*CPI's Europe Column Presents:*

# A Re-awakening of the Failing Firm Defense in the EU in the Aftermath of COVID-19?

*By Dr. Assimakis Komninos, Jan Jeram & Iakovos Sarmas (White & Case LLP)*[1]

*Edited by Anna Tzanaki (Competition Policy International) & Juan Delgado (Global Economics Group)*

CPI COMPETITION POLICY INTERNATIONAL

April 2020

## Introduction – The Broader Challenges of Merger Control

The ongoing COVID-19 global crisis and the expected downturn in the global economy will certainly affect competition law enforcement. While we do not expect any fundamental revisiting of the dogma underpinning competition law, there will be some challenges of both a procedural and substantive nature.

Most of these challenges in the short and medium term will be felt in the area of merger control, due to the very nature of merger control itself. Unlike antitrust enforcement, which is focused on dealing with past conduct, so that a substantial amount of time naturally passes between the conduct at issue and the investigation and the possible decision, in mergers the time horizon is shorter and the analysis is forward-looking. In addition, while competition authorities enjoy discretion as to which antitrust cases to bring and when, the system of merger control is broadly based on the timing and initiative of private parties. Competition authorities must deal with notifications and review the mergers submitted to them, or else the lapse of the statutory deadlines will mean that the mergers are cleared.

For these reasons, the current crisis has so far mostly raised concerns on the merger control front (if we leave State aid control aside). After the initial shock of the first days of the lockdown, it seems that the European Commission ("Commission") and national competition authorities ("NCAs") in Europe have already tried or contemplated giving various responses to the challenges, such as: (i) asking parties not to pre-notify or notify deals; (ii) stopping the clock in Phase II investigations (mostly due to the impossibility of gathering market information in a timely fashion); (iii) requesting and getting the parties' consent to extend deadlines where this is provided for under the law; (iv) imposing no fines for failure to notify within certain national statutory time limits;[2] (v) and even considering the possibility of letting deadlines lapse in unproblematic cases, so that the merger will be cleared automatically.[3] More dramatic steps (like changing the statutory deadlines in the law) cannot be excluded if the situation worsens, although there are some signs of a potential return to normality (e.g. the Commission has recently given the green light to notifying parties to submit Form COs and has restarted the clock in Phase II investigations).[4]

While these are mostly procedural challenges and responses, there is no doubt that the substantive competitive analysis in merger cases cannot ignore the fundamental change of circumstances that we are living. As we know, under EU law,

> *[t]o declare a concentration incompatible with the common market, the Commission has to prove, in accordance with Article 2(3) of the merger regulation, that the implementation of the notified concentration would 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. Such a decision, adopted on the basis of Article 8(3) of the merger regulation, is based on the outcome of a prospective analysis carried out by the Commission. That prospective analysis consists of an examination of how the notified concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious*

*impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*.[5]

Yet, how can a competition authority conduct this analysis while ground-breaking market developments are in the making and when important parts of the economy are in lockdown? For example, imagine a merger involving airlines, almost all of which have grounded their aircraft and, therefore, there is currently no competition whatsoever. And how can a "prospective analysis" be done when it is currently not clear how much the economy will contract and which of the many (sometimes contradictory) scenarios is most credible for the months and years to come?

Finally, a competition authority can only block or condition a proposed transaction if there is a strict causal link between the transaction under assessment and the anticipated harm to competition.[6] While the anticompetitive effect of a merger may not be disputed, it is possible that, in some situations of acute economic crisis, such a link may not be established. That could be the case if the affected markets, absent the merger, would in any event experience an increase in concentration and a significant lessening of competition.[7] This is where the failing firm defense ("FFD") becomes relevant.

Having been involved in the last EU case where a fully-fledged FFD was successfully invoked[8] and six years after we wrote about this topic,[9] we come back to it and consider it in light of the COVID-19 crisis.

## The FFD in Early EU Practice and the *Aegean/Olympic* Saga

The Commission first considered the FFD in 1991 in *Aerospatiale-Alenia/deHavilland*[10] and dismissed it. This defense was first successfully argued in 1994 in *Kali+Salz/Mdk/Treuhand*,[11] in which the Commission established three conditions that need to be fulfilled for a successful FFD. The Commission refined these criteria in the next case in which it accepted the defense. This was *BASF/Eurodial/Pantochim* in 2001.[12] These cumulative criteria, which were later reflected in the 2004 Horizontal Merger Guidelines,[13] are:

1. The failing firm would, in the near future, be forced out of the market because of financial difficulties, if not taken over by another undertaking;
2. There must be no less anti-competitive alternative purchase than the proposed transaction; and
3. In the absence of the proposed transaction, the assets of the failing firm would inevitably exit the market.

Among these early invocations of the FFD in the EU, only one case involved a regional crisis that transcended the balance sheet of a single company.[14] Every other case involved companies that were failing for specific microeconomic reasons in an otherwise stable economy.

*Olympic/Aegean Airlines* remains the paramount case where the parties raised the FFD in the wake of a global economic crisis, specifically the Greek sovereign debt crisis that followed the financial crisis of 2007–08.[15] The Commission rejected the parties' FFD arguments and prohibited the transaction. It found that none of the elements of the FFD test were met and that "*the transaction would most likely deteriorate competition to a significant extent, well beyond the extent of the deterioration that could result were Olympic Air to exit the market*."[16] The Commission also held that the parties were unable to provide evidence that Olympic would exit the market absent the transaction (first criterion) stating that "*[t]emporary losses [incurred by both airlines in the year before the decision were] not surprising or necessarily indicative of the unsustainability of operations by more than one airline*."[17] It considered that the second criterion was not met because the parties were unable to provide information on alternative buyers with which negotiations had occurred, and the reasons for their failure. It also stressed that Olympic's brand would be returned to the Greek State in the event of bankruptcy and that the third criterion was thus not met (the Commission did not test third parties' interest in acquiring the assets).[18]

Finally, the Commission assessed the FFD arguments in the context of the general economic conditions in Greece and the prospects of the air transport demand rising. Relying on its internal reports, it was sorely mistaken in concluding that Greek GDP was "*expected to become positive again in 2012*,"[19] when in reality it fell by an additional 7.3 percent in 2012 and 3.2 percent in 2013.[20] The Commission also relied on "*the confidence of market operators in the positive evolution of the […] market in the medium-long term*."[21]

However, two years later, in October 2013, a similar transaction between the two airlines was unconditionally approved (*Aegean/Olympic II*).[22] This was the first (and remains the only) time the Commission cleared a merger after it has previously prohibited it. By then, the sovereign debt crisis had fully devastated the Greek economy. *Aegean/Olympic II* remains the last time a party successfully argued a fully-fledged FFD. It is also the only case involving a global downturn and, as such, is particularly relevant in the present circumstances.

The Commission analyzed the renewed FFD arguments in this changed economic context and came to the view that, because of "*both the on-going economic crisis in Greece and Olympic's very difficult financial situation*," "*Olympic would be forced to leave the market soon, with or without the merger*." If not acquired by Aegean, Olympic would "*simply shut down*" – a conclusion "*in part*" reached "*due to the economic situation in Greece*."[23]

Olympic's situation in 2013 was dismal. The company had been lossmaking since the start of its operations in 2009[24] and had been regularly receiving financial support from its parent company. Olympic withdrew from two dozen routes and underwent a drastic downsizing, which included removing all the jets from its fleet and focusing on turboprop aircraft only.

The situation in *Aegean/Olympic II* was exacerbated by the fact that the failing firm's parent company was also in financial distress and arguably no longer willing to financially support (or even capable of supporting) its subsidiary. This was a key consideration in swaying the Commission into accepting the FFD. Finally, the Commission's "*market investigation has also shown that there [was] no other credible purchaser interested in acquiring Olympic. There has also been no expression of any credible interest in the acquisition of Olympic's very few assets. This extends to the brand, which is owned by the Greek State.*"[25]

Based on these overwhelming facts, the Commission announced that its in-depth investigation had shown that the merger had "*no additional negative effect on competition*"[26] and that there was "*no doubt that the failing firm defence scenario can apply and should apply to this case*."

Just a month before the decision in *Aegean/Olympic II*, the Commission accepted a "failing division defense" in *Nynas/Shell*. Although the refinery that Nynas was trying to acquire had been unprofitable for years, Shell could have kept it afloat. The first criterion of the FFD could therefore not be met and the parties did not raise the FFD defense. The Commission was convinced, however, that Shell would in all likelihood shut down the refinery, thus dramatically reducing European production capacity on certain base and process oils. The transaction was therefore unconditionally cleared. This case confirmed that the parties could overcome the rigidity of the FFD criteria if they convinced the Commission of the likelihood of an alternative counterfactual scenario whereby the target's assets would exit the market.[27] We have seen a similar approach in subsequent cases.

### The Fate of the FFD Since *Aegean/Olympic II*

*Aegean/Olympic II* has shown that the standard that the parties must fulfil for a successful FFD is very high. As a result, no party after Aegean has come close to successfully arguing a fully-fledged FFD. Likely dissuaded by the excessively high standard, the parties in *GE/Alstom*,[28] *H3G/Wind*[29] and *T-Mobile/Tele2*[30] did not even try. Rather, perhaps inspired by *Nynas/Shell*, they tried convincing the Commission that the gloomy state of the targets' financials in these cases should influence the Commission's counterfactual assessment even if the strict conditions for a successful FFD were not met.

In *GE/Alstom*, the parties admitted outright that the fully-fledged FFD was not on the table, because Alstom did not meet the three cumulative conditions.[31] The "failing division defense" was also unsuitable, because the target business was among the strongest of Alstom's business units. Rather, the parties invited the Commission to discount evidence of Alstom's past competitiveness in the heavy-duty gas turbines market and, instead, focus on Alstom's negative cash flows, high debt, reduced capacity for R&D, and other structural deficiencies that reduced its ability to compete in a scale-sensitive and R&D-driven market.[32]

The Commission reviewed the parties' arguments without regard to the strict FFD criteria. For example, instead of looking for evidence that Alstom would fail in the near future (first FFD criterion), the Commission inquired into the degree of its financial challenges in the past and its own projections for the future. In the end, Alstom's troubled financials did not nudge the Commission into changing its counterfactual assessment – the Commission considered that the target would have remained, absent the transaction, GE's close competitor and the parties had to offer a divestiture. *GE/Alstom* exposed how the parties can bring past and future financial performance to the center of merger control assessment even before the target enters the dire straits that Olympic had to navigate in 2013.

In a series of 4-to-3 telecommunications mergers reviewed in the following years, the Commission remained attentive to alternative counterfactual analyses.

The parties in *H3G/Wind*[33] argued that they had to merge to be able to invest in 4G network and keep up with their rival mobile network operators in Italy.[34] Had they remained independent, their respective competitive positions would decline substantially because of H3G's lack of incentives to invest and Wind's high debt.[35] When reviewing these arguments, the Commission echoed its assessment in *GE/Alstom* and focused its counterfactual analysis on each party's (a) pre-merger operational and financial performance; (b) forward-looking performance projections (absent the merger); and (c) alternatives to the merger.[36]

The Commission rejected the parties' arguments. It considered that H3G, even as a small company, had previously competed effectively[37] and that its latest two- to three-year financial forecasts were positive. Moreover, the Commission relied on Wind's internal documents and public announcements to take the view that its recent debt refinancing was successful and its financial outlook positive.[38] The Commission also noted that Wind's parent company had the incentive to support it, if necessary.[39] It also suggested that, instead of pursuing the proposed transaction, the parties could have explored alternative solutions (e.g. a network-sharing agreement), which would deliver synergies with fewer competition concerns.[40] The transaction was eventually cleared with commitments.

Only two years later, similar arguments were successful in the Netherlands, which contributed to the Commission's unconditional clearance of a 4-to-3 merger in the telecommunications industry. In *T-Mobile/Tele2*,[41] the Commission partially accepted the parties' arguments that the target's future competitive strength would deteriorate absent the transaction, due to its poor network performance, limited investments, and recent failure to increase its share despite an aggressive commercial strategy. The Commission saw two likely counterfactual scenarios absent the transaction: (a) the target would continue operating on the same basis; or (b) the target would exit the market.[42] The investigation led the Commission to conclude that, even under the more optimistic and likely scenario, the target's compromised network would require significant investment to remain competitive, but the investment would lead to increased incremental costs and less-competitive pricing.[43] For this reason, the Commission concluded that Tele2 was not "*an important competitive force […] on the retail mobile telecommunications market in the Netherlands*"[44] and unconditionally cleared the transaction. The target's competitive position was only one of the factors on which the Commission relied to conclude that the transaction would not lead to a significant impediment to effective competition in the Dutch market. Other factors, including the merged entity's relatively small combined share and the lack of evidence establishing potential coordinated effects, were equally important in achieving the unconditional clearance.

These cases show that it takes more than fragile figures in a company's balance sheet to convince the Commission to consider the target's financial weakness in the counterfactual. The Commission clarified that it will not presume that a company's weak financial situation necessarily weakens its competitive position.[45] These cases also show that, in circumstances that might fall well short of the FFD, a changed counterfactual is possible and can lead to unconditional clearance decisions.

Five years after *Aegean/Olympic II*, the Commission faced for the first time another fully-fledged FFD in *ArcelorMittal/Ilva*.[46] The parties argued that:

(a) The target risked bankruptcy liquidation because historic underinvestment had damaged its credibility and sustainability (first FFD criterion);

(b) There was no viable alternative buyer other than ArcelorMittal (second criterion); and

(c) Absent the transaction, the target would lose its environmental permit and inevitably exit the market.[47]

The Commission believed that "*at least*" the second and third criteria had not been fulfilled.[48] Concerning the second criterion, the Commission found that alternative purchasers had indeed expressed their interest for the target in the bidding process and even after the announcement of the proposed transaction. The parties submitted that the delays incurred and the degradation of Ilva's assets since the announcement of the bid would make it unlikely that the alternative bidder would still be in a position to acquire Ilva. The Commission rejected this and explained that when a seller chooses a purchaser that raises potential competition concerns, the risk of subsequently losing a less problematic alternative buyer is assumed by the parties.[49] This is consistent with *GE/Alstom*, where the uncertainty caused by the Commission's assessment of the merger was deemed irrelevant to the counterfactual assessment.[50] But what happens if the alternative purchaser is no longer interested, e.g. due to a global pandemic? Such a development should be "*unrelated to the merger*" and thus relevant in the assessment of the second criterion.[51]

As to the third criterion, the Commission noticed that even if Ilva's assets were to exit the market, there was no evidence to suggest that Ilva's market share would accrue to the acquirer. This was an unwelcome return to the earlier and more demanding interpretation of the third criterion,[52] which the Commission had not followed in *BASF/Eurodiol/Pantochim*.[53]

The Commission rejected the FFD, but the parties did not stop there. They asked the Commission to "*at least take [the FFD] elements into account in the determination of the relevant counterfactual*."[54] This seemed like a return to *Nynas/Shell* and other precedents where the Commission adjusted its forward-looking analysis to account for financial difficulties.[55] However, the Commission refused to look at the same arguments that the parties presented unsuccessfully for the FFD and reinterpret them as a counterfactual scenario, because that would "*in essence be tantamount to the acceptance of a FFD*."[56] In other words, the parties had already played the exiting firm card within their FFD arguments and failed, and would therefore have to convince the Commission of a different counterfactual. In *T-Mobile/Tele2*, for example, the Commission accepted a second potential counterfactual whereby Tele2 would not exit the market but would become a weaker competitor.[57]

### The FFD in Times of COVID-19

When the 2008 global recession broke out, the Commission had declared that its merger control regime was sufficiently fit to deal with the financial hardships of merging companies on a case-by-case basis.[58] As evidenced by the relatively low number of FFD cases during and after the crisis, the Commission's approach was probably right at the time. But not all crises are of the same nature.

COVID-19 and the almost universal lockdown measures are infecting all sectors of the economy.[59] Planes are parked, cruise ships docked, and entire factories shut. It is difficult to conceive of a supply chain today that has not seen major disruptions. Wall Street and MSCI (a measure of global equities) lost a fifth of their value in the first quarter of 2020, marking their biggest drop since the 2008 financial crisis. In these circumstances, it should be no surprise if the Commission starts seeing more and more FFD arguments in the short and medium term.[60]

However, unlike the 2008 recession, which was caused by systemic macroeconomic issues and seized the world gradually over months, the current crisis has stopped the global economy almost overnight. Currently, few reliable projections exist on the duration of the upcoming crisis, but analysts seem hopeful that the economic crisis might be considerably shorter than the 2008 recession.[61] The abrupt nature and the expected shorter duration of the COVID-19 crisis might have an impact on how the authorities interpret FFD arguments.

The *Aegean/Olympic* saga and the subsequent Commission decisions described in the previous section offer a number of insights that are relevant for any party attempting to acquire a company affected by the COVID-19 crisis.

First, while the Commission's standard for accepting a fully-fledged FFD is high, it has been previously met in times of recession, when demand has collapsed (*Aegean/Olympic II*). We expect that the unprecedented violence of this crisis and its global scope could result in successful FFD cases, especially in the hardest hit industries, such as aviation, transportation, oil & gas, hospitality and event organization, tourism and others. For the parties arguing the FFD, one challenging feature will be the expected shorter duration of this crisis. In *Olympic/Aegean Airlines*, the Commission underscored that temporary losses were not necessarily indicative of unsustainability of operations.[62] We believe, however, that the Commission would be unwise to see the current crisis as transient and dismiss the parties' arguments about its longer-lasting impacts (the dismissal of such arguments in *Olympic/Aegean Airlines* required the Commission to reverse itself only two years later).

Second, when it comes to the three FFD criteria, the Commission is likely to continue focusing on the third criterion, i.e. the inevitable exit of the failing firm's assets from the market. The parties should ensure that they present a scenario that clearly sets out this aspect. This has the highest chances of success when supported by convincing evidence that the Commission can stress test and independently confirm with independent sources. On the other hand, if the analysis shows that the target and its assets are most likely to remain on the market, its chronic financial difficulties (even if rather serious) are unlikely to affect the Commission's assessment (e.g. *GE/Alstom*, *H3G/Wind*).

Third, the Commission has previously proven that it has an open and flexible mind when presented with convincing facts. After it issued a prohibition decision in *Olympic/Aegean Airlines*, it reached the diametrically opposite decision two years later by taking due account of the considerably changed factual circumstances (*Aegean/Olympic II*). Although that's not an ideal scenario for companies in difficulty (waiting for an initial negative decision to be reversed later on), it shows that the Commission may have learnt its lesson and will now avoid uncritically adopting over-optimistic scenarios on how the market will grow. For example, the Commission is now unlikely to tersely discount the parties' financial forecasts in the current circumstances, which means that meeting the first FFD criterion (failing firm forced out of the market in the near future because of financial difficulties) may be easier.

Fourth, even when the facts might fall short of the strict FFD standards, the Commission has indicated its willingness to adjust the counterfactual and take into account the target's failing financial health and diminishing position on the market (*Nynas/Shell* and *T-Mobile/Tele2*). Companies looking into potential acquisitions in 2020 (and possibly later) should seriously consider whether FFD or counterfactual arguments could be helpful in the merger control analysis of the deal. The choice between them may be critical, because, as we have seen,[63] a mere recirculation of failed FFD arguments under the counterfactual analysis will not do.

Fifth, a lot will depend on the time horizon that will be adopted for the FFD and the counterfactual analysis. In *GE/Alstom* and *H3G/Wind*, the time horizon for the counterfactual was 2-3 years. At this point, the temporal effect of the COVID-19 crisis is not clear. Particularly in the short term, when it is hard to predict how global and regional economies will be affected, parties are best advised to build on various macroeconomic scenarios (from the most pessimistic to the most optimistic one), as established by expert organizations, to present the Commission with alternative counterfactuals based on the above scenarios.

Sixth, parties who are considering raising a FFD or a related counterfactual before the Commission in these turbulent times must raise these arguments early in the notification process. In normal times, parties might be discouraged from discussing these topics (similarly to remedies) early in the process, as it might be perceived as signaling a weakness in their case. In today's environment, however, where competition authorities are struggling to manage their cases remotely and communicate effectively, we expect that proactive communication on this topic would be beneficial.

**Conclusions – A Policy Conundrum**

We expect to see a number of cases where the parties will be making FFD and related counterfactual arguments in the future. Some of these arguments will not succeed because the applicable standards in the EU are relatively high. Does this mean that the EU rules need to change? Specifically, should the FFD standards be lowered or should the law provide an exemption for buying companies out of bankruptcy like in the US? The answer to this question will depend on the dimensions of the COVID-19 crisis and its effects on the EU economy.

The Commission will struggle between pragmatism and ideological orthodoxy. Interestingly, there are marked differences between the approach in State aid and in merger control cases. The Commission has shown flexibility in approving State aids *en masse* both during the sovereign debt and banking crisis and in the aftermath of COVID-19. Yet, this flexibility has not been evident in accepting the FFD in merger control. That reveals the Commission's fundamental belief that it is preferable to accept artificially keeping competitors on the market at the expense of taxpayers (because of State aid measures) than allowing companies to acquire failing firms at the expense of a much narrower group of taxpayers, the consumers of the specific products/services, which possibly stand to lose because of the reduction of competition and the creation of monopolies or oligopolies. Still, important policy questions can be asked: is it more acceptable that the burden of keeping cruise ship operators and travel agencies afloat is borne by all taxpayers rather than by the users of these services?

These are difficult questions, which the Commission will without doubt be considering in the future. If we can make a prediction, it is likely that the Commission will show a degree of flexibility and some pragmatism in accepting FFD and similar counterfactual arguments in some cases in the aftermath of COVID-19. Indeed, it is likely that the Commission will go a bit further than the existing precedents. But there will be no revolution.

[1] The authors practice law at the Brussels office of White & Case LLP. Assimakis Komninos is also a visiting research fellow at University College London and Member of the Executive Committee of the Global Competition Law Centre (GCLC). The views expressed in this article are personal to the authors and do not represent those of White & Case or its clients.

[2] Certain national legal systems impose an obligation to notify a transaction within a specific time limit from signing (e.g. Cyprus, Greece, Slovenia).

[3] To date, the Commission has let the deadline lapse only once, in Commission Decision of October 29, 1993 in Case M.330 *McCormick/CPC/Rabobank/Ostmann* due to an "*error in the calculation of the legal deadlines*," but nonetheless considered it within its powers to refer the case for review to the Federal Cartel Office of Germany, see para. 79.

[4] In Case M.9568 *EssilorLuxotica/GrandVision*, the Commission suspended its second phase on March 2, 2020 and resumed it on March 18, 2020.

[5] Case T-342/07, *Ryanair Holdings plc v. Commission*, ECLI:EU:T:2010:280, paras. 26-27.

[6] OECD Competition Committee, Roundtable on Failing Firm Defence, DAF/COMP(2009)38, Background Note, p. 19.

[7] *Ibid*.

[8] Commission Decision of October 9, 2013 in Case M.6796 *Aegean/Olympic II*. White & Case LLP was lead counsel representing Aegean Airlines before the European Commission.

[9] See A. Komninos & J. Jeram, "Changing Mind in Changed Circumstances: *Aegean/Olympic II* and the Failing Firm Defence," 5 JECLAP 605 (2014).

[10] Commission Decision of October 2, 1991 in Case M.53 *Aerospatiale/Alenia/De Havilland*.

[11] See Commission Decision of July 9, 1998 in Case M.308 *Kali+Salz/MdK/Treuhand*.

[12] See Commission Decision of July 11, 2001 in Case M.2314 *BASF/Eurodiol/Pantochim*. The Commission also analyzed FFDs in Commission Decisions of February 3, 1999 in Case M.1221 *Rewe/Meinl,* of May 10, 2007 in Case M.4381 *JCI/FIAMM,* and of March 30, 2012 in Case M.6447 *IAG/BMI*. The defense failed in these cases. In Commission Decision of April 2, 2003 in Case M.2876 *NewsCorp/Telepiu*, the fully-fledged FFD failed, but the Commission properly adjusted its counterfactual, recognizing that a conditional approval would "*be more beneficial to consumers than a disruption caused by a potential closure of Stream*." For more cases where the counterfactual analysis was adjusted to account for financial difficulties, see Commission Decision of July 1, 2002 in Case M.2810 *Deloitte & Touche/Andersen (UK)*, Commission Decision of September 9, 2002 in Case M.2816 *Ersnt & Young France/AndersenFrance*, and Commission Decision of December 17, 2008 in Case M.5141 *KLM/Martinair*.

[13] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ [2004] C 31/5, para. 90.

[14] *Kali+Salz/MdK/Treuhand*, *supra* note 11.

[15] Commission Decision of January 26, 2011 in Case M.5830 *Olympic/Aegean Airlines*. The parties argued that Olympic was a failing firm.

[16] *Ibid*. para. 2120. Apart from the FFD raised, the parties also tried to convince the Commission that, given the severe financial situation, at least one of the parties would exit all overlapping routes irrespective of the transaction. The Commission accepted that the number of overlapping routes would be probably reduced, even absent the transaction, but that the parties would continue to compete domestically and internationally.

[17] *Ibid*. paras. 1998 and 1999.

[18] In addition, the Commission considered that Olympic's bilateral flying rights and its aircraft could be picked up by other airlines operating on the Greek market and would therefore not exit the market. For details see Komninos & Jeram, *supra* note 9.

[19] *Olympic/Aegean Airlines*, *supra* note 15, para. 369.

[20] Source: OECD Economic Outlook: Statistics and Projections.

[21] *Olympic/Aegean Airlines*, *supra* note 15, para. 376.

[22] *Aegean/Olympic II*, *supra* note 8.

[23] "Competition – Mergers – Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines: Statement by Joaquín Almunia," https://ec.europa.eu/commission/presscorner/detail/en/IP_13_927 accessed on April 1, 2020.

[24] Olympic Air was formed when the former Greek national carrier Olympic Airlines was privatized in 2009.

[25] "Competition – Mergers – Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines:

Statement by Joaquín Almunia," https://ec.europa.eu/commission/presscorner/detail/en/IP_13_927 accessed on April 1, 2020.

[26] *Ibid*.

[27] See also *NewsCorp/Telepiu*, *supra* note 12 for a similar situation which led to a conditional clearance.

[28] Commission Decision of September 8, 2015 in Case M.7278 *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business*). The acquisition was approved subject to divestment of central parts of Alstom's heavy-duty gas turbines business to Ansaldo.

[29] Commission Decision of September 1, 2016 in Case M.7758 *Hutchison 3G Italy/Wind/JV*.

[30] Commission Decision of November 27, 2018 in Case M.8792 *T-Mobile NL/Tele2 NL*.

[31] *GE/Alstom*, *supra* note 28, para. 1134.

[32] *Ibid*. paras. 1133 *et seq*.

[33] *H3G/Wind*, *supra* note 29. The parties obtained clearance conditional on a fix-it-first remedy to divest assets to a new mobile network operator.

[34] *Ibid*. para. 572.

[35] *Ibid*. paras. 577-582 and 677.

[36] *Ibid*. paras. 590, 684. See also *GE/Alstom*, *supra* note 28, para. 1156.

[37] *H3G/Wind*, *supra* note 29. The Commission noted that H3G and its competition had comparable incremental costs, which drove H3G towards a more aggressive commercial policy in order to increase its customer base and recover its fixed costs.

[38] *Ibid*. paras. 691-694.

[39] *Ibid*. para. 750.

[40] *Ibid*. para. 622.

[41] *T-Mobile/Tele2*, *supra* note 30.

[42] *Ibid*. para. 486.

[43] *Ibid*. paras. 543-544.

[44] *Ibid*. para. 565. See also Commission Decision of May 28, 2014 in Case M.6992 *Hutchison 3G UK/Telefonica Ireland*, paras. 527-557 and Commission Decision of June 26, 2017 in Case M.7612 *Hutchison 3G UK/Telefonica UK*, paras. 684-777, where the Commission examined two other 4-to-3 transactions between mobile network operators and did not accept the parties' counterfactual analyses. The parties did not argue an exiting firm counterfactual in these cases.

[45] *GE/Alstom*, *supra* note 28, para. 1153.

[46] Commission Decision of May 7, 2018 in Case M.8444 *ArcelorMittal/Ilva*. The Commission's clearance of the transaction was conditional on the divestiture of an extensive remedy package.

[47] *Ibid*. para. 405.

[48] *Ibid*. paras. 416 *et seq*.

[49] *Ibid*. paras. 423 and 424.

[50] *GE/Alstom*, *supra* note 28, paras. 1201 *et seq*.

[51] *Ibid*. para. 1206.

[52] *Kali+Salz/MdK/Treuhand*, *supra* note 11, upheld in Joined Cases C-68/94 and C-30/95, *France, and SCPA and EMC v. Commission*, ECLI:EU:C:1998:148, para. 115.

[53] *BASF/Eurodiol/Pantochim*, *supra* note 12, paras. 151-163.

[54] *ArcelorMittal/Ilva*, *supra* note 46, para. 406.

[55] *NewsCorp/Telepiù*, *D&T/Andersen*, EY/*Andersen*, and *KLM/Martinair*, *supra* note 12.

[56] *ArcelorMittal/Ilva*, *supra* note 42, paras. 414-415.

[57] *T-Mobile/Tele2*, *supra* note 30, para. 489.

[58] OECD Competition Committee, Roundtable on Failing Firm Defence, DAF/COMP(2009)38, Note of the European Commission, pp 187-188.

[59] See J.T. Areddy, T. Fairless & H. Torry, "Coronavirus Confronts Global Economy With Tough Recovery," March 10, 2020, Wall Street Journal, available at www.wsj.com/articles/coronavirus-confronts-global-economy-with-long-road-to-recovery-11583855225 accessed on April 1, 2020.

[60] Parties are already starting to think about the impact of the COVID-19 fallout on the Commission's substantive review of pending transactions. In Case M.9162 *Fincantieri/Chantiers de l'Atlantique* (shipbuilding industry),

where the Commission has already expressed serious concerns, on 2 April 2020, the parties announced that "*the world has changed*," the "*market will be transformed by this pandemic*" and this "*ddecefinitely force[s] a rethinking of all the assumptions that have been made in the past*." See MLex, "Comment: Fincantieri goes down to the wire, with EU review clock ticking," March 3, 2020, available at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1167442&siteid=190&rdir=1 accessed on April 2, 2020 and MLex, "Fincantieri-Chantiers merger review must be "re-thought" after COVID-19 crisis, says Maestrini," April 2, 2020, available at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1176098&siteid=190&rdir=1 accessed on April 2, 2020.

[61] See Goldman Sachs, "SARS-Coronavirus-2 / COVID-19: An Update on Developments in Europe," March 26, 2020, available at www.goldmansachs.com/insights/talks-at-gs/03-26-20-update-coronavirus-europe-f/report.pdf accessed on April 1, 2020.

[62] *Olympic/Aegean Airlines*, *supra* note 19, paras. 1998 and 1999.

[63] *ArcelorMittal/Ilva*, *supra* note 46, paras. 414-415.