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

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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 granted clearance under the Merger Regulation on 12 December 2013."

¹⁸ T Matl... rescue Award, Univ...

¹⁹ K Joer... firm "ces" (2003) 26(3) W...

²⁰ Eg, De... Decision of 01/07/20...



²¹ K Fountoukakos and L Geary, "Time to bid farewell to the failing firm defence? 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

³² OECD

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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.icncompetition.org/~/media/ICN/RecommendedPracticesforMergerAnalysis2010.pdf>>

(accessed 10 July 2014)

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<<https://www.oecd.org/competition/mergers-and-acquisitions/2014-09-01-geradi>

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(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://www.ft.gov.uk/shares/red_oftr/... (2014).

⁵⁹ P Marsden and more... financial... 92, 5.

⁶⁰ OFT (n...
⁶¹ UK Financial Services Authority (2008) (2014).

⁶² Marsden...

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⁶⁴ Ibid, p...
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 scenario (2009) <[ext=.pdf](#)>

⁷⁵ Oxera (2014) 3 after [guidelines" od-money-](#)

⁷⁶ Ibid, 4

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⁷⁸ 2014

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, p

⁹³ Comm and Olyr [Aegean Airlines -release_IP-11-68_e](#)

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¹⁰⁰ Ibid.

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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.

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¹⁰⁶ Komninos (n 104) 10.

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

¹⁰⁸ Ibid.

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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).

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¹⁴⁰ Ibid, 21.

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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.

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¹⁶³ Ibid, para 10.

¹⁶⁴ Ibid, para 11.

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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).

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¹⁶⁹ OECD CC (n 139) 48-9.

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¹⁷³ Ibid;

¹⁷⁴ *Competition Law and Policy: An application of Article 101(1) TFEU* [2010] OJ L 335/43.

¹⁷⁵ Ibid

¹⁷⁶ EC's submission (n 144) paras 1008-10.

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¹⁷⁸ BIDS

¹⁷⁹ Ibid,



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

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¹⁹⁷ Ibid, para 31.



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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.

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²⁰⁸ *Kokkoris* (n 149) 57-8.

²⁰⁹ *Trstenjak* (n 150) para 54.

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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 54 ITP 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);

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²³² Note (n 228) 4.

²³³ Ibid.

²³⁴ Informal communication with the Commission (2010) 3(3) Competition Policy Newsletter; Note (n 218) para 10.

²³⁵ Kienapfel and Wils (n 229) 3.

²³⁶ Kienapfel and Wils (n 229) 3.

²³⁷ Ibid.

²³⁸ Eg, A. (n 228) 4.

²³⁹ GCLC (n 228) 4.



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 Pu

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²⁵⁶ Note

²⁵⁷ Kienapfel



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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