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Original Articles

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

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each case, the Commission's approach is rather formalistic. While the Commission

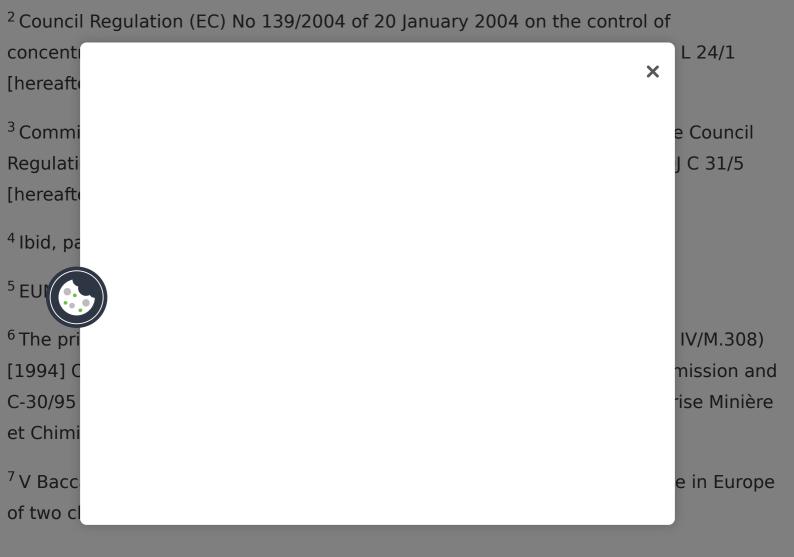
advocates the same public policy concern across the board, namely to protect competition in a market, the criteria aimed at doing this are set out slightly differently in each of the three situations. The aim of this article, however, is not to argue for a more relaxed approach to competition policy 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 pa	sectors in distre	ess

Notes

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



- 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).



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- <u>The-failing-firm-defenc.aspx</u>> (accessed 10 July 2014). ³⁰ See infra for a counterfactual analysis. 31 "Failin vue des × droits de 32 OECD

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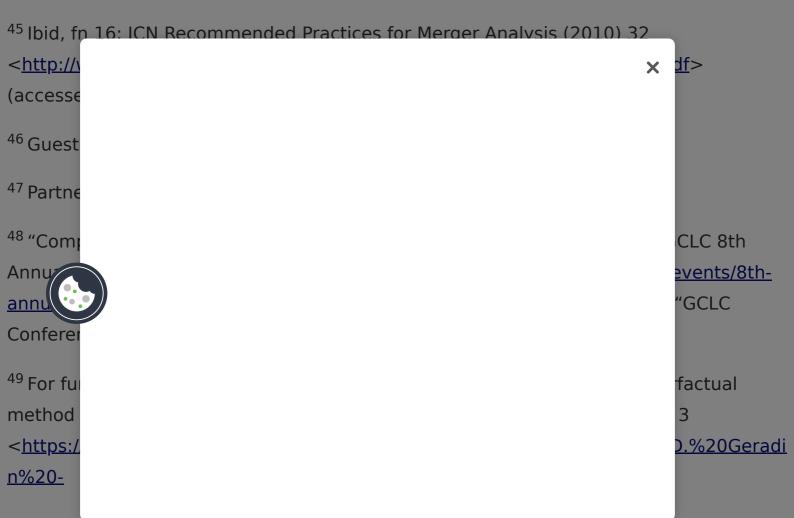
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³⁸ OECD (n 11) 35; guest speaker Jorge Padilla at OECD (n 11) 211: Dr Padilla agreed that the evidentiary burden of proof should be on the parties. However, the substantive burden of proof – ie, balancing of pro-competitive and anti-competitive effects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

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<sup>39</sup> OECD (n 11) 35.
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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.



⁴⁰ OECD (n 11) 20.

⁴¹ Ibid, 32.

⁴² US DOJ and FTC, Horizontal Merger Guidelines (2010) 32

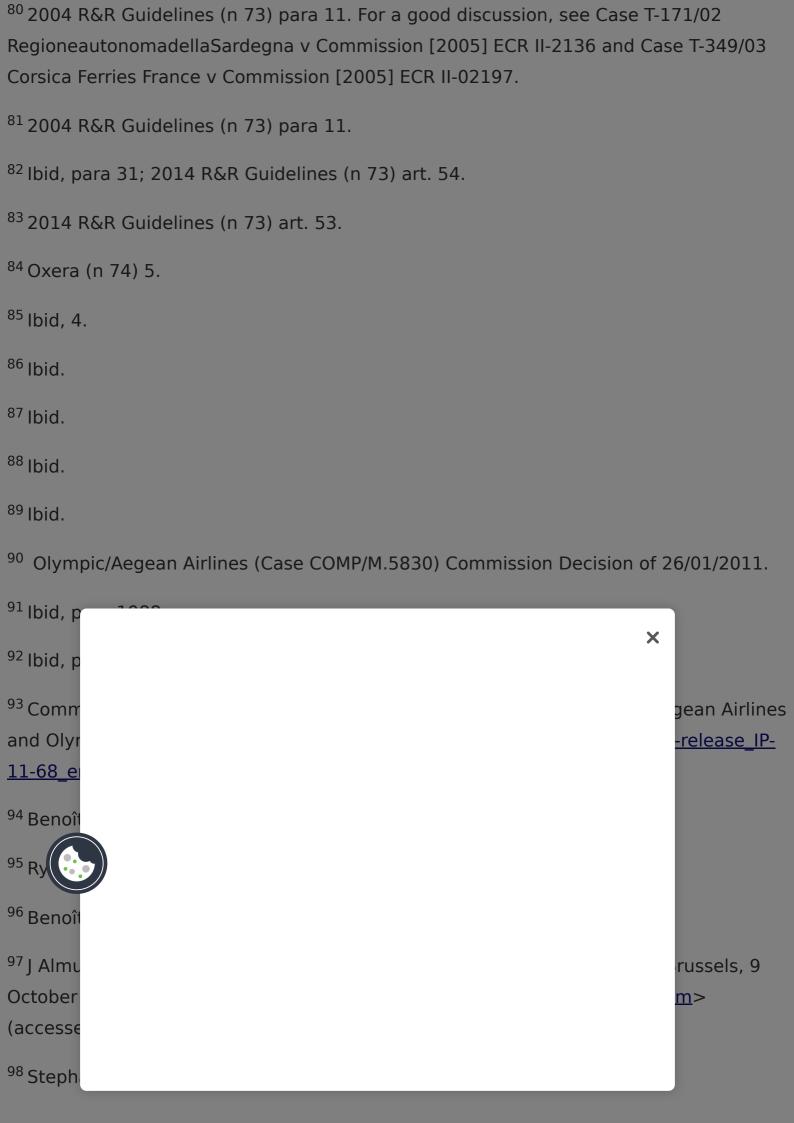
http://www.justice.gov/atr/public/guidelines/hmg2010.pdf (accessed 10 July 2014) [hereafter "US HMG"].

%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 Rusiness Enterprise and Regulatory Reform" (24 October 2008) <http://v t.gov.uk/sha X red_oft/p)14). ⁵⁹ P Mars financial -92, 5. and mor 60 OFT (r 61 UK ion Order 2014). 62 Marsd 63 OFT (r 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] QLC 244/2 [hereafter "2004 R&R Guidelines"]. X 74 Oxera ctual scenario n, December df? 2009) <ext=.pd 75 Oxera guidelines" (2014) 3od-moneyafter ⁷⁶ Ibid, 4 77 Based

⁷⁸ 2014

79 Ibid.



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 Europe Competition Law & Practice, 10.	ean
¹⁰⁵ Mason and Weeds (n 35) 26.	
¹⁰⁶ Komninos (n 104) 10.	
107 Whish and Bailey, Competition Law (Oxford University Press, 7th ed, 20)12) 19.
¹⁰⁸ Ibid.	
¹⁰⁹ Komninos (n 104) 9.	
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<sup>117</sup> Ibid.
<sup>118</sup> OECD (n 11) 36.
<sup>119</sup> OECD (n 11) 42; economics literature uses the expressions "Type I" and "Type II"
errors.
<sup>120</sup> 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.
<sup>123</sup> OECD (n 11) 44; see infra Section C on cartels.
<sup>124</sup> Ibid.
125 Ibid.
<sup>126</sup> From the poem "The latest decalogue" (first published 1862, FL Mulhauser 1974).
<sup>127</sup> Deputy Assistant A-G for International Enforcement, Antitrust Division, US DOJ.
<sup>128</sup> WJ Ko
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<sup>129</sup> Ibid.
130 A Sm
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131 See,
132 Ibid.
<sup>133</sup> For ir
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134 Kolasky (11 120)
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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, X 142 Ibid. 143 Ibid, 144 Com ober 2011) DAF/COI 145 p ni Institute of rsity of Deve cessed 10 Hambur August 2 146 Ibid.

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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> (accesse X 157 Kokk 158 Alexi **GCLC** Confere ¹⁵⁹ EC's 160 Th **Annual** sts where Repo ncing a over a p significa ıt ailable does accompa not indic in the

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161 Ibid,

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<sup>162</sup> Ibid, paras 8 and 42.
<sup>163</sup> Ibid, para 10.
<sup>164</sup> Ibid, para 11.
<sup>165</sup> 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.
<sup>166</sup> US submission to OECD CC (n 139) 215-8.
<sup>167</sup> 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)
<a href="http://www.justice.gov/atr/public/speeches/245857.htm">http://www.justice.gov/atr/public/speeches/245857.htm</a> (accessed 10 July 2014).
<sup>168</sup> Kokkoris (n 149) 55.
<sup>169</sup> OECD CC (n 139) 48-9.
<sup>170</sup> EC's submission (n 144) paras 45-6.
<sup>171</sup> Ibid, paras 43-4.
<sup>172</sup> See,
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<sup>173</sup> Ibid;
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175 II
<sup>176</sup> EC's
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<sup>177</sup> Ibid;
<sup>178</sup> BIDS
<sup>179</sup> Ibid,
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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.



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<sup>198</sup> EC's submission (n 144) para 35; 101(3) Guidelines (n 193) para 75.
<sup>199</sup> 101(3) Guidelines (n 192) para 105.
<sup>200</sup> 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.
<sup>201</sup> Kokkoris (n 149) 56.
<sup>202</sup> Trstenjak (n 150) para 51.
<sup>203</sup> Ibid, para 52.
<sup>204</sup> Ibid.
<sup>205</sup> Kokkoris (n 149) 57.
<sup>206</sup> Trstenjak (n 150) para 53.
<sup>207</sup> Ibid.
<sup>208</sup> Kokkoris (n 149) 57-8.
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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.

 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.

can create a large welfare loss in a few markets.

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. X ²²⁰ Case ²²¹ Eq. F /EC [2003] OJ L 209 ²²² F Cas ommission's practice 223 🛕 elines. 224 Ibid; 2) Commis Abrasives available). (Case Co The Con Guidelines taking ir

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)

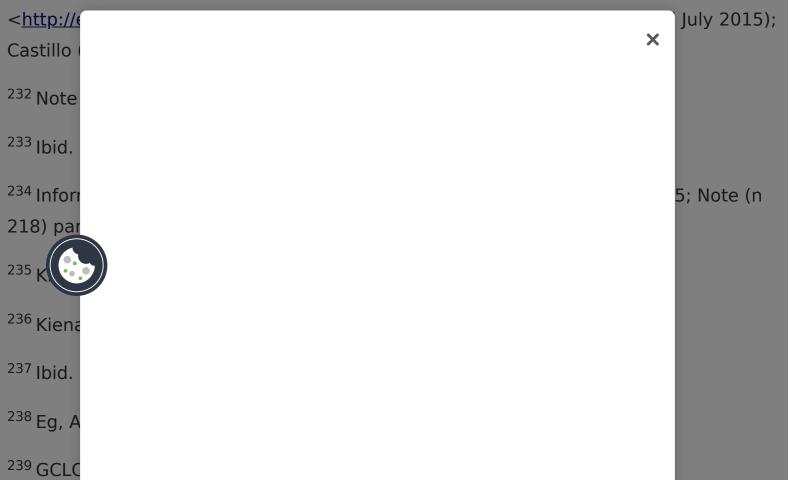
http://www.oecd.org/competition/latinamerica/SI-Buchtova-EU-EN.pdf (accessed 17 July 2014). Statistics: ITP claims since the introduction of the new ITP methodology in 2009 (as of August 2013): 14 ITP claims were accepted and 33 were rejected out of 54ITP claims in total.

²²⁸ Ibid, art. 4.

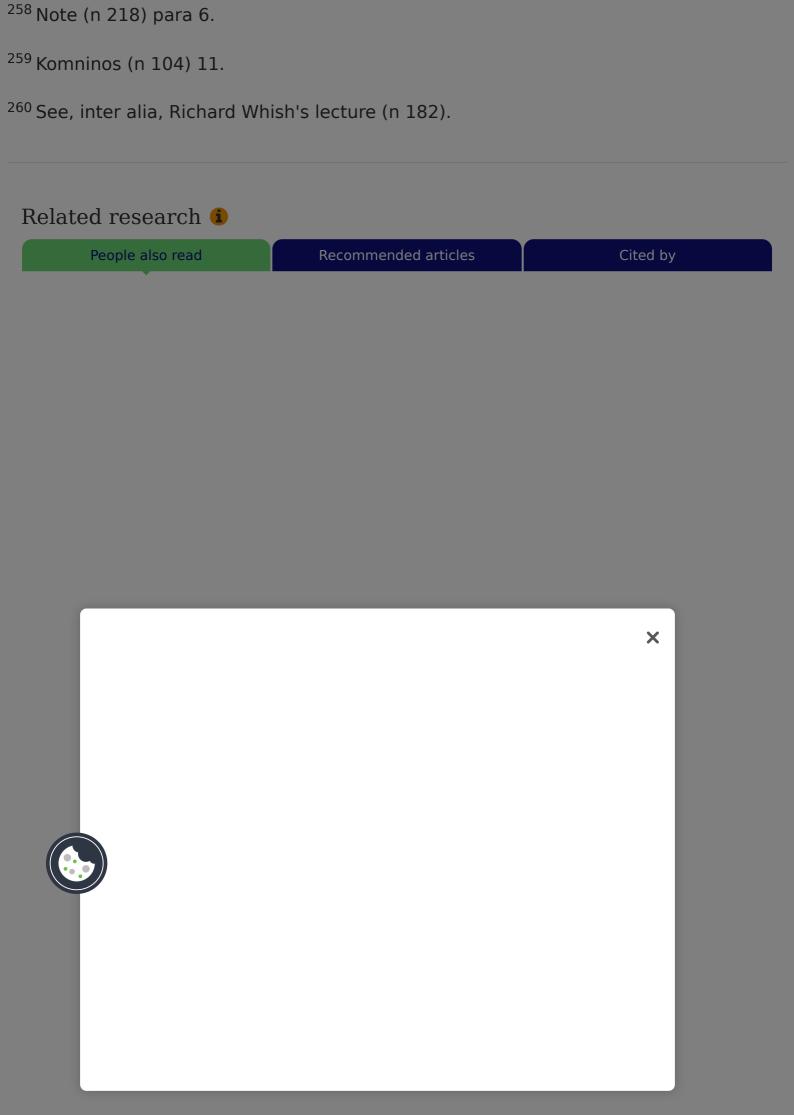
²²⁹ Castillo (n 222) 398; P Kienapfel and G Wils, "Inability to pay – first cases and practical experiences" (2010) 3(3) Competition Policy Newsletter.

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

²³¹ ITP questionnaire sample at



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<sup>240</sup> Kienapfel (n 229) 6.
<sup>241</sup> Note (n 218) para 7.
<sup>242</sup> Kienapfel (n 229) 6.
<sup>243</sup> Note (n 218) para 8.
<sup>244</sup> Ibid, para 9. They point out that individual assets never completely lose their value
because they normally retain a certain operational and resale value.
<sup>245</sup> Ibid.
<sup>246</sup> Ibid.
<sup>247</sup> Ibid.
<sup>248</sup> Coates (n 225).
<sup>249</sup> Kienapfel (n 229) 6.
<sup>250</sup> Coates (n 225).
<sup>251</sup> Ibid.
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