of the CA of Greece regarding the concentration of Piraeus Bank and the Agricultural Bank of Greece⁴¹.

The concentrations that took place between 2012 and 2014 were of a restructuring nature, carried out to rehabilitate the so called "problematic" credit institutions in order to safeguard financial stability and maintain depositor confidence⁴². Hence, the Bank of Greece was able to intervene in credit institutions facing difficulties, aiming to maintain stability in the financial system and to safeguard public trust. As evident from the above these concentrations were initiated by the state rather than the private sector, following processes activated by the Bank of Greece. The inability of most Greek banks to meet capital adequacy and liquidity requirements during the crisis led to the forced revocation of their operating licenses by the Bank of Greece and their placement under special liquidation. However, to protect the depositors of the banks under liquidation and ensure the smooth continuation of their operations, the Bank of Greece invoked Article 63D of the repealed Law 3601/2007 to facilitate the acquisition of the assets (rights or obligations) of "problematic" banks by healthy credit institutions. Similarly, Article 63E of Law 3601/2007 was used for the establishment of transitional credit institutions, which would later be transferred to financially sound credit

⁴⁰ Hellenic Bank Association (2011) "The Greek Banking System in 2010" (available at <https://www.hba.gr/UplFiles/Ereunes-meletes/EllinikoTrapezikoSistima2011.pdf>), pp. 13-14.

⁴¹ Hellenic Competition Commission. (2012). Decision No. 549/VII/2012 (available at https://www.epant.gr/files/2012/apofaseis/549_2012.pdf), p. 33 onwards.

⁴² According to Article 63B of the repealed Law 3601/2007 (Government Gazette 178 A/1-8-2007), paragraph 1: *'By decision of the Bank of Greece, for the sake of protecting financial stability and strengthening public confidence in the financial system, restructuring measures under Articles 63C to 63E may be imposed on a credit institution.'*

institutions. Therefore, these consolidations were used by the central bank as part of preventive restructuring measures. There were also consolidations within the Greek banking sector initiated by private entities, which, while not subjected to the procedures of Law 3601/2007, are considered as part of the restructuring efforts since they occurred within the framework of strengthening the Greek financial system.

Piraeus Bank played a leading role in these consolidations, as in just two years, it absorbed the Agricultural Bank of Greece, acquired Geniki Bank, and after the onset of the Cypriot banking crisis, took over the Greek branches of Cypriot banks and purchased Millennium Bank. Another bank that actively participated in the restructuring processes carried out by the Bank of Greece was Eurobank, which acquired the transitional credit institutions New Proton and New Postal Savings Bank, both of which had been established with funds from the Hellenic Financial Stability Fund (HFSF)⁴³.

This massive wave of mergers reshaped the map of the Greek banking system, strengthening the presence of systemic banks while weakening other competitors. This gradual concentration of market shares by the four major banks, while it succeeded in restoring the lost competitiveness and credibility of Greek banks, also raised concerns regarding the reduction of competition in the banking market. The Hellenic Competition Commission was eventually called upon to ensure the presence of fair competition in a banking sector characterized by significant shocks and destabilization risks.

III. OECD position⁴⁴ (2009 Roundtable on Competition Policy)

In 2009, the OECD Competition Committee convened to discuss, among other things, the issue of rescue mergers. It was emphasized that while the core focus is on applying the conditions analyzed earlier, these do not constitute the only factors, as other equally important elements may exist, with the burden of proof lying with the parties involved in each case. A common observation was that, despite the limited use of this theory, the global financial crisis and its visible effects on markets would likely necessitate its more frequent invocation. The main issues discussed were the evidence supporting the need to protect failing firms, the debate on showing potentially greater leniency during times of economic crisis, and the unique case of mergers involving financial institutions. It was noted that the argument for a rescue merger is more likely to be used during an economic or financial crisis, as many companies face financial

⁴³ Pistiolis K. (2013) “Merger Control in the Greek Banking Sector: The Example of the Incomplete Merger between the National Bank of Greece and Eurobank” *Global Antitrust Review*, p. 171.

⁴⁴ OECD, (2009) Roundtable on failing firm defense.

instability. One suggested solution is merging with a financially stronger company. However, it is crucial for competition authorities to carefully assess the various mergers under review, distinguishing between companies facing imminent market exit and those merely experiencing a decline in economic performance.

The criteria for this evaluation show little variation among member states, with the main criterion being the causal link between the merger and the confirmed worsening of competition in the relevant market. However, if one of the merging parties is failing (on the verge of economic collapse and likely to exit the market absent the merger), the expected deterioration in market structure (from a competition standpoint) may not be causally linked to the merger. In such cases, the post-merger scenario might be less harmful to competition than the alternative, where the failing firm exits the market. These mergers may be approved even if post-merger competitiveness is weaker than before the merger. The Roundtable concluded that despite slight variations in the approaches of different competition authorities, all require the cumulative fulfillment of three criteria for accepting the failing firm defense; firstly, the failing firm must leave the market in the near future due to financial difficulties unless the merger occurs, secondly, there is no feasible alternative transaction or reorganization that is less harmful to competition than the proposed merger and finally the assets of the failing firm will have to exit the market if the merger does not take place.

One legal framework difference in handling rescue mergers is the comparison between the company's bankruptcy, along with the liquidation of its assets, and the approval of the merger, including the effects of each scenario on competition. Some competition authorities emphasize this factor, as it is observed that companies remaining in the market might compete to acquire the market share and assets of the distressed company. On the other hand, if the merger is approved, those assets would be concentrated on a single company, the acquiring one. According to the Committee's opinion, it is not necessary to prove that the financially troubled company's market share would automatically go to the acquiring company if the merger does not occur. This condition has not been adopted by many member states, possibly because the FFD is more integrated into European legal frameworks than into individual national laws, and because this theory has evolved through case law.

It has also been observed that the theory of rescue mergers is not legally embedded in all member states, with some opting to handle relevant cases by applying the aforementioned criterion of causal connection. However, the exclusive application of this criterion appears not to align with the now more sophisticated handling of such cases and focuses more on merger approval by competition authorities than on the adverse effects on competition. In contrast, countries that have incorporated the rescue merger theory into their legal framework are more

aligned with the correct application of the causal connection criterion. Countries that have formally adopted the FFD report that it produces results similar to those obtained through proper application of the causal link criterion and offers greater predictability for companies.

Moreover, it was agreed that an economic crisis cannot be used as a criterion to relax the conditions applied to protect a troubled company. Specifically, since 2009, the number of mergers evaluated by competition authorities surged, but this did not affect their approach, which remained grounded in strict legal application. The OECD Committee members judged that economic crises do not justify lenient treatment, given that other tools such as bankruptcy proceedings or state aid can be used to support companies. One of the key arguments for strictly applying the conditions is the temporary nature of an economic crisis compared to the lasting impact of a merger on competition and market structure. It was suggested that there is no need to relax these criteria, even amid the global financial crisis. Authorities emphasize that excessively lenient standards could lead to many false positives (Type II errors), with long-term and difficult-to-reverse market distortions.

A final point made was that banks are unique economic players due to their critical role in the stability of the financial system and, therefore, the potential collapse of a major financial institution could trigger a chain reaction and a broader loss of confidence, potentially leading to a severe economic downturn. All countries recognize the special role of financial institutions, although some do not consider that mergers involving failing banks should be treated differently. Nonetheless, most countries are willing to treat these mergers more leniently when a bank is at risk of collapse. Some authorities argue that government intervention (e.g., financial assistance) is often expected to prevent failing banks from exiting the market, making it unlikely that the bank's assets would be lost.

The roundtable's general conclusion was that the rescue merger theory has seen limited application under the Merger Regulation and that the economic and financial crisis did not lead to an increase in companies invoking this defense. In the financial sector, this can largely be attributed to the fact that banks facing solvency issues were rescued through recapitalization with state resources, as also evident in the case of Greece. The current framework for analyzing troubled companies was deemed balanced, as it allows for the smooth restructuring of the economy without obstructing competition. Thus, there is no need to relax the criteria during crises. Instead, competitive assessments should account for rapidly changing market conditions. As such, the current strict regime should be maintained and applied flexibly, based on the specifics of each case.

IV. The KLM/Martinair case⁴⁵

The case in question concerned the merger between two companies operating in the air transport sector, KLM and Martinair. The merger involved KLM acquiring 50% of Martinair's shares, making Martinair a subsidiary of KLM. The European Commission, in examining the merger, took into account the fact that KLM already had control over Martinair prior to the merger, which clearly reduced the potential anti-competitive effects of the merger. Although the Commission did not accept the parties' arguments regarding the protection of the failing company, it considered Martinair's difficult financial situation, the state of its assets, its significant investment needs, and the challenges in meeting those needs.

This case suggests that in instances where a merger results in the failure or decline of a business sector within an otherwise profitable parent company, the parties may wish to focus on explaining why there is no causal link between any potential adverse effects on competition and the merger, or, if such a link exists, why it is insignificant due to the reduced competitive significance of one of the merging parties, rather than seeking to invoke the FFD⁴⁶.

In conclusion, the European Commission determined that the proposed merger's impact on the passenger airline activities of the parties involved would likely be limited. Taking into account, among other factors, the potential efficiencies that might arise from the demand side as a result of the merger, the proposed merger was declared compatible with the common market, as the Commission did not find it capable of significantly impeding effective competition within the common market or a substantial part of it.

V. The Nynas/Shell/Harburg Refinery Assets case⁴⁷

In 2013, the Commission approved the third rescue merger in a row, with Nynas acquiring control of Shell's Harburg Refinery. The rationale was that, without the acquisition, the most likely scenario would be the exit of refinery assets from the market, which would lead to increased prices due to a significant reduction in supply⁴⁸. Shell Deutschland Oil, part of the Shell group, aimed to transition into a new phase by divesting from fuel refineries and its main

⁴⁵ Case No COMP/M.5141 – KLM/Martinair.

⁴⁶ Clark E. and Foss C. "When the Failing Firm Defence Fails" *Journal of European Competition Law & Practice* Volume 3 Issue 4 August 2012, pp 317–331, (available at <https://doi.org/10.1093/jeclap/lps023>).

⁴⁷ Case No COMP/M.6360 – Nynas/Shell/Harburg Refinery Assets.

⁴⁸ European Commission Press Release Nynas/Shell/Harburg Refinery (available at http://europa.eu/rapid/press-release_IP-13-804_en.htm).

production plant in Hamburg, while Nynas sought to lease the primary production structure for 25 years, with the alternative being an asset transfer agreement. For this reason, the case concerned the Commission, especially regarding its compatibility with the common market, given the limited number of competitors. After thorough examination, the Commission concluded that the deterioration of competition should be attributed to the merger, and its assessment required the use of the counterfactual analysis method. Despite the lack of explicit reference, the Commission chose to base its analysis on the criteria for rescue mergers.

The Commission compares the competitive conditions that would result from the transaction with those that would prevail without it. In most cases, the competitive conditions at the time of the Commission's review, prior to the transaction's completion, are the relevant benchmark for this evaluation. In this case, the continuation of the exploitation of the Harburg refinery assets by Shell would have been the benchmark. However, in certain instances, the Commission may consider foreseeable future market changes to assess whether a merger significantly impedes effective competition. In this case, alternative scenarios could have been foreseen (sale of the refinery to Ergon, a Shell competitor, or shutdown of the facilities if the acquisition did not proceed). The Commission used the counterfactual method to evaluate which of these scenarios was the most likely and what the impact of the proposed transaction would be compared to that scenario. The Commission concluded that, without the merger, the most likely scenario was that Shell would shut down the Harburg refinery. Thus, the Commission assessed the competitive impact of the notified transaction compared to the impact on competition from closing the Harburg refinery assets⁴⁹.

Regarding the application of the rescue merger criteria, initially, by examining the criterion of the problematic division's exit from the market in the absence of an acquisition, it was noted that this involved a "failing division." The conclusion was that shutting down the facilities would affect Shell's dynamics in Europe but not its overall financial position. As highlighted, the relevant division would exit the market, as its continued operation would cause losses to the core business, and Shell had already publicly announced the shutdown due to its exit from the naphthenic oil market⁵⁰.

⁴⁹ Castaldo G. and Bogdanov A. (2015) "The Nynas Case The Interplay Between the Failing Firm Defence and the Counterfactual Method Journal of European Competition Law & Practice Vol 6 No 5.

⁵⁰ Castaldo G. and Bogdanov A. (2015) "The Nynas Case The Interplay Between the Failing Firm Defence and the Counterfactual Method Journal of European Competition Law & Practice Vol 6 No 5.

Regarding the second criterion of less harmful alternatives to competition, the Commission considered two scenarios if the merger were prohibited: the sale of the assets to the only potential buyer, Ergon, or the cessation of operations. However, evaluating Ergon's behavior throughout the assessment showed that it was not a viable alternative buyer⁵¹.

Finally, the Commission took into account the third criterion concerning the exit of the assets from the market, which was deemed fulfilled due to the situation already shaped by Shell's decision and the lack of an alternative buyer. Furthermore, it was noted that without the acquisition, there would be a significant reduction in supply in the sector, leading to price increases. It is worth noting that this case was the first where the Commission accepted the argument of a failing division. Although Shell's viability was not at risk, it was accepted that the decision to shut down the plant was due to genuine economic hardship. Moreover, the parties demonstrated that the proposed merger would positively impact competition. On the other hand, through the merger, Nynas, a specialized company needing to expand its production capacity to meet growing global demand, would enhance its competitive activity in the market⁵².

Of particular interest is the absence of any explicit reference to a "failing firm" or "failing division," as the decision marked the first time the FFD was applied. The Commission opted not to analyze the fact that continuing the refinery's operations would not endanger Shell's overall financial position. Instead, it focused on the economic significance of the assets, Shell's strategic plans as the parent company, and the absence of a reliable alternative buyer, based on counterfactual analysis rather than a series of doctrinal criteria. The case should not be considered a relaxation of the failing firm criteria but rather an application of these criteria in a more flexible manner, emphasizing evidence and exploring alternative scenarios.

VI. The case of the COVID-19 pandemic

While the theoretical dialogue on economic crises and their impact on competition, particularly concerning business mergers, remains active, the sudden emergence of the COVID-19 pandemic created new conditions and challenges. The unexpected onset of the pandemic, combined with the inability to predict its full extent, contributed to a new economic crisis,

⁵¹ Castaldo G. and Bogdanov A. (2015) "The Nynas Case The Interplay Between the Failing Firm Defence and the Counterfactual Method Journal of European Competition Law & Practice Vol 6 No 5.

⁵² Giannino M. (2014) "There Is Always a First Time The European Commission Applies the Failing Firm Defence to an Unprofitable Division in NYNAS/Shell/Harburg" (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544084).

which necessitated the adoption of essential measures, overriding conventional solutions. The need to comply with new hygiene standards, state restrictions, and the decrease in supply and demand raised doubts about businesses' ability to adapt to the newly shaped environment. This led many companies to financial distress, which resulted to their inevitable exit from the market. Those were profitable before the pandemic, an example of which are companies in the tourism sector, such as airlines and tourist operators. Another notable characteristic of the pandemic crisis was the disruption of supply chains, which led to shortages of certain essential products, eventually negatively affecting business behavior and, in some cases, resulting in potentially exploitative pricing. Distinguishing between legal and illegal pricing practices, as well as the best way to address the latter, posed significant challenges for competition authorities.

In this context, mergers and acquisitions have become a key factor for companies looking to revise their strategic planning, improve competitiveness, and, naturally, continue their operations. It is noted that after the World Health Organization declared the COVID-19 outbreak a pandemic, the number of mergers and acquisitions dropped by 50%, a decrease attributed to the new business framework characterized by an increase in home-based purchases, new government measures, and the unpredictable consequences of the pandemic⁵³. In the months that followed, the easing of restrictions and the start of vaccinations triggered a resurgence of mergers. Specifically, according to a Deloitte report the total value of reported deals between January and October 2020 reached \$2.2 trillion⁵⁴. The fourth quarter of 2020 was one of the three most significant for M&As in the past two decades, with deals valued at \$612 billion, compared to \$461 billion in 2019 and \$491 billion in 2018⁵⁵.

Under these conditions, it was logical for companies to invoke the FFD argument, urging competition authorities to be more lenient in approving proposed mergers, which under other circumstances might have raised competition concerns. However, it was necessary to establish that one of the merging businesses was indeed failing and met the three conditions mentioned earlier: that the so-called failing firm would be forced to exit the market in the near future due

⁵³ Kooli .C Lock Son M. "Impact of COVID-19 on Mergers Acquisitions & Corporate Restructurings Businesses" 2021 (1), pp. 102-114 (available at <https://doi.org/10.3390/businesses1020008>).

⁵⁴ Macmillan I. and Purowitz M. (2021) "M&A and COVID-19: Charting New Horizons" Deloitte (available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/COVID-19/gx-COVID-19-Mergers-Acquisitions-Charting-New-Horizons.pdf>).

⁵⁵ Massoudi A. (2020) "Global M&A Recovers on Vaccine Hopes and US Political Stability" Financial Times (available at <https://www.ft.com/content/b1935f10-d1b2-4920-ab76-0a2dff670556>).

to severe financial difficulties, that there was no other less anti-competitive alternative to the notified merger, and that if the merger did not proceed, the failing firm would inevitably cease its operation and that the merger would not distort the structure of competition.

In March 2020, the European Commission announced a primary framework for state-led initiatives to support member states' economies. The pandemic was recognized as a serious public health emergency with severe consequences for both global and European economies. Therefore, a coordinated response from both member states and EU institutions was deemed necessary to mitigate the economic impacts. The Commission emphasized that banks and other financial intermediaries could play a key role in maintaining credit flow to the economy, which, if disrupted, could severely slow down economic activity as businesses would struggle to pay suppliers and employees. Member states were encouraged to take measures incentivizing financial institutions to continue supporting economic activity⁵⁶.

The subsidies granted by Member States to businesses in accordance with Article 107(3)(b) of the TFEU, based on this communication, and which are channeled through banks as intermediaries, directly benefit these businesses. These subsidies are not aimed at maintaining or restoring the viability, liquidity, or solvency of the banks. Similarly, the aid granted by Member States to banks under Article 107(2)(b) of the TFEU to compensate for direct damage suffered as a result of the COVID-19 outbreak is also not intended to maintain or restore the viability, liquidity, or solvency of an institution or entity. Therefore, such aid will not be classified as extraordinary public financial support under Directive 2014/59/EU of the European Parliament⁵⁷ and the Council (Bank Recovery and Resolution Directive)⁵⁸ or

⁵⁶ European Commission (2020) “Communication From The Commission Temporary framework for State aid measures to support the economy during the current outbreak of COVID-19” (available at https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=OJ%3AJOC_2020_091_I_0001).

⁵⁷ Council of the European Union Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. Official Journal of the European Union (L 173), pp. 190–348.

⁵⁸ Council of the European Union Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. Official Journal of the European Union (L 173), pp. 190–348.

Regulation 806/2014 of the European Parliament ⁵⁹and the Council (SRM Regulation) ⁶⁰and will also not be assessed under the state aid rules applicable to the banking sector.

As a first measure, the Commission proposed the targeted and proportional application of state aid control, to assist businesses affected by the pandemic while ensuring the unity of the EU internal market and competition conditions. Additionally, the Commission referred to a previous communication where it proposed relevant measures available to businesses, including wage subsidies, suspension of corporate tax, VAT payments, or social security contributions, or direct financial support to consumers for services canceled or non-refundable tickets. Furthermore, the Commission proposed that Member States design support measures and notify the Commission of aid schemes to address urgent liquidity needs and support businesses facing financial difficulties due to the pandemic or provide compensation to businesses operating in sectors particularly affected by the COVID-19 outbreak. Regarding the adoption of temporary measures, the Commission proposed providing limited amounts of aid for a temporary period to businesses facing sudden liquidity shortages. Another temporary measure proposed was the provision of public guarantees for loans for a limited time and loan amount, as well as subsidized interest rates.

At the same time, the OECD, in its policy brief⁶¹ following the convening of its competition committee, emphasized that the magnitude of the pandemic's impact would depend on the duration and severity of the outbreak, as well as the restart and recovery of economic activity. Therefore, given the sudden impact and changes in supply and demand sectors, governments need to take necessary measures to support consumers, workers, and businesses, with a focus on providing immediate support directly affected businesses, such as those in the aviation, tourism, and healthcare sectors. As noted by the OECD, some businesses will inevitably exit the market after the crisis and, consequently, competition authorities may be called upon to

⁵⁹ Council of the European Union. (2014). Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund. Official Journal of the European Union, L 225, 30.7.2014, pp. 1–90.

⁶⁰ Council of the European Union. (2014). Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund. Official Journal of the European Union, L 225, 30.7.2014, pp. 1–90.

⁶¹ OECD (2020) OECD competition policy responses to COVID-19, (available at https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxgniyo7u&title=OECD-competitionpolicy-responses-to-COVID-19).

closely examine some urgent and critical mergers and ensure that those based on public interest reasons remain limited in number. Special treatment is required for so-called "failing firm" mergers. Specifically, if the assets of a business would exit the market anyway, the merger might be more favorable for competition compared to the scenario of the company's bankruptcy, despite the increased market power of the resulting entity. Therefore, competition authorities should continue to carefully analyze such mergers and ensure that all conditions are met. Otherwise, they risk approving anti-competitive mergers with long-term negative market consequences.

As highlighted, the argument of a failing firm relates to non-transient economic difficulties that would force the company to exit the market shortly; cases of poor financial performance or reduced profits do not fall within its scope. While the significance of an unforeseen event in the financial sector cannot be overlooked, it is not sufficient to approve a merger of this type, which explains the limited number of approved cases. With the outbreak of COVID-19, the number of struggling businesses seeking merger solutions increased, justifying this option to some extent. However, this unforeseen circumstance is not expected to assist the work of competition authorities, as distinguishing between businesses that have suffered permanent impairment and those capable of short-term recovery may prove challenging. In this context, cooperation with relevant bodies (e.g., liquidators) and the involvement of a specialized court is necessary. Additionally, to thoroughly analyze the case in the event of a rejected merger proposal, a forward-looking analysis of the competitive dynamics and possible developments in light of the crisis, whose impact and timeline may remain unclear, is required.

Finally, competition authorities may face more cases involving companies that would not have been able to exert significant competitive pressure in any case due to their unfavorable financial condition. At the same time, in assessing these cases, they cannot ignore aspects such as the impact of the crisis on an entire sector, especially when competitors of the merging parties may fail or be unable to compete to the extent they could have in the pre-crisis market. Therefore, competition authorities must strictly monitor failing firm mergers while considering whether any substantial or procedural differentiation is justified to ensure appropriate and faster review.

The first case during the pandemic where the FFD was invoked is that of *Amazon/Deliveroo*⁶². The UK's Competition & Markets Authority (CMA) stated that "the COVID-19 pandemic has not led to any relaxation of the criteria by which mergers are assessed or the CMA's

⁶² Competition and Markets Authority (UK) (2020) "Amazon/Deliveroo merger inquiry CMA" Final Report 4 August 2020 (available at <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>).

investigative standards"⁶³. However, it is interesting that the CMA accepted the FFD in approving the merger between Amazon and Deliveroo in April 2020. Specifically, at an initial stage, the UK's competition authority (CMA) expressed doubts about Amazon's acquisition of a part of Deliveroo, which would bring it into the online food delivery market. While the CMA had found that Deliveroo was performing successfully in its sector, this situation changed significantly with the outbreak of the pandemic, leading Deliveroo to shut down key locations and experience a significant revenue reduction. These new conditions severely impacted the company's operations, leading Deliveroo to inform the CMA that if the merger did not proceed, the company would go bankrupt and exit the market.

Given the new circumstances, the CMA concluded that Deliveroo would indeed exit the market without Amazon's investment, as additional funding sources had become limited due to the pandemic, especially for startups like Deliveroo⁶⁴. Considering that Deliveroo's market exit would be more harmful to competition than approving Amazon's investment, the CMA provisionally approved the merger. Eventually, the CMA approved Amazon's acquisition of 16% of Deliveroo, arguing that the merger would enhance Amazon's competitive activity both in food provision and online food delivery.

⁶³ UK, Competition and Market Authority, "Annex A: Summary of CMA's position on mergers involving "failing firms", April 22, 2020, (accessed at: <https://www.gov.uk/government/publications/merger-assessments-during-the-coronavirus-covid-19-pandemic/annex-a-summary-of-cmas-position-on-mergers-involving-failing-firms>).

⁶⁴ Competition and Markets Authority (UK) (2020) "Amazon/Deliveroo merger inquiry CMA" Final Report 4 August 2020 (available at <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>).

E. Legal criteria

I. The SIEC (“Significant Impediment of Effective Competition”) test

In today's globalized economy, where mergers and acquisitions (M&As) shape the modern economy, there are certain strategies for companies looking to expand their influence and increase their market share and profitability. However, mergers may pose a significant threat to competition and consumer welfare, if they create a friendlier environment to monopolies or oligopolies that stifle innovation, increase prices, and reduce the available choices of consumers. To prevent these negative outcomes, the European Commission applies rigorous scrutiny to all mergers proposed assessing the potential negative benefits for the community. The Significant Impediment of Effective Competition (SIEC) test was introduced through Regulation 139/2004⁶⁵ and it serves as a critical tool for analyzing the impact mergers pose on competition within the European Union (EU).

Before the adoption of the SIEC test, European merger control was navigated by Regulation 4064/89 and supported that mergers creating or strengthening a dominant position that significantly deteriorated competition in the European market were incompatible with the EU “standards” (Article 2(3)⁶⁶). The new regulation declares that mergers are incompatible with the common market if they significantly impede effective competition in the common market or a substantial part of it thereof, especially when resulting from the creation or strengthening of a dominant position. As clearly stated in Recital 25 of the regulation “*Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market*”⁶⁷. The previous test focused on whether a proposed merger would create a dominant position or strengthen an already dominant market player that could potentially hinder competition, making thus the dominant position a necessary

⁶⁵ According to Article 2(2)(a). 2 “*Concentrations which are not likely to significantly 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 compatible with the common market*”.

⁶⁶ According to Article 2(3) “*For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:*

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.”

⁶⁷ Recital 25 of the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

precondition for competition hinderance. This test although effective in preventing some anti-competitive mergers, in certain cases such mergers could potentially impede competition, even without creating a dominant position to the party, this can be particularly evidenced in oligopolistic markets where there are only few companies holding high levels of market power.

In response to these issues, Regulation 139/2004 introduced the SIEC test as a more flexible test. This test allows the European Commission to block mergers not only based on the creation of a position of dominance but also on other factors that could potentially threaten competition in the market, even when the firm does not hold a dominant position. The Significant Impediment to Effective Competition (SIEC) test, as adopted in Article 2(2) of the Regulation aims to ensure legal certainty in assessing the potential negative effect of a merger in the market or a part of it. This test was created as a response to the shortcomings of the previous “test”, as highlighted in cases like *Airtours*⁶⁸ in the EU and *Heinz*⁶⁹ in the U.S., where market shares before the merger fell below the threshold of a dominant position, but still posed a threat to competition. Hence, with the SIEC test these issues are addressed, as the expansion beyond the dominant position to include also non-coordinated effects, covers situations where a merger could still harm competition through unilateral actions, even without establishing a dominant player in the market. As a result all mergers with potential adverse effects to competition are assessed. Moreover, the SIEC test introduces referral mechanisms to enhance the merger control system in the EU, ensuring that the appropriate authorities handle investigations and that legal certainty regarding jurisdiction is being maintained. Specifically, it is stated in explanatory paragraph 16 that “*The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community*”⁷⁰.

Regarding the Greek legislation, there is no direct definition of the “abuse of dominant position”, however Article 1(1) of Law 3959/2011⁷¹ lists the primary forms of such behavior.

⁶⁸ Case T-342/99 *Airtours v Commission* [2002] 5 C.M.L.R. 317

⁶⁹ US District Court, Columbia, *FTC v HF Heinz Company et al.*

⁷⁰ Recital 16 of the Merger Regulation 139/2004 on the control of concentrations.

⁷¹ “1. It is prohibited for one or more undertakings to abuse their dominant position within the national market or in a part of it.

2. Such abuse may, in particular, consist in: a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; b) limiting production, distribution or technical development to the prejudice of consumers; c) applying dissimilar conditions to equivalent trading transactions with other trading parties, especially the unjustified refusal to sell, buy or otherwise trade, thereby placing certain undertakings at a competitive disadvantage; d) making the conclusion of contracts subject to acceptance, by the other

Nevertheless, as stated above, since dominance can indeed be shared by multiple companies (not only one, as the previous European legislation), also known as "collective dominance". Hence, it is not necessary for a company to hold a dominant position, but rather if there is a collaboration among more firms, placing them in such a position. The Commission in *Airtours /First Choice*⁷² has defined collective dominance as a situation in which a group of firms, without engaging in collusion formally after a direct agreement, nonetheless behave in a way that is consistent with coordinated effects reducing competition. The European Commission has maintained an economic-based approach in its merger approach, but nevertheless, granting it more flexibility. However, the commission must prove that the merger does pose a threat to competition, which may be difficult in cases of tacit collusion or when the company will have a smaller share of the market.

The SIEC test does not require dominance for anti-competitive effects to arise. For instance, when the merging firms offer products which are substitutes, easily replaced they are in direct competition with each other. Hence, before the merger, if one company raises its prices, a customers can switch to its competitor, but after it, customers will no longer have alternative products, enabling the newly merged company to unnecessarily raise its prices without being a dominant market player. Product differentiation and the nature of the market enable several companies simultaneously to wield market power, particularly in oligopolistic markets where competition is already limited. As a result, under the SIEC test it is not obligatory to prove dominance for the Commission to not approve a merger. Instead, the focus is on the anti-competitive effects which help eradicate anti-competitive mergers which would otherwise go unchecked under a dominance-based standard.

II. The 'causal link' criterion and relevant case Law

The concept of the 'causal link' criterion is pivotal in the process of assessing whether a merger involving a financially distressed company, at the verge of bankruptcy, can be approved under EU competition law. Regulation 139/2004 is the most fundamental tool of the EU for ensuring the preservation of free and effective competition between companies and businesses within

parties, of supplementary obligations which, by their nature or according to commercial practice, have no connection with the subject of such contracts."

⁷² Case No IV/M.1524 –Airtours /First Choice.

the European Union. The Commission itself is the body implementing it and its interpretation stems from the Guidelines on the Assessment of Horizontal Mergers⁷³.

Although the regulation does not explicitly mention mergers concerning failing firms, the Guidelines provide a clear framework for such scenarios. Specifically, at point 89 of the Guidelines it is stated that *“The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger (109). This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger”*⁷⁴. Hence, according to these Guidelines, the Commission may permit a merger that would otherwise raise competition concerns if one of the parties is a failing firm. The main idea behind this notion is that the hinderance of competition would have occurred even without the merger being evident in that market, due to the failing company's inevitable exit from the market from its financial difficulties. In such cases, the Commission examines whether the competitive landscape in that specific market would be influenced equally or to a greater extent without that specific merger. Therefore, this perspective allows the merger to be approved and effected when it is deemed that the deterioration of competition results not from the merger itself but from the distressed firm ceasing to exist due to bankruptcy.

In order for the Commission to accept the Failing Firm Defense for a merger, certain stringent conditions must be met and those are stated clearly in point 90 of the Guidelines⁷⁵.

The failing firm must be facing an imminent and inevitable exit from the market due to its severe financial struggles, which would render its survival in the field impossible. Hence, the acquisition by another company must be the only means of its survival, as the allegedly failing firm would in the near future be forced out of the market due to financial difficulties, if it is not taken over by another undertaking. The parties involved in the merger must provide robust evidence, including financial reports and certain profitability assessments, to demonstrate the

⁷³ European Commission. (2004). Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. Official Journal of the European Union, C31/5. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205(02)).

⁷⁴ Guidelines for the assessment of horizontal concentrations according to the Council Regulation on the control of concentrations between undertakings, C 31/5, of 5.2.2004 - para 89.

⁷⁵ Guidelines for the assessment of horizontal concentrations according to the Council Regulation on the control of concentrations between undertakings, C 31/5, of 5.2.2004 - para 90.

firm's inability to continue operations without being acquired by another company. This determination is based on projections of future cash flows, discount rates, and returns, which are inherently uncertain⁷⁶.

A second criterion is that “*there is no less anti-competitive alternative purchase than the notified merger*”. In the absence of any alternative viable option to that merger that would be less harmful to competition the Commission may approve it. The merging parties must prove that no other option exists besides the proposed merger and that efforts were made to find other potential buyers or investors. This requirement can be particularly challenging to satisfy, as the distressed company must effectively showcase itself to potential buyers, which could harm its standing in the market and accelerate its downfall. There are various requirements regarding the extent of the effort failing firms must make to attract other alternative and perhaps potentially less harmful for the competition, acquisition offers. In both the US (“unsuccessful good-faith efforts”) and Ireland (“good-faith and verifiable efforts”), the merging parties must prove that they took reasonable steps to explore alternative options⁷⁷. In contrast, some other jurisdictions only examine whether such alternative options actually exist, without imposing a formal obligation on the failing firm to demonstrate that it has assessed and afterwards rejected the other possibilities.

Finally, the third criterion states that “*in the absence of a merger, the assets of the failing firm would inevitably exit the market*”. Hence, it must be established that if the merger does not go through, the failing company will inevitably cease to exist and its assets will either leave the market entirely through their liquidation after the filing of bankruptcy or be reallocated in a way that would not pose a competitive threat. As stated in the *Kali and Saltz* cases, which will be analyzed afterwards, the unavoidable exit of the assets, that the failing firm possesses, from the market, especially in cases where such a merger would lead to a monopoly, can support the conclusion that the share the failing firm has in the market would inevitably be transferred to the other merging entity. Therefore, this aspect of the FFD is particularly difficult to prove, as a very detailed analysis is required, in order to establish whether any competitor might be interested in acquiring parts of the distressed firm's assets during its liquidation. In practice like in other jurisdictions in the EU the burden of proof lies with the merging parties, meaning they must convince the Commission that no competitor would take over these assets in this case and that their market exit is hence inevitable⁷⁸. As stated in the OECD Roundtable of 2009 “*The three abovementioned conditions must all be satisfied simultaneously in order to argue successfully that the proposed merger does not causally contribute to any distortion of*

⁷⁶ OECD, (2009) Roundtable on failing firm defense, p. 33.

⁷⁷ OECD, (2009) Roundtable on failing firm defense, p. 32.

⁷⁸ OECD, (2009) Roundtable on failing firm defense, p. 33.

*competition in the market. The parties must also show that there is no alternative transaction with less anti-competitive effects. This is also analytically demanding. If forecasting the competitive effects of a merger is difficult on its own, comparing prospectively the effects of two competing mergers is a much more complex exercise. In practice it may require detailed information about potential acquirers that will not be available to the failing firm unless it enters into negotiations with several parties at once. It may also prove to be highly complex and time consuming since there are many potential alternatives*⁷⁹. The parties must prove that any harm to the competitive landscape would occur even without the merger, solely due to the firm's inevitable market exit. In this way, the causal link serves as a safety measure, ensuring that mergers involving failing firms disrupt market dynamics in an unfair way. The Commission has to evaluate whether the potential weakening of competition originates from the merger itself or from the inevitable exit of the failing firm.

Regarding the burden of proof the Roundtable of 2009 has stated that in all the jurisdictions examined under it, the criteria for successfully invoking the *failing firm defense* are exceptionally stringent, placing a significant burden of proof on the merging parties. They must convincingly demonstrate that, even without the merger, the failing company's assets would imminently exit that market. As stated in the Roundtable *"This comparison will provide a good indication as to whether or not keeping the firm 'alive' is a profitable course of action"*⁸⁰. The valuation of the company as a viable entity depends on the willingness of stakeholders to support a potential financial or economic restructuring and evaluating the liquidation value requires a thorough understanding of the industry's overall health. In a profitable sector, a firm's assets may command a higher price if sold to competitors, whereas in a declining industry, their value would be minimized.

All in all, while these Guidelines provide a structured approach in assessing the impact of failing firm mergers, it is important to note that they primarily focus on the fate of the distressed firm's assets, rather than taking a broader view of how market conditions might evolve in the absence of the merger. This narrow focus could potentially overlook other significant factors that might influence the competitive landscape and economic stability in the long term. Nevertheless, the following cases shaped the FFD framework as it is today.

⁷⁹ OECD, (2009) Roundtable on failing firm defense, p. 33.

⁸⁰ OECD, (2009) Roundtable on failing firm defense, p. 33.

1. The Aerospatiale – Alenia/ De Havilland⁸¹ case

The case of *Aerospatiale-Alenia/de Havilland* was the first one the Commission dealt with in terms of the Failing Firm Defense. In this case Alenia and Aerospatiale aimed to purchase De Havilland, a division of Boeing focused on regional aircraft. Both Alenia and Aerospatiale were already active in the turboprop aircraft market through their joint venture, ATR. Their merger with De Havilland would have created a combined entity holding 64% of the global market for medium-sized jets and ATR and De Havilland after a merger would obtain a worldwide share of about 50 % of the overall commuter market and about 65 % in the Community. However, the merging parties argued that the acquisition was necessary to prevent De Havilland from being eventually shut down by Boeing⁸². Hence, the European Commission, upon reviewing the merger under the Merger Control Regulation 4064/1989, which is now replaced by Regulation 139/2004, questioned the claim that De Havilland would exit the market if the merger did not go through and the possibility of liquidation. It was pointed out that Boeing had expressed a preference to sell De Havilland rather than close it down and, additionally, it noted that Alenia and Aerospatiale were not the only potential buyers for the business.

Therefore, the Commission assessed several factors, including De Havilland's strong market reputation, the quality of its products, and the fact there was no foresight of an improvement in its financial performance, prohibiting the concentration in question, which dealt with the difficulty of a partial undertaking and assessing that the exit of De Havilland's exit from the market was not inevitable. Although not explicitly stated, the case underscored that proving the need for a “rescue” merger involving a troubled division is more demanding than proving a similar case for an entire failing company.

2. The Kali and Salz case⁸³

The *Kali und Salz* case marked the Commission's first major application of the FFD and is a milestone case in merger control ever since. In this case, the Commission concentrated on the need for a “causal link” between the merger and the formation or strengthening of a dominant position in the market. The case concerned the creation of a joint venture between Kali & Salz AG and Mitteldeutsche Kali AG (MdK), where their combined operations in potash and mineral salt would result in a market monopoly. MdK was facing severe financial difficulties due to its

⁸¹ Case No IV/M.053 - Aerospatiale-Alenia/de Havilland

⁸² Clark E. and Foss C. “When the Failing Firm Defence Fails” *Journal of European Competition Law & Practice* Volume 3 Issue 4 August 201, pp 317–331, (available at <https://doi.org/10.1093/jeclap/lps023>).

⁸³ Joined cases C-68/94 and C-30/95, *Kali und Salz AG v. European Commission*.

low performance and the collapse of its Eastern European markets, which highly deteriorated the already problematic functioning of the company. Its sales in Germany were also declining, and it lacked an efficient distribution system. Thus, both companies wanted to merge, supporting the fact that without the intervention of Treuhand, which had been covering its losses, MdK would have been unable to continue functioning and would eventually cease to exist.

According to the European Commission, a merger can be approved only if it directly leads, (meaning there is a causal link) to a dominant market position. If no causal link can be found between the merger and the creation of the dominant position, then the merger will not be prohibited. The Commission therefore outlined the three criteria to assess the causal link⁸⁴ and afterwards assessed the merger according to them, finding that in this case they were fulfilled. In addressing the first criterion, the Commission highlighted that the focus should be on the market of the failing firm and found that if the assets exited the market it would lead to reduced supply and, thus, increase prices, harming in the long term consumer welfare, a pivotal notion which drives EU competition law.

Further it found that the other two criteria were satisfied, as the acquiring company would eventually obtain the market share of the acquired company if MdK was forced to exit the market, and eventually, that there was no other alternative solution available for the acquisition, a solution less harmful to competition and the consumers. Thus, the causal link between the merger and the creation or strengthening of a dominant position is not evident in cases when the dominant position results from the inevitable exit of a failing firm from the market, rather than the merger itself. As a result, if a merger results in a dominant position presumed to harm competition, the merging parties must disprove this presumption.

In *Kali and Salz* there was an appeal by the French government and Société Commerciale des Potasses et de l'Azote (SCPA), and the decision went to the Court of Justice of the European Union (CJEU). The parties argued that the Commission misapplied the Failing Firm Defense without fully considering and assessing U.S. antitrust laws. However, the CJEU rebutted this argument and confirmed that the Commission was correct in applying the Failing Firm Defense after confirming the merger was compatible with the European market. The Court rejected the

⁸⁴ 1. *The company being acquired would inevitably exit the market if not acquired by another firm.*

2. *The acquiring company would reclaim the market share of the acquired company if the latter disappeared.*

3. *No alternative, less harmful to competition, exists for acquiring the struggling company.*

argument that differences between EU and U.S. antitrust standards invalidated the decision and it found that that differences between U.S. and EU competition laws do not invalidate the Commission's decision. The CJEU supported the Commission's conclusion that MdK's exit from the market was almost certain, justifying the approval of the merger under the Failing Firm Defense.

Another key point of the decision was the introduction of a criterion regarding whether the acquiring company would have obtained the market share of the failing firm if the latter exited the market. The Court ruled that this consideration helped to assess the impact the merger would have on competition and if it is found that the market conditions will worsen regardless of the merger, the FFD could be applied. The CJEU ruled that this criterion was crucial to determine the causal link between the merger and any deterioration in market competition. Despite the fact that the decision was annulled on other grounds, the CJEU upheld the Commission's view that the goal of rescuing a failing company does not warrant an exception to the merger rules and a more favorable treatment of such mergers but rather supports the conclusion that the prohibition simply does not apply⁸⁵.

This criterion, regarding market share absorption sparked controversy, as it is argued that without it, mergers meeting the other criteria would not negatively impact competition in the market, even if the acquiring company would not fully obtain the market share of the failing firm in the absence of the merger. The introduction of this criterion ensures that any potential causal link between the merger and a worsening of the market competition will not be dismissed unless it is clear that the market structure would be similarly deteriorated, even without the merger. In this way the neutrality regarding the deterioration or impediment of competition is ensured, aligning with the causal link concept under Article 2(2) of Regulation 139/2004.

Although the decision in *Kali und Salz* may appear straightforward, applying the outlined criteria becomes more challenging when there are multiple competitors in the market, especially after the failing firm's exit from the market. In such cases, the market share will be generally divided among the remaining firms rather than automatically being absorbed by the acquiring entity. This complexity means that it is not immediately clear whether a merger is devoid of a causal link to the creation of a dominant position, or whether it maintains neutrality.

Additionally, the principle of market share absorption often overlooks the possibility of new competitors entering the market. The ruling highlighted the importance of considering the potential competition when evaluating a merger and the fact that an exit of the failing firm from

⁸⁵ D. Tzouganatos in the Seminar of Greek Commercial Lawyers, Commercial Law and the Economic Crisis, p 125-127.

the market may actually result in the attraction of new competitors, resulting itself in the stimulation of the competition rather than its hinderance. Even in industries with limited players, there's a chance that competitor firms may claim the market share of the failing company. Thus, this possibility indicates that, in some cases, it may be more beneficial for the failing firm to exit the market, enabling enhanced competition among the existing competitor firms and the possibility new players entering the market, as opposed to allowing a merger that might lead to monopolistic or oligopolistic conditions.

3. The Saint-Gobain/Wacker-Chemie/NOM case⁸⁶

In the *Saint Gobain* case, a joint venture was established between Société Européene des Produits Réfractaires (SEPR), a company belonging in the Gobain house, and Elektroschmelzwerk Kempten (ESK), which was part of the German Wacker Chemie group and Nom's, to produce, process, promote, and sell silicon carbide, which is a key material in various industrial applications like refractories, abrasives, and electronics. The proposed merger would unite two very important producers in the industry of silicon production within the European Economic Area (EEA), giving them over 60% of the market share in abrasive silicon and 52% in refractory silicon.

The European Commission did not accept the argument that Wacker Chemie was a failing company because the criteria for the FFD established in *Kali & Salz* were not satisfied. Specifically, the Commission found that Wacker Chemie was not at risk of an imminent market exit due to its financial situation and the proposed merger would eventually lead to a dominant position in the market⁸⁷. It was noted that Saint-Gobain would not have acquired Wacker Chemie's market share if the latter had exited the market. Therefore, it reasonably concluded that competition after the merger would likely be deteriorated, as opposed to the conditions that would continue developing if the merger was not approved. The Commission also ruled that there were alternative buyers for Wacker Chemie and therefore less harmful solutions to that merger and competition existed, such as selling a highly advanced production facility, which could operate as a competitor to Saint Gobain in the market, rather than creating monopolistic or dominant market conditions.

In this case the Commission faced some challenges in assessing whether there is a causal link between the merger and consequences in the market, however, its reasoning aligns with the *Kali und Salz* decision, where it was evaluated whether a merger would worsen competition

⁸⁶ Case No IV/M.774 - Saint-Gobain/Wacker-Chemie/NOM, p. 1.

⁸⁷ Case No IV/M.774 - Saint-Gobain/Wacker-Chemie/NOM, par. 247

conditions in the market or if there were less restrictive alternatives available to maintain competition in the market. According to that decision, there should have been no causal relationship between the merger and the deterioration of competition.

4. The Bertelsmann/Kirch/Premiere case⁸⁸

The *Bertelsmann/Kirch/Premiere* case involved Bertelsmann AG and the Kirch Group seeking to jointly control Premier Medien GmbH & Co KG, along with BetaDigital and BetaResearch, through share purchases by CTL-UFA S.A. and Taurus Beteiligungs-GmbH & Co KG. Bertelsmann was a leader in media, already operating in publishing, music, and television, while Kirch specialized in feature films and TV. Bertelsmann AG is also the parent company of a leading German media conglomerate, operating in sectors like book and magazine publishing, music, and commercial television and it holds interests in Premiere through CLT-UFA, a joint venture with Audiofina SA, where both parent companies merged their European TV interests. Taurus, part of the Kirch Group, serves as a holding company and Kirch is a prominent German provider of feature films and entertainment for TV and has a significant presence in commercial television, within Germany.

Hence, when the two biggest pay-TV producers in Germany wanted to merge the Commission was concerned and eventually did not approve the merger as it was deemed that it would harm competition in the market. While one of Kirch's divisions faced financial difficulties in the subscription TV service, a part of its activity, it was ruled that the company as a whole remained viable. The Commission held that the cessation of the division struggling financially was a business decision rather than an inevitable outcome resulting in its exit from the market, and further alternatives did exist. Specifically, the Commission stated that: *“In this instance Kirch’s abandonment of the pay-TV market is simply a management decision to give up an 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”*⁸⁹. Thus, the three criteria were not satisfied for the FFD argument since it lacked the necessary causal link.

The measures proposed by the merging parties, particularly in the pay-TV sector, were insufficient for maintaining competition and, as a result, Premiere would retain the ability to control market entry conditions. While measures, such as allowing third-party involvement in

⁸⁸ Case No IV/M.993 - Bertelsmann/Kirch/Premiere), pp. 1 - 30.

⁸⁹ Case No IV/M.993 - Bertelsmann/Kirch/Premiere), p. 14.

BetaResearch and eliminating the shareholder veto rights are active steps toward loosening control, the lack of an alternative program platform limits the potential for actual competition. Consequently, the merger is viewed as creating or strengthening a dominant position, hindering true competition in a significant part of the EU community.

III. The efficiency defense

It is important firstly to clarify that the horizontal concentrations mentioned above are essentially mergers between actual or potential competitors in the market. According to the teachings of the Chicago School of thought, businesses engage in mergers or acquisitions with efficiency as their motivation, rather than the market power they possess. Through the efficiency defense firms can justify mergers or generally business conducts which would otherwise be deemed anti-competitive and therefore be blocked. Its primary argument is that, despite a potential deterioration of competition, that merger or conduct will probably lead to a significant efficiency that ultimately could increase consumer welfare⁹⁰ and benefit the whole market in the form of cost reductions, innovation, or improvements in the quality of products and services. However, in order for the merger to meet the assessment criterion for prohibiting it, it must be found that it would cause a substantial lessening of competition (SLC). Despite the substantial lessening of competition, the benefits from improved efficiency outweigh the harm (to welfare) according to the efficiency defense. Its inclusion as a factor means that efficiency is part of the overall evaluation and is used to counter an initial finding of harmful impact on competition: due to the improvement in efficiency, there is no substantial lessening of competition⁹¹.

It is often viewed, especially by the EU, that the main goal of competition law is efficiency; not only for the companies themselves, but for the consumers as well. Given its economic character, competition law aims, in the final analysis, to enhance efficiency. The primary goal of competition law is to protect the market and, therefore, consumers from practices leading to monopolies, price-fixing, or other forms of market manipulation. In a market with perfect competition, firms compete in a healthy way by offering improved prices, quality, and innovation, benefiting consumers and driving economic growth. In his opinion in the Intel case

⁹⁰ See Guidelines for the assessment of horizontal mergers, para. 76 et seq. The Guidelines for the assessment of non-horizontal mergers do not analyze in detail the significance of efficiencies but refer (see para. 52) to the corresponding analysis in the Guidelines for the assessment of horizontal mergers.

⁹¹ Gavala, A. (2010). *Economic efficiency in the Community merger control*. Nomiki Vibliothiki, pp 27-28.

advocate General Wahl stated that “*The importance placed on efficiency is also in my view clearly reflected in the case-law of the EU Courts*⁹²”.

However, in some cases there are certain actions “reducing” competition, which may result in efficiency in the market, such as economies of scale, allowing the firms to reduce their production costs, resulting in lower prices and eventually benefiting consumers. Evidently, this efficiency benefits both consumers and the firms, as they could potentially allocate the resources saved to a research and development program creating a new and improved product. Hence, it is rather a balancing factor between competition and a greater “leniency” towards businesses.

The way efficiency is integrated into the control system, and the overall design of the control system, aims to avoid three potential errors in the assessment of a concentration, specifically the following:

- a. Prohibiting a transaction whose net outcome is positive.
- b. Approving a transaction with clear anti-competitive effects.
- c. Making a decision that entails excessive implementation costs for the businesses and the competent authority.

Thus, economic efficiency when assessing the remedial nature of concentrations, such as in the cases of the FFD, is inextricably a defense, simply because it presupposes that according to the causal link criteria it will cause a substantial lessening of competition. Nevertheless, it is a valid defense, as despite the deterioration of competition, it improves the welfare of the economy, increasing efficiency. As evidenced from the case law analyzed above (the “causal link” case law to be exact), for some years there were no pivotal changes to the approach the Commission held regarding concentrations, as set in *Kali and Salz*. However, with the following cases and especially with the BASF/Eurodiol/Pantochim case the jurisprudential landscape changed.

1. The BASF/ Eurodiol/Pantochim case⁹³

The BASF case is a pivotal case in the evaluation of mergers, since it introduced a shift in the evaluation of the causal link between mergers and the increase of a dominant position in the market to a new framework based on economic criteria. If we delve deeper into the concept of the more economic approach (rule of reason), we understand that it involves greater use of economic models in assessments, focusing on the economic effects of each specific case

⁹² Opinion Of Advocate General Wahl, case C-413/14 P Intel Corporation Inc. v European Commission, points 41-42.

⁹³ Case No COMP/M.2314 - BASF/Eurodiol/ Pantochim.

(through an effects-based approach), with the clear aim of improving the quality of decisions. This ruling, issued in 2001, notably predates the release of the Guidelines on Horizontal Mergers. The approach adopted in this ruling seems even more reasonable given the then-observed trend of increasingly considering efficiencies when applying EU competition law. Hence, no concentration was deemed compatible with the common market on the basis of the efficiency defense until the *BASF/Eurodiol/Pantochim* case.

In this merger the parties involved were BASF Aktiengesellschaft which aimed to acquire control of Pantochim SA, Eurodiol SA, and ProvironFtal NV through the purchase of shares from their parent company, SISAS SpA. Although this would increase BASF's market share to 70%, which under the "causal link criteria" would be detrimental to the economy and competition since it would place BASF in a very dominant position, the Commission approved of this merger. Eurodiol and Pantochim were on the verge of bankruptcy and in a severe financial situation. As such, the Commission adopted a new way of thinking, considering the financial status of the companies "out of the box", in a more unorthodox and wholistic for the market way, ruling that the merger would be less harmful than the market exit of those firms, as "*the Commission concludes that the deterioration of the competitive structure resulting from the notified operation will be less significant than in the absence of the merger*"⁹⁴. It considered arguments like the reduced supply, which would result from their exit and the forthcoming of the price increases, as well as the economic status of the firms in Belgium.

In 2000 the Belgian courts placed both companies under a pre-bankruptcy regime ("*concordat judiciaire*") and appointed four Court Commissioners ("*Commissaires au sursis*") supervising them. During this time, debt payments were halted, and creditors' claims were temporarily suspended. Efforts to create a restructuring plan were unsuccessful due to severe liquidity problems and escalating debts. As a result, the court indicated that bankruptcy was highly probable. Hence, when BASF argued that if they did not acquire the companies, both would go bankrupt and exit the market, the Commission considered it, as the exit would cause a significant market disruption in the sector. Regarding other criteria the court has adopted for mergers, there were no other interested buyers for the two firms, even after the effort the Commission and the court made to obtain alternative ones, to avoid a high market share of BASF. Nevertheless, the search was fruitless, as initially supported by BASF, and the negative repercussions of companies' market exit would be more detrimental to the competition and the consumers. This was very important considering that the inelastic demand and low production capacity would render their market further disruptive⁹⁵.

⁹⁴ Case No COMP/M.2314 - BASF/Eurodiol/ Pantochim, par 163.

⁹⁵ Case No COMP/M.2314 - BASF/Eurodiol/ Pantochim, par 35.

When deciding on the merger the Commission took under consideration various factors, among which the imminent bankruptcy of the firms, the inevitable exit of the companies' assets from the market and the absence of other alternative buyers. Along with the abovementioned problems and considering the very limited production capacity of the industry, it could easily be implied that competition would be actually harmed more, especially in the case of Eurodiol and its assets which would reduce the supply in the market and eventually increase prices, harming consumer welfare, if the firms were not acquired. It referenced the criteria from the *Kali und Salz*, emphasizing that a merger could be allowed and would be viewed as a "rescue" merger, if the market structure would face similar competitive degradation without it. In this case, the court broadened this approach by introducing an additional criterion, allowing BASF to acquire only part of the companies rather than the entire businesses, as long as their assets would otherwise leave the market without the merger. The criteria were outlined by the Commission in the following manner:

"Given this general framework, the Commission regards the following criteria as relevant for the application of the concept of the "rescue merger":

- (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"*⁹⁶

2. The Newscorp⁹⁷ case

In the Newscorp case, the primary issue was the shift of control over Stream from shared to exclusive ownership by one of Newscorp's subsidiaries and its subsequent merger with Telepiù. The central issue was whether the rescue merger principle could apply since Stream was struggling financially, while Newscorp remained stable. Newscorp argued that Stream would exit the market without the merger due to its dire financial situation. However, the European Commission found that Newscorp failed to prove the lack of a causal link between the merger and competition issues. Despite this, the Commission approved the merger under conditions, considering the benefits to consumers over the potential disruption caused by Stream's closure.

⁹⁶ Case No COMP/M.2314 - BASF/Eurodiol/ Pantochim, par 142.

⁹⁷ Case No COMP/M.2876 - NEWSCORP/ TELEPIU.

Newscorp argued that Stream was on the verge of market exit due to financial difficulties and that there were no realistic prospects for partnerships that could result in a less anti-competitive market impact while also financially rescuing Stream. The company further argued that the preferential rights of Stream would likely end up with Telepiù, and upon Stream's bankruptcy, these rights would return to the original holders, allowing for resale. The Commission noted that Newscorp did not mention potential buyers with whom they or Vivendi negotiated for the sale of their Italian companies, nor the reasons these negotiations failed. Based on the Commission's findings, no evidence suggested that Newscorp or Telecom Italia publicly offered Stream for sale. According to Newscorp, the assets set for acquisition would inevitably exit the market, and the preferential rights of Stream would likely be acquired by Telepiù. Hence, in the event of Stream's bankruptcy, these rights would return to the original holders, allowing them to resell. Furthermore, Newscorp insisted that there was no "causal link" between the worsening of the competitive structure and the merger resulting from the acquisition.

The Commission, however, had a different opinion. The Commission ruled that "*Newscorp has not been able to demonstrate that there is no causal link between the concentration and the effect on competition, because conditions of competition can be expected to deteriorate to a similar or identical extent even without the concentration in question*"⁹⁸. Nevertheless, the Commission adopted the view that accepting the merger under conditions would benefit consumers compared to the disruption that would result from Stream's closure. The Commission considered the overall market conditions, focusing on the long-term financial difficulties and the specific characteristics of the Italian market, and opted for a more lenient approach, ultimately approving the merger.

3. The Arthur Andersen cases (Deloitte & Touche/Andersen UK ⁹⁹and Ernst & Young/Andersen France¹⁰⁰)

The two cases were a result of the breakup of the Andersen group, and they involved acquisitions happening after the Enron scandal. Although the Commission applied the "rescue" merger criteria, as listed in the BASF case, the main legal issue arising was the existence of a "causal link" between the merger and the dominant position in the market. During its investigation, the Commission found that Andersen Worldwide was unable to fulfill its core contractual obligations in coordinating the firms, members of its network, and there were

⁹⁸ Case No COMP/M.2876 - NEWSCORP/ TELEPIU, par 221.

⁹⁹ Case No COMP/M.2810 - DELOITTE & TOUCHE / ANDERSEN (UK).

¹⁰⁰ Case No COMP/M.2816 - ERNST & YOUNG FRANCE / ANDERSEN FRANCE.

significant overlaps concerning the mergers in the market for audit and accounting services for listed and large firms on a national level.

In the Deloitte & Touche/Andersen UK case, Andersen UK was an active member firm of Andersen Worldwide international network of accounting and professional services firms, while Deloitte offers also audit and financial services. The case involved the acquisition of Arthur Andersen's UK division by Deloitte & Touche after the Enron scandal, as mentioned above, which led to the collapse of Andersen Worldwide. The European Commission did approve this merger, as it viewed the importance of the financial difficulty of Andersen and its inability to fulfill its obligations.

Therefore, the Commission once again concluded that the merger would result in a smaller deterioration of competition in the market than if the merger did not happen and highlighted that there were no other less harmful alternatives. The court stated that the two alternatives were either *“the take-over of Andersen UK by one of the other remaining Big Four audit and accounting firms”* or *“no take-over takes place and the existing clients would be dispersed between the remaining Big Four firms (with two sub-scenarios for the attribution of shares)”*¹⁰¹. It was the conclusion of the Commission that no alternative solution with a less negative impact on the competitive structure existed and, therefore, there was a lack of a causal link between the proposed merger and any other competition-impairing conditions arising from this merger. It was argued by the parties that Andersen was no longer a dominant competitor in the audit services market, compared to the Big Four, and as a result, it was inevitable that the market would shrink to four firms, regardless of the merger's outcome.

In this respect the Commission highlighted that a sudden collapse of the Andersen group, as similar cases were evidenced in other countries similarly, affected in a negative way the attempt of other “players” efforts to enter the industry by acquiring parts of Andersen, as well as firstly the attempts to rebuilt the group. Hence, even if Andersen continued its operation independently, it would not be possible in the long term to do so viably.

In the Ernst & Young/Andersen France case, the main difficulty was the lack of causal link between the proposed merger and the collective dominant position created after it. In this case the Commission ruled that there was no causal link due to the fact that *“the reduction from five to four global accounting networks was inevitable”* and that *“the proposed merger is not more harmful for competition than other possible scenarios as regards the risk for collective dominance on the market for audit and accounting services to large and quoted companies”*¹⁰².

¹⁰¹ Case No COMP/M.2810 - DELOITTE & TOUCHE / ANDERSEN (UK), par 49.

¹⁰² Case No COMP/M.2816 - ERNST & YOUNG FRANCE / ANDERSEN FRANCE, par 75.

Thus, had the acquisition not taken place, the alternative would be that one of the remaining Big Four would acquire Andersen France.

Hence, in both cases, the Commission after thorough examination decided that the mergers would not hinder competition in the market. Although neither of the companies were financially insolvent, the Commission the lack of causal link criterion, as formulated in *Kali und Salz*, and approved the mergers, since it would be more efficient for the market if the mergers took place, sooner than later.

F. The failing firm defense under the American legislative framework

I. The American legislative framework

The legislative framework for mergers in the United States is dates back to 1890, as it is, perhaps, one of the first nations to establish a set of rules regulating mergers. The *Sherman Antitrust Act*¹⁰³ (SAA) was the first regulatory act enacted by the United States Congress which dealt with competition law issues. Its purpose was to protect the market from unfair competition by cartels, as they were created to increase the prices, reduce the production and generally eventually have similar results to a monopoly. The core provisions of the SAA are found in Chapters 1 and 2, which primarily prohibit any merger that tends to restrict trade and commerce, and it provides a framework for penalties in case of such behavior. Where the likely alternative to merger which would be considered as negative for competition in a market, the financial failure of one of the merging parties and its eventual exit from the market, will help the authorities establish that it does not violate Section 7 of the Clayton Act¹⁰⁴, the section prohibiting mergers and acquisitions that may substantially lessen competition or tending to create monopolies.

The Failing Firm Defense was recognized by the U.S. antitrust agencies in the 2010 Horizontal Merger Guidelines¹⁰⁵, as it is the one establishing the principle under the lens of US antitrust law. Related concepts of “failing division” and “failing” firm or weakened firm defenses may also be recognized and accepted for deals that enforcers would otherwise paint as anticompetitive as well.

The introduction of the *failing company defense* in U.S. antitrust law was first seen in the *International Shoe Co. v. Federal Trade Commission* Supreme Court decision in 1930¹⁰⁶. The assessment of whether a proposed merger would lead to an important increase in market concentration and potentially to certain anti-competitive effects in it, is based on a review of whether the merger significantly restricts competition. With this decision, the failing company

¹⁰³ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1890).

¹⁰⁴ Clayton Antitrust Act of 1914, 15 U.S.C. § 18 (1914).

¹⁰⁵ U.S. Department of Justice & Federal Trade Commission. (2010, August 19). Horizontal Merger Guidelines. <https://www.justice.gov/atr/file/810276/dl>, p. 31 state: “The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (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”.

¹⁰⁶ *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930).

defense was official in the US. Although the Supreme Court did not explicitly state that it was setting the boundaries for a failing firm defense, but rather later developments proved that *International Shoe* inaugurated what was later named the failing firm defense under US antitrust legislation¹⁰⁷.

Despite the clear reference of Chapter 7 of the Clayton Act to mergers that may reduce existing competition, mergers that similarly worsen the already weak competition in a market, as well as those that maintain the status quo but prevent potential competition from developing in the future, should be prohibited. According to Chapter 7, it is not required to prove a substantial reduction in competition. It is sufficient that the proposed merger might lead to it. Congress identified the need to establish an exception for failing companies and amended Chapter 7 in 1950 and decided to include the failing firm defense based on the decision in *International Shoe*: “*The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out. The committee is in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type. The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensure*”¹⁰⁸.

The subsequent legislative revision of the Clayton Act through the Celler-Kefauver Act of 1950¹⁰⁹ validated the argument for restructuring mergers, and it is worth noting that the *International Shoe* case served as the foundation and guide for this amendment. The argument was reaffirmed many times through the subsequent Supreme Court case law.

The review of proposed mergers is always conducted according to the directives of the Guidelines, which include a specific chapter on protecting failing firms and failing firms’ divisions. Competition authorities assess whether one of the parties involved is likely to go

¹⁰⁷ López-Galdos M. (2016) “Comparing the US & the EU failing firm defense Reflections from an economic perspective” Loyola Consumer Law Review 28(2-3) Article 4 (available at <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1969&context=lclr>).

¹⁰⁸ López-Galdos M. (2016) “Comparing the US & the EU failing firm defense Reflections from an economic perspective” Loyola Consumer Law Review 28(2-3) Article 4 (available at <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1969&context=lclr>)

¹⁰⁹ Celler-Kefauver Act of 1950, 15 U.S.C. § 18 (1950).

bankrupt, leading to the removal of its assets from the market if the merger is prohibited, and if a merger is not expected to create or enhance a dominant market position, if the imminent failure of one of the merging firms would result in the exit of its assets from the relevant market etc. The Guidelines, influenced by the case law, purport to identify cases with the FFD established as absolute, and aimed to distinguish it from the previous ones, where the defense was not applied. The Supreme Court decisions and US Horizontal Merger Guidelines make it obvious that the failing firm defense is a concept quite evident in the US antitrust regime. However, the enforcement and application of the failing firm defense seems to be quite ambiguous, as is evidenced in Europe as well.

The position of case law regarding the failing firm doctrine was first recorded in the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission in 1992. According to them, when assessing whether an undertaking could qualify as a failing firm, enabling the parties to invoke the failing firm defense, the following four criteria must be met:

- (i) *“the failing firm would be unable to meet its financial obligations in the near future;*
- (ii) *it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;*
- (iii) *it has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and,*
- (iv) *absent the acquisition, the assets of the failing firm would exit the relevant market.”*¹¹⁰

As expected, the US merger control system is more lenient and less stringent than the European one, set by the Commission, which traditionally is stricter in competition law. For example, In the US legal system the transfer of the market share of the target company is not required if the failing firm exits the market. Similarly, mergers involving failing divisions are treated with comparable flexibility. Competition authorities will allow the acquisition of a failing division if the division has negative cash flow, if it is shown that, without the acquisition, the division's assets would exit the market in the near future, if the owner has made good-faith efforts to secure alternative buyers for the assets, and if the company complies with the requirements for selecting the most competitive buyer, as outlined in Chapter 5.1 of the Guidelines. Despite the lack of provisions in the Guidelines for protecting distressed industries, the text suggests that

¹¹⁰ López-Galdos M. (2016) “Comparing the US & the EU failing firm defense Reflections from an economic perspective” Loyola Consumer Law Review 28(2-3) Article 4 (available at <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1969&context=lclr>)

the prevailing conditions in declining sectors should be considered when assessing the impact of a proposed merger on competition.

II. The Failing Firm Defense in the USA

A merger between firms, one of which is a failing firm, as mentioned before, is an exception to the Clayton Act, section 7, since it is considered a non-harmful merger, which will not hinder competition in the relevant market, since without it the assets of the failing company and the company itself would exit the market. Hence, rejecting such a merger, where the target company is failing, could lead to the liquidation of its productive assets.

The choice to begin examining the theory of "failing firm defense" from U.S. law, and specifically from the case law of American courts, is not coincidental, as this doctrine did not originate from a theoretical construct but first emerged as a product of U.S. case law. The first traces of the "failing firm defense" appeared in *International Shoe Company v. Federal Trade Commission*. According to the facts of the case, the company being acquired, McElwain, was facing serious financial difficulties when it agreed with its competitor, International Shoe, for the latter to acquire a controlling stake in its share capital. Indeed, in 1930 the US Supreme Court in *International Shoe*¹¹¹, by approving a prima facie illegal merger, took the opportunity to assess the outcome of such a merger and especially to balance the potentially negative consequences with the market conditions.

The first issue being assessed is whether the company is in a severe financial position. In *International Shoe* it was ruled that the company to be acquired was in economic distress and its assets would eventually exit the market. This was the first case the court assessed extensively the anti-competitive effects of a concentration, eventually ruling in favor of the merger. For the FFD to apply, the company must indeed be shown to be facing severe financial difficulties, meaning either that it is already insolvent in the market and to its creditors, or on the verge of bankruptcy or an imminent financial collapse. In reality, the courts have been very strict in applying this criterion. Specifically, the company's dire financial condition must be proven, as well as its minimal or nonexistent chances of recovery, demonstrating that only in this way will the merger not truly hinder competition, which is the primary and foremost goal of competition law. Thus, the failing firm must not be shown to be receiving significant benefits from the proposed merger, as such a scenario would indicate that the firm is not truly failing.

The possibility of collapse may exist, and although not imminent, reorganization might not be entirely ruled out as a potential option, thus placing the company's viability under a cloud of

¹¹¹ *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930).

uncertainty. Undoubtedly, the reorganization process involves a high degree of uncertainty, making it challenging to provide reliable predictions during the merger review process regarding the success of alternative reorganization options. As Edward Correia supports, if a failing firm is unsuccessful in reorganizing and recovering through the proposed merger, or if it survives but with a significantly reduced production capacity, then there is a risk of competitive harm based on lost productivity¹¹². When invoking the FFD, the company (which bears the burden of proof) must prove that it could not reorganize successfully. This requirement serves to confirm the company's long-term non-viability and proves that its difficulties are not merely temporary and, thus, support the necessity of such a merger. It is also important to note that the failing firm defense can be invoked by companies that are in a steep decline but are not officially considered failing under the failing firm defense criteria.

In the US if the company is left to its impending financial collapse, it may undergo Chapter 11 bankruptcy proceedings and remain in the market. Reorganization is an expensive process, and both shareholders and creditors incur losses. If failing firms opt for and succeed in reorganization and liquidation, they eventually cease operations and liquidate their assets. Nevertheless, the evaluation of the failing firm defense is closely linked to the assessment of several variables that must be considered, as well as the inherent uncertainty regarding the future viability of the supposedly failing firm, a notion also supported by the Guidelines. Consequently, this results in a clear loss of competitive advantage as well as productivity and jobs.

Another important factor considered in the merger assessment is finding the ideal buyer. This involves evaluating aspects such as the fair price for acquiring the company and the subsequent effects on market structure following the merger, factors also met in the European competition law assessment. A condition for accepting the failing firm defense is the absence of any other potential buyer, meaning that the defense cannot apply when there is an alternative potential buyer who would pose a lesser threat to competition. Although the buyer must make a reasonable offer the interested buyer is not evaluated solely based on offering a price higher than the liquidation value of the company's assets and the ability to keep it in the market. The competition authorities must also assess whether the alternative buyer has the capability to manage the failing firm and keep it as a competitive, operating entity, even with the capital influx necessary to ensure its viability.

¹¹² Correia E.O. (1996) Re-examining the failing company defense *Antitrust Law Journal* 64(3) 683-701 American Bar Association (available at <https://www.jstor.org/stable/40843345>).

In case, there is an absence of an alternative buyer, good-faith efforts to find one must be made. Essentially, the failing firm must demonstrate good-faith attempts to negotiate offers from other companies that would keep it in the market while posing the least threat to competition.

1. The International Shoe Co v Federal Trade Commission case¹¹³

The case, as mentioned above, became a cornerstone for the judicial recognition of the "failing firm defense" theory by the Supreme Court and the acceptance of this argument, as it is the first clear Court statement that we know of today. The case in question involved the review of the merger between two shoe manufacturers, as International Shoe company bought McElwain Company.

According to the Federal Trade Commission, such a merger would significantly hinder competition between the two companies, restrict trade in the shoe industry, and lead to a monopolistic market structure. However, that viewpoint was not shared by the Supreme Court. Rather it overturned the lower court's decision, reasoning that the company being acquired was on the brink of financial collapse and it rather found that there was little direct competition between the two companies. The Court assessed that the company being acquired was facing widespread financial difficulties, making liquidation an inevitable outcome. In doing so, the Court indirectly recognized the impending collapse as a condition for applying the failing firm defense. The Court considered, as required, all the alternatives available to the failing company and being faced with the options of bankruptcy or sale to the sole potential buyer, the directors, shareholders, and creditors felt obliged to choose the latter option, fully aware of the company's critical situation and being arguably better positioned than the commission or the court to predict the future consequences. Hence, it rejected the argument that the alleged anti-competitive consequences of the potential approval of the merger were more harmful than those that would arise if the failing company were to withdraw from the market.

It was the view of the Court that McElwain was in severe financial distress and, thus, there was a good chance of its financial assets being sold, eliminating the possibility that a viable company would remain after liquidation. The Court supported that as the prospect of rehabilitation was so remote, the grave probability of failure was evident, affecting its stockholders and injury to communities where its plants were operated. The Court considered the fact that the company's sources of funding had been exhausted, and no prospects of recovery were evident, factors that confirmed the impending collapse and signaled losses for shareholders and harm to the communities where the company operated.

¹¹³ International Shoe Co. v. Federal Trade Commission, 280 U.S. 291 (1930).

As a result, the purchase of its capital stock by a competitor, as there was no other prospective purchaser, would not result in lessening competition, but it would facilitate the accumulated business of the purchaser and mitigate seriously anticompetitive consequences otherwise probable¹¹⁴. It would limit the serious and harmful consequences expected otherwise and was ultimately less damaging to competition and in public interest.

The Court's ruling shows that the "failing firm defense" theory requires that the impact on competition, as well as the damage to shareholders and local communities, be lesser if the company continues to exist, even under a merger, than if it exits the market entirely. Evaluating the *International Shoe* decision, it is clear that it laid the foundation for the FFD argument, directing merger control rules towards reorganization.

2. The *Citizen Publishing Co v United States* case¹¹⁵

About thirty years later, while the "failing firm" argument had not been seriously addressed by the courts, the Supreme Court, in the case *United States v. Philadelphia National Bank*¹¹⁶, mentioned that the argument could also be used in the banking sector. Given that the bankruptcy of a financial institution would have serious public consequences, the application of the "failing firm defense" in such cases could be easily justified. The systematization of the criteria for the "failing firm" argument, however, occurred in *Citizen Publishing Co. v. United States*. Arguably, the most important case in discussing the FFD is the *Citizen Publishing* case in 1969. In this case the owners of the newspapers *Star* and *Citizen* negotiated a joint operation agreement for the newspapers for a period of 25 years, beginning in March 1940, which was extended in 1953 until 1990. The agreement stipulated, among other things, that both companies would participate in the formation of Tucson Newspapers Inc., each holding a 50% share.

The sole defense of the defendants was based on the FFD argument. However, the Court rejected this argument, while simultaneously setting strict conditions for its potential acceptance. The two considerations mentioned in *International Shoe*, meaning the high possibility of a company facing a business failure and the lack of finding an alternative purchaser, were preserved. In this case the Court added a third stipulation, one that was previously rejected as too speculative. The Court recognized the defense that reorganization

¹¹⁴ Correia E.O. (1996) Re-examining the failing company defense *Antitrust Law Journal* 64(3) 683-701 American Bar Association (available at <https://www.jstor.org/stable/40843345>), p. 684.

¹¹⁵ *The Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

¹¹⁶ *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

through receivership or filing for bankruptcy proceedings must be considered as "dim or non-existent". In this case the Court stated "[W]e know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies."¹¹⁷

The *Citizen Publishing* case marked the tightening and clarification of the rules for applying the "Failing Firm Defense". Specifically, it emphasized the absence of any effort to find a buyer for the newspaper and highlighted that the burden of proving that the conditions for invoking the Failing Firm Defense are met. The Court pointed out that there was no indication that the owners of *Citizen* were considering liquidating the company or selling the business, and there was no evidence that the signed agreement was the last and only solution, without any other alternatives. Since the theory of the failing firm can only be applied if it is established that the acquiring company is the only available buyer, here it did not apply. Additionally, the chances of reorganizing the failing company through receivership or under Chapters 10 and 11 of the Bankruptcy Act must be minimal or nonexistent and the burden of proof for meeting the conditions lies with those invoking the theory, however, in this case, the interested parties were unable to substantiate their claims. Therefore, the Supreme Court adopted an official type of review for applying the Failing Firm Defense similar to that used by the guidelines. *A merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure ... of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market...*¹¹⁸

3. The United States v General Dynamics Corp case¹¹⁹

The Failing Company Defense is claimed often in combination with other defenses, which although may be factually related, they are analytically distinct¹²⁰. The same arguments underlying a failing company's claim may be used to support that the firm soon to be acquired is a "weak competitor" and, therefore, the combined market share or other circumstances

¹¹⁷ The *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), par. 138

¹¹⁸ U.S. Department of Justice & Federal Trade Commission. (2010, August 19). Horizontal Merger Guidelines. <https://www.justice.gov/atr/file/810276/dl>, p. 30.

¹¹⁹ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)

¹²⁰ Correia E.O. (1996) Re-examining the failing company defense *Antitrust Law Journal* 64(3) 683-701 American Bar Association (available at <https://www.jstor.org/stable/40843345>), p. 687.

suggest that the merger is less harmful to competition. The notion of the weak competitor mentioned before, is often associated with *United States v General Dynamics Corp.*

The Supreme Court was here tasked with deciding whether to approve or reject the acquisition of a mining company, which would result in the creation of a corporate entity with a large market share in a concentrated industry. Based on the factual circumstances at the time, the profitability of the acquired company was declining, though it was not facing imminent bankruptcy. These facts raised doubts about whether the merger should be justified, as the element of immediate danger was lacking. This case is particularly noteworthy because the Court conducted a realistic assessment of the potential anti-competitive effects of a merger involving a company that was neither failing — nor at immediate risk of being forced out of the market — nor a significant competitor. In this instance, the Court deviated from the core criteria of the failing firm defense argument and based its decision on the declining value of the non-renewable assets of the company being acquired. In the merger it was not claimed that the merger would strengthen the firm being acquired, rather that the future market share combined would be somehow smaller compared to the combined share in the present the case was heard.

The shareholders face significant losses, especially in the case of liquidation. However, if the merger is profitable, shareholders do not risk losing their investment and may actually gain profits. Creditors benefit by maintaining their claims against the debtor and are likely to be compensated for the credit provided. In contrast, if insolvency procedures are applied due to the merger being blocked, full compensation seems unlikely. Hence, in this case, the Court concluded that three categories of private parties benefit from the acquisition of a failing firm: shareholders, creditors, and employees. Therefore, the Court made its decision to prevent potential future harm to all interested parties.

The claim that the output of a firm to be acquired disappearing altogether if the merger is prohibited is difficult to evaluate. The uniqueness of the decision lies in its forward-looking assessment of the company's viability and competitiveness and in its attempt to find the best solution for the future prosperity of the parties involved. There was significant debate over whether the Supreme Court was applying the failing firm defense or if it was, in essence, applying a new, differentiated theory.

III. A comparative examination of the differences with the of the EU legislative framework

The FFD is a recognized concept in both the U.S.A. and Europe. In the U.S.A., it was firstly legally established through the 1992 Horizontal Merger Guidelines, as implemented by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). The FFD was not

officially part of the Merger Regulation in Europe, however, it was incorporated through the 2004 Merger Guidelines. Specifically, in the UK, the country in the European continent with the most similarities with the American legal system, the Office of Fair Trading (OFT)'s substantive assessment guidance for mergers extensively discusses the FFD (in paragraphs 4.36-39)¹²¹. The FFD, at the same time, has not been applied frequently in the clearing of mergers, however, there are some important cases. Early examples from the U.S. case-law, as mentioned before, include cases such as *International Shoe*, while in continental Europe, the European Commission applied the FFD firstly in *Kali and Salz*, and when BASF acquired Eurodiol and Pantochim in 2001. In the UK the OFT has applied the FFD only on a few occasions since the Enterprise Act 2002¹²²¹²³. While there are some minor discrepancies in the application of it across different jurisdictions, all share certain common requirements, and particularly that the post-merger outcome in the relevant market should be no worse than the market outcome if the merger never happened. Interestingly, the FFD has received renewed attention due to the recent financial crisis¹²⁴.

It is clear that both legal systems share the same beliefs regarding merger rules and practices, namely the protection of free and effective competition, with the primary objective being to prevent price increases, and secondly, to eliminate the harmful consequences of a merger that may lead to subsequent price rises.

Regarding the implementation of legislation, the United States first introduced a legislative framework regulating mergers at a very early stage in 1890, while in contrast, the European Union developed a similar regulatory framework in the 1990s, indicating that the U.S. anticipated the need to regulate corporate behavior 100 years earlier. The fact is that U.S. competition policies are enforced by more than one authority, making the interpretation of the regulatory framework significantly more challenging. For example, the Department of Justice and the Federal Trade Commission have made independent interpretations, which may potentially conflict with federal law. In contrast, in the European Union, the sole competition authority for mergers is the European Commission, making the regulatory framework more coherent, without conflicting interpretations, and of a mandatory nature. The particular features

¹²¹ Office of Fair Trading. (2010). Merger Assessment Guidelines. OFT1254.
<https://www.gov.uk/government/publications/merger-assessment-guidelines>.

¹²² Enterprise Act 2002, c. 40. (U.K.).

¹²³ Bouckaert J. and Kort P.M. "MERGER INCENTIVES AND THE FAILING FIRM DEFENSE", *The Journal of Industrial Economics* 62(3) 436–466 (available at <http://www.jstor.org/stable/43305496>).

¹²⁴ See OECD [2009] Report for a recent overview.

of each legal system impact both markets, as companies are obliged to comply with the mandatory conditions set by the respective authorities in order for a merger to take place. It is also noteworthy that the enforcement of the merger regulatory framework in the European territory is considered overall more lenient compared to that of the U.S.

A deep examination of the core regulatory framework concerning merger control in the EU and U.S. shows that the American approach to competition appears more effective in market regulation than the European approach. The reasons, as outlined above, relate to the pre-2004 perspective of the EU, which primarily prohibited mergers based on the abuse of a dominant position. It was only through subsequent legislative convergence with the American model that the EU avoided mergers that significantly impeded effective competition. Nevertheless, following the 2008 economic recession, the U.S. revised its merger control guidelines due to market dysfunctions that contributed to or worsened the market downturn. Thus, the economic situation clearly influenced the formation of both legal systems, and consequently, the prosperity of the market, as both systems agree that the predominant goal of the respective interventions should be ensuring that consumer welfare is not harmed.

The structural process also has certain disparities. As masterly stated by Bergman *“The US methodology has a “Quick Look” procedure that allows the parties to focus the second request investigation on specific issues that would clear the deal ... In the EU on the other hand, once the in-depth (Phase II) investigation is initiated, the Commission needs to take the case through a full investigation and issue a formal decision, unless the parties withdraw their notification and abandon the merger”*¹²⁵. In the U.S., once the merger process is completed, only the relevant authorities have the right to challenge the agreement. However, to successfully revoke it, they must prove their case in court. On the other hand, decisions of the European Commission regarding proposed mergers are legally binding for the parties involved. Additionally, a competent court can overturn the decision if the involved parties or a third party with a legitimate interest appeal the decision.

The procedural process for mergers shows significant similarities in both legal systems. However, there are also notable differences. Specifically, due to the high thresholds required for a merger to be deemed to have an EU as Bergman states *“The EU is limited to reviewing relatively large transactions, leaving smaller deals to member nations, whereas the US captures*

¹²⁵ Bergman M.A., Coate M.B., Jakobsson M. and Ulrick S.W., “Merger Control in the European Union and the United States: just the Facts”, European Competition Journal, 2011, 7, 1, 89-125, Hart Publishing Ltd, https://www.academia.edu/21017274/Merger_Control_in_the_European_Union_and_The_United_States_Just_the_Facts .

a broader size range in its regulatory net¹²⁶. In contrast, in the U.S., the thresholds are lower, and thus the volume of cases under the jurisdiction of federal competition authorities is much larger.

Hence, it is evident that several changes have taken place in the field of merger control to align policies with current economic developments. A notable case is *General Electric vs. Honeywell* in 2001¹²⁷, where the European Commission prohibited the merger between the two companies, even though it had been approved by the U.S. competition authorities. The merger would have allowed for price reductions and the creation of better products through the combination of the companies' technological equipment. This case sparked debates about whether the Director-General for competition issues of the Commission evaluated the case with a focus more on protecting competitors in the market rather than safeguarding consumer interests and welfare. It is evident in this case that the Commission assesses similar facts more broadly than the DoJ and attempts to review the source of divergence¹²⁸. As a result of efforts to align its regulatory framework with a more globalized approach, the European Union amended its merger control policy in 2004 to include those that "significantly impede effective competition." The EU and the U.S. now share the same focus regarding merger control: the prohibition of mergers that may hinder competition in a market.

¹²⁶ Bergman M.A., Coate M.B., Jakobsson M. and Ulrick S.W., "Merger Control in the European Union and the United States: just the Facts", *European Competition Journal*, 2011, 7, 1, 89-125, Hart Publishing Ltd, https://www.academia.edu/21017274/Merger_Control_in_the_European_Union_and_The_United_States_Just_the_Facts.

¹²⁷ *General Electric Co. v. Honeywell International Inc.*, Case COMP/M.2220 (2001).

¹²⁸ Grant J. and Neven D. "THE ATTEMPTED MERGER BETWEEN GENERAL ELECTRIC AND HONEYWELL A CASE STUDY OF TRANSATLANTIC CONFLICT" *Journal of Competition Law & Economics* Volume 1 Issue 3 September 2005, pp 595–633, (available at <https://doi.org/10.1093/joclec/nhi019>).

D. The Failing Firm Defense under Greek legislation

The FFD under Greek law is an important defense when a merger raises concerns about market competition. In times of economic crisis, the theory has gained renewed attention as a way for companies to acquire financially troubled competitors, with the argument for allowing such mergers being that the failing companies would leave the market anyway, even without the merger happening. The argument behind the exception in cases where the FFD is being used for mergers is that, typically, a company threatened with bankruptcy or facing serious financial difficulties would withdraw from the market for its own benefit. However, there are cases where the realization of such a merger with a competing company can indeed save the company that is at risk of bankruptcy and withdrawing from the market due to the financial difficulties it faces. However, Greek and European competition authorities have been hesitant to loosen up strict rules, even during economic recessions and periods of economic stress and difficulties, as it is strenuous to provide sufficient evidence to meet the criteria for approving rescue mergers.

In some cases, a horizontal merger with a competing company is indeed a way to rescue a business in decline. The theory of the FFD should be explored by companies considering the acquisition of competitors on the verge of bankruptcy. However, practice has shown that even under the conditions of the modern severe economic crisis, like the 2007-2009 economic crisis was for Greece, competition authorities have been reluctant to relax the narrowly and strictly applied frameworks for the implementation of this theory. Indeed, cases in which this defense has been the basis for the acceptance of an otherwise problematic and thus prohibited merger are comparatively few, and this is because it is difficult for the parties to present sufficient evidence to meet the strict criteria.

Until 2011, when the new legislation was adopted, under Law 703/1977, Greek legislation did not offer any particularly special provisions regarding “rescue” mergers and how the Greek courts should deal with the FFD, requiring always a mandatory prior notification to the Greek Competition authority and a probable ban on their implementation. Therefore, the rules regarding those mergers were very unyielding and unfavorable. However, substantive control of mergers was based on whether a causal link existed between the merger and changes in market structure, and whether the merger would actually positively improve the competitive conditions existing in the market where a dominant position was present. Law 703/1977 did indeed establish rules for the functioning of the market and provided useful mechanisms for the control of practices restricting and threatening competition in the market, aiming to preserve or restore, when necessary, competitive market conditions within Greece, but unfortunately, as mentioned previously, it did not provide specifically for mergers aiming to change the market dynamics, as such. Companies from their standpoint, especially experiencing the aftermath of the 2007 economic recession, which hit many businesses across Europe and Greece

significantly, the concept of “rescue” mergers and the FFD became a lot more popular, as firms facing imminent bankruptcy and inability to meet their financial obligations sought for solutions to avoid their inevitable market exit. Hence, Law 703/1977 needed significant improvements that could not be addressed through amendments alone. The legal framework and the level of competition in the domestic market, clearly required the elimination of existing obstacles, were in grave need of a significant and substantial change.

The improvements introduced in 2011 aimed at strengthening the Hellenic Competition Commission’s (HCC) independence, prioritizing significant cases, streamlining procedures, reducing administrative burdens, improving predictability, and ensuring alignment with EU merger control legislation. In 2011, the field of competition law was strengthened by a new legislative initiative through the enactment of Law 3959/2011 on the “Protection of Free Competition”¹²⁹. These regulations were adopted within the framework of Greece's Economic Adjustment Program and a broader effort to restructure the Greek economy with a competitive outlook. Through this new law the field of competition law in Greece was modernized and aligned with European standards through the enactment of this law, which replaced the older Law 703/1977 and all its amendments, upgrading and improving the landscape significantly. Among other improvements was the role of the Hellenic Competition Commission, which became financially and administratively independent, free to evaluate mergers and acquisitions according to the new law, which provided guidelines for mergers, ultimately having the ability to approve or prohibit them¹³⁰.

The HCC may approve a merger with the freedom to impose certain conditions, when deemed necessary, or without, always taking into account the impact each merger may have on the market structure. The Commission now may exercise a preventative ex ante check of the merger under certain criteria listed in the new law¹³¹, having the freedom to control it after receiving

¹²⁹ Law 3959/2011 (Government Gazette A’ 93/20.04.2011).

¹³⁰ Law 3959/2011, article 12 “*Competition Commission is established and shall operate as an independent authority.*

Its members shall enjoy personal and functional independence, they shall be bound only by law and their conscience in exercising their competences and they are required to observe the principles of objectivity and impartiality. Its members shall neither receive nor request directions regarding the exercise of their duties from the Government or other public or private parties.”

¹³¹ Law 3959/2011, article 7 states regarding the criteria that “*in particular, of the structure of all the relevant markets, of the actual or potential competition from undertakings located inside or outside Greece, of any legal or other barriers to market entry, of the market position of the undertakings concerned and their economic and financial power, of the alternatives available to suppliers and users, of their access to sources of supply or markets for the goods, of the supply and demand trends for the relevant goods and services, of the interests of the*

the notification of the merger within 30 days “*of the conclusion of the agreement or the announcement of the bid or the acquisition of a controlling interest, where turnover by all undertakings in a concentration within the meaning of Article 10 totals at least EUR one hundred and fifty million (150,000,000) on the global market and each of at least two (2) of the undertakings involved generate turnover totalling over EUR fifteen million (15,000,000) on the Greek market*”¹³². This is a significant improvement from the previous status of Law 703/1977, under which the merger had to be notified to the Competition Commission "retroactively", and not beforehand, to assess the anti-competitive influence it could have in the market, placing a significant burden on the parties. The preventative check, rather than the retrospective one, is an important improvement as it acts as a stimulation for the merging companies to make any necessary administrative and financial changes to ensure that the merger takes place. This measure ensures the merging companies review whether their merger would negatively influence the market structure and restrict competition, even partially, through the creation of a dominant market position. Under the shadow of a prohibition the merging firms will take all necessary measures available to ensure that the proposed merger does not reduce the economic benefit for consumers and, consequently, does not negatively affect overall economic and social welfare.

Finally, it is important to note the recent Law 4886/2022, passed by the Parliament's Plenary in January 2022, which addresses, among other things, the modernization of both substantive competition law and the procedures for implementing Law 3959/2011 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in Greece, to meet the demands of the digital economy. It also incorporates Directive (EU) 2019/1 of the European Parliament and Council of December 11, 2018, which aims to strengthen the competition authorities of member states, ensuring more effective enforcement of national and European competition rules. The new law introduces several changes regarding mergers, with key points including the amendment of lower thresholds for preventive control through a joint decision of the Ministries of Finance and Development & Investments (Article 6, paragraph 7) to reduce the risk of competition restriction, as well as a provision for submitting proposals for corrective measures during the first phase of preventive control by the Competition Commission. This allows for quicker approval decisions if the Commission accepts the modifications proposed by the companies involved (Article 8, paragraph 4a).

intermediate and ultimate consumers and of the contribution to technical and economic progress and to improving economic efficiency, provided that it is to consumer's advantage and does not form an obstacle to competition”.

¹³² Law 3959/2011, article 6 par 1.

I. The new regime under Law 3959/2011

The new law, contrary to the common practice of new laws that simply amend the previous existing provisions, adding further to the plethora of legislation and, thus, confusion, constitutes a unified legal text that successfully avoids conflicting provisions and oversights, making it easier for both the competent authorities and citizens to apply the law. As stated in the explanatory report of the law: *“The proposed text is based on five pillars, namely:*

a. The institutional strengthening of the Competition Commission and the enhancement of its independence, which is achieved by changing the method of appointing its members (appointment of the President and Vice President by the Conference of Presidents of the Parliament, and the other members by decision of the Minister of Economy, Competitiveness, and Shipping, following the opinion of the Committee on Institutions and Transparency of the Parliament), extending the term of office of its members, broadening the incompatibilities, and establishing an obligation for accountability as a result of the democratic organization and functioning of the state.

b. The enhancement of the effectiveness of the Competition Commission's action by setting strategic goals and providing the ability to prioritize the examination of specific cases, taking into account the public interest, the estimated impact on competition, and consumer protection. Furthermore, in order to make the selection of cases for priority review more transparent and objective, the quantification of the above criteria is provided.

c. Granting the Commission the ability to intervene in sectors of the economy to remove regulatory barriers that distort competition. Specifically, the Commission can both adopt the necessary regulatory measures within the framework of sectoral investigations and provide opinions on provisions of draft laws that may introduce state or other regulatory barriers.

d. Strengthening the deterrent power of the prescribed sanctions by increasing the existing ones and introducing new ones, and finally,

e. The alignment of the provisions with European standards and the modernization of the Commission's operations. Specifically, Article 4a of Law 703/1977, which required the ex-post notification of so-called "small" mergers for market mapping purposes, is abolished, as this provision constituted a horizontal regulatory burden for businesses and an administrative burden for the Competition Commission, and it has not produced results throughout its application. Moreover, no similar provision is found in any other Member State of the European

Union. For the same reasons, the obligation to notify agreements under Article 21 of Law 703/1977 is also abolished, in order to achieve full alignment with European standards.”¹³³.

It is clear that adjusting merger control to the conditions of economic recession and declining markets would not come through legislative changes alone, as similar reforms had not been made at an EU level. The judiciary had historically responded to the evolving needs of markets and was again called upon to play a crucial role. In Greece, the EA was the relevant competition authority, and its role needed substantial upgrading, and this was indeed achieved with the new law on the protection of free competition, Law 3959/2011.

When evaluating the regulatory framework for mergers, as shaped by Law 3959/2011, it is worth noting that its most significant reforms include the alignment of the basic principles prohibiting mergers with the EU legislation and in line with Article 101 of the TFEU (Article 1), the introduction of the prohibition of the abusive exploitation of a dominant position with indicative descriptions of such cases in line with Article 102 of the TFEU (Article 2). The changes generally move in the right direction, as they confirm the Commission’s independence, giving it the ability to prioritize cases based on their importance, establish more reasonable time frames for examination, and abolish provisions that merely require notifications of mergers or agreements, without offering any substantial benefit to competition, thus creating a burden for both the HCC and, mainly, businesses. The Commission’s independence is further strengthened through the ability of a possible regulatory intervention through more structural measures, including opinions for the abolition or modification of certain legislative acts, when found incompatible with competition (Article 11), and the numerous other provisions that amend the internal structure and organization of the Commission, aiming at its independence and effectiveness, as well as addressing obstructive bureaucratic procedures.

To conclude, necessary reforms were implemented through Law 3959/2011 and these reforms modernized Greek competition law and empowered the HCC to respond more effectively to the market needs. Although the legislative framework remained strict, the case law played a key role in adapting to changing market conditions, demonstrating flexibility and responsiveness. The CA’s role was significantly enhanced to ensure better enforcement of competition rules and promote transparency and intervention in broader competition issues.

¹³³ Explanatory Report on the draft law "Protection of Competition" (available at <https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/P-PROANT-eis.pdf>).

II. The merger control between Kraft Hellas SA and Chipita International SA¹³⁴

The merger control between the companies "Kraft Hellas S.A." and "Chipita International S.A." was reviewed in 1996 by the HCC. The merger was notified to the HCC in October 1995 and it constitutes one of the first "rescue merger" cases that the national Competition Authority dealt with. What concerned HCC in this case was whether the divestment of KRAFT's croissant production branch and its transfer to the company SMAKY, whose sole shareholder was CHIPITA, could significantly restrict competition. In this decision, it was emphasized that the creation or strengthening of a dominant position (in accordance with the provisions of Law 703/1977) by the acquiring company through the merger can be weakened or overturned if the acquired, failing, company would inevitably have gone bankrupt otherwise. The restriction on competition was assessed given both the financial difficulties faced by the acquiring company and the commitments undertaken by SMAKY, on the condition that the proposed merger would be approved.

According to the Commission's position in this case, it was pointed out that if other factors supporting the likelihood and possibility that the proposed merger would not significantly restrict competition existed, such as the risk of the acquired company's forced bankruptcy and its imminent exit from the market, the merger could be approved. However, there was no evidence to prove that KRAFT was facing serious financial difficulties that would lead to its immediate exit from the market if acquisition did not happen, or that it had unsuccessfully tried to find alternative buyers with smaller market shares. The Commission held that it is not sufficient that the acquired, failing, company is unable to meet its financial obligations, is already insolvent, and is in a pre-bankruptcy stage, but the company must also have made unsuccessful attempts to sell its assets. Thus, the Commission did not approve the merger, stating that it would obstruct competition and the economic welfare of consumers, considering a series of criteria such as the structure of the relevant market, entry barriers, actual or potential competition, among others. However, this case was criticized for failing to clearly define how a remedial merger could positively impact competition, and it failed to establish any clear or explicit conditions under which this will be considered.

III. The Aegean/Olympic Air case¹³⁵

Perhaps, the most known case of a "rescue" merger in Greece, using the Failing Firm Defense of course, is the merger which took place in 2013 between Aegean Airlines, an airline providing

¹³⁴ Hellenic Competition Commission. (1996). Decision No. 23/1996. (available at https://www.epant.gr/files/1996/apofaseis/23_1996.pdf).

¹³⁵ Case No COMP/M.6796 – AEGEAN/ OLYMPIC II.

mainly air transport of passengers and to a more limited extend of cargo, with Olympic Air, another Greek airline fully owned by Marfin Investment group; between the two largest airlines in Greece at that time. It was the first time the Commission cleared a concentration it rejected some years before, signaling that sometimes it may change its viewpoint and assess concentrations differently, when new arguments appear. In this case, the FFD, which was previously unsuccessful, was finally accepted because of changed circumstances¹³⁶.

The commission reviewed the merger once before, in 2011¹³⁷ and despite the parties' statement that the merger was necessary due to the severe ongoing economic crisis and the significant increase in fuel taxes, rendering their merger a one-way street for their survival in the market. Nevertheless, the Commission initially held that this merger would cease the intense competition between the two companies and create a potential monopoly in the domestic flight market, on at least 10 flight routes. Furthermore, the Commission was very skeptical of the failure of the interested parties to propose effective solutions to safeguard the interests of the public. Hence, the merger was not approved at that time as it would positively hinder competition in the market and that it would be difficult for new companies to enter the domestic market due to the high, if not monopolistic, market shares that would result from the merger. The Commission believed this would lead to a quasi-monopoly in the Greek air transport market and eventually result in higher fares.

However, in 2013, the Competition Commission was called to reassess the matter. Specifically, given that Olympic Air was facing financial difficulties that continued to worsen due to the economic crisis in Greece at the time, Aegean Airlines proposed to acquire full control of Olympic Air by purchasing its shares. *"The Notifying Party submits that the continued and unprecedented Greek recession and the dramatic decline in demand for passenger air transport services within Greece have forced the Parties to restructure and to downsize their respective operations over the last three years"*¹³⁸. Since the merger would significantly affect trade between Member States and competition, and after confirming that the formal and substantive conditions of the relevant provisions for the referral of the case were met, the proposed merger was referred to the European Commission under Article 22 of Regulation (EC) No. 139/2004. Although, Olympic Air regularly received funding from its parent company, Marfin's difficult

¹³⁶ Assimakis K. and Jeram J. "Changing Mind in Changed Circumstances Aegean/Olympic II and the Failing Firm Defence" *Journal of European Competition Law & Practice* Volume 5 Issue 9 November 2014 Pages 605–615 (available at <https://academic.oup.com/jeclap/article-abstract/5/9/605/1794506?redirectedFrom=PDF>).

¹³⁷ Case No COMP/M.5830 – Olympic/ Aegean Airlines.

¹³⁸ Case No COMP/M.6796 – AEGEAN/ OLYMPIC II, p. 10.

financial situation following the bankruptcy of Cyprus Popular Bank and the anticipated peak of Olympic Air's further financial needs in the future did not incentivize Marfin to continue investing in its subsidiary and keeping it operational, while the full closure of the Greek airline appeared inevitable. The Commission, taking into account the acquiring company's claim regarding Olympic Air's increased financial needs, lack of available capital and the necessity of the transaction to *"allow the Parties to maintain their (currently minimal) ability to compete against substantially larger and stronger European and non-European rivals as well as to stem continued losses and further marginalisation of their respective networks and activities"*¹³⁹, reconsidered the possible application of the "failing firm" defense, evaluating the relevant criteria as defined in case law and the Horizontal Merger Guidelines.

Additionally, regarding the other two criteria of the FFD, they were not met. Regarding the criterion of the existence of an alternative buyer, the Commission's market investigation revealed that, apart from Aegean, there was no other competitor expressing interest in acquiring Olympic Air, despite the fact that in 2011 the merger between the two companies was prohibited. Hence, even though the airline was clearly available for sale to other buyers, there were no alternatives found. Finally, concerning the third criterion, no party expressed interest in obtaining Olympic Air's assets, including the company's brand, which was owned by the Greek state, its bilateral traffic rights, and its leased aircraft. As a result, since no credible new entrant showed interest, it was inevitable that Olympic Air's assets would eventually exit the market.

Therefore, from all the above, it is evident that the three criteria for the FFD were met here. The Commission considered the, still evident, influence of the economic crisis and the decline it caused in domestic flight bookings in Greece, Olympic Air's lack of profitability history accompanied with the limited recovery prospects, the financial difficulties of Marfin and thus the limited incentives for further financial support of Olympic Air. Hence, the Commission concluded that, although, the two merging parties were close competitors, there was no change in the competitive structure from the initial decision made in 2011. The merger of Aegean airlines and Olympic Air met the requirements of a failing firm under the Horizontal Merger Guidelines, and the proposed merger was not incompatible with the internal market as it did not significantly impede effective competition.

At this point, it is worth mentioning the commitments proposed by the acquiring company, in accordance with Article 8, paragraph 2 of the Merger Regulation. Specifically, these commitments involved "setting a price cap on fares and offering to sublease aircraft to potential

¹³⁹ Case No COMP/M.6796 – AEGEAN/ OLYMPIC II, p. 10.

new carriers under certain conditions.” However, the Commission deemed these commitments inadequate to address the competition concerns identified but noted that since Olympic Air would eventually exit the market even without the merger, there was no need for such commitments from the notifying party, as the merger could not have any negative impact on competition.

IV. The ANEK/ATTIKA GROUP case¹⁴⁰

The very recent notified merger the HCC approved of, is the one concerning the absorption of "ANONYMOS NAFTILIAKI ETAIREIA KRITIS A.E." (ANEK) by "ATTICA ANONYMOS ETAIREIA SYMMETOCHON" (Attica Group). This merger was notified to the Competition Commission on October 25, 2022, and on August 3, 2023, it was approved by the Commission's Plenary with Decision No. 827/2023, under Article 8, paragraph 6 of Law 3959/2011¹⁴¹, as stated in the relevant announcement by the Commission.

The merger concerns the markets of the provision of passengers, private vehicles, and sea transport services within Greek territory and between port routes (Origin-Destination) in Crete and the Adriatic, as well as the market for the provision of sea transport services through public service contracts. With the aforementioned decision, the Competition Commission ruled that, although the merger falls within the scope of article 6, paragraph 1 of Law 3959/2011 and following a full investigation under article 8, paragraph 6 of Law 3959/2011, it does not raise serious doubts about its compatibility with the requirements for competition in the aforementioned relevant markets. The Competition Commission's Plenary Department concluded that, despite the fact that this merger may have significant implications for competition, especially by creating or strengthening a dominant position in certain markets for the provision of passenger, car, and ferry services on specific port routes, the three criteria required for accepting the FFD were in this case met. Specifically, In particular, the Competition Commission found that: a) ANEK would be forced to exit the market in the near future due to the financial difficulties it faces, b) there was no alternative acquisition option for ANEK that would be less harmful to competition than the notified merger, and c) no credible interest was

¹⁴⁰ Hellenic Competition Commission. (2023). Decision No. 827/2023.

¹⁴¹ “The concentration shall be prohibited by decision of the Competition Commission, issued within ninety (90) days from the date on which the full investigation procedure was initiated, if the criteria defined in Article 7(1) are fulfilled and, in the case referred to in Article 5(5), if the criteria defined in Article 1(3) are not fulfilled. The Competition Commission shall allow the concentration in all other cases. If the period of ninety (90) days expires and a decision prohibiting the concentration has not been issued, it shall be regarded as approval of the concentration by the Competition Commission, which must issue the relevant declaratory act”.

expressed in acquiring ANEK's assets, and consequently, the company's assets would exit the market. In any case, the structure of competition, when considering all the affected markets as a whole, would not be worse due to the merger compared to the scenario where ANEK's assets were not sold, and as such, the merger is not causally linked to this.

Taking the above into account, and recognizing that ANEK is a failing firm and that the conditions for its protection in the public interest were met, the Commission ruled that the merger did not raise serious concerns regarding its compatibility with the requirements for maintaining competition in the relevant markets.

V. The Attica Bank/Pancreta Bank merger¹⁴²

The merger of Attica Bank and Pancreta Bank was finalized in August 2024, creating the fifth largest bank in Greece, by estimated assets. According to the official announcement, the merger was completed within very demanding timelines and at an unprecedented speed for such cases, only weeks after the shareholders' agreement¹⁴³. This concentration, while falling under the scope of Article 6(1) of Law 3959/2011, does not raise serious doubts as to its compatibility with the requirements for effective competition in the relevant markets concerned. Following approvals from relevant supervisory authorities, including the Bank of Greece, the Hellenic Competition Commission, and the general assemblies of Attica Bank and Pancreta Bank, the merger was finalized through the absorption of Pancreta Bank by the former, as confirmed by the Ministry of Development and its registration in the General Commercial Registry.

The HCC approved the concentration under Article 8(3) of Law 3959/2011, which was notified, concerning, on the one hand, the merger of the two abovementioned banks with Pancreta Bank being absorbed by Attica Bank, and, on the other hand, the acquisition by "Thrivest Holding Ltd" of exclusive control over the entirety of Attica Bank following its merger with Pancreta Bank. At the meeting of the Department of the HCC, it was unanimously decided to approve the merger in accordance with Article 5, Paragraph 2(a) of Law 3959/2011, and on the other hand, the acquisition of exclusive control by Thrivest Holding LTD over the enterprise that would result from the completion of the aforementioned merger. This merger concerned the

¹⁴² Hellenic Competition Commission. (2024). Decision No. 855/2024 (available at <https://www.epant.gr/en/decisions/item/3013-decision-855-2024.html>).

¹⁴³ Ekathimerini. (n.d.). "Merger of Banks Attica and Pancreta Finalized" (available at <https://www.ekathimerini.com/economy/1247846/merger-of-banks-attica-and-pancreta-finalized/>) (accessed November 16, 2024).

broader banking sector and, more specifically, the markets of retail banking deposits and loans, corporate banking deposits and loans, payment cards (issuance and acceptance), and others.

The merger did not involve affected markets at either the horizontal or vertical level, as in none of the relevant markets mentioned above are the following criteria cumulatively met; Firstly, the activity of at least two (2) of the participating companies and a combined market share of at least 15% (regarding horizontal markets), or, secondly, the activity of at least one of the participating companies and a combined market share of at least 25% (regarding vertical markets)¹⁴⁴. Additionally, the merger did not result in vertical relationships between the parties, as the activities of one party in the transaction are not in a higher or lower economic tier in relation to the activities of the other party in the transaction, as well as any conglomerate effects. Hence, the Hellenic Competition Commission unanimously approved the merger, on the grounds that, while the merger falls within the scope of Article 6, Paragraph 1 of Law 3959/2011, it does not raise serious doubts as to its compatibility with the competitive market framework.

¹⁴⁴ Naftemporiki. (n.d.). “ Merger of Pancretan – Attica Bank: 'Green light' also from the Competition Commission ” (available at <https://www.naftemporiki.gr/business/1753443/sygchoneysi-pagkritias-attica-bank-prasino-fos-kai-apo-tin-epitropi-antagonismoy/>) (accessed September 16, 2024).

E. Conclusion

The protection of competition ensures the safeguarding of free economic activity for both businesses and consumers through the application of rules designed to contribute to consumer welfare and, as much as possible, achieve economic efficiency. Merger control plays a significant role in modern economies, as highlighted by the continuously increasing number of mergers being carried out and the purpose of the legal framework for merger control is to detect mergers that could have competitive impacts on the market structure and hinder competition. If the competent competition authorities, which are responsible for reviewing mergers, believe that a proposed merger has anti-competitive effects, they can block it by deeming it incompatible with the common market. However, the assessment by competition authorities does not involve a generalized evaluation of restructuring mergers but rather an individualized assessment of each case based on its particular circumstances. The difficulties in evaluation stem from the fact that economic efficiency gains are considered when they are qualitatively significant, and the potential anti-competitive effects are minor. As a result, the scope for applying the restructuring merger defense has been significantly reduced. A case-by-case and very careful approach by competition authorities is justified by the uncertainty about the impact of each restructuring merger on market competition.

The dilemma boils down to whether competition policy should be reoriented or remain stable during times of crisis. In similar economic downturns, there have been attempts to "relax" the rules governing competition law. In this analysis, several important issues and decisions related to the evaluation of mergers involving troubled companies were explored. The 2008 economic crisis and the 2020 COVID-19 pandemic presented unique challenges for businesses, many of which faced severe survival problems. In this context, the FFD argument emerged as a useful tool to save companies at risk of exiting the market and, in any case, to prevent further disruption in the common market and the economy. The main argument, as mentioned earlier, is the failure of free markets and the justified application of interventionist policies in response.

When evaluating rescue mergers, competition authorities face the difficult task of weighing the negative competitive effects of a merger against the social and economic benefits that arise from approving such a merger involving a troubled company. Therefore, for the Failing Firm Defense to apply, participating companies must demonstrate that one of the businesses is indeed failing and that, as a result, the merger itself will not have anti-competitive effects. Additionally, they must show that the competitive structure of the market would deteriorate, even without the merger, due to the failing company's market exit. Essentially, they argue that without the merger, the acquired company would leave the market, and thus, any reduction in competition in the relevant market should not be seen as an automatic consequence of the proposed merger. It remains a constant challenge for economic and legal experts, as well as governments and

companies, to ensure that decisions reflect the best interests of the community and the overall economy.

However, competition authorities are hesitant to extend the application of the FFD to financially weak companies that have not yet failed but are less efficient competitors. This hesitation is justified by the fact that parties involved in mergers that could reduce competition would have a strong incentive to claim financial difficulties, even if their situation is not as severe as that of a failing company, in order to convince the authorities to handle their case more leniently than they should. Many argue that the damage caused when a competition authority makes a wrong assessment of a company's viability (which is actually insolvent) exceeds the damage caused by a mistaken assessment of insolvency for a company that is actually viable. Therefore, in cases of doubt, merger control should be more lenient. The opposite reasoning is presented by equally strong supporters at a theoretical level, leading to the conclusion that a more agnostic approach seems safer.

The central question in times of crisis is whether the economic crisis affects the application of competition law and whether deeply recessionary conditions justify the conclusion of agreements that would otherwise be prohibited, a more lenient treatment of dominant firms, or more favorable treatment of mergers aimed at resolving insolvency issues. The past has taught us that competition law requires consistent application regardless of economic, political, or social conditions. It cannot be disputed that the market economy and free competition system have led the economies of the countries that follow it to unprecedented growth and prosperity, while on the other hand, countries like Greece have paid dearly for state interventions in the economy.

However, the relationship between competition law and public interest goals is extremely complex and the economic crisis cannot serve as a permanent excuse for deviations in the application of competition rules. The general risks from a shift toward the so-called "more economic approach" were highlighted earlier, along with the resulting legal uncertainty. Competition law does not serve social or political purposes but only competition itself. Therefore, its application cannot be either lenient or strict depending on the economic circumstances. The ultimate and constant goal must remain the establishment and maintenance of conditions for effective competition. Competition authorities, as independent experts, must demonstrate that the political measures taken do not threaten the beneficial effects of competition.

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