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Comparing the US & the EU Failing Firm Defense: Reflections from an Economic Perspective

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COMPARING THE US & THE EU FAILING FIRM DEFENSE: REFLECTIONS FROM AN ECONOMIC PERSPECTIVE

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I. INTRODUCTION

The present paper is aimed at analyzing the doctrine of failing firm defense in both the United States ("US") and the European Union ("EU") by describing relevant case law and exploring the main problems associated with its enforcement. As this paper will conclude, when firms are failing during economic crisis, antitrust laws can play a key role in reactivating the economy, provided that the antitrust authorities apply the rule of reason and economic analysis accurately.

The analysis will be divided into several sections. The first two sections of the paper discuss the evolution of the failing firm defense in the US and in EU jurisdictions. In evaluating this evolution, we must delve into relevant case law and the related regulations. The second section will analyze the main dilemmas posed by application of the failing firm defense. These include analysis of the requirements of the failing firm defense test, the

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question of the failing firm division, the problem of the enforcement of the failing company defense in oligopolistic markets, and the consideration of efficiencies. The final section will discuss social and environmental concerns when applying the failing company defense. The concluding analysis will contain remarks whereby the main concerns associated with the failing firm defense will be summarized.

II. THE U.S. ORIGIN OF THE FAILING FIRM DEFENSE

The US 1992 Horizontal Merger Guidelines[1] (the "US Horizontal Merger Guidelines") provide orientation about the failing company defense in the US. In this regard, § 5.1 of the US Horizontal Merger Guidelines provides that an undertaking will qualify as a failing firm, and thus can be admitted under the failing company defense, when the following four cumulative conditions are met:

(i) the failing firm would be unable to meet its financial obligations in the near future;

(ii) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;[2]

(iii) it has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and,

(iv) absent the acquisition, the assets of the failing firm would exit the relevant market.

The US Horizontal Merger Guidelines were revised

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[1] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5 (1997), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.
[2] *See* 11 U.S.C. §§ 1101-1174 (1988).

in 1997 but gave no further clarification to what was already stated in 1992 concerning failing firms. That said, the failing firm defense test, as defined in the US Horizontal Merger Guidelines, is the result of various US Supreme Court decisions. Initially, the failing company defense did not exist in the US legal framework. In 1930, the US Supreme Court established the first decision concerning the failing firm defense in the landmark case *International Shoe Co. v. Federal Trade Commission.*[3] With this decision, the failing company defense was installed in the US. Although the Supreme Court did not explicitly state that it was setting the boundaries for a failing company defense in the US, later developments prove that *International Shoe* inaugurated what was later named the failing firm defense under US antitrust legislation.

Indeed, in 1930 the US Supreme Court took the opportunity to balance the consequences of approving a prima facie illegal merger with the consequences of banning such merger. Eventually, the Court decided to approve the merger because the market conditions showed that otherwise, the acquired company and its assets would disappear from the market, which would have had more harmful consequences than allowing a higher degree of concentration in the market. In this regard, the US Supreme Court ruled:

> In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudi-

[3] *See* Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930).

cial to the public and does not substantially[...].[4]

It is understood that when a merger is prima facie and found to be illegal, the company is considered failing so long as: (1) the acquired firm faces a grave probability of business failure, and (2) there is no other prospective purchaser.[5]

In 1950, Congress, when amending § 7 of the Clayton Act, decided to include the failing firm defense based on the decision in *International Shoe*:

> The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out. The committee is in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type. The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensure.[6]

However, neither the US Supreme Court nor Congress clarified how the failing firm defense should be applied. In this regard, the applicable test under the failing firm defense was clarified in *Citizen Publishing Co. v. United*

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4 Int'l Shoe, 280 U.S. at 302-303.

5 *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Vol. IV, ¶ 970b (2d ed. 2006).

6 Celler-Kefauver Act is a United States federal law passed in 1950 that reformed and strengthened the Clayton Antitrust Act of 1914 which had amended the Sherman Antitrust Act of 1890.

States.[7] In particular, the Supreme Court[8] reiterated the failing company defense test based on what it had previously ruled in *International Shoe.*[9] In *Citizen Publishing,* the Court added a third requirement to the test it established in *International Shoe*: the impossibility of a reorganization through receivership or bankruptcy.[10]

The *Citizen Publishing* test was confirmed in the following two Supreme Court decisions: *United States v. General Dynamics Co.*[11] and *United States v. Greater Buffalo Press.*[12] In the former, the Court adopted the idea of the "weak competitor."[13] The concept of the "weak competitor" states that because the market share of the acquired firm was low compared to the rest of the competitors, the combined market share of the resulting merger could not be troublesome.

The Supreme Court decisions and US Horizontal Merger Guidelines make it obvious that the failing firm defense exists under the US regime. However, certain important questions remain unanswered. In this sense, the enforcement and application of the failing firm defense seems to be quite ambiguous. Admittedly, lawyers and judges still debate the following issues: how could one prove that there is no alternative purchaser? How can it be proved that the merger will have the least anticompetitive effects if approved? As we will further study, these questions also remained unanswered under the European regime.

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[7] *See* Citizen Pub. Co. v. United States, 394 U.S. 131 (1969).

[8] It is important to recall that Justice Harlan concurred, Justice Steward dissented and Justice Fortas did not participate.

[9] *See* Int'l Shoe, 280 U.S. at 291.

[10] *See* Edward O. Correia, *Re-examining the Failing Company Defense,* 64 ANTITRUST L.J. 683 (1996).

[11] *See* U.S. v. General Dynamics Corp., 415 U.S. 486 (1974).

[12] *See* U.S. v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971).

[13] *See* General Dynamics, 415 U.S. at 486.

III. THE DEVELOPMENT OF THE FAILING FIRM DEFENSE IN EUROPE

After reviewing how the failing firm defense is constructed under US law, we now turn to the evolution of the failing firm defense in the EU. We will first review the provisions under EU legislation where the failing firm defense is established. Next, we will briefly recall the most important cases concerning the failing firm defense. In this regard, the applicable test for the failing firm defense has also been clarified thanks to the European courts' interpretation of the defense.

In Europe, the institution in charge of maintaining effective competition in the market is the European Commission (hereinafter, the "Commission"). In order to fulfill such a task, the main piece of law used by the Commission to study mergers is Regulation 139/2004,[14] which focuses on the control of concentrations between undertakings (the "EC Merger Regulation"). The enforcement of the EC Merger Regulation is clarified by the EU Horizontal Merger Guidelines, which also gives clearance with regard to the failing firm doctrine.[15]

Notably, the EC Merger Regulation remains silent in relation to the failing firm defense. However, Article 2(2) of the EC Merger Regulation states, "a concentration which would not 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, shall be declared compatible with the common market."[16] The EU Horizontal Merger Guidelines give some clarification regarding the application of the failing company doctrine in the EU. In this

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[14] *See* Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 [hereinafter "EC Merger Regulation"].

[15] *See* Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 3 [hereinafter "Guidelines on the Assessment of Horizontal Mergers"].

[16] *See* EC Merger Regulation, *supra* note 14.

sense, the EU Horizontal Merger Guidelines provide that a problematic merger might be considered compatible with the common market if one of the merging parties is a failing firm, as long as there is lack of causality between the merger and the deterioration of the competitive structure.[17]

In the same line as the US Horizontal Merger Guidelines, the EU Horizontal Merger Guidelines provide for a three-step test requiring the following:

(i) the allegedly failing firm would be forced out of the market if it is not absorbed by another company;

(ii) there is no less anti-competitive alternative purchaser, and finally;

(iii) that the assets of the firm in difficulty will exit the market.[18]

It can be anticipated that in practice, when facing the failing firm defense, the EU Horizontal Merger Guidelines leave many questions unanswered. For example, when a firm might be considered failing or how to assess that there is no other alternative to the merger to avoid the exit of a company.[19]

Similar to the evolution of the failing firm defense in the US, the applicable test for the European failing firm defense has also been the result of the evolution of the case law. In 1991, in the landmark case *Alenia-Aerospatiale/De Havilland*,[20] the failing firm defense was

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[17] *See* Guidelines on the Assessment of Horizontal Mergers, *supra* note 15.
[18] *See id.*
[19] *See* Guidelines on the Assessment of Horizontal Mergers, *supra* note 15.
[20] *See* Comm'n Decision of 2 Oct. 1991 Declaring the Incompatibility with the Common Market of a Concentration (Case No. IV/M.053-Aerospatiale-Alenia/de Havilland), 1991 O.J. (L 334) 42 [hereinafter "Aerospatiale-Alenia/de Havilland"].

argued for the first time in the EU.[21] The merger involved the acquisition of De Havilland, a division of Boeing, by Alenia-Aerospatiale. The resulting merger would have increased Boeing's market share for medium-size turboprop airplane up to 64%. Boeing made the argument that if it did not acquire De Havilland, the latter would exit the market.[22] However, the Commission did not accept such argument and the failing firm defense was dismissed, similar to what the US Supreme Court stated in the International Shoe case.[23] Specifically, the Commission stated:

> On the evidence made available to the Commission, there is therefore no likelihood that de Havilland, in the absence of the proposed concentration, would in any case be phased out. Boeing has however expressed its preference to sell de Havilland rather than continue to operate it. This would seem possible given that the parties are not the only potential buyers. British Aerospace, for example, has expressed an interest to buy de Havilland.[24]Some years later, the Commission clarified the applicable test for enforcement of the failing firm doctrine in *Kali & Salz.*[25] This case continues to serve as the EU reference point for the failing firm defense test.

In *Kali & Salz,* the proposed merger affected the potash market and would have implied the creation of a monopoly (98% market share) had it been approved.[26] When establishing the applicable test in the EU, the

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[21] *See* Ioannis Kokkoris, *Failing Firm Defence in the European Union: A Panacea for Mergers?*, 27(9) EUR. COMP. L. REV. 494-509 (2006).
[22] Aerospatiale-Alenia/de Havilland, *supra* note 20.
[23] *See Int'l Shoe*, 280 U.S. at 291.
[24] Aerospatiale-Alenia/de Havilland, *supra* note 20, at para. 31.
[25] *See* Comm'n Decision of 14 Dec. 1993 Relating to a Proceeding Pursuant to Council Regulation (EEC) No. 4064/89 (Case No. IV/M.308-Kali+Salz /Mdk/Treuhand), 1994 O.J. (L 186) 38 [hereinafter "Kali+Salz/Mdk/Treuhand"]. This decision was annulled in its entirety by the ECJ.
[26] *See id.*

Commission considered the lack of causality between the increase in the concentration of the market and the deterioration of the competitive structure as the key issues.[27] The Commission concluded that a failing company defense in the EU could be raised when three conditions were met: (i) the acquired company would be forced out of the market without being absorbed by another company; (ii) if the failing company exited the market, its market shares would be taken over by the acquiring company; and (iii) there is no less anti-competitive alternative.[28] One may conclude that these three requirements were aimed at explaining the situations when there is a lack of causality between the increase in the concentration of a market and a proposed merger. Indeed, as the Commission clearly stated:

> Bearing in mind the causality considerations outlined above, a merger leading to the creation or reinforcement of a dominant position must take place in such a way as to cause the least possible damage to competition. This means that any alternative partial disposal of the target company which will reduce the deterioration of the competitive structure must as a rule be carried out if the rest of the merger is to be accepted under merger law.[29]

The *Kali & Salz* case is of utmost importance to the analysis undertaken in this paper because the French government appealed the Commission's decision basing its arguments on the fact that the Commission had not applied the same criteria as the US Antitrust institutions, thereby enforcing a different test in the EU than the one existing in the US.[30]

In particular, the French government considered the second requirement excessive. The French government argued that the acquiring company had to prove

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[27] *See id.*
[28] *See id.*
[29] *Id.* at para. 87.
[30] *See* Kokkoris, *supra* note 21.

that without the merger, it would acquire the failing firm's market share entirely.[31] The European Court of Justice (hereinafter, the "ECJ") not only rejected the French arguments, but also confirmed that the Commission's proposed test was aimed at clarifying that the proposed merger and the harm done to the competitive structure lacked a causal relationship. In this regard, the ECJ clarified that:

> The criterion of absorption of market shares, although not considered by the Commission as sufficient in itself to preclude any adverse effect of the concentration on competition, therefore helps to ensure the neutral effects of the concentration as regards the deterioration of the competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation.[32]

Additionally, the ECJ broadened the test proposed by the Commission by stating that a merger would be cleared, "if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed."[33] The test proposed in the *Kali & Salz* merger was later confirmed in 1997 by the Commission in the *Saint Gobain* case.[34]

In 2002, just before the EU Horizontal Merger Guidelines were published, the Commission decided another important merger for the consolidation of the failing firm defense doctrine in the EU. Indeed, the *BASF/Eurodiol/Pantochim* case[35] represented a major de-

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[31] *See id.*

[32] *See* Cases C-68/94 and C-30/95, French v. Comm'n, Societe Commerciale des Potasses et de l'Azote (SCPA) v. Comm'n, 1998 E.C.R. I-1375.

[33] *Id.* at para. 115.

[34] *See* Comm'n Decision of 4 Dec. 1996 Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.774-Saint-Gobain/Wacker-Chemie/NOM), 1996 O.J. (L 247) 1, 10.9 [hereinafter "Saint-Gobain/Wacker-Chemie/NOM).

[35] *See* Comm'n Decision of 7 Nov. 2001 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the

velopment in the definition of the boundaries of the European failing company defense doctrine. The Commission considered that blocking the merger would have worse consequences in the market than rendering the merger legal.[36] Thus, the Commission decided to clear the merger.[37] In this case, the fact that two of the companies, Eurodiol and Pantochim, were placed under a pre-bankruptcy regime greatly influenced the Commission's final decision. Indeed, the Belgian authorities stated to the Commission that the two failing companies would have been declared bankrupt if they weren't acquired. Hence, when analyzing whether the three requirements established in *Kali & Salz* were fulfilled, the Commission not only declared that those requirements were met, but also redefined the test. Significantly, in relation to the third requirement, the Commission accepted that it was not necessary to prove that the acquiring company would have accrued the failing company's entire market share to comply with such requirement.

Finally, the Commission made it clear that a rescue merger would only be accepted in the EU when the deterioration of the competitive structure resulting from the concentration was expected to deteriorate in similar fashion even if the concentration were not allowed to proceed. We may conclude by saying that the Commission has included the failing firm defense test in the EU Horizontal Merger Guidelines as a result of what it had previously stated in several merger cases, without providing further clarification on the test. As has happened in the US legal framework, many questions remain difficult to define in practice. The following section will deal with some of these controversies that are common to both the EU and US legal antitrust frameworks.

EEA Agreement (Case No. COMP/M.2314-BASF/Eurodiol/Pantochim), 2001 O.J. (L132) 45 [hereinafter "BASF/Eurodiol/Pantochim"].

[36] *See id.*

[37] *See id.*

IV. Common Dilemmas When Applying the Test

The regulations and existing case law regarding the failing firm doctrine do not provide much clarification to its enforcement in real terms. Under the current section, several dilemmas common to both jurisdictions will be addressed. First, the question of the definition of a failing firm will be analyzed. Second, the question of establishing when there is no alternative purchaser will be considered.

A. Defining a Failing Firm

A common feature of the EU and the US regime is that none of the Horizontal Merger Guidelines define what a failing firm is. Indeed, one of the most difficult aspects of applying the failing firm doctrine is how to define when a firm is to be considered failing.

A general definition of what a failing firm is cannot be drafted due to the different economic scenarios that might surround a potential failing firm;[38] therefore, a case-by-case analysis is deemed necessary. In this respect, the dilemma of defining a failing firm resides on whether to adopt a broad definition or a more strict definition when analyzing whether a firm could be classified as failing.

Indeed, on one hand, one may argue that a strict definition should be given to the failing firm since such defense represents an exception to an otherwise anticompetitive merger. Hence, if the definition of a failing firm is broadened too much, it could facilitate the clearance of a large number of mergers, leading to a higher degree of concentration in the markets to the detriment of consumers.

On the other hand, if the concept of a failing firm is defined too narrowly, fewer firms would be able to claim the failing firm defense, and therefore, only very

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[38] *See* G. Monti & E. Rousseva, *Failing Firms in the Framework of the E.C. Merger Control Regulation*, 24 E.J. Rev. 24(1), 58 (1999).

extreme cases would be argued successfully. Moreover, defining a failing firm very strictly could render the defense itself useless since the assets of the failing firm could be deteriorated to an extent that no company would be willing to buy it, ultimately leading the failing company to exit the market. Reaching a middle point between those two positions is tough and, consequently, has not always been done successfully.

Under the US Horizontal Merger Guidelines, as we have explained in Section 1, a firm that wants to invoke such defense would: (i) allegedly be unable to meet its financial obligations in the near future, and (ii) not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act.[39] Intuitively, two questions arise from these two requirements, namely: (1) what time period must be considered to define when a firm would be unable to meet its financial obligations, and (2) what is a successful reorganization? Differently, under the EU Horizontal Merger Guidelines, only the first requirement of the test mentions the financial difficulties that a firm must be facing in order to utilize the failing firm defense. In this sense, the US Horizontal Merger Guidelines require that a firm would be forced out of the market because of financial difficulties.

The first observation to be made is that the EU's Guidelines provide a more restrictive definition of a failing firm than the US Guidelines. Indeed, under the US regime, a firm could be considered failing just by not being able to meet its financial obligations. In comparison, under the EU regime, the firm has to prove that it would be forced out of the market. The analysis presented below will show that regardless of the differences existing in both Horizontal Merger Guidelines, in practice, the consideration of a failing firm has become a quasi-identical test.

In this sense, in *International Shoe*, the U.S. Supreme Court defined a failing firm as a firm "with re-

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[39] *See* 11 U.S.C. §§1101-1174.

sources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of business failure."[40] However, this narrow definition of a failing firm has been criticized and a looser definition has been favored.

In this regard, it has been argued that a company should be considered as failing by proving that insolvency or bankruptcy is imminent or highly probable.[41] Nevertheless, in theory, even if a less narrow approach was taken into consideration when defining a failing firm, it would still be very difficult to define when insolvency or bankruptcy is imminent or highly probable. In practice, surprisingly, establishing an imminent or highly probable insolvency has not become a big concern. In most cases, imminence has not been taken into consideration, but actual insolvency has.[42] Another key issue that has been discussed before US courts is whether, without a potential bankruptcy, a firm could be considered as a failing firm. This question still remains controversial.[43]

Rousseva and Monti proposed a new definition of a failing firm that did not entirely coincide with the US requirements or the EU requirements. In a study published in 1999, the authors proposed to consider a firm as failing when financial and economic analyses showed a continuous presence of one of the following factors: (i) production costs exceeding sales revenue; (ii) inability to innovate when other firms are able to do so; or (iii) risk of assets leaving the industry.[44]

With reference to this proposal, it is not absolutely convincing that the authors' test will facilitate the task of identifying a failing firm. Indeed, both the first and the second requirements proposed by such authors will only prove that a firm is inefficient, but not necessarily failing. Hence, those two requirements remain inappropriate

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[40] *Int'l Shoe*, 280 U.S. at 302.
[41] AREEDA & HOVENKAMP, *supra* note5, at para. 9531.
[42] *Id.*
[43] *Id.*
[44] *See* Monti & Rousseva, *supra* note 38.

to define a failing firm. On the other hand, the consideration of the risk of assets leaving the industry could be a very significant development in the securitization of a potential failing firm. As explained by the authors, this requirement could generate efficiencies, and thus, it remains more important than the risk of insolvency.[45]

If we recall what the ECJ stated in *Kali & Salz*, we can conclude that the test in the EU is similar to that in the US. We can also conclude that the key issue when analyzing a possible failing firm is the financial situation of an undertaking, as Rousseva and Monti stress. In this sense, it is important to recall that in the *Kali & Salz* ruling, the ECJ stated that the company "[...] *was highly likely to close in the near future.*"[46]

In conclusion, the Horizontal Merger Guidelines give some guidance on how to define a failing firm but do not enter into much detail. Indeed, the Guidelines talk about insolvency, bankruptcy, or exit from the market. Nevertheless, what is important and what the authorities should consider is the financial situation of a firm in the particular circumstances at the time the merger is proposed. From the analyses of a company's financial situation, a firm could be considered as failing even before reaching bankruptcy and even without the fear of it exiting the market if the merger were not to occur. Although this rule of reason approach could open the gate to numerous possible failing firm defense arguments, it would be a more realistic and pragmatic approach, which would ultimately benefit the functioning of the market and, eventually, consumers.

B. No Alternative Purchaser

The existence of a failing firm is one of the requirements needed to satisfy the failing firm defense test.[47] Additionally, the US and EU jurisdictions both re-

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[45] *Id.*
[46] Kokkoris, *supra* note 21, at para. 120.
[47] *See* Guidelines on the Assessment of Horizontal Mergers, *supra* note 15.

quire the merger to be the only available one in the market. In other words, both jurisdictions require that the purchase by the proposed acquirer is the only possible recourse. In this respect, the US Horizontal Merger Guidelines state that a failing firm has to make "unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of assets of the failing firm that would both keep its tangible and intangible assets in the market and pose a less severe danger to competition than does the proposed merger."[48] The EU Horizontal Merger Guidelines provide that there must not be a less anti-competitive alternative to the notified merger.[49]

The dilemma of the enforcement of this requirement was clearly stated by Justice Steward's dissent in *Citizen Publishing*, where he stated, "Today's decision for the first time lays down the blanket rule that the failing company defense is forfeited by a company which cannot show that it made substantial affirmative efforts to sell to a non-competitor."[50] Some authors have argued that the requirement of no other alternative purchaser is not relevant to the enforcement of the failing firm defense.[51] Those authors consider that such requirement is irrelevant because if the causal link between the deterioration of the market and the merger is proved nonexistent, then there is no reason to consider whether the purchaser is already dominant, and thus, will become more dominant or not.[52] This approach seems reasonable since the causal link between the merger and the deterioration of the market is the key aspect of the failing firm defense. The third requirement of the EU Horizontal Merger Guidelines might be considered irrelevant, but only in the EU.

A similar conclusion could be drawn for the US

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[48] HORIZONTAL MERGER GUIDELINES, *supra* note 1, at Section 5.1.
[49] *See* Guidelines on the Assessment of Horizontal Mergers, *supra* note 15.
[50] *See Citizen Pub.*, 394 U.S. at 131.
[51] *See* Antonio Bavasso & Alistair Lindsay, *Causation in EC Merger Control*, 3(2) J. OF COMPETITION L. AND ECONS. 181 (2007).
[52] *See id.*

model. Indeed, the US Horizontal Merger Guidelines require a good faith search by the failing firm to find the least anti-competitive purchaser; in other words, a preferred purchaser. To comply with this requirement, the failing firm should do enough diligence to seek other offers and try to find the best one. Under the US regime, and contrary to what happens in the EU, the good faith search requirement remains useful. As was confirmed in the *Citizen Publishing* case by the US Supreme Court, "[t]he failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser."[53] Ultimately, in the words of Low, "how to determine the purchaser that would have the least anticompetitive effect and whether a minimum purchase price is required remains unclear."[54]

Indeed, Low's comment regarding the requirement of a minimum price remains an unanswered question. For example, imagine there is a failing firm in a particular market worth US $50. In such market, a dominant company is ready to pay $100 for the failing firm's assets because this purchase will enable that company to acquire market share, and consequently strengthen its market power. On the other hand, there is a small company active in the same market, ready to pay $20 for the same assets. According to the failing firm defense theory, in such scenario, if the dominant firm proposes to acquire the failing firm alleging the failing firm defense exception, such merger should not be cleared because a less anticompetitive purchaser would exist in the market. However, if that would be the case, a decision contrary to all economic reasoning would be adopted, since the alternative purchaser would not pay for the failing firm's assets at market price. The trade-offs between allowing a monopoly firm to increase its market power by purchasing a failing firm's assets at a market price or allowing a

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[53] *Citizen Pub.*, 394 U.S. at 138.

[54] *See* Richard E. Low, *The Failing Company Doctrine Revisited*, 38 FORDHAM L. REV. 23 (1969).

smaller company to increase its market share by paying a non-market price are not easy to draft. Therefore, proving that there is no alternative purchaser is a difficult task with no clear test.

It should be highlighted that the two problems described in this section only prove that the failing firm defense is difficult to enforce in reality. Although the US and EU Guidelines provide some orientation on how this doctrine should be enforced, reality shows that each merger represents a completely different scenario and thus, antitrust authorities should conduct a rule of reason oriented analysis to authorize or block the merger. In this respect, as discussed below, the consideration of what a failing firm is and the determination of when the alternative purchaser requirement is fulfilled represent only two obstacles for clearly defining the failing firm doctrine. In addition to those two problems, another important dilemma remains - the consideration of efficiencies in a merger of a failing firm.

V. THE FAILING FIRM DIVISION

The most obvious difference that can be found when comparing the US Horizontal Merger Guidelines to the EU Horizontal Merger Guidelines is that the American legislation provides for the possibility of a failing division defense, while the European legislation does not. Nevertheless, the study of European case law shows that under the EU regime, a failing firm division defense has also been accepted although not enforced.

In this regard, the US Horizontal Guidelines establish that for the failing division defense to be invoked, similar conditions to the failing firm test must exist, namely: (1) the division must have a negative cash flow, (2) the assets of the division would exit the relevant market if not sold, and (3) the owner of the failing division must comply with the competitively-preferable purchaser requirement equivalent to the one applied to the failing firm.[55] Nevertheless, the application of the failing division defense has been compared to a shipwreck, due to the fact that US courts have hardly ever applied such defense.[56] The most significant case concerning the failing firm division defense is *California v. Sutter Health*.[57] In this case, the District Court for the Northern District of California recognized the existence of the failing division defense. Eventually, the failing firm defense, and not the failing division defense, was applied.[58] Consequently, the failing division defense remains an "unsettled area of law"[59] in the US.

On the contrary, under the EU Horizontal Merger Guidelines, a reference to the failing division defense is non-existent. As the failing division defense is already established in the US Horizontal Merger Guidelines, more time will now be devoted to the European case law, as the defense has been possible in the EU due to a development in case law. In 1997, in the well-known *Bertelsmann* merger,[60] which, if authorized, would have led to a monopolization of the German pay TV market, the Commission clarified that under EU law, if a failing division defense is invoked, "particularly high standards must be set for establishing that the conditions for a defense on the grounds of lack of a causal link have been met."[61] In this merger, the parties did not fulfill the failing firm doctrine test as established in the *Kali & Salz* case, and, therefore, also failed to prove the lack of causal link between the deterioration of the competitive structure of the market and the merger; hence, the mer-

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[55] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 1.

[56] *See* Amanda L. Wait, *Surviving the Shipwreck: A Proposal to Revive the Failing Division Defense*, 45 WM & MARY L. REV. 429 (2003).

[57] California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1133 (N.D. Cal. 2001).

[58] *Id.*

[59] *Id.*

[60] *See* Comm'n Decision of 27 May 1998 Relating to a Proceeding Pursuant to Council Regulation (EEC) No. 4064/89 (Case No. IV/M.993-Bertelsmann/Kirch/Premiere), 1998 O.J. (C 1439) 19 [hereinafter "Bertelsmann/Kirch/Premiere].

[61] *Id.*

ger was blocked.[62] By making the failing division defense more difficult to succeed in a merger, the Commission was trying to limit the number of cases where such defense would be invoked to avoid accounting manipulation that could render it very easy for an unprofitable business to be acquired before being closed.[63]

Some years later, under the *Rewe/Meinl* case, the Commission had the opportunity to analyze the arguments in favor and against the consideration of a failing division defense.[64] However, the Commission did not design a new test, but instead applied the same test that had been established under the *Kali & Saltz* case.[65] According to the Commission, the burden of proof on such case was to be discharged by the parties as regards the lack of causality between the merger and the possible deterioration of the competitive structure, due to the fact that the transaction was a particularly heavy one.[66] Baccaro envisions the possibility of advocating failing division defense when, "the deterioration of the competitive structure would possibly occur if a management decision to shut down a division was not just part of a strategic plan; it would have to be based on prospects of inevitable closure of the division in the absence of the merger."[67] Therefore, Baccaro suggests that under EU law, there is an additional requirement that must be fulfilled when advocating failing division defense.

The same situation happened some years later in the *Newscorp/Telepiu* case.[68] Once again, the Commis-

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[62] *Id.*

[63] *See Int'l Shoe,* 280 U.S. at 291.

[64] Comm'n Decision of 3 Feb. 1999 Relating to Proceedings Under Council Regulation (EEC) No. 4064/89 (Case No. IV/M.1221-Rewe/Meinl), 1999 O.J. (C 228) [hereinafter "Rewe/Meinl"].

[65] *See* Kali+Salz/Mdk/Treuhand, *supra* note 25.

[66] Vincenzo Baccaro, *Failing Firm Defence and Lack of Causality: Doctrine and Practice in Europe of two Closely Related Concepts,* 25 EUR. COMPETITION L. R. 1, 11 (2004).

[67] *Id.* at 16.

[68] *See* Comm'n Decision of 4 Feb. 2003 Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement

sion did not accept the failing division defense because the necessary causal link had not been appropriately justified.[69] Indeed, the Commission repeatedly said that, "Newscorp has not been able to demonstrate that there is no causal link between the concentration and the effect on competition, because conditions of competition can be expected to deteriorate to a similar or identical extent even without the concentration in question."[70]

In conclusion, even if the EU Horizontal Merger Guidelines do not provide for the possibility of having a failing division defense, *de facto*, this case could be advocated before the Commission. Therefore, the failing firm division defense is similarly adopted in both jurisdictions. Indeed, both jurisdictions accept the possibility of advocating a failing firm division defense. On the other hand, neither of the jurisdictions has enforced such defense in practice.

VI. THE FAILING FIRM DEFENSE IN OLIGOPOLISTIC MARKETS

The problems that antitrust authorities have to face when applying the failing firm defense in oligopolistic markets are analyzed in this section. Indeed, the fact that the clearance of a merger in an oligopolistic market can lead to or improve a collective dominance is the main problem created by the use of the rescue merger. The case where a collective dominance exists prior to the merger should be treated differently, as if the collective dominance is the direct consequence of the merger. For the purpose of illustrating the problems of applying the failing firm defense in oligopolistic markets, the failing firm doctrine in oligopolistic markets will be considered through the analysis of the European cases, although the conclusions should be the same for the US. That said, it is interesting to recall that although the EU Horizontal

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(Case No. COMP/M.2876-Newscorp/Telepiu), 2003 O.J. (C 1082) [hereinafter "Newscorp/Telepiu"].

[69] *See id.*

[70] *Id.* at para. 52.

Merger Guidelines no longer require the existence of a causal link between the merger and the deterioration of the market structure, taking into consideration Article 2 (2) of the EC Merger Regulation and the *Kali & Saltz* case, such requirement remains crucial. As we will now analyze, the *Andersen* mergers approve this idea.[71]

Before analyzing the details of the *Andersen* cases, it is important to recall that under the EU, and as it was stated in the *Airtours* case,[72] three conditions are necessary for a finding of collective dominance:

(1)"[...] there must, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

(2) second, the situation of tacit coordination must be sustainable over time; and

(3) third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy."[73]

Once the collective dominance position is established in the EU, we now turn to analyze the *Andersen* mergers. These mergers were proposed after the Enron scandal when most of Andersen's national divisions decided to merge with other audit firms. The most recent merger in the audit market that the Commission had an-

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[71] Comm'n Decision (Case No. COMP/M2816-Ernst &Young France/Andersen France), 2002 O.J. (L 2985) [hereinafter Ernst & Young, France]; Comm'n Decision (Case No. COMP/M2824-Ernst & Young/Andersen Germany) [hereinafter Ernst & Young, Germany]; 2002 O.J. (L 2985); Comm'n Decision (Case No. COMP/M.2810-Deloitte & Touche/Andersen (UK)), 2002 O.J. (L 2985) [hereinafter Deloitte & Touce/Andersen (UK)].
[72] Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585.
[73] *Id.* at 2613-14.

alyzed was the *Price Waterhouse/Coopers & Lybrand* merger.[74] In that merger, the Commission concluded that "... any reduction in the number of suppliers in the Big Six audit market for large companies constitutes a further element which might be conducive to collective dominance. However, the Commission's investigation has not led to the conclusion that the merger would create a situation of oligopolistic dominance."[75]

The Commission, when analyzing the *Andersen* mergers, did not literally consider the failing firm defense, and hence, did not apply the corresponding test. In its analysis, the Commission examined whether the envisioned deterioration on the audit market would be the result of the merger, or, on the contrary, whether such deterioration would occur independent of the merger.[76] The Commission scrutinized these mergers by trying to identify whether the situation of collective dominance was the result of the proposed mergers. However, the ECJ considered that the key question to be analyzed under the failing firm defense was the relationship between a transaction and the deterioration of the competitive structure of the market. Therefore, it might be concluded that although the failing firm defense was not mentioned in the *Andersen* cases, the analysis that the Commission carried out mirrored the test applied when enforcing the failing firm defense.

In this sense, some authors, like Joergens, are of the opinion that when analyzing the *Andersen* cases, the Commission applied a "sort of truncated failing company

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[74] *See* Comm'n Decision of 20 May 1998 Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.1016-Price Waterhouse/Coopers & Lybrand), 1998 O.J. (C 1338) [hereinafter PriceWaterhouse/Coopers & Lybrand].

[75] *Id.* at 25.

[76] *See* Konstantin Joergens, *Andersen and the "Failing Firm": The Application of the "Failing Firm Defence" in Merger Proceedings Involving Firms Providing Professional Services,"* 26(3) WORLD COMPETITION 363 (2003).

defense."[77] Hence, the Commission, instead of applying the three-prong-analysis of the failing firm defense, concentrated in the causality connection as set out in Article 2 (2) of the Merger Regulation.[78] Differently, other authors, such as Jackson, are of the view that the Commission only focused on the causal link analysis as set out in Article 2 (2) of the Merger Regulation, without considering the failing firm defense at all.[79]

However, whether the Commission applied a strict failing firm test remains secondary to the question dealt with in this section. Indeed, the important detail to highlight in these cases is that the Commission did not consider that, in the European audit market, there was a collective dominance position prior to the proposed Andersen mergers.[80] Therefore, it proved easier for the Commission to clear such mergers, as a previous dominant position would not be reinforced whether or not the failing firm defense was applied in a strict sense. The case probably would have been different if the Commission had considered that a collective dominant position existed before the proposed merger. In such hypothesis, the mergers would have been blocked, because it would have been difficult to prove that the proposed mergers would not cause a distortion of the existing competitive conditions.

In summary, it may be said that the failing company defense is easier to accept in an oligopolistic market where collective dominance does not exist prior to the proposed merger. However, if a collective dominance position exists before the merger is cleared, then a failing firm defense would be accepted only in exceptional cases, because it would be very difficult to prove that such merger would not improve the market position of the acquirer, and thus, render the market conditions less

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[77] *See id.*
[78] *See id.*
[79] *See* D. Jackson, *Failing Firm Defense, The Andersen Mergers - A New Approach to the Failing Firm Principle?*, 1 COMPETITION LAW INSIGHT 11 (Nov. 2002).
[80] *See* Joergens, *supra* note 76.

competitive than they were prior to the merger.

Finally, it is important to note that, although in the US the development of the concept of collective dominance has not succeeded,[81] the same conclusion could be reached in the US with regard to the application of the failing firm defense in oligopolistic markets. Indeed, when there is an oligopoly in which the tendency is to collude, and such situation exists prior to a merger involving a failing firm, the acceptance of the failing firm defense would be less likely than if the collusive situation did not exist prior to the merger.

VII. The Failing Firm Defense and the Efficiencies

Both the US and the EU, in the past few years, have understood the need to progressively and increasingly introduce the rule of reason as an instrument to modernize their competition policies.[82] One clear sign of such desire to promote a modern approach to antitrust policies is the consideration of efficiencies under merger control cases. In this sense, although the main regulations do not foresee the possibility of advocating efficiencies in a merger clearance procedure, several reforms have been carried out in relation to the Horizontal Merger Guidelines to include the consideration of efficiencies in both jurisdictions.

In 1997, the US was the first jurisdiction to carry out a reform of the Horizontal Merger Guidelines[83] to add a provision on efficiencies. In relation to the consideration of efficiencies when analyzing mergers, the US Horizontal Merger Guidelines recognize that "efficiencies generated through a merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or

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[81] Sahin Ardiyok, *Comparative Analysis of Collective Dominance*, 3 J. OF YEDITEPE U. 1 (2008).
[82] *See generally* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[83] HORIZONTAL MERGER GUIDELINES, *supra* note 1.

new products."[84] Hence, the US Horizontal Merger Guidelines only refer to merger-specific efficiencies, that is, improvements to be obtained only through the proposed merger.

To put it succinctly, as Pitofsky states, the efficiency considerations under US law need at least four qualifications: "(i) The alleged efficiencies must be verifiable; (ii) The efficiencies must be timely, likely and sufficient to overcome anticompetitive effects; (iii) The efficiencies must not grow out of an anticompetitive reduction in output or service; and (iv) Efficiencies [will] almost never justify a merger to monopoly or near-monopoly."[85] Therefore, the proposed checks and balances test to be applied to efficiencies by the antitrust agencies consists of balancing the effects of cognizable efficiencies vis-à-vis the merger's potential to harm consumers in the relevant market. Indeed, the passing on of benefits to consumers active in the relevant markets has turned out to be one of the cornerstones of the efficiencies analysis in merger control policies in the US.[86]

The European approach to efficiencies is somewhat similar to the US approach. The EU Merger Regulation provides in provision 2(1)(b) that "technical and economic progress provided it is to the consumers' advantage should be taken into account."[87] However, the inclusion of efficiencies considerations in the EU Horizontal Merger Guidelines[88] occurred only in 2004. The description of the efficiencies contained in the EU Horizontal Merger Guidelines is structured differently compared to the efficiencies test under the US Horizontal Merger Guidelines. Indeed, the EU Guidelines divide the

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[84] *Id.*

[85] Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 FORDHAM INT'L L.J. 1413 (2006-2007).

[86] Brian A. Facey & Henry Huser, *A Comparison of Horizontal Merger Guidelines in Canada, the European Union, and the United States*, 19 ANTITRUST 43 (2004-2005).

[87] *See* EC Merger Regulation, *supra* note 14.

[88] *Id.*

efficiencies considerations into three main sections: (i) benefit to consumers; (ii) merger specificity; and (iii) verifiability.[89] It is important to recall that likewise under the US regime, the EU considers that efficiencies must be passed on to consumers. However, it is important to advance at this point that, in the EU, efficiencies are considered as one part of the welfare enhancement test as a whole that ultimately must compensate for the negative consequences of the merger in its entirety.

In relation to the consideration of efficiencies and the failing firm defense, the determination on how a dominant firm would perform in the market remains the key question. In this regard, scholars have taken very different positions. Indeed, Posner, for example, rejects the possibility of taking efficiencies into consideration when analyzing mergers [90] McChesney, on the contrary, suggests that the "acquisition of a failing firm is always efficient."[91] Rousseva and Monti argue that when analyzing efficiencies in the acquisition of a failing firm, the degree of failure of the firm as well as the level of dominance of the acquirer are the key issues.[92] Others such as Jones and Gonález-Díaz have suggested that where dominance exists, efficiencies cannot be taken into consideration, arguing that, "if a strong dominant position is acquired, monopoly prices will be charged."[93] This idea has been adopted by both the US and the EU Guidelines.[94] Indeed, the US Horizontal Merger Guidelines state that "efficien-

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[89] *Id.*

[90] *See Int'l Shoe*, 280 U.S. at 291.

[91] Fred S. McChesney, *Defending the Failing-Firm Defense*, 65 NEB. L. REV. 1, 3 (1986).

[92] *See* Monti & Rousseva, *supra* note 38.

[93] Christopher Jones & Enrique Gonzalez-Diaz, THE EEC MERGER REGULATION (1992).

[94] In this regard, the US Horizontal Guidelines state "efficiencies almost never justify a merger to monopoly or near monopoly." The EU Horizontal Guidelines, on the other hand, establish that "it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground of efficiency gains."

cies almost never justify a merger to monopoly or near monopoly."[95] The EU Horizontal Merger Guidelines, on the other hand, establish that "it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground of efficiency gains."[96]

Indeed, the main dilemma when analyzing the possibility of considering efficiencies when the failing firm defense is advocated in a merger is the problem of considering the possibility of advocating efficiencies in a merger involving a dominant or almost dominant firm that will strengthen its market power through the merger. In this respect, the US & EU Guidelines advance that the consideration of efficiencies in a merger leading to a monopoly is basically impossible, but they do not expressly forbid them. Indeed, the US Horizontal Merger Guidelines textually say that, "efficiencies almost never justify a merger to monopoly or near-monopoly."[97] In other words, there is a small probability that efficiencies may justify a merger resulting in a monopoly. That said, the failing firm defense should not represent the exceptional case where efficiencies could be taken into account to justify a merger resulting in a monopoly. However, as will be defended herewith, it could be considered that the failing firm defense itself represents an efficiencies-based approach to the analysis of mergers. In other words, the test upon which the failing firm defense is based is an efficiencies-oriented test and consequently a disguised form of considering efficiencies.

In order to develop this idea, it is important to recall the concept that the consideration of efficiencies is a question of balancing pro- and anti-competitive effects that a potential acquisition may bring about. If we think about how efficiencies could justify the creation of a monopoly when a failing firm exits the market, it be-

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[95] *See* Correia, *supra* note 10.
[96] *See* EC Merger Regulation, *supra* note 14.
[97] *See* Correia, *supra* note 10.

comes easy to think that a monopoly would always be created even without the merger, because the failing firm would otherwise exit the market, and thus, the remaining undertaking would eventually increase its market share. However, it is also true that by acquiring a failing firm, the dominant firm will increase its market power, as it would increase its productive capacity and thus, it would be easier to increase its prices to the detriment of consumers.

Following Friedman's conclusions, one could argue that the merger involving a failing firm is not a case where an active firm is killed by the acquisition of the dominant firm, but that the merger is equivalent to internal growth.[98] Even then, a balancing test on whether the firm would have grown in such way without the merger is vital, and in practice it is a very difficult test to carry out *ex ante*.

On the contrary, if the merger does not take place, the dominant firm will eventually monopolize the market. Nevertheless, in the latter scenario, the firm does not become more efficient. Therefore, to gain market power it would have to behave differently and in a more competitive way - at least in the short term than if it had acquired the failing firm. Consequently, the possibility of increasing its prices, at least for the initial time period, would remain lower in the second scenario.[99]

This is precisely the balancing test set out through the requirements of the test of the failing firm defense. Therefore, the key question concerning the consideration of efficiencies and failing firms rests on how to compare the way the acquiring firm would behave in the market with or without acquiring the failing company, and how the competitive structure of the market would change with or without the merger. In other words, the analysis of the causal link between the consequences of the mer-

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[98] Richard D. Friedman, *Untangling the Failing Company Doctrine*, 64 TEX. L. REV. 1375 (1986).
[99] *See* Monti & Rousseva, *supra* note 38.

ger and the distortion of the market structure remains the key question.

The complexity of balancing the trade-offs in mergers involving a failing firm that must be carried out before the merger is enforced makes defining such balancing extremely difficult. Indeed, as has been analyzed in this paper, each of the requirements that a merger involving a failing firm must fulfill are not clearly delineated and are not without practical enforcement problems.

Finally, and independently of whether the failing firm defense is actually a disguised efficiencies test, the analysis of the failing firm defense and the consideration of efficiencies reveals one of the biggest concerns when dealing with efficiencies in a broader context. That concern relates to the dominance or increase in market power of the acquiring firm.

VIII. THE POSSIBILITY OF INCLUDING SOCIAL AND ENVIRONMENTAL CONSIDERATIONS IN THE FAILING FIRM DEFENSE: THE U.S. V. THE E.U. APPROACH

A crucial difference between the US and the EU is that the US is a federal state and the EU is not. As obvious as this difference might seem at first glance, it appears to be of utmost importance with regards to the different aims and objectives that underlie their competition and other policies, and for the purpose of enforcing the failing firm defense.

The Sherman Act was enacted in 1890 to deal with the trusts that were controlling several markets. Those trusts were created by combining in one enterprise the power to make pricing and output decisions for entire industries, such as oil, sugar, tobacco, and whiskey.[100] Therefore, in the US, antitrust policy was conceived to enable the market to function in a competitive manner.

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[100] Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (2d ed. 2002).

Under the US regime, Posner's view has apparently governed the merger clearance procedures. Indeed, as expressed in this paper, the "failing firm defense is one of the clearest examples in antitrust law of a desire to subordinate competition to other values."[101] The US Horizontal Guidelines, as analyzed above, only provide for the consideration of economic efficiencies when dealing with a failing firm as long as such efficiencies are passed on to consumers. Therefore, under US antitrust law, it is clear that social concerns do not have a role when analyzing rescue mergers.

In contrast, the EU competition policy is not only used to maintain an undistorted competition within the internal market, but is also used as an instrument to attain the Community objectives, thus helping to build the path towards an ever closer union. In this regard, the ECJ stated that:

> [A]ccording to Article 3(g) of the EC Treaty102 (now, after amendment, Article 3(1) (g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.[103]

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[101] *See Int'l Shoe*, 280 U.S. at 291.
[102] Article 3(g) of the EC Treaty reads: "*For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: [...] (g) a system ensuring that competition in the internal market is not distorted.*" Treaty Establishing the European Community, Art. 3(g), 2002 O.J. (C 325-33).
[103] Case C-126/97, Eco Swiss China Time Limited v. Benetton International, 1999 E.C.R. I-3055.

Prima facie, we should conclude that there is a mandate in the EU stating that competition policy should take into consideration social and environmental concerns, whereas in the US, the legislation remains silent in this respect. However, further analysis needs to be done with regards to this preliminary conclusion. Indeed, the analysis of the failing firm defense is the perfect framework to study the extent to which social and environmental concerns are relevant when drafting competition analysis, and more importantly, to what extent such concerns can be invoked.[104] In practice, both the ECJ and the US Supreme Court have had the opportunity to adopt a position on this question. Indeed, in the case of *Vittel & Others v. Commission*,[105] the Court of First Instance ("CFI") stated that:

> For that purpose it must be noted to begin with that in the scheme of Regulation No 4064/89, the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it.[106]

Monti and Rousseva have argued that "the rescue of a failing firm is consistent with Community policy objectives and not inconsistent with the Merger regulations.

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[104] David Banks, *Non-Competition Factors and their Future Relevance under European Merger Law*, 3 EUR. COMMON L. REV. 182 (1997).
[105] Case T-12/93, Comité Central d'Entreprise de la Société Anonyme Vittel v. Eur. Comm'n, 1995 E.C.R. II-1247.
[106] *Id.*

To insist that the Merger Regulation is purely efficiency-based is therefore against the express recommendation of the Court of First Instance ("CFI") and inconsistent with the text of the Merger Regulation."[107] Such an approach seems too theoretical. In fact, when deciding *Vittel & Others*, the CFI was not setting a general rule whereby social and environmental concerns should be taken into account when analyzing mergers in addition to the efficiencies test. The CFI expressly mentions that such reconciliation can only be considered in certain cases, where the operation might adversely affect the social objectives previously framed under Article 2 of the EC Treaty.[108]

Therefore, the development of case law should be directed towards defining the meaning of "adverse effects." Even in the case where the circumstances under which social concerns should be considered were clarified, it still remains difficult to imagine a test whereby social concerns could be balanced vis-à-vis the increase in market power of the acquiring company. Indeed, it is extremely complicated to quantify the social benefits that a merger can bring about, and much more difficult to set the trade-offs between such social advantages and the anticompetitive effects of the merger. In other words, quantifying the benefits of trading apples for oranges has always been a controversial problem.

This is why it could be well advanced that such social considerations should only be considered in certain situations, i.e. economic crisis, where the exit of a failing firm would have a higher degree of possibility of adversely affecting the European objectives and values in its integrity. Therefore, when at a European level it is decided that social concerns should be balanced with regards to a failing firm, they should be taken into consideration, because it will represent that in that particular market, and that particular moment, there is a substan-

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[107] *See* Monti & Rousseva, *supra* note 38.
[108] Consolidated Version of the Treaty Establishing the European Community art. 2, 2006 O.J. C 321 E/37.

tial problem that needs a short-term solution for the sake of the European values, such as the current financial crisis.

Finally, it is important to highlight the idea that the need or will to consider social and environmental issues when analyzing a merger from an antitrust perspective only reflects a poor enhancement of a particular social and environmental policy. Indeed, when such situations arise, one should only conclude that there has been an unparalleled development of the economic and social/environmental policies in that society. In other words, the conclusion should be that there has been an unsustainable social development for which the organizations in charge of antitrust should not be responsible.

IX. CONCLUSION

This paper has attempted to clarify the enforcement of the failing company defense both in the US and in the EU. It has also attempted to explore the main problems common to both jurisdictions that the enforcement of the failing firm defense brings about. In this regard, and as a way of summarizing the most important points of the current analysis, the following conclusions have been reached: (1) The failing firm defense is a judicially-constructed doctrine that has been subject to judicial creativity and a "rule of reason" oriented approach employed by the courts when analyzing critical mergers; (2) The current tests applicable under both the US and EU are very similar, although in the EU, the causal link between the merger and the deterioration of the market structure remains the key issue; (3) Even though it is difficult to establish the requirements needed to classify a firm as failing, the risk of assets leaving the industry and the financial situation of a company in a precise moment should be the factors to consider when defining a failing firm; (4) When dealing with the requirement that no other alternative purchaser should exist in the market, the questions of which purchaser would have the least anticompetitive effect and whether a minimum purchase price is required remain controversial and without clear answers; (5) The application of the failing division defense is quasi-identical in both jurisdictions: *de jure* possible, but *de facto* never accepted; (6) The enforcement of the failing firm defense in oligopolistic markets is a difficult issue. Where a collective dominant position or a collusive situation exists prior to the controversial merger, the adoption of the failing company defense will be more difficult than if such pre-established condition does not exist; (7) The test proposed under the failing firm defense test is, by itself, an efficiencies-based test. In other words, the failing firm defense represents a disguised way of taking efficiencies into consideration, even when dominance exists; (8) Finally, the authorities in charge of enforcing antitrust laws should not be responsible for dealing with social and environmental concerns. Those concerns should be taken into account only in very limited cases when considering the failing firm defense. Trading apples for oranges has always been a difficult task, since it is impossible to quantify the trade-offs between them. Therefore, such checks and balances should not be carried out.

A final remark related to this paper's introductory comments would be that the failing firm defense is a clear example of how antitrust law should be enforced to the benefit of consumers by placing emphasis on the economic reasoning behind its enforcement. Indeed, the adoption of the failing company defense represents an intelligent rule of reason-oriented use of the antitrust rules to maintain the competition in the markets. It also signifies that the competition analysis should be carried out on a case-by-case basis, always taking into consideration the particular circumstances that surround a transaction.

Now that the economy is hurting, antitrust authorities should try to limit administrative economies as much as possible in favor of scrutinizing each transaction in detail. The birth of the failing firm defense is the result of a pragmatic and consumer-oriented enforcement of the antitrust rules conditioned by the economic situation governing the time when it was conceived. Similarly, our societies need any help available to overcome the current financial crisis, and antitrust laws certainly play a role. In this regard, the authorities in charge of enforcing the antitrust rules should be aware of the importance of antitrust rules in times of economic distress. Therefore, they should use the best economic reasoning—especially vis-à-vis the consideration of efficiencies—when analyzing a transaction. Consumers deserve so.