

# Merger Control in Times of Crisis

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# Agency Preparedness for COVID-Related Consolidation

- Post-COVID surge in consolidation may stress competition authority resources
- Potential for major restructuring of important markets: food, healthcare, retail, transportation
- Dynamics will affect all aspects of merger analysis



# Timing and Perspective

- Forward-looking merger analysis complicated by rapid COVID-related changes in markets
- Will affect traditional forms of evidence and predictive analysis
- Multiple transactions likely to be under review at the same time
- “Scenario” analysis may play important role in reviews



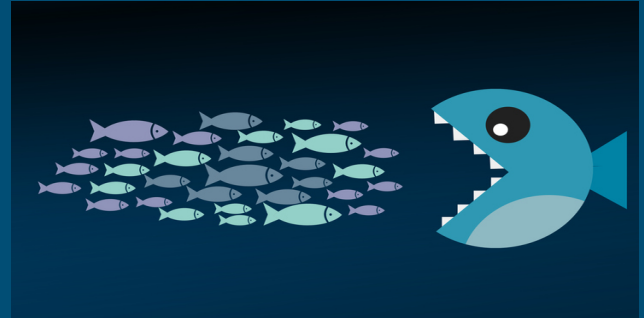
# Market Definition

- Evidence of broader product substitutability during COVID
- Merging parties likely to cite to substitution patterns during COVID to support broader market definitions in future cases
- Findings in previous cases provide important comparisons



# Types of Mergers and Competitive Concerns

- COVID-related failures of small firms means more acquisitions of potential rivals
- More proposals by large players to integrate horizontally and vertically, especially if given temporary immunity to coordinate during COVID
- Impact on market structures raises concerns about super-dominant firms (excluding rivals), oligopolies (collusion), higher barriers to future entry



# Efficiencies

- Parties are likely to make COVID-inspired efficiencies claims beyond traditional cost-savings and consumer benefits. E.g., “Our merger will....
  - improve the stability and resiliency of the supply chain”
  - prevent destabilizing job losses”
  - create scale and scope economies, lower prices, and protect consumers against future price gouging”
  - better coordinate manufacturing and distribution to deliver essential commodities”
  - enable us to compete better with larger rivals”

# Efficiencies (Cont.)

- Authorities should view with skepticism
- Claimed merger efficiencies rarely materialized before COVID
- Claims are less likely to be merger-specific and cognizable
- Risks *de facto* change to standard of review

# Remedies

If post-COVID markets become more concentrated...

- Blocking a transaction may be the most “effective” remedy
- Firms have stronger incentives to violate conditions in conduct remedies
- Increased difficulty in finding viable buyers of divested assets during pandemic will make structural remedies more difficult





# Failing Firm Defense

- Exits of smaller firms and acquisitions of failing rivals affect market concentration
- Determining “Imminent failure” versus “declining competitive significance” may be more difficult
- Changed market dynamics will affect key criteria, such as ability to meet financial obligations, reorganize in bankruptcy, and secure other offers for failing assets
- Emphasizes importance of maintaining rigorous standard and taking remedies in “marginal” cases





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