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Rescuing Icarus: the European Commission's approach to dealing with failing firms and sectors in distress

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Abstract

In Greek mythology, Icarus is given wings made of feathers and wax by his father as a means to escape exile. Experiencing flight for the first time ashe makes his escape, Icarus dares to fly too near the sun despite his father's warnings not to do so. His wax wings melt in the heat and Icarus consequently plunges to his death in the sea. The Commission is faced with a challenging task when dealing with firms in financial distress, some of them with falls befitting Icarus. This article focuses on three such concrete situations that the Commission has to manage: the “Failing Firm Defence” in merger control cases, restructuring agreements in declining sectors (also called “crisis cartels”) assessed under Article 101 TFEU, and undertakings’ inability to pay fines under point 35 of the Fining Guidelines. In all three situations, the Commission carries out a similar assessment of the financial health of the “failing” firm or sector, and in

each case, the Commission's approach is rather formalistic. While the Commission advocates the same public policy concern across the board, namely to protect competition in a market, the criteria aimed at doing this are set out slightly differently in each of the three situations. The aim of this article, however, is not to argue for a more relaxed approach to competition policy as the standard, but rather for a more refined pragmatism that would also be more aligned to the effects-based competition enforcement adopted by the Commission in recent years.

Keywords:

Article 101 TFEU | counterfactual | crisis cartels | EU merger control | failing firm defence | fining guidelines | firms in difficulty | inability to pay | sectors in distress

Notes

[1] Charles Franklin Kettering (1876–1958) was an American inventor and engineer and Head of Research at General Motors.

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

[3] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5 [hereafter “HMG”].

[4] Ibid, para 89.

[5] EUMR (n 2) art. 2(3).

[6] The principle of neutrality was stated in Kali and Salz/MdK/Treuhand (Case IV/M.308) [1994] OJ L 186/30; on appeal Joined Cases C-68/94 French Republic v Commission and C-30/95 Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC) v Commission [1998] ECR I-1375, para 116.

[7] V Baccaro, “Failing firm defence and lack of causality: doctrine and practice in Europe of two closely related concepts” (2004) 25 E.C.L.R. 12.

[8] This narrowness is a subject of criticism in Lindsay and Berridge, The EU Merger Regulation: Substantive Issues (4th ed, Sweet & Maxwell, 2012) 17–018.

[9] GP Kyprianides, “Assess the importance of the counterfactual in merger assessment with regards to the failing firm defence” (2012) 576 E.C.L.R. 6.

[10] The FFD implicitly relies on the merger generating efficiencies. For an interesting discussion, see K Heyer & S Kimmel, “Merger review of firms in financial distress” (2009) 5(2) CPI 110.

[11] For a full review of the FFD in different countries, see OECD Roundtable on Failing Firm Defence (21 October 2009) DAF/COMP (2009) 38 [hereinafter “OECD”].

[12] HMG (n 3), para 90.

[13] Kali and Salz (n 6); BASF/Eurodiol/Pantochim (Case COMP/M.2314) Commission Decision 2002/365/EC [2002] OJ L 132/45, para 142.

[14] OECD (n 11), 11.

[15] Nynas/Shell/Harburg Refinery (Case M.6360) Commission Decision of 02/09/2013 (not yet published).

[16] Aegean/Olympic II (Case M.6796) Commission Decision of 09/10/2013 (not yet published).

[17] “The Commission's decision in Aegean/Olympic Air: merger to monopoly clearance under the failing firm defence” (67th Lunch Talk Series of the GCLC, Brussels, December 2013) [hereafter “GCLC event”].

[18] T Mathews, “The failing firm defence: re-examining Canada's approach to rescue mergers in light of the US and EU experience” (James H. Bocking Memorial Award, University of Ottawa, 2013) 28.

[19] K Joergsen, “Andersen and the ‘failing firm’: the application of the ‘failing firm defence’ in merger proceedings involving firms providing professional services” (2003) 26(3) World Competition 363–80, 1.

[20] Eg, Deloitte & Touche/Andersen (UK) (Case COMP/ M.2810) Commission Decision of 01/07/2002.

[21] K Fountoukakos and L Geary, “Time to bid farewell to the failing firm defense? Some thoughts in the wake of Nynas/Olympic/Aegean” (2013) C.P.I. Europe Column 11.

[22] EF Clark and CE Foss, “When the failing firm defence fails” (2012) 3(4) Journal of European Competition Law & Practice 317–31, 15.

[23] OECD (n 11) 183.

[24] Ibid, 188.

[25] OECD (n 11) 35.

[26] Ibid.

[27] Ibid, 183.

[28] Ibid.

[29] Ibid; see also Oxera, “Failing, or just flailing? The failing-firm defence in mergers” (2009) 3 <http://www.oxera.com/Latest-Thinking/Agenda/2009/Failing,-or-just-flailing-The-failing-firm-defenc.aspx> (accessed 10 July 2014).

[30] See infra for a counterfactual analysis.

[31] “Failing firm defence: A new theory?” (2010) Tendances Concurrences: Revue des droits de la concurrence n 2, 12–22, 17.

[32] OECD (n 11) 32.

[33] Oxera (n 29) 1.

[34] Heyer (n 10) 108.

[35] Mason and Weeds, “Merger Policy, Entry, and Entrepreneurship” (2013) 57 (1) European Economic Review 23–38, 5 <http://www.essex.ac.uk/economics/discussion-papers/papers-text/dp634.pdf> (accessed 2 August 2014).

[36] OECD (n 11) 35.

[37] Bavasso and Lindsay, “Causation in EC merger control” (2007) 181(3) Journal of Competition Law & Economics 192.

[38] OECD (n 11) 35; guest speaker Jorge Padilla at OECD (n 11) 211: Dr Padilla agreed that the evidentiary burden of proof should be on the parties. However, the substantive burden of proof – ie, balancing of pro-competitive and anti-competitive effects – should lie on competition agencies.

[39] OECD (n 11) 35.

[40] OECD (n 11) 20.

[41] Ibid, 32.

[42] US DOJ and FTC, Horizontal Merger Guidelines (2010) 32 <http://www.justice.gov/atr/public/guidelines/hmg2010.pdf> (accessed 10 July 2014) [hereafter “US HMG”].

[43] OECD (n 11) 32; eg, Ryanair entry strategy in Aegean/Olympic II (n 16). The Commission relied on Ryanair's statements that it had no entry plans, mainly because of the high charges in AIA. Interestingly though, in January 2014, Ryanair announced its new entry into the Greek domestic market.

[44] US HMG (n 42) 32.

[45] Ibid, fn 16; ICN Recommended Practices for Merger Analysis (2010) 32 <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf> (accessed 15 July 2014).

[46] Guest speaker Dr Padilla in OECD (n 11) 209.

[47] Partner of Cleary Gottlieb in the Brussels office.

[48] “Competition law in times of economic crisis: in need for adjustment?” (GCLC 8th Annual Conference, Brussels, November 2012) <https://www.coleurope.eu/events/8th-annual-conference-gclc-0?language=fr> (accessed 15 July 2014 [hereafter “GCLC Conference”]).

[49] For further discussion on the counterfactual, see D Geradin, “The counterfactual method in EU competition law” (GCLC Conference, Brussels, October 2011) 3 <https://www.coleurope.eu/content/gclc/documents/7th_conference/6.%20D.%20Geradi

n%20-%20The%20Counterfactual%20Method%20in%20EU%20Competition%20Law.pdf> (accessed 15 July 2014).

[50] See eg, NewsCorp/Telepiú (Case COMP/M.2876) Commission Decision 2004/311/EC [2004] OJ L 110/73; and KLM/Martinair (Case COMP/M.5141) Commission Decision of 17/12/2008 [2009] OJ C 51.

[51] The bankruptcy of the Enron Corporation in 2001 led to the dissolution of Arthur Andersen, one of the five largest audit and accountancy firms worldwide.

[52] Andersen (n 20); it should be stressed that no FFD assessment was involved.

[53] Ibid, para 49.

[54] Ibid.

[55] Ibid, para 52.

[56] Ibid, para 65.

[57] Baccaro (n 7) 8.

[58] OFT, "Anticipated acquisition by Lloyds TSB plc of HBOS plc. Report to the Secretary of State for Business Enterprise and Regulatory Reform" (24 October 2008) <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/press_release_attachments/LLloydstsb.pdf> (accessed 10 August 2014).

[59] P Marsden and I Kokkoris, "The role of competition and state aid policy in financial and monetary law" (2010) 13(3) Journal of International Economic Law 875–92, 5.

[60] OFT (n 58) para 173.

[61] UK Enterprise Act 2002 (Specification of Additional Section 58 Consideration Order 2008) SI 2008/2645 <http://www.legislation.gov.uk/> (accessed 10 August 2014).

[62] Marsden (n 59) 5.

[63] OFT (n 58) paras 61 and 68 et seq.

[64] Ibid, para 85.

[65] Ibid.

[66] Ibid, para 86.

[67] H Zenger (Former Member of the Chief Economist Team in the Commission's DG Competition) H Zenger, “Merger control. Challenges during economic crises” <https://www.coleurope.eu/events/8th-annual-conference-gclc-0?language=fr> (accessed 10 August 2014).

[68] Oxera (n 29) 5.

[69] H Zenger (n 67) 10.

[70] I Asimov, The Winds of Change and Other Stories (Doubleday & Company, BCE ed, 1983).

[71] OECD (n 11) 12–13.

[72] Commission, Competition Policy Brief (Issue 9, June 2014) 1. <http://ec.europa.eu/competition/publications/cpn/> (accessed 10 July 2014).

[73] Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C 249/1 [hereafter “2014 R&R Guidelines”]; the previous EU Guidelines on State Aid for rescuing and restructuring firms in difficulty [2004] OJ C 244/2 [hereafter “2004 R&R Guidelines”].

[74] Oxera, “Should aid be granted to firms in difficulty? A study on counterfactual scenarios to restructuring state aid” (Prepared for the European Commission, December 2009) <http://www.oxera.com/Oxera/media/Oxera/Restructuring-state-aid.pdf?ext=.pdf> (accessed 10 July 2014).

[75] Oxera, “Throwing good money after bad? EU rescue and restructuring aid guidelines” (2014) 3 <http://www.oxera.com/Latest-Thinking/Agenda/2014/Throwing-good-money-after-bad-EU-rescue-and-restru.aspx> (accessed 10 July 2014).

[76] Ibid, 4.

[77] Based on Oxera empirical study (n 74) 142.

[78] 2014 R&R Guidelines (n 73) para 20.

[79] Ibid.

[80] 2004 R&R Guidelines (n 73) para 11. For a good discussion, see Case T-171/02 RegioneautonomadellaSardegna v Commission [2005] ECR II-2136 and Case T-349/03 Corsica Ferries France v Commission [2005] ECR II-02197.

[81] 2004 R&R Guidelines (n 73) para 11.

[82] Ibid, para 31; 2014 R&R Guidelines (n 73) art. 54.

[83] 2014 R&R Guidelines (n 73) art. 53.

[84] Oxera (n 74) 5.

[85] Ibid, 4.

[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] Olympic/Aegean Airlines (Case COMP/M.5830) Commission Decision of 26/01/2011.

[91] Ibid, para 1988.

[92] Ibid, paras 1986 et seq.

[93] Commission, "Mergers: commission blocks proposed merger between Aegean Airlines and Olympic Air" (Brussels, 26 January 2011) <http://europa.eu/rapid/press-release_IP-11-68_en.htm> (accessed 10 August 2014).

[94] Benoît Durand (Partner at RBB Economics) in GCLC event (n 17).

[95] Ryanair/Aer Lingus III (Case COMP/M.6663) [2013] OJ C 216/07.

[96] Benoît Durand in GCLC event (n 17).

[97] J Almunia, "Statement on Aegean/Olympic Air merger" (speech 13/800, Brussels, 9 October 2013) <http://europa.eu/rapid/press-release_SPEECH-13-800_en.htm> (accessed 10 July 2014).

[98] Stephan Simon in GCLC event (n 17).

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] A Komninos and J Jeram, “Changing mind in changed circumstances: Aegean/Olympic II and the failing firm defence” (2014) 5 Journal of European Competition Law & Practice, 10.

[105] Mason and Weeds (n 35) 26.

[106] Komninos (n 104) 10.

[107] Whish and Bailey, Competition Law (Oxford University Press, 7th ed, 2012) 19.

[108] Ibid.

[109] Komninos (n 104) 9.

[110] Commission, “Mergers: Commission approves acquisition of Shell's Harburg refinery assets by Nynas AB of Sweden” (Brussels, 2 September 2013) <http://europa.eu/rapid/press-release_IP-13-804_en.htm> (accessed 10 August 2014).

[111] “Analysing restructuring transactions: reviewing mergers in markets in decline” (White & Case Workshop, Brussels, 25 February 2014) <http://www.concurrences.com/Photos/Analysing-restructuring-1547/> (accessed 31 July 2014).

[112] Fountoukakos (n 21) 11.

[113] Commission Press release (n 110).

[114] Komninos (n 104) 9.

[115] White & Case Workshop (n 111) 3.

[116] Ibid.

[117] Ibid.

[118] OECD (n 11) 36.

[119] OECD (n 11) 42; economics literature uses the expressions “Type I” and “Type II” errors.

[120] See supra Section B.2(a).

[121] OECD (n 11) 42; in the US today, the courts are more concerned about false positives than false negatives, whereas in the Commission and the EU courts, the opposite is true.

[122] Mason and Weeds (n 35) 26.

[123] OECD (n 11) 44; see infra Section C on cartels.

[124] Ibid.

[125] Ibid.

[126] From the poem “The latest decalogue” (first published 1862, FL Mulhauser 1974).

[127] Deputy Assistant A-G for International Enforcement, Antitrust Division, US DOJ.

[128] WJ Kolasky, “What is competition?” (Seminar on Convergence Sponsored by the Netherlands Ministry of Economic Affairs in The Hague, Netherlands, October 2002).

[129] Ibid.

[130] A Smith in The Wealth of Nations (first published 1776, Penguin 1999): “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”; Whish and Bailey (n 108) 513.

[131] See, inter alia, Whish and Bailey (n 107) 513.

[132] Ibid.

[133] For instance, in the UK and the US they have criminal fines and jail sentences for offenders.

[134] Kolasky (n 128).

[135] Eg, J Almunia, “Cartels: the priority in competition enforcement” (Brussels, 24 April 2011) <http://ec.europa.eu/competition/speeches/index_2011.html> (accessed 10 July 2014).

[136] Eg, CA Varney (Assistant A-G, Antitrust Division, US DOJ), “Vigorous antitrust enforcement in this challenging era” (remarks as prepared for the Centre for American Progress, May 2009) <http://www.justice.gov/atr/public/speeches/245711.htm> (accessed 10 July 2014).

[137] Ibid; for instance, the US adopted the National Industry Recovery Act in 1933 which legalised cartels to help the US economy recover from the Great Depression.

[138] N Kroes, “Antitrust and state aid control – the lessons learnt” (36th Annual Conference on International Antitrust Law and Policy, Fordham University, New York, September 2009) <http://europa.eu/rapid/press-release_SPEECH-09-408_en.htm?locale=en> (accessed 10 July 2014).

[139] OECD Roundtable on Crisis Cartels (October 2011) DAF/COMP/GF(2011)11, 9 and 20 et seq [hereafter “OECD CC”].

[140] Ibid, 21.

[141] Ibid, 22.

[142] Ibid.

[143] Ibid, 390.

[144] Commission's submission to the OECD Roundtable on Crisis Cartels (October 2011) DAF/COMP/GF(2011)11 para 6.

[145] P Mehra, “Choice between cartels and horizontal mergers” (Indira Gandhi Institute of Development Research, Mumbai and Institute of Law and Economics, University of Hamburg) 28 <http://www.wu.ac.at/europainstitut/noeg/mehra_s4.6-2> (accessed 10 August 2014).

[146] Ibid.

[147] Case C-209/07, Competition Authority v Beef Industry Development Society and Barry Brothers, [2008] ECR I-8637 [hereafter “BIDS”].

[148] See infra Section D for a detailed analysis of the Commission's fining policy.

[149] I Kokkoris and R Olivares-Caminal in “Antitrust law in the wake of the recent financial crises: a critical analysis of the status quo and a roadmap for reinforcing enforceability” (2010) <http://law.bepress.com/expresso/eps/index.159.html> (accessed 15 July 2014).

[150] AG Trstenjak Opinion, delivered on 4 September 2008, para 63.

[151] Hans Zenger (n 67) 24.

[152] EC's submission (n 144) para 58; Geoffroy van de Walle de Ghelcke at GCLC Conference (n 48).

[153] Synthetic Fibres (Case IV/30.810) [1984] OJ L 207/17 and StichtingBaksteen (Dutch Bricks) (Case IV/34.456) [1994] OJ L 131/15.

[154] Ireland's submission to OECD CC (n 139) 140. Ireland emphasised that they do not rely on past decisions.

[155] GCLC Conference (n 48).

[156] Geoffroy van de Walle de Ghelcke, “Crisis Cartels” at GCLC Conference (n 48) <https://www.coleurope.eu/events/8th-annual-conference-gclc-0?language=fr> (accessed 15 July 2014).

[157] Kokkoris (n 149) 54.

[158] Alexis Walckie (Chief Economist of the Belgian Competition Authority) at GCLC Conference (n 48).

[159] EC's submission (n 144) para 5.

[160] The Commission defined what is meant by structural overcapacity in its Annual Report on Competition Policy, point 38 (1982): “Structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilisation and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term.”

[161] Ibid, para 8.

[162] Ibid, paras 8 and 42.

[163] Ibid, para 10.

[164] Ibid, para 11.

[165] As a matter of law, all restrictions can be saved by Art 101(3) TFEU; see Case T-17/93 Matra Hachette v Commission [1994] ECR II-595, para 85.

[166] US submission to OECD CC (n 139) 215–8.

[167] Carl Shapiro (Deputy Assistant A-G for Economics, Antitrust Division, US DOJ), "Competition policy in distressed industries" (remarks as prepared for the ABA Symposium: Competition as Public Policy, May 2009) <http://www.justice.gov/atr/public/speeches/245857.htm> (accessed 10 July 2014).

[168] Kokkoris (n 149) 55.

[169] OECD CC (n 139) 48–9.

[170] EC's submission (n 144) paras 45–6.

[171] Ibid, paras 43–4.

[172] See, inter alia, Jones and Sufrin, EU Competition Law: Text, Cases and Materials (Oxford University Press, 4th ed, 2010) 994.

[173] Ibid; EC's submission (n 144) para 47.

[174] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements [2010] OJ L 335/43.

[175] Ibid, art. 1(1).

[176] EC's submission (n 144) para 48; see, inter alia, Jones and Sufrin (n 172) 1008–10.

[177] Ibid; BE Specialisation agreements (n 174) Art 5(1).

[178] BIDS (n 147).

[179] Ibid, paras 3–4.

[180] Ibid, paras 8 and 13.

[181] Trstenjak (n 150) paras 12–3.

[182] Some authors argue that it would be beneficial for legal certainty to have object restriction decisions exempted by Art 101(3) TFEU. One option would be adopting decisions under Art 10 Regulation 1/2003; see, inter alia, D Bailey, “Restrictions of competition by object under Article 101 TFEU” (2012) 49(2) Common Market Law Review, 559–99, 40; see also R Whish, “How efficient is the Commission at making decisions under 101(3)?” (Lunchtime Lecture at Parliament Chamber Inner Temple, London, December 2013).

[183] BIDS (n 147) para 33.

[184] Bailey (n 182). The three main arguments are stressed at 577–8; also in EC's submission (n 120) para 15.

[185] BIDS (n 147) para 21

[186] Trstenjak (n 150) paras 68 and 70.

[187] BIDS (n 147) para 35.

[188] Ibid, para 21; see, inter alia, Jones and Sufrin (n 172) 799–80.

[189] BIDS (n 147) para 21; Trstenjak (n 150) para 58.

[190] Its views were summarised in its submission to the OECD (n 144).

[191] EC's submission (n 144) para 19; stated in Art 2 Regulation 1/2003.

[192] Commission Guidelines on the application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 48.

[193] EC's submission (n 144) para 25.

[194] Ibid, para 29.

[195] 101(3) Guidelines (n 192) para 83.

[196] EC's submission (n 144) para 50.

[197] Ibid, para 51.

[198] EC's submission (n 144) para 35; 101(3) Guidelines (n 193) para 75.

[199] 101(3) Guidelines (n 192) para 105.

[200] BIDS (n 147) para 21; the principle of independent decision-making runs throughout the jurisprudence on Art 101(1). See, inter alia, Case 40/73 SuikerUnie v Commission (1975) ECR 1663, para 173.

[201] Kokkoris (n 149) 56.

[202] Trstenjak (n 150) para 51.

[203] Ibid, para 52.

[204] Ibid.

[205] Kokkoris (n 149) 57.

[206] Trstenjak (n 150) para 53.

[207] Ibid.

[208] Kokkoris (n 149) 57–8.

[209] Trstenjak (n 150) para 54.

[210] L'Allegro, opening lines (first published 1631, Kindle edition 2010). In Greek mythology, Cerberus is the three-headed hound that guards the entrance to the underworld as a powerful deterrent to curious members of the living who want to explore the Kingdom of Hades.

[211] See, inter alia, opinion of Advocate General Kokott delivered on 29 April 2010 in Case C–550/07 P Akzo Nobel v Commission [2010] ECR I-08301.

[212] For a further discussion, see É Barbier de La Serre and E Lagathu, “The law on fines imposed in EU competition proceedings: faster, higher, harsher” (2013) 4(4) Journal of European Competition Law & Practice

[213] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1/1, art. 23(2).

[214] WPJ Wils, “Optimal antitrust fines: theory and practice” (2006) 29(2) World Competition 19. The 10% cap already takes into account the undertaking's ability to pay.

[215] Ibid.

[216] Ibid; eg, see J Harrington, “Deterring EU competition law infringements: are we using the right sanctions?” (Optimal Deterrence of Competition Law Infringements, U. of Pennsylvania – The Wharton School, December 2012) slide 8 <http://assets.wharton.upenn.edu/~harrij/pdf/Deterring%20EU%20Competition%20Law%20Infringements12.12.pdf> (accessed 15 July 2014). Harrington notes that over-deterrence can create a small welfare loss in many markets, whereas under-deterrence can create a large welfare loss in a few markets.

[217] Commission Guidelines on the method of setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2 para 3.

[218] J Almunia and J Lewandowski, “Information note: inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines” 2 SEC(2010) 737/2 OJ 1922.

[219] Case C-328/05 P SGL Carbon AG v Commission [2007] ECR I-03921, para 100.

[220] Case T-62/02 Union Pigments v Commission [2005] ECR II-5057, para 177.

[221] Eg, French Beef (Case COMP/38.279/F-3) Commission Decision 2003/600/EC [2003] OJ L 209/12.

[222] F Castillo de la Torre, “The 2006 guidelines on fines: reflections on the Commission's practice” (2010) 33(3) World Competition 359–416, 402.

[223] A similar provision existed in point 5(b) of the previous 1998 Fining Guidelines.

[224] Ibid; eg, in Mountings for Windows and Window-Doors (Case COMP/39452) Commission Decision of 28/03/2012 (no public version available) and Steel Abrasives (Case COMP/39792) Commission Decision of 02/04/2014 (no public version available). The Commission exceptionally reduced the fines pursuant to point 37 of the Guidelines taking into account, inter alia, the mono-product range of the companies.

[225] Kevin Coates in his personal blog “Inability to pay and significant loss of asset value” (21st Century Competition. Reflections on Modern Antitrust, 27 January 2014) <http://www.twentyfirstcenturycompetition.com/2014/01/inability-to-pay-and-significant-loss-of-asset-value/> (accessed 2 August 2014.

[226] Ibid.

[227] Katerina Buchtova (Case Handler, Cartels Directorate), “Fines Setting by the EU Commission for Antitrust Infringements” (September 2013) <http://www.oecd.org/competition/latinamerica/SI-Buchtova-EU-EN.pdf> (accessed 17 July 2014). Statistics: ITP claims since the introduction of the new ITP methodology in 2009 (as of August 2013): 14 ITP claims were accepted and 33 were rejected out of 54ITP claims in total.

[228] Ibid, art. 4.

[229] Castillo (n 222) 398; P Kienapfel and G Wils, “Inability to pay – first cases and practical experiences” (2010) 3(3) Competition Policy Newsletter.

[230] The same 5 criteria outlined in Kienapfel (n 229) 3.

[231] ITP questionnaire sample at <http://ec.europa.eu/competition/antitrust/information_en.html> (accessed July 2015); Castillo (n 222) 403.

[232] Note (n 218) para 7.

[233] Ibid.

[234] Information extracted from ITP Questionnaire (n 231); Kienapfel (n 229) 5; Note (n 218) para 7.

[235] Kienapfel (n 229) 5; Note (n 218) para 7.

[236] Kienapfel (n 229) 5.

[237] Ibid.

[238] Eg, Aegean/Olympic I (n 90).

[239] GCLC Conference (n 48).

[240] Kienapfel (n 229) 6.

[241] Note (n 218) para 7.

[242] Kienapfel (n 229) 6.

[243] Note (n 218) para 8.

[244] Ibid, para 9. They point out that individual assets never completely lose their value because they normally retain a certain operational and resale value.

[245] Ibid.

[246] Ibid.

[247] Ibid.

[248] Coates (n 225).

[249] Kienapfel (n 229) 6.

[250] Coates (n 225).

[251] Ibid.

[252] R Posner and F Easterbrook, Antitrust: cases, economic notes and other materials (West Publishing, 2nd ed, 1981) 472.

[253] Kienapfel (n 229) 7.

[254] Note (n 218) para 8.

[255] For instance, in 2010, amidst the financial crisis, the Commission accepted ITP claims in three out of its six new cartel decisions: Bathroom Fittings and Fixtures (Case COMP/39092) Commission Decision of 23/06/2010 (no public version available); Prestressing Steel (Case COMP/38.344) Commission Decision of 30/06/2010 [2011] OJ C 339; and Animal Feed Phosphates (Case COMP/38.866) Commission Decision of 20/07/2010 [2011] OJ C 111.

[256] Note (n 218) para 8.

[257] Kienapfel (n 229) 7.

[258] Note (n 218) para 6.

[259] Komninos (n 104) 11.

[260] See, inter alia, Richard Whish's lecture (n 182).

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