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# Reflections on the European Commission's draft Merger Guidelines

## The Failing Firm Defence

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The European Commission has rarely relied on the Failing Firm Defence, and the test set out in its draft Merger Guidelines remains stringent. At first glance, this is surprising: national competition authorities have increasingly accepted the defence, and it can facilitate the reallocation of unproductive assets to more efficient uses. In this article, **Segye** and **Angelos** consider whether the draft should be revised in this respect, or whether the draft Guidelines offer another way to facilitate the exit of Europe's unproductive 'zombie' firms.

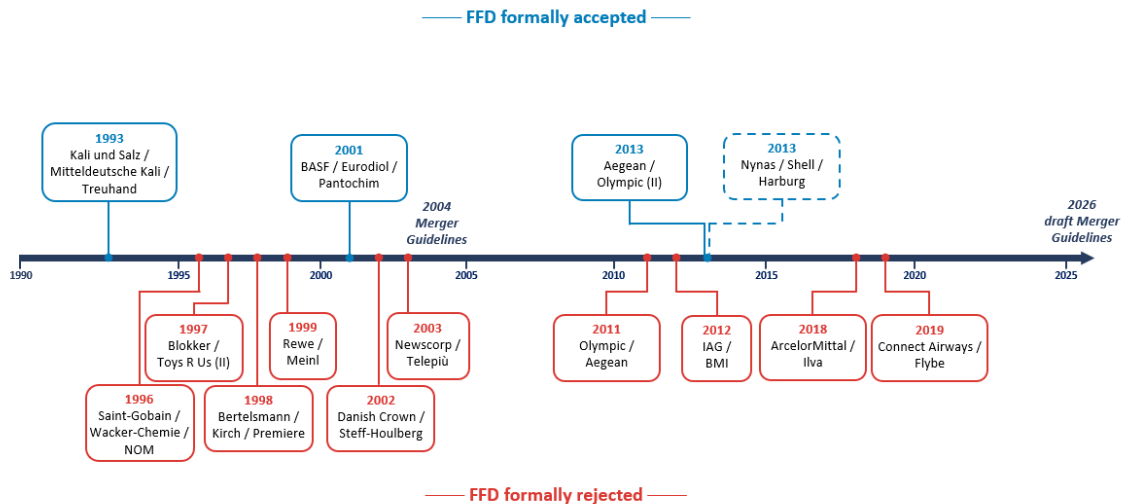
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### The Failing Firm Defence in Europe

- 1 The European Commission's ("Commission") draft Merger Guidelines include revisions to the Failing Firm Defence ("FFD"), often an afterthought in EU merger control.<sup>2</sup>
- 2 The FFD has a core purpose that is clear and well-understood but is rarely seen in practice. It allows for an otherwise anticompetitive merger to be cleared if one party would exit the market anyway. In that case, the merger does not reduce competition compared with the relevant counterfactual.
- 3 Initially referred to as the "Failing *Company* Defence", the FFD doctrine entered EU merger control with *Kali und Salz/MdK/Treuhand*,<sup>3</sup> where, following appeal, the European Court of Justice accepted in principle that a concentration would not be the cause of anticompetitive effects if three cumulative conditions were satisfied. These conditions were subsequently codified in the 2004 Horizontal Merger Guidelines (Guidelines), requiring that:<sup>4</sup>
  - i. the acquired undertaking would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking;
  - ii. there is no less anti-competitive alternative purchase than the notified merger; and
  - iii. in the absence of the merger, the assets of the failing firm would inevitably exit the market.
- 4 Since its inception in *Kali und Salz/MdK/Treuhand*, the Commission has only accepted the FFD on three further occasions, and only twice after the 2004 Guidelines came into force over 20 years ago. In *Aegean/Olympic II*, the Commission cleared the transaction on the basis of the FFD.<sup>5</sup> In *Nynas/Shell/Harburg* the Commission relaxed the doctrine, clearing the transaction against the counterfactual of a failing *division*, rather than an entire firm.<sup>6</sup>

- 5 The FFD in EU merger control has, in effect, sunk to the point of “*practical irrelevance*”,<sup>7</sup> the product of a high evidentiary burden and a seeming reluctance to engage with the defence on the part of the Commission. The approach contrasts with that of some national authorities, for example the UK CMA which specifies a key “*or otherwise*” clause which allows FFD to be applied to cases other than complete failure of the acquired undertaking.<sup>8</sup>

**Figure 1: FFD Timeline**



Source: Compass Lexecon analysis based on data from the European Commission case registry.

## The rationale of changing how the Commission assesses the FFD

- 6 The Draghi report is concerned with Europe’s weak productivity performance, poor capital reallocation, insufficient firm scaling, fragmented financial markets and the need to shift resources toward high-productivity sectors.<sup>9</sup> All these issues partly follow from a common set of underlying barriers to allocation: weak financial markets, inefficient insolvency regimes, state support or soft budget constraints can keep low-productivity firms alive, thus tying up labour, capital and market share that might otherwise move to more dynamic firms.
- 7 The same barriers contributed to a steady increase in the number of ‘zombie’ firms in Europe: businesses that remain operational despite being persistently weak and economically unproductive.<sup>10</sup> How to tackle this problem featured prominently in policy debates during, and following, the 2008 global financial crisis<sup>11</sup> and the COVID-19 pandemic.<sup>12</sup>
- 8 These firms raise difficult questions for merger control. They are financially distressed, but they do not satisfy the stringent requirements of the FFD. Traditionally, merger control has offered little to facilitate their exit and reallocation of their assets to more productive uses.
- 9 Addressing zombie firms is further complicated by an incentive gap: solvent firms often have no strategic incentive to acquire a failing competitor. Research suggests that profitable firms prefer the total exit of a failing rival over a rescue merger, as the former leads to a more significant reduction in competition and higher resulting profits for the remaining players. The economic literature contends, therefore, that unless significant economies of scale or scope are present, the market may naturally not seek to acquire the distressed assets, preferring them to exit entirely.<sup>13</sup>

- 10 Consequently, there have been calls to broaden the application of the principles that underpin the FFD to facilitate an effective and orderly exit mechanism for such ‘zombie’ or ‘flailing’ firms through mergers.<sup>14</sup> These calls included some of our colleagues at Compass Lexecon, for instance:
- Jorge Padilla suggested the counterfactual applied in the FFD is too stringent, failing to align with that of standard merger assessments. That is because the FFD’s third condition, the ‘asset exit’ requirement, means that ‘exit’ is read too narrowly as requiring the physical disappearance of assets. It is not sufficient to show that the firm itself will fail; the productive assets must also be expected to leave the relevant market. Otherwise, some less anticompetitive alternative is *presumed* to exist (for example, acquisition by a non-market participant or sale to a smaller competitor). In practice, this approach means the counterfactual becomes the ‘best available merger’ (hypothetically), rather than the most likely outcome absent the transaction. This approach does not necessarily align with the treatment of counterfactuals in standard merger assessments. In contrast, a firm can remain legally and operationally alive, while still failing in an economically meaningful sense: its capital, labour, customer relationships, capacity, or know-how may remain trapped in low-productivity uses. Treating asset redeployment as part of the counterfactual, rather than asking only whether assets leave the market altogether, may therefore provide a more economically meaningful assessment.<sup>15</sup>
  - Lau Nilausen and Conor Duggan distinguish takeovers of effective competitors from those of firms that merely survive. These are “*businesses that remain technically solvent but are competitively ineffective*.” By recognising these “*anti-mavericks*”, they contend that regulators could move beyond traditional constraints of market-share assessments and overly restrictive FFD. Rather, by analysing capacity constraints and investment incentives, the Commission could better identify mergers that are unlikely to harm competition. Such an approach recognises that certain acquisitions may benefit customers and stimulate market growth by unlocking supply capacity and improving competitiveness.<sup>16</sup>
- 11 Less stringent application of the FFD could help mitigate the issue of zombie firms.<sup>17</sup> It could also help the Commission avoid a repeat of cases like *Aegean/Olympic I* (2011).<sup>18</sup> There, the Commission concluded that a complete market exit by Olympic Air was not the most likely scenario and that its brand and assets remained attractive to alternative purchasers. Yet, for those close to the facts of the case, Olympic’s inability to compete effectively following the prohibition decision looked increasingly evident.<sup>19</sup> The situation of Olympic continued to worsen, and less than two years later the Commission accepted the FFD in *Aegean/Olympic II* (2013).<sup>20</sup>
- 12 Other jurisdictions already show how the FFD can be used less restrictively in practice.
- In the US, where the FFD was first established back in 1930,<sup>21</sup> the test sets out similar criteria but they are applied differently.<sup>22</sup> The ‘asset exit’ requirement is what makes the Commission’s test materially stricter than its US counterpart. Under the US regime, no hypothetical ‘acquirer not active in the market’ is presumed exist, offering a less anticompetitive alternative for reallocating the unproductive assets. This treatment better aligns with the evidentiary requirements of the merger control regime in other contexts.
  - National Competition Authorities (NCA) elsewhere in Europe take a similar approach. The CMA has cleared 6 mergers on the basis of an FFD since 2024: Eurofins/Cellmark (2024);<sup>23</sup> Tate & Lyle Sugars/Tereos (2024);<sup>24</sup> Bidvest/Citron Hygiene (2025);<sup>25</sup> Sportradar/IMG Arena (2025);<sup>26</sup> Rundvirke Industrier AB/Calders & Grandidge (Boston) Limited (2025);<sup>27</sup> and Constellations Developments Limited/ABVR Holdings Limited (2026).<sup>28</sup> In contrast, it had cleared just one between 2020 and 2023: Nijjar Group (Acton)/Medina (2022), a merger in the dairy industry.<sup>29</sup> The French Competition Authority (ADLC) recently accepted the FFD for the first time in Mobilux

Group/Conforama Group (2022),<sup>30</sup> and the Hellenic Competition Commission similarly recently accepted its first FFD case, Attica Group/ANEK (2023).<sup>31</sup>

## A more stringent and prominent FFD in the draft Merger Guidelines

- 13 The draft Merger Guidelines, however, do not materially relax the conditions for invoking the FFD. The doctrine receives greater prominence, expanding from the final three paragraphs of the 2004 Guidelines (paragraphs 89–91) to seven paragraphs in the draft Guidelines (paragraphs 45–51), with substantially more discussion devoted to its application.
- 14 A side-by-side comparison of the key provisions (**Table 1**) shows why the bar may remain prohibitively high when tackling zombie firms. The main points are that:
- The three-limb test is recast as “*necessary*”, rather than “*especially relevant*”.
  - The first condition still requires that a failing firm would be forced out the market in the near future, potentially ruling out zombie firms. Further, the draft Guidelines add an additional counterfactual to the merger: that the firm cannot be taken over, nor “*successfully reorganised*”.
  - The second condition now acknowledges that an alternative acquirer should be “*credible*”. However, this codifies the current practice seen for example in *Aegean/Olympic I*. The key issue for zombie firms is that it maintains the need for a counterfactual acquirer, which goes beyond ‘most likely counterfactual’ that is applied in a standard merger; and
  - The third limb now explicitly includes the scenario where assets “*cease to play a competitive role*”. This is encouraging, but given the cumulative nature of the conditions, it applies to the assets of a failing firm that will be “*forced out of the market*”. So, it cannot apply to unproductive assets of firm that remains in the market but has cease to play a competitive role.

**Table 1: a comparison of the FFD in the 2004 Merger Guidelines and 2026 draft Guidelines**

2004 Merger Guidelines <sup>32</sup>	2026 draft Merger Guidelines <sup>33</sup>
“The Commission considers the following three criteria to be <b>especially relevant</b> for the application of a ‘failing firm defence’.”	“The Commission considers the following three cumulative criteria <b>necessary</b> to find that one of the merging parties is a ‘failing firm’.”
“First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties <b>if not taken over</b> by another undertaking.”	“First, the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties <b>if not taken over</b> by another firm <b>or successfully reorganised</b> . Temporary financial problems or short-term liquidity constraints are insufficient to qualify as a failing firm.”
“Second, there is no less anti-competitive <b>alternative purchase</b> than the notified merger.”	“Second, there is no less anticompetitive alternative than the notified merger. <b>Alternatives may include business reorganisations</b> (such as obtaining external funding) <b>or credible alternative acquirers</b> . The realistic and attainable prospect of such alternatives within a reasonable period of time is assessed at the time the notified merger has been initiated, negotiated, concluded or announced.”
“Third, in the absence of a merger, the assets of the failing firm <b>would inevitably exit</b> the market.”	“Third, absent the merger, the assets of the failing firm <b>would inevitably exit</b> the market, <b>cease to play a competitive role, or the market share of the failing firm would in any event accrue to the acquirer</b> .”

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- 15 The draft Guidelines also address the concept of a “*failing division*” (paragraph 50), an issue previously considered by the Commission in cases such as *Aegean/Olympic II* and *Nynas/Shell/Harburg*.<sup>34</sup>
- 16 The core requirements largely mirror those applicable to a failing firm. The first condition, however, introduces additional considerations specific to failing divisions, including whether (a) the parent company can no longer offset the subsidiary's losses to prevent its insolvency, or (b) the parent lacks any strategic, financial, or other incentive to continue supporting the subsidiary. The practical difficulty of this assessment is illustrated by the draft's discussion of the second condition. There, the Commission emphasises that a division should not qualify merely because management has decided to discontinue an underperforming business. Instead, the Commission seeks to determine whether the subsidiary could continue to be cross-subsidised, whether its losses are only temporary, or whether it serves an important non-financial purpose within the wider corporate group, notwithstanding representations by the parent to the contrary.
- 17 In *Aegean/Olympic II*, the Commission was satisfied by the evidence presented.<sup>35</sup> As discussed above, however, that case involved a rather clear-cut prospect of imminent market exit. Depending on the degree of scepticism applied in practice, the hurdle may prove significantly higher in less extreme cases and potentially insurmountable for unproductive zombie firms.

### Tackling zombie firms by other means: a Dynamic Effects Defence?

- 18 The draft Guidelines signal that the Commission intends to keep the FFD within the narrow scope it had before. If anything, it may be even narrower. However, there may be justification for this; it could leave the FFD with its narrow purpose, and use other tools at its disposal to facilitate the reallocation of unproductive assets to address the issue of zombie firms.<sup>36</sup>
- 19 The draft Guidelines may allow the Commission to assess mergers involving zombie firms by shifting the focus from static concentration effects to dynamic welfare: productivity, investment incentives, exit, and reallocation. This does not mean ignoring short or long-term price effects. Rather, it means that in cases with distressed firms, the counterfactual may be worse than the merger – especially if prohibition leaves assets stranded, preserves a zombie competitor, or causes disorderly liquidation.
- 20 One option is to appeal to merger impacts of improving access to finance and reallocating scarce R&D resources. The draft Guidelines acknowledge these as potential dynamic efficiencies (see 325 (g) and (h)). While this may be applicable to some mergers, however, it does not address the underlying issue with zombie firms. If the Commission clears a merger on the basis that the transaction would unlock valuable investment opportunities or R&D projects that are currently constrained by a lack of finance, then it recognises that the target possesses profitable and potentially pro-competitive growth opportunities. A true zombie firm lacks those opportunities; strictly, it is not economically viable on a standalone basis and lacks sufficiently promising projects to sustain its operations. So, while this approach may help in some cases, its application to the broader problem may more limited.
- 21 A second option offers more hope: using a dynamic counterfactual in the merger assessment. This avoids the overly stringent barrier that the FFD's counterfactual imposes. Assessing mergers involving financially weak or zombie firms requires a dynamic approach to counterfactual analysis. The current practice is predominantly static. It looks at the presence of the zombie firm and any competitive constraint it applies in the market today, assuming it will remain at least at the same level of effectiveness in the future. However, the more relevant question is how competition and investment are likely to evolve in the future. A zombie firm will persist in providing ineffective competition and continue to ebb as a competitive force. A dynamic merger assessment should

therefore compare the transaction against this more realistic trajectory. Whether this can be achieved via assessments outside the FFD doctrine and purely on the basis of a dynamic analytical framework remains to be seen.

22 What is at stake if we do not get this (mostly) right? Zombie firms stay around for longer, meaning an underutilisation of resources in the European economy, leading to lower productivity, and ultimately a slower and smaller economy. As Padilla (2026) remarks, “[w]ithout the exit of inefficient firms, entry and growth stall; without capital reallocation, the EU economy is condemned to stagnation, rather than dynamism”.<sup>37</sup> Even if the FFD might often seem like an afterthought in competition policy circles, it goes to the heart of the issues the revised Guidelines are trying to address.

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1 Segye Shin is a Senior Vice President. Angelos Stenimachitis is a Vice President. The authors gratefully  
 2 acknowledge the contribution of Jorge Padilla, Andrew Tuffin and Adam Sanderson in preparing this article.  
 3 See European Commission draft Merger Guidelines (2026), [https://competition-  
 4 policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-  
 5 2b71f85685ef\\_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf](https://competition-policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-2b71f85685ef_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf).  
 6 See Case No. IV/M.308, 1993 and Case C-68/94 and C-30/95, 1998, [https://eur-  
 7 lex.europa.eu/eli/dec/1994/449/oj/eng](https://eur-lex.europa.eu/eli/dec/1994/449/oj/eng) and [https://eur-lex.europa.eu/legal-  
 8 content/EN/TXT/HTML/?uri=CELEX:61994CJ0068](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61994CJ0068).  
 9 See European Commission Horizontal Merger Guidelines (2004), paragraphs 89-91, [https://eur-  
 10 lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205%2802%29](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004XC0205%2802%29).  
 11 See Aegean/Olympic II final decision, [https://ec.europa.eu/competition/mergers/cases/decisions/m6796\\_20131009\\_20682\\_4044023\\_EN.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf).  
 See Nynas/Shell/Harburg final decision where merger efficiencies also played a role, [https://ec.europa.eu/competition/mergers/cases/decisions/m6360\\_5463\\_2.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m6360_5463_2.pdf).  
 See Padilla, J. (2026). Reinvigorating The "Failing" Failing Firm Defence in Eu Merger Control. Available at SSRN: <https://ssrn.com/abstract=6003016> or <http://dx.doi.org/10.2139/ssrn.6003016>. p.3.  
 CMA Merger Assessment Guidelines (2021) paragraph 3.21, “In forming a view on an exiting firm scenario, the CMA, in both its Phase 1 and Phase 2 investigations, will use the following framework of cumulative conditions: (a) the firm is likely to have exited (**through failure or otherwise**); and, if so (b) there would not have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question.”  
 See [https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs\\_for\\_publication\\_2021\\_-\\_\\_.pdf](https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_-__.pdf).  
 See Draghi report (2024), [https://commission.europa.eu/topics/competitiveness/draghi-report\\_en](https://commission.europa.eu/topics/competitiveness/draghi-report_en).  
 See Gouveia, A.F., and Osterhold, C. (2018). Fear the walking dead: zombie firms, spillovers and exit barriers. OECD Productivity Working Papers No. 13, OECD. Available at: [https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/06/fear-the-walking-dead\\_5b19a68a/e6c6e51d-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/06/fear-the-walking-dead_5b19a68a/e6c6e51d-en.pdf); Banerjee, R.N., and Hofmann, B. (2020). ‘Corporate zombies: Anatomy and life cycle,’ BIS Working Papers 882, Bank for International Settlements. Available at: <https://www.bis.org/publ/work882.htm>; Adalet McGowan, M., Andrews, D., and Millot, V. (2017). The Walking Dead?: Zombie Firms and Productivity Performance in OECD Countries. OECD Economics Department Working Papers No. 1372, OECD. Available at: [https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/01/the-walking-dead\\_f0d1388b/180d80ad-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/01/the-walking-dead_f0d1388b/180d80ad-en.pdf).  
 See for instance, OECD. (2009). Roundtable on Failing Firm Defence. OECD Roundtables on Competition Policy No. 103. Available at: [https://www.oecd.org/content/dam/oecd/en/publications/reports/2010/10/the-failing-firm-defence\\_a0e37e7e/c90c3d1e-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2010/10/the-failing-firm-defence_a0e37e7e/c90c3d1e-en.pdf); Oxera. (2009). Failing, or just flailing? The failing-firm defence in mergers. Available at: <https://www.oxera.com/wp-content/uploads/2018/03/Failing-firm-defence-3.pdf>.

- 12 See for instance, Freshfields. (April, 2020). Available at: <https://www.lexology.com/library/detail.aspx?g=40207807-d29a-438b-bca6-c6cd976da1c6>; Slaughter and May. (May, 2020). Available at: [https://www.slaughterandmay.com/media/aiblvqqh/the\\_failing\\_firm\\_defence\\_during\\_covid\\_19\\_and\\_the\\_tension\\_with\\_cms\\_s\\_approach\\_to\\_the\\_potential\\_competition\\_in\\_dynamic\\_markets\\_1461pdf.pdf](https://www.slaughterandmay.com/media/aiblvqqh/the_failing_firm_defence_during_covid_19_and_the_tension_with_cms_s_approach_to_the_potential_competition_in_dynamic_markets_1461pdf.pdf); Cleary Gottlieb. (May, 2020). Available at: <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/european-merger-control-in-times-of-crisis.pdf>; Authors from Freshfields in Bloomberg Law. (November, 2020). Available at: <https://news.bloomberglaw.com/mergers-and-acquisitions/is-a-merging-company-failing-flailing-or-just-ailing>.
- 13 The FFD can positive or negative effects depending on the circumstances. Most authors, therefore, argue for flexible, effects-based application focused on rigorous counterfactuals and evidence of genuine failure, alternative purchasers, and asset exit. See Persson, L. (2005). The Failing Firm Defense. *Journal of Industrial Economics*, 53, 175-201. Available here: <https://doi.org/10.1111/j.0022-1821.2005.00251.x>; Fedele, A., & Tognoni, M. (2010). Failing Firm Defence With Entry Deterrence. *Bulletin of Economic Research*, 62, 365-386. <https://doi.org/10.1111/j.1467-8586.2009.00334.x>; Vasconcelos, H. (2013). Can the failing firm defence rule be counterproductive?. 65, 567-593. Available here: <https://doi.org/10.1093/oep/gps034>; Bouckaert, J. and Kort, P.M. (2014). Merger Incentives and the Failing Firm Defense. *The Journal of Industrial Economics*, Volume 62, Issue 3, Pages 436-466. Available here: <https://doi.org/10.1111/joie.12053>; Ayal, A., & Rotem, Y. (2019). The Failing Firm Defense – An Equity-Based Approach. *Journal of Competition Law and Economics*, 15, 468-499. <https://doi.org/10.1093/joclec/nhz020>.
- 14 See Padilla, J., Perkins, J., Piccolo, S., and Reynolds, P. (2021). Merger Control Z. Available at SSRN: <https://ssrn.com/abstract=3889230> or <http://dx.doi.org/10.2139/ssrn.3889230>.
- 15 See Padilla, J. (2026).
- 16 See <https://www.compasslexecon.com/insights/publications/anti-maverick-acquisition-targets-distinguishing-between-takeovers-of-effective-competitors-and-mere-survivors>.
- 17 See Jovanovic, B. and Rousseau, P.L. (2008). Mergers as Reallocation. *The Review of Economics and Statistics*, MIT Press, vol. 90(4), pages 765-776; and David, J.M. The Aggregate Implications of Mergers and Acquisitions, *The Review of Economic Studies*, Volume 88, Issue 4, July 2021, Pages 1796–1830. Available here: <https://doi.org/10.1093/restud/rdaa077>.
- 18 See [https://ec.europa.eu/competition/mergers/cases/decisions/m5830\\_7897\\_2.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m5830_7897_2.pdf).
- 19 Contemporary Greek press coverage portrayed Olympic Air as a materially weakened carrier by 2011. Greek sources reported that Olympic Air’s revenues had fallen from €334m to €240.5m, that it remained EBITDA-negative and recorded net losses of €32.3m in 2011 down from €90.1m in 2010, and that its strategy involved cutting loss-making routes and redesigning its network. Importantly, Olympic was able to manage its losses only by selling some of its most profitable slots, like those for landing in London and Paris, to Aegean. See (in Greek) <https://www.tovima.gr/2012/04/02/finance/22-ekat-eyrw-pwlithikan-ta-slots-tis-olympic-air-se-londino-kai-parisi/>.
- 20 The Commission highlighted the continued worsening of the situation, noting that the case in the present (Aegean/Olympic II) was, “characterised by the protracted adverse economic conditions in Greece, significant decline in passenger numbers on Greek domestic routes, historic unprofitability of Olympic without conceivable prospects for reversal in the near future, difficult finances of the parent company and its limited ability and incentive to further financially support Olympic”. The Commission also included comparison to Aegean/Olympic I (2011), concluding that, “Overall, although the Commission found in Olympic/Aegean I that the parties had not convincingly demonstrated that Olympic’s assets would inevitably exit the market, in the present case the prerequisites of this condition are met.”
- 21 When the Supreme Court decided *International Shoe Co. v FTC*, 280 U.S. 291, see <https://supreme.justia.com/cases/federal/us/280/291/>. The doctrine was later more clearly articulated and narrowed in *Citizen Publishing Co. v United States* in 1969, where the Supreme Court described the failing-company defence as a “judicially created doctrine” and referred back to *International Shoe* as the earlier case in which the defence was before the Court, see <https://supreme.justia.com/cases/federal/us/394/131/>.
- 22 Both US and EU require proof of imminent failure, lack of better buyers, and inevitable asset exit, and both treat the failing firm defence as a narrow carve-out from normal merger prohibitions. The US embeds the doctrine explicitly in guidelines and bankruptcy-focused criteria, but still rarely accepts it in practice. The EU built the doctrine through case law, emphasizes strict counterfactual causation and a high “inevitability” standard.

- 23 See Eurofins/Cellmark final full text decision,  
[https://assets.publishing.service.gov.uk/media/66c2f82867dbaeb97a13e344/Full\\_text\\_decision\\_-\\_Eurofins\\_Cellmark.pdf](https://assets.publishing.service.gov.uk/media/66c2f82867dbaeb97a13e344/Full_text_decision_-_Eurofins_Cellmark.pdf).
- 24 See Tate & Lyle Sugars/Tereos final report,  
[https://assets.publishing.service.gov.uk/media/66d5bb09701781e1b341db09/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/66d5bb09701781e1b341db09/Final_report.pdf).
- 25 See Bidvest/Citron Hygiene final full text decision,  
[https://assets.publishing.service.gov.uk/media/67ea96caf0edd954a99fe965/Full\\_text\\_decision\\_.pdf](https://assets.publishing.service.gov.uk/media/67ea96caf0edd954a99fe965/Full_text_decision_.pdf).
- 26 See Sportradar/IMG Arena final full text decision,  
[https://assets.publishing.service.gov.uk/media/6908720ac0dc8f124841750f/Sportradar-IMG\\_A\\_full\\_text\\_decision\\_4.pdf](https://assets.publishing.service.gov.uk/media/6908720ac0dc8f124841750f/Sportradar-IMG_A_full_text_decision_4.pdf).
- 27 See Rundvirke Industrier AB/Calders & Grandidge (Boston) Limited final full text decision,  
[https://assets.publishing.service.gov.uk/media/693990617a605b2d61cd9093/Full\\_text\\_decision\\_-\\_1.pdf](https://assets.publishing.service.gov.uk/media/693990617a605b2d61cd9093/Full_text_decision_-_1.pdf).
- 28 See Constellations Developments Limited/ABVR Holdings Limited final report,  
[https://assets.publishing.service.gov.uk/media/69a968b798da555143be92a4/Final\\_Report.pdf](https://assets.publishing.service.gov.uk/media/69a968b798da555143be92a4/Final_Report.pdf).
- 29 Notably, the CMA now applies a “two limb” test, as in its revised 2021 Merger Assessment Guidelines it removed the equivalent “third limb” whereby it considered whether the exit of a business would be a substantially less anti-competitive outcome than the merger, although in practice this appears to have been absorbed into the second limb and the overall competitive assessment.
- 30 See <https://www.whitecase.com/insight-alert/french-competition-authority-decides-rare-failing-firm-defence-case>.
- 31 See (*in Greek*) <https://epant.gr/enimerosi/deltia-typou/item/2608-deltio-typou-eksetasi-tis-eisigisis-epi-gnostopoiisis-sygkentrosis.html>.
- 32 See European Commission Horizontal Merger Guidelines (2004), paragraph 90.
- 33 See European Commission draft Merger Guidelines paragraphs (2026), paragraphs 45-49.
- 34 See Nynas/Shell/Harburg final decision where merger efficiencies also played a role,  
[https://ec.europa.eu/competition/mergers/cases/decisions/m6360\\_5463\\_2.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m6360_5463_2.pdf).
- 35 See e.g., Case M.6796 – Aegean/Olympic II, paragraphs 752 et seq., 765 et seq.,  
[https://ec.europa.eu/competition/mergers/cases/decisions/m6796\\_20131009\\_20682\\_4044023\\_EN.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf)
- 36 The Tinbergen Rule states that to successfully achieve a specific number of independent economic policy targets, a policymaker must have at least an equal number of independent policy instruments. Named after Dutch economist Jan Tinbergen, the first Nobel Prize winner in Economics, this principle suggest that you cannot “*kill two birds with one stone*” when those “*birds*” (targets) are moving in different directions.
- 37 See Padilla, J. (2026).