THE FAILING FIRM DEFENSE IN TIMES OF (THE COVID-19) CRISIS: IS IT WORTH REVISITING?

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I. INTRODUCTION

The recent COVID-19 pandemic has affected all areas of economic activity and competition law was not spared. Regulators around the world had to deal with this crisis from administrative-type issues (teleworking including for hearings, submissions, etc.) to how to apply substantive competition law in times of crisis. In Europe, the European Commission ("Commission") reacted very swiftly and made use of all the legal instruments in its armory to ensure its procedures and analysis remained fit for purpose during the crisis.

In the area of State aid, the Commission issued a Temporary Framework for State aid on March 19, 2020, aimed at supporting the Member States' efforts to inject much needed capital into businesses under financial stress.[2] Similarly, in the field of antitrust, the Commission issued on April 8, 2020 a Temporary Framework with guidance for cooperation projects between competitors aimed at addressing a shortage of supply of essential products and services due to the coronavirus outbreak.[3]

In the area of merger control (which is the focus of the present article), the Commission also put in place some measures[4] to ensure business continuity and the adequate implementation of the EU Merger Regulation ("EUMR").[5] At the same time, the Commission acknowledged that its procedures and analysis under the EUMR would inevitably be affected. For example, from a procedural perspective, it became evident that, in some cases, the Commission would face difficulties in gathering information from the notifying parties and third parties such as customers, competitors and suppliers due to the disruption caused by the lockdowns. Notifying parties were therefore encouraged to discuss the timing (and indeed, to the extent possible, delay) of their merger notifications with the relevant case teams and to use electronic means to file transactions.[6]

In substantive terms, this crisis led to many businesses facing financial problems and thus becoming potential targets, sometimes by way of rescue acquisitions. These acquisitions may have positive effects as they avoid the target going under with the beneficial side effect of avoiding potential losses in assets, supply and employment. In such a scenario one may wonder: what is the role of merger control and competition policy in

2 Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, March, 20, 2020. Available here https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf.

3 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, April 8, 2020. Available here https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX-:52020XC0408(04)&from=en.

4 See Commission's website https://ec.europa.eu/competition/mergers/covid_19.html.

5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

6 See Commission's website https://ec.europa.eu/competition/mergers/information_en.html.

general? Should the rules change in times of crisis by acknowledging the greater financial distress of such companies to allow their takeover even where this would otherwise lead to a loss of competition?

The merger control regime in the EU has long offered a possible solution to this situation with the concept of the failing firm defense ("FFD"). By applying the FFD to an otherwise problematic merger, the Commission has a solid basis to authorize an acquisition and avoid that a failing firm disappears from the market with the subsequent loss in consumer welfare. However, the FFD has very rarely been applied in the EU and the number of successful cases can be counted with one hand. This is probably not only because the number of cases that raise FFD issues in the first place may be limited in practice, but also due to the very high evidential burden that the notifying parties must meet to be able to rely on the FFD.

A previous article by one of the co-authors in the same publication back in 2015[7] reviewed the Commission's practice at that time and considered whether the Commission had relaxed its rules in the wake of two cases where the FFD was successfully applied: *Nynas/Shell* and *Aegan/Olympic II*. In this article we revisit the FFD in light of the COVID-19 crisis. Given the absence of cases raising clear FFD issues at EU level we focus on the analysis undertaken by the UK Competition and Markets Authority ("CMA") in a string of recent cases (including *Amazon/Deliveroo*). We conclude – once more – that, while regulators will be receptive to FFD arguments, they are unlikely to relax their rules. Evidence will remain key. However, we also argue that regulators including the Commission could make greater use of a wider counterfactual scenario (beyond FFD) and look at changes that are likely to take place in the market conditions in the medium and longer term due to COVID-19 overall.

II. THE FAILING FIRM DEFENSE IN THE EU: A RECAP

A. Introduction

Before exploring in more detail the role of the FFD in times of COVID-19, it may be worth revisiting the foundations of the FFD in the EU. Article 2(3) of the EUMR prohibits concentrations "*which would significantly impede effective competition* [SIEC]*, 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.*" This provision establishes a principle of causality according to which concentrations that are the cause of an SIEC should be prohibited, however, concentrations that do not result in an SIEC should, in principle, be allowed.[8]

In performing its review, the Commission uses a counterfactual analysis by comparing the situation without the merger and the situation with the merger. As set out in the Horizontal Merger Guidelines:[9]

> *"In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison."*

This comparison and the causal link required between the concentration and an SIEC is precisely where the FFD makes sense. In the case of a failing firm, the SIEC is not caused by the concentration itself but instead by the likely exit of the failing firm from the market absent the merger. This reasoning is set out in paragraph 89 of the Horizontal Merger Guidelines according to which "[*t*]*he Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.*"

7 K. Fountoukakos & L. Geary, The Failing Firm Defence – Some Further Thoughts Post Nynas/Shell and Aegean/Olympic II Introduction, *Competition Policy International*, May 2015.

8 Joined Cases C-68/94 and C-30/95, *Kali+Salz*, para. 110.

9 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18 ("Horizontal Merger Guidelines") para. 9.

The key factor is therefore whether in a counterfactual scenario – i.e. in the absence of the merger – the competitive conditions on the market would be worse or equally bad than if the failing firm is rescued. In such a comparison, the merger is not the cause of the SIEC and in addition – beyond the strict legal test in the EUMR – the merger may be preferable from a wider perspective by rescuing the target and avoiding a bankruptcy.

In order for an FFD to be accepted, the parties to a concentration must satisfy three cumulative criteria that are set out in the Horizontal Merger Guidelines and which are based on the case law of the Court of Justice of the EU ("CJEU" or "Court"). These criteria are strict and are there to ensure that the merger is really not the cause of a possible SIEC: (i) 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; (ii) there is no less anti-competitive alternative purchase than the notified merger; and (iii) in the absence of the merger, the assets of the failing firm would inevitably exit the market.[10] The burden of proof that these cumulative criteria are satisfied falls on the notifying parties.[11]

i. The failing firm may be forced out of the market due to financial difficulties

According to the first criterion, the notifying parties must demonstrate that 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. It is not required that bankruptcy proceedings or similar restructuring are already ongoing but rather that it is likely that the failing firm would have to exit the market absent the merger. Financial difficulties may exist for example when no shareholder or financial investor would be willing to provide the necessary capital for the business to continue.[12]

The evidence that a firm is under financial stress is normally measured by reference to the company's balance sheet in terms of profitability, liquidity, and solvency. However, the assessment of these parameters must be done on a case-by-case basis and subject to the characteristics of each industry.[13] In the current post-COVID-19 economic environment, it may be increasingly easier for firms to demonstrate that they are under financial difficulties and that market exit is a likely scenario in the near future.

ii. There is no less anticompetitive alternative

The second criterion of the FFD requires that there should be no less anti-competitive alternative purchase than the notified merger. The obvious difficultly with this second limb of the FFD lies in that the parties must be able to demonstrate a negative: i.e. the parties must be able to prove that they have made all efforts to find an alternative purchaser but were unable to do so. Timing is also important. In normal circumstances, a business may be able to reasonably predict whether it needs to be rescued by an investor. However, in times of economic turmoil there may be little time left to find possible investors until the business is forced to exit the market.

iii. The assets would inevitably exit the market

The third and last criterion deals with the question of whether the assets of the failing firm would inevitably exit the market, absent the merger. In essence, the third limb of the FFD test tries to determine whether the assets of the failing firm would completely exit the market or whether any third parties may be willing to purchase those assets and keep them in the market. If the assets of the failing firm are likely to remain in the market, the disruption to competition may be less or even more beneficial than the acquisition of the entire business. In practice, this part of the test has been applied rather strictly and is generally very difficult to satisfy.[14]

10 Horizontal Merger Guidelines, para. 90.

11 Horizontal Merger Guidelines, para. 91.

12 OECD, *Failing Firm Defence* (2009), page 183, available at https://www.oecd.org/competition/mergers/45810821.pdf.

13 *Ibid.* page 184.

14 *Ibid.*

III. THE VERY STRICT APPLICATION OF THE FAILING FIRM DEFENSE

A. Overview

The FFD can be a key, central argument to save an otherwise problematic merger. However, the FFD has been rarely successful. This is largely due to the high evidential burden placed on the parties. The Horizontal Merger Guidelines clarify at paragraph 91 that "*it is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.*"

This high evidential burden means that the parties should be able to provide sufficient supportive evidence to convince the Commission that all three criteria of the FFD test are satisfied: a very difficult standard to meet in practice. The timing of providing the relevant evidence is also important: if the parties invoke the FFD too late in the proceedings (e.g. by not referring to it in the Form CO) their claims are likely to have less weight as they may seem to be improvised out of a sense of imminent prohibition of the proposed merger.[15]

In the EU, the first time the FFD was accepted (following an earlier rejection in *Aerospatiale-Alenia/De Havilland* in 1991[16]) was in 1993 in the *Kali+Salz/MdK/Treuhand* case which raised the question of whether an undertaking with large market shares (Kali+Salz) could acquire its main failing competitor (MdK).[17] In this case, the Commission found that there was no strict causal link between the proposed merger and the deterioration of the competitive structure in the German market because even if the merger were prohibited, Kali+Salz would inevitably reinforce its position of dominance given it was the only relevant player in the market.[18] Therefore, on balance, it would be better if the failing competitor were to remain in the market. The Commission concluded that (i) the failing firm would in the near future be forced to exit the market absent the merger; (ii) the acquirer would in any case absorb the market share of the failing firm if it were to exit the market; and (iii) there was no less anti-competitive alternative purchaser.[19]

The Commission applied the *Kali+Salz* criteria in a restrictive manner for a long time. It was not until 2001 that the Commission accepted another FFD in *BASF/Eurodiol/Pantochim*.[20] This case was a significant departure from the *Kali+Salz* criteria, especially on the absorption of the market share criterion. In *BASF/Eurodiol/Pantochim*, the Commission considered that the absorption of the market share criterion was too restrictive and that for a FDD to be successful, it would be sufficient to show that the assets of the failing firm would inevitably exit the market absent the merger, and that there was no less anti-competitive alternative purchase.[21] This broader interpretation of the FFD was in line with the Court's *Kali+Salz* judgment[22] and was later enshrined in the 2004 Horizontal Merger Guidelines.

It took twelve years until the FFD was applied again successfully. In 2013, the Commission adopted the *Nynas/Shell*[23] and *Aegean/Olympic II*[24] decisions in which the Commission recognized for the first time the concept of a "failing division defense." We analyzed these decisions in detail in a previous article dated May 2015.[25]

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15 See, e.g. M.2876, *Newscorp/Telepiù*, April 2, 2003, para. 215.

16 IV/M.053, *Aerospatiale-Alenia/de Havilland*, October 2, 1991.

17 M.308, *Kali+Salz/MdK/Treuhand*, December 14, 1993. For e.g. in cases relating to the aviation sector, the Commission has considered that slots at congested airports would be allocated to other airlines and therefore that the criterion about exit of assets would not be fulfilled. See for example, M.6447, *IAG/bmi*, March 30, 2012 para. 621.

18 *Ibid*. para. 72.

19 *Ibid*. para. 71.

20 M.2314, BASF/Eurodiol/Pantochim, July 11, 2001.

21 *Ibid*. para. 142.

22 Joined Cases C-68/94 and C-30/95, *France et al v. Commission (Kali+Salz)* [1998] ECR I-1375.

23 M.6360, *Nynas/Shell/Harburg Refinery*, September 2, 2013.

24 M.6796, *Aegean/Olympic II*, October 9, 2013.

25 K. Fountoukakos & L. Geary, The Failing Firm Defence – Some Further Thoughts Post Nynas/Shell and Aegean/Olympic II Introduction, *Competition Policy International*, May 2015.

B. Nynas/Shell and Aegean/Olympic II

In *Nynas/Shell*, the Commission approved Nynas' acquisition of Shell's Harburg refinery assets after considering that absent the merger, the refinery was very likely to be closed. Shell was not a failing firm but a refinery (i.e. the "division") which had been unprofitable for years. There was therefore a very real risk that the refinery would have to exit the market in the absence of the merger with the subsequent reduction in production capacity and increase in prices.

The economic evidence submitted by Shell in conjunction with its internal documents convinced the Commission that, absent the merger, the rational decision would be to close the refinery because it had been loss making for five to ten years.[26] Further, an exit would be in line with Shell's business strategy that focused on larger scale facilities. This conclusion was bolstered by Shell's internal documents and annual reports pre-dating the notification to the Commission.[27] The Commission therefore concluded that "*it is very likely that the Harburg refinery will be closed and that the assets will in the near future be forced out of the market if not taken over by another undertaking, because of their poor financial performance and because of Shell's strategic focus on other activities.*"[28]

In October 2013, just one month after *Nynas/Shell*, the Commission unconditionally approved the *Aegean/Olympic II* merger after concluding that Olympic was failing and would be forced to exit the market absent the merger. The Commission approved this transaction despite having prohibited the same merger in 2011, because at that time, it would have led to the acquisition of Aegan's closest competitor and a monopoly in several routes.[29]

In 2013, Olympic Air's financial situation (as a division) and that of its parent company Marfin had deteriorated to such an extent – in part due to the significant drop in demand for domestic air travel due to the financial crisis in Greece – that the Commission was convinced that absent the merger, Olympic Air would be forced to exit the market in the near future. In the clearance decision, the Commission solely relied on the FFD to conclude that even if the transaction would lead to a merger to monopoly in five routes and would eliminate the most likely competitor for six additional routes, there was no causal link between the transaction and the deterioration of the competitive conditions and that absent the merger, the competitive conditions would deteriorate at least to the same extent.[30]

While these cases seemed to suggest that the Commission had adopted a more flexible approach towards the FFD, the truth is that the criteria and strict application in terms of evidentiary standard remained intact. A slight relaxation was that in failing division situations, the Commission seemed to accept that notifying parties were no longer required to prove that the viability of the whole group is endangered.

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26 M.6360, *Nynas/Shell/Harburg Refinery*, September 2, 2013, para. 316.

27 *Ibid.* para. 319.

28 *Ibid.* para. 327.

29 M.5830, *Olympic/Aegan Airlines*, January 26, 2011.

30 See for a more detailed analysis of this decision, K. Fountoukakos & L. Geary, The Failing Firm Defence – Some Further Thoughts Post Nynas/Shell and Aegean/Olympic II Introduction, *Competition Policy International*, May 2015.

IV. RECENT DEVELOPMENTS IN LIGHT OF COVID-19[31]

A. The CMA Merger Guidance on COVID-19 and the Amazon/Deliveroo Case

There has not (yet) been an EUMR case which has assessed the FFD in the context of the COVID-19 pandemic. It is therefore helpful to consider recent national developments, in particular in the UK, where some interesting recent cases included an FFD analysis.

In the UK, the test is broadly similar to the one applied by the Commission:[32] the CMA considers (i) whether the firm would have exited (through failure or otherwise) absent the transaction;[33] (ii) whether there would have been an alternative purchaser for the firm or its assets; and (iii) what the impact of exit would be, and how this would compare to the impact of the transaction.

The CMA (and its predecessors) has accepted the FFD more often than the Commission and its approach seems slightly more flexible grounding the analysis in an overall counterfactual assessment rather than focusing more mechanistically on the three FFD criteria. The most recent example is *Aer Lingus/CityJet* which cleared at Phase 1 a long-term wetlease arrangement and landing slots transfer between Aer Lingus and CityJet relating to air transportation services between London City airport and Dublin.[34] The CMA found that the FFD applied since CityJet had taken the decision to stop providing services on this route prior to the agreement and the CMA's detailed investigation showed that no other airline would have been interested in taking over the business.

In April 2020, the CMA issued guidance on merger assessments during the COVID-19 pandemic,[35] including a separate summary of its position on how the CMA will assess "failing firm" arguments in a merger review context. The CMA emphasized that its overall approach to assessing whether a merger gives rise to competition concerns remained unchanged and expressly stated that COVID-19 "*[had] not brought about any relaxation of the standards by which mergers are assessed or the CMA's investigational standards.*"[36] The CMA noted that the impact of COVID-19 will be factored into the substantive assessment of a merger "*where appropriate*" but "*even significant short-term industry-wide economic shocks may not be sufficient, in themselves, to override competition concerns that a permanent structural change in the market brought about by a merger could raise.*"[37]

However, a few days before issuing this guidance, the CMA provisionally cleared Amazon's investment in Deliveroo on the basis of failing firm arguments.[38] The CMA noted in particular the "*wholly unprecedented circumstances*" and the "*stark outcome*" for food delivery options that would result if Deliveroo exited the market.[39]

As for the first condition (market exit), the CMA found that Deliveroo had provided evidence that, without the Amazon investment, it would fail financially and be forced to exit the market. Based on financial data from early-April 2020, the CMA reached such conclusion against the backdrop of restaurant closures, consumer fears over contamination and a significant reduction of available couriers, and considered that Deliveroo could not have re-structured its operations to avoid a market exit.[40] The CMA also noted that Deliveroo's current financial constraints could

31 This section includes developments up to July 27, 2020.

32 CC2, CMA Merger Assessment Guidelines, September 2010, paras 4.3.8 to 4.3.18. While the CMA Guidelines and decisions usually refer to the "exiting firm scenario," we have used the "FFD" terminology in this article for ease of reference.

33 While the Horizontal Merger Guidelines expressly refer to an exit of the market because of financial difficulties, the CMA Merger Assessment Guidelines note that "[t]*he exiting firm scenario is most commonly considered when one of the firms is said to be failing financially. However, exit may also be for other reasons, for example because the selling firm's corporate strategy has changed*," para. 4.3.9.

34 Completed agreement between Aer Lingus Limited and CityJet designated Activity Company, CMA decision of December 21, 2018.

35 CMA Guidance, Merger assessments during the Coronavirus (COVID-19) pandemic, April 22, 2020.

36 CMA Guidance, Annex A: Summary of CMA's position on mergers involving 'failing firms,' April 22, 2020, para. 26.

37 CMA Guidance, Merger assessments during the Coronavirus (COVID-19) pandemic, April 22, 2020.

38 Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, notified on April 16, 2020 ("*Amazon/Deliveroo*").

39 Press Release, CMA provisionally clears Amazon's investment in Deliveroo, April 17, 2020.

40 *Amazon/Deliveroo*, Provisional Findings report, April 16, 2020, paras 4.24-4.49.

not be attributed to its decision to accept investment from Amazon: any alternative investment available at the time would not have put Deliveroo in a viable position to survive the COVID-19 disruption.[41]

In respect of the second condition (no less competitive alternative purchaser), the CMA found that Deliveroo's current shareholders were not a source of viable alternatives and that, given COVID-19, alternative funding was very unlikely and would not have been provided in the timing required.[42] As for the third condition (impact of exit), the CMA found that Deliveroo's exit would result in significantly weaker competition over an extended period of time, and this would be the case even if Amazon ultimately re-entered the market successfully.[43] Therefore the CMA provisionally concluded that Deliveroo exiting the market would have had a greater negative effect on competition and consumers than any effect from allowing the transaction to proceed.

This decision has been heavily criticized by third parties. In particular, third party submissions raised the temporary nature of the adverse impact of the COVID-19 on Deliveroo's business so that the CMA failed to take into account the likely increase in order volumes and revenues which took place a few weeks after COVID-19's outbreak.[44] For example, Deliveroo's competitor Just Eat noted that the negative COVID-19 impact on its business was only for about 1-2 weeks followed by a quick and strong recovery even to a level above the original benchmark both in the UK and in other markets.[45] In light of these developments, the CMA's Final Report's deadline was extended by eight weeks to allow the CMA to reflect the impact of COVID-19 in the CMA's assessment.[46]

On June 22, 2020, the CMA issued revised Provisional Findings which changed the grounds for provisional clearance. The CMA acknowledged that its previous decision was issued in the urgency of the situation but that market conditions and Deliveroo's financial situation had materially changed since that decision.[47] First, the CMA found that COVID-19 had had a more limited impact than expected on Deliveroo's business, and notwithstanding the company's ongoing reliance on external funding, the most likely counterfactual was that Deliveroo's exit was not inevitable.[48] Second, the CMA found that Deliveroo was no longer facing a financial "cliff-edge" and that the urgent funding need due to COVID-19 envisaged in the April Provisional Findings no longer appeared to have arisen. The CMA therefore provisionally concluded that the most likely counterfactual was that Deliveroo would have continued to compete in the market, and to raise funds to do so, in the same way as it anticipated prior to the crisis.[49]

This "U-turn" in the CMA's provisional conclusions confirms that the FFD cannot be used to address short-term financial difficulties; rather it is the long-term impact of the crisis on the target that prevails. It also confirms that, as provided in its guidance, the CMA is not willing to flex the test as a result of COVID-19.

41 *Ibid*. paras 4.45-4.49.

42 *Ibid*. paras 4.50-4.65.

43 *Ibid*. paras 4.66-4.89.

44 See for example Company D's response to the CMA's Provisional Findings in *Amazon/Deliveroo*, May 13, 2020, section B.

45 Just Eat Takeaway.Com, Submission to the CMA in response to its request for views on its Provisional Findings in relation to the *Amazon/Deliveroo* merger inquiry, para. 21.

46 Reference relating to the Anticipated Acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, CMA Notice of extension of inquiry period under section 39(3) of the Enterprise Act 2002, 10 June 2020, para. 4.

47 *Amazon/Deliveroo*, CMA Summary of revised provisional findings, April 22, 2020, paras 2-3.

48 *Amazon/Deliveroo*, CMA Revised Provisional Findings, June 22, 2020, paras 19-22.

49 *Ibid*. paras 23-25.

B. Other Recent COVID-19 Related Developments in the UK

To date, the CMA has not accepted arguments relating to the adverse impact of the COVID-19 pandemic in its competitive assessment.

In *Sabre/Farelogix*, which was blocked on April 9, 2020, the CMA indicated that the significant disruption that COVID-19 is expected to create to the travel industry did not change its assessment of the consequences of the merger on competition.[50]

In *JD Sports Fashion/Footasylum*, which was blocked by the CMA on May 6, 2020, the CMA noted that, while COVID-19 is significantly affecting the sector, it had not found evidence that this would remove its competition concerns. In particular, the CMA found that, while there remained considerable uncertainty around the extent and the duration of COVID-19's impact,[51] the parties were not hit harder relative to other retailers, such that either party would be in a much weaker competitive position in comparison to each other and other retailers, or that other competitors would become significantly stronger.[52] The parties also confirmed to the CMA that none of them would go out of business. However, the CMA took the uncertainties of the current situation into account in the time given to JD Sports to sell Footasylum.[53] JD Sports Fashion plc has appealed the CMA's decision before the Competition Appeal Tribunal (the "CAT"). One ground for the appeal argues that the CMA erred in law and/or acted irrationally by excluding the effect of COVID-19 on Footasylum when considering the relevant counterfactual. JD Sports further alleges that the CMA was also mistaken in finding that COVID-19 would not materially affect Footasylum's competitive constraint.[54] Beyond the strict conditions of the FFD, JD Sports' appeal raises the question of considering the impact of COVID-19 more broadly in the competitive assessment, namely in the changes to the structure of competition and consumer behavior. It will therefore be interesting to see the CAT's response to JD Sports' allegations.

In *Circle Health Holdings Limited/BMI Healthcare Limited*, which was conditionally cleared on June 23, 2020, the CMA took into account the contemporaneous arrangement between the parties and the NHS for temporary capacity allocation. The CMA however considered that this arrangement was unlikely to impact the long-term competitive dynamics of the private healthcare industry.[55]

In *Viagogo/StubHub*, which was referred to Phase II on June 25, 2020, the CMA noted that the COVID-19 outbreak had had, at least in the short-term, a substantial impact on the live events and ticketing industries.[56] However, the CMA considered that there remained considerable uncertainty about the duration and long-term effects of this impact while a "*merger investigation typically (…) considers what lasting structural impacts a merger might have on the relevant market*."[57] The CMA found no evidence indicating that the COVID-19 outbreak would have a disproportionate impact on the parties relative to other providers. It therefore considered pre-merger conditions of competition to be an appropriate proxy for assessing the lasting structural impact of the merger.[58]

One specific difficulty for the parties to convince the CMA to take into account the impact of COVID-19 in the counterfactual - that comes out of the recent cases - is to demonstrate that the pandemic had a disproportionate impact on the parties relative to its competitors. This puts a very high burden of proof on the parties, especially as market data is not necessarily available to them in these uncertain times and while the commercial pressure to complete quickly (or remove a hold separate order) is high.

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50 Anticipated acquisition by Sabre Corporation of Farelogix Inc., CMA Final Report, April 9, 2020, para. 55. Sabre Corporation has appealed the CMA's decision.

51 Completed merger on the acquisition of Footasylum by JD Sports Fashion plc, CMA Final report, May 6, 2020, paras 8.305, 9.223, 13-152, 13-153.

52 *Ibid*. para. 4.

53 *Ibid*. para. 5.

54 Case No. 1354/4/12/20, *JD Sports Fashion plc v. Competition and Markets Authority*, CMA Summary of application under section 120 of the enterprise act 2002, para. 2.

55 Completed acquisition by Circle Health Holdings Limited of GHG Healthcare Holdings Limited, a parent of BMI Healthcare Limited, CMA decision on relevant merger situation and substantial lessening of competition, April 8, 2020, paras 56-57.

56 Completed acquisition by PUG LLC Of StubHub, Inc., StubHub (UK) Limited, StubHub Europe S.à.r.l., StubHub India Private Limited, StubHub International Limited, StubHub Taiwan Co., Ltd., StubHub GmbH, and Todoentradas, S.L., Summary of the CMA's decision on relevant merger situation and substantial lessening of competition, June 11, 2020, para. 5.

57 *Ibid*. para. 5.

58 *Ibid*. para. 5.

These decisions show that the CMA will be vigilant and will not easily accept FFD arguments especially when these are based on a short-term impact assessment. Given the uncertainty surrounding any impact of COVID-19 (and with many jurisdictions moving back to reopening their economies), it seems unlikely that the FFD will be accepted more easily purely on COVID-19 related grounds. This highlights the importance of a case-by-case assessment which takes into account the commercial dynamics and the evidence available to the parties in given circumstances. The defense may therefore continue to apply as before, i.e. only where it can clearly be demonstrated that the target will inevitably exit the market imminently or in the short term and the remaining criteria are satisfied.

V. CONCLUSION – A STRICT APPLICATION OF THE FFD IS LIKELY TO CONTINUE DESPITE THE COVID-19 CRISIS?

The recent cases in the UK as well as the precedents at EU level show that the requirements of the FFD remain very demanding, even in times of a global pandemic. Whether the FFD should be made more lenient or not seems to be a debate that keeps creeping back in times of economic turmoil. Already in 2009, the Commission and other OECD Member countries rejected this idea in the midst of one of the worst financial crises since the Great Depression of 1929.[59]

Back then, a number of competition authorities recognized that the low number of mergers in which parties claimed the FFD was probably due to the perception that the FFD criteria are too strict. However, the consensus was that those criteria should not be loosened, even in light of a global economic crisis, mainly because there are other policy instruments (e.g. State aid or bankruptcy law) better suited to help failing firms in times of crisis.[60]

Nonetheless, the reason FFD arguments always resurface in times of crisis is a simple one. A crisis does create a sense of urgency and the deteriorating economic environment does indeed make it more likely that some firms will fail. In such situations, a merger with a financially stronger competitor may be the only option left for a firm to ensure its viable continuation and avoid having to exit the market.

In addition, with crises that may have a longer-term impact (and it remains to be seen what the impact of COVID-19 will be on various sectors of the economy), a proper counterfactual analysis (beyond the strict parameters of FFD) is necessary. Regulators need to assess whether the new economic situation in the medium and longer term will result in permanent changes to the market that need to be taken into account when analyzing the merger. Such a wider counterfactual analysis could include elements of FFD without fixating on the strict criteria of FFD in a mechanistic manner. In the recent CMA cases such a counterfactual analysis was undertaken but ultimately the CMA was not convinced that this should result in it departing from using the pre-merger level of competitive interaction as the relevant counterfactual. As the longer-term impact of COVID-19 may become clearer and the economy moves (to use a cliché) to a "new normal," it remains to be seen whether firms will raise FFD and wider counterfactual arguments and how receptive regulators and in particular the Commission will be.

59 OECD, Failing Firm Defence (2009), page 12-13: available at https://www.oecd.org/competition/mergers/45810821.pdf.

60 *Ibid.* page 13.

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