

RESTRUCTURING
AND
ANTITRUST

IN TIMES OF COVID-19

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What is forbidden?

A concentration 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, **shall be declared incompatible** with the common market.

In that case, **it is mandatory to notify** the transaction to competition authorities.

When to notify?

FACTORS

Degree of concentration of the relevant market

Market share of the parties

The merger eliminates a driver of competition

The merger is able to limit the development of competitors

Monopoly

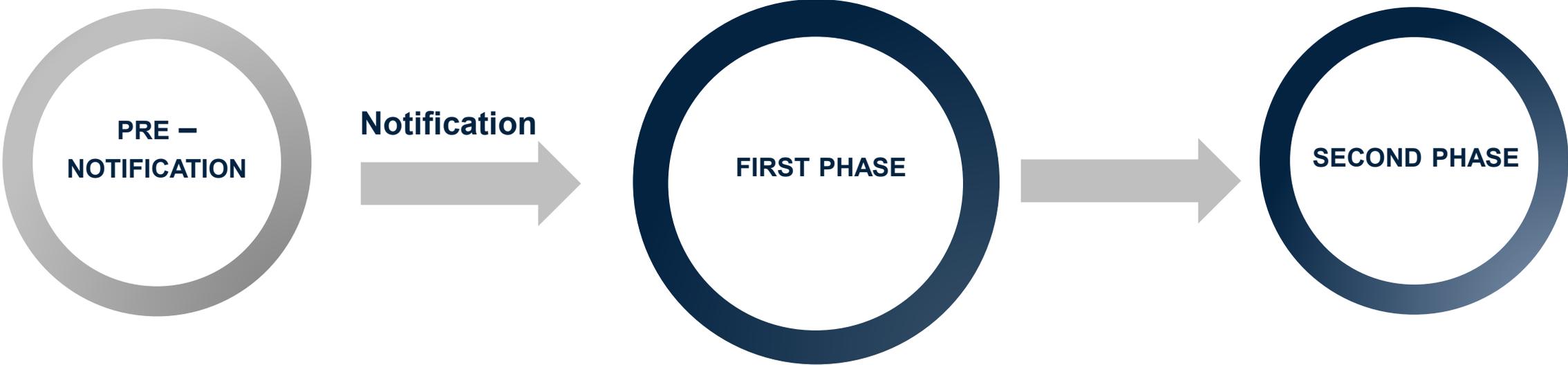
3 to 2 competitors

THRESHOLDS

Company's turnover

Company's market share

MERGER CONTROL PROCEDURE



INSOLVENCY LAW AND ANTITRUST

- What happens in a merger when:
 - The target and the buyer are competitors?
 - The merger would significantly impede competition
 - The target is failing?

FAILING FIRM DEFENCE – CLASSIC APPROACH

CLASSIC APPROACH (Case *Kali+Salz*)



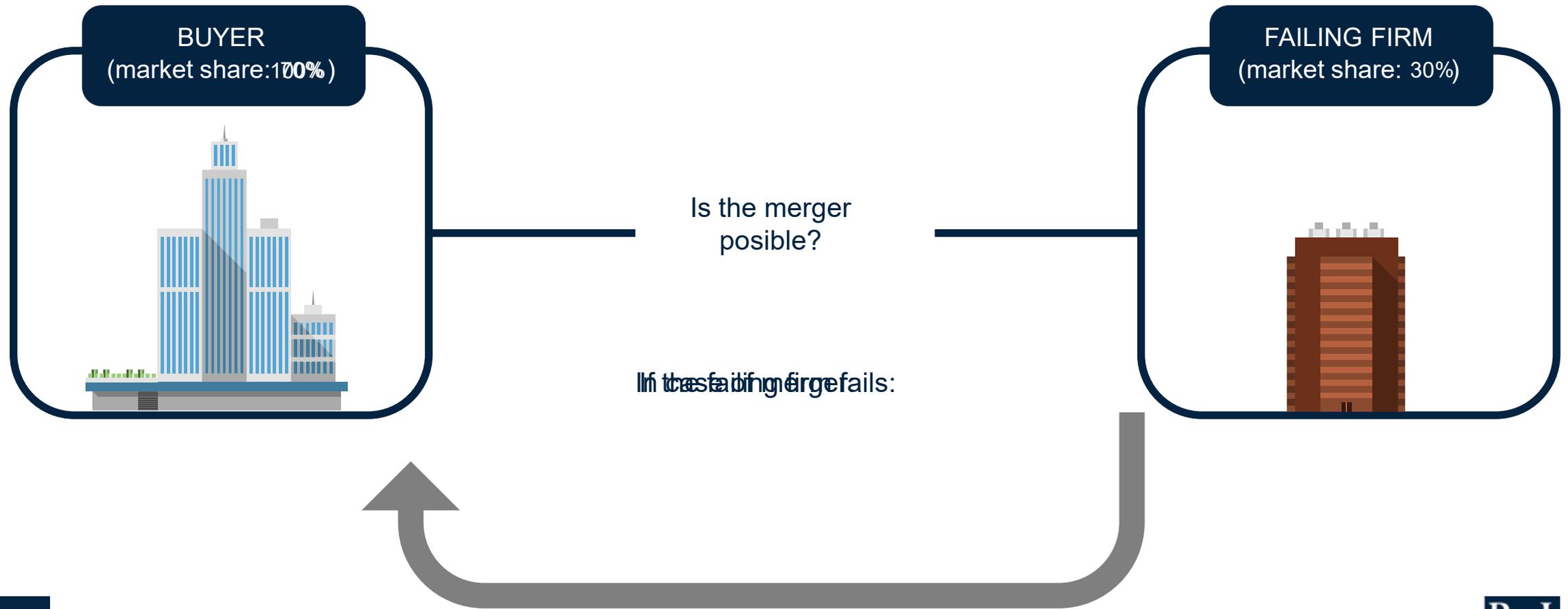
The acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; and

There is no less anti-competitive alternative purchase

The acquiring company would take over the market share of the failing company if forced out of the market

The lack of causality between the merger and the creation of a dominant position means that the latter would result from the disappearance of the failing company, in any event.

FAILING FIRM



BASF/EURODIOL

Case Basf/Eurodiol changed the approach:

Basf was a chemical company that aimed to buy two Belgium companies, which were placed under pre-bankruptcy regime

In this Decision, the European Commission changed the third criterion

New criterion: whether the assets would inevitably exit the market in the absence of a merger

GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS

The 2004 Guidelines adopted the change of criteria laid down in *Basf/Eurodiol*.

2

There is no less anti-competitive alternative purchase than the notified merger

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

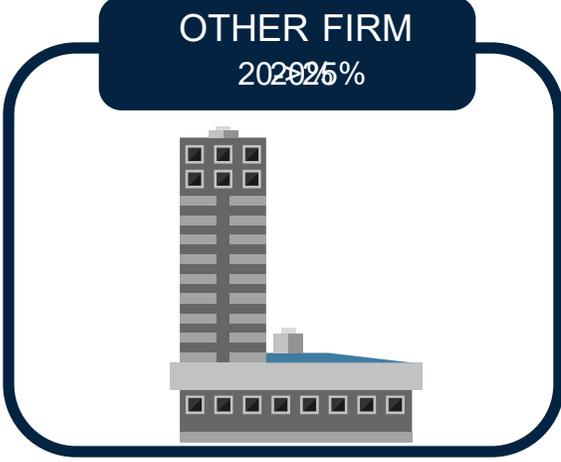
3

In the absence of a merger, the assets of the failing firm would inevitably exit the market

(*) Although they are not cumulative criteria, they are treated as such.

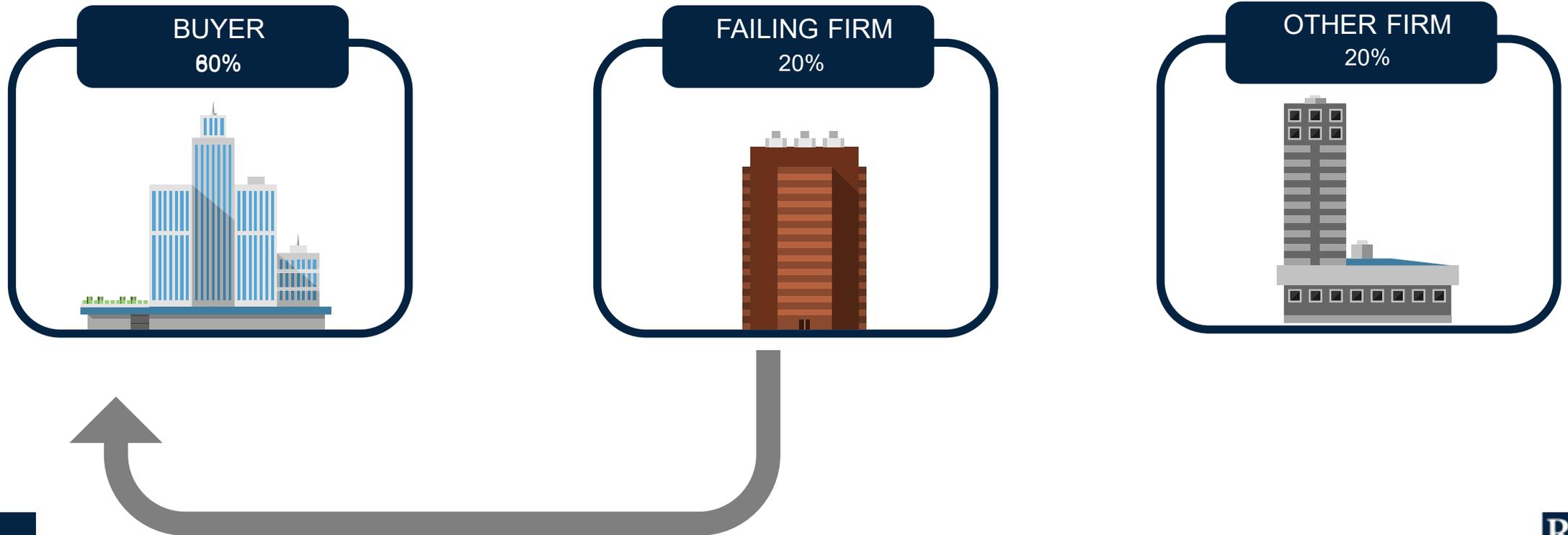
FAILING FIRM

If the failing firm fails



FAILING FIRM

In case of merger



USA-EU

EUROPEAN UNION	UNITED STATES
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	Inability to meet financial obligations
No less anticompetitive alternative	Inability to reorganize under Chapter 11
The assets of the failing firm would exit the market	No reasonable alternative less detrimental to competition
	The assets of the failing firm would exit the market

FIRST CRITERION: TO BE FORCED OUT OF THE MARKET

EUROPEAN UNION

When is a company “failing”?

- Case-by-case basis analysis
- It has to be demonstrated that the company is unlikely to meet its financial obligations in the future. Bankruptcy proceedings don't have to be ongoing
- Likelihood that the company will enter into bankruptcy in the absence of the merger in the near future

UNITED STATES

Inability to meet financial obligations:

- Case-by-case analysis. No fixed conditions.
- Main factors: the existence of cash-flow, total liabilities or the irreversibility of the financial problems, etc.

Inability to reorganize in bankruptcy:

- Can the elimination of the company's debt through the bankruptcy proceeding correct the financial problems?
- Are creditors willing to restructure the company's debt?

SECOND CRITERION: NO LESS ANTICOMPETITIVE SOLUTION

EUROPEAN UNION

Are there alternative purchasers available?

It is necessary to make a counter-factual assessment of what the market structure would look like in case of alternative acquirers. For instance:

- Do they cause lesser risks of anti-competitive restrictions?
- Are there any efficiencies?

UNITED STATES

The company to be acquired has to make a “good faith” effort to seek “reasonable alternatives” offers so that its tangible and intangible assets stay in the market.

Reasonable alternative:

- The solicitation of potential buyers offers shall not discourage
- A number and variety of companies must be contacted
- Sufficient information must be provided
- Pursue seriously any possible interest
- Investment bankers with proper incentives

THIRD CRITERION: NO LESS ANTICOMPETITIVE SOLUTION

EUROPEAN UNION

- Is it likely that assets will remain in the market as they currently are?
- Will they be liquidated and re-allocated to another, more efficient use? If the assets could remain in the market, the effect on competition could be more beneficial
- Decrease in output

UNITED STATES

The assets of the company would exit the market absent the acquisition:

- Objective evidence: that is not more profitable for it to continue to operate the assets than to have them employed elsewhere
- It seems implied that piecemeal liquidation value is above liquidation value

FAILING DIVISION VS. “FLAILING” FIRM

FAILING DIVISION

Applicable to failing divisions of healthy companies:

- The division must have a negative cash flow on an operating basis
- Its assets would exit the market absent the transaction
- No reasonable alternative less detriment to completion

Additional difficulties:

- Is there clear evidence that the division would be liquidated absent the merger?
- Would a third-party investor put money in the division so that it would eventually operate profitably?

“FLAILING” FIRM

Company in a situation of financial weakness, which may not be as competitive in the future but does not fulfil the conditions of the Failing Firm Defence

Will the company be an effective competitor absent the merger?

- Financial weakness is one of the relevant factors to consider
- Financial weakness must affect its prospects as a future competitor



THANK YOU

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