

The failing firm defense: recent developments



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11/11/2014

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1. Conditions for a failing firm defense (FFD)
 2. Traditional approach: restrictive interpretation
 3. Recent cases: Olympic Aegean and Nynas/Shell
 4. Interpretation: has the practice with respect to the FFD changed and what lessons can be drawn from recent cases?
 5. Conclusion

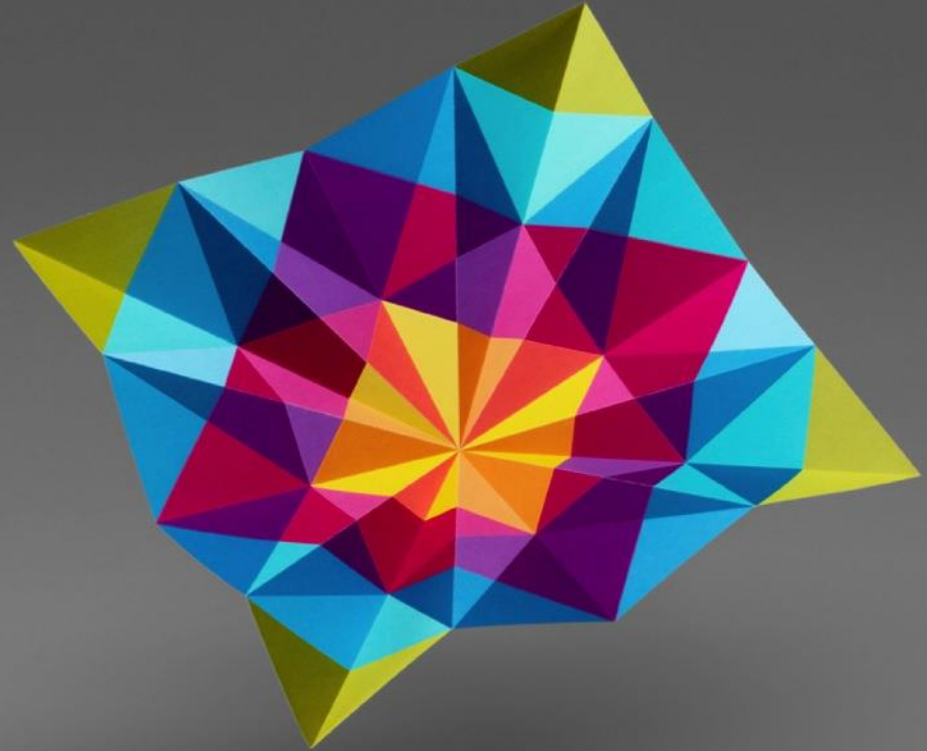
1. Conditions for a FFD



Cumulative conditions

- 1) The allegedly 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 is no less anticompetitive alternative purchaser than the notified transaction.
- 3) In the absence of a merger, the assets of the failing firm would inevitably exit the market.

2. Traditional Approach



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A restrictive interpretation

First condition (forced out of the market):

- The commission assesses financial distress based on profitability, liquidity and solvency criteria.
- However, it is particularly strict with respect to a failing division (concern that the parent company may the balance sheet of a division to meet the test).
- Extreme requirement: would the operation of the division endanger the parent company's survival?

Second condition (no less anticompetitive purchaser)

- Have the parties tried to find potentially better purchaser from a competition point of view? E.g. did they negotiate in good faith with smaller competitors?

Third condition (assets exiting the market)

- The Commission has recognised that this part of the test has traditionally been applied rather strictly (OECD roundtable, 2009)

Example: Aegean/Olympic I

Commission concluded that the proposed acquisition would lead to monopoly or quasi-monopoly on 9 routes.

Prohibition in January 2011.

FFD discussed at length and rejected:

- While Olympic had been incurring losses, the Commission considered the possibility of a restructuring plan.
- The Commission considered that the Greek market could sustain two airlines / Olympic could adopt an alternative business model.
- Olympic's shareholder Marvin did not face financial difficulties (failing division only).
- The Commission considered that Marvin did not have an interest in liquidation due to high exit costs.
- Marvin did not substantiate that it looked for another potential buyer
- Assets would not leave the market (in particular the Olympic brand)...

3. Recent cases



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Aegan / Olympic II

- In October 2013, the Commission approved the transaction following Olympic's financial decline. The transaction led to 5 monopoly routes.
- Rare example of application of failing division example: the Commission accepted confirmation by sole shareholder, Marfin, that they were not prepared to provide further financial support to Olympic.
- Contrasts with 2011 decision which indicated that Marfin had incentives to avoid a bankruptcy.
- Market investigation indicated no credible expression of interest by potential acquirers.

Nynas/Shell

- Proposed acquisition by Nynas of Shell's Harburg refinery assets.
- Nynas only producer of naphthenic base and process oils in the EEA.
- The Commission concludes that the Harburg plant would have closed absent the transaction.
- Parent company was not experiencing financial difficulties.
- The Commission considered that the transaction would lead to efficiencies in the form of lower cost that would be passed on to some extent to consumers.

→ Evidence of broader counterfactual analysis

4. Interpretation



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Interpretation

- A change of policy or a change of economic conditions?
- FFD as a special (extreme) case of counterfactual analysis counterfactual analysis.
- For example:
 - Would a specific plant be likely to close?
 - Would the company likely exit a market (e.g. airline route)?
 - Should one expect the parties' business to decline coming forward?

5. Conclusion



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Conclusion

- FFD has and can be used as shown in recent cases
- However, application of 3 cumulative conditions tends to be restricted to most extreme circumstances
- Yet, even in less extreme cases, counterfactual analysis can be very effective
- Importance of setting the scene/providing convincing evidence on the counterfactual from the start (just as with efficiencies)

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