CANADIAN MERGER REVIEW: ASSESSING FAILING FIRM CLAIMS IN MARKET CONDITIONS DISRUPTED BY COVID-19

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I. INTRODUCTION

The coronavirus pandemic has disrupted the global economy, transformed supply chains, and shocked daily lives across the world. This is a crisis – a challenging moment in time, and the work of competition authorities, while important in any economic environment, is even more crucial in times of economic crisis to support short- and long-term recovery efforts.

A wave of proposed transactions involving distressed companies is anticipated by some as a result of the COVID-19 pandemic crisis. If such a wave materializes, these proposed transactions may require swift review by competition authorities, especially in jurisdictions like Canada with *ex ante* regimes. There are calls from the business community in Canada and elsewhere for competition authorities to relax their standards for review in a failing firm context due to the exigent circumstances presented by the crisis. Relaxing standards in a crisis period may have long-term implications in key sectors of the economy where the irreversible and immediate enhancement of market power through strategic acquisition could lead to deeper and longer-term implications for the economy and its recovery.

Experience in evaluating failing firm claims in a recent case in Canada indicates that rigor and speed need not always be at odds. Where the parties to the proposed transaction come in early and provide the evidence, data and information required in order for the reviewing authority to do its work quickly, parties may get the certainty they need within ambitious timelines that recognize the urgency of companies in true financial distress without compromising the public interest in competition that is vital to support short- and long-term economic recovery efforts.

II. IMPORTANT LESSONS FROM PAST CRISES

The advice of antitrust enforcers and lessons learned from prior crises is one of the only guides we have to navigate the current crisis. This advice tells us that the need for antitrust law to foster competitive markets is especially pronounced in times of economic crisis.[2] The words of our former Commissioner during the 2009 Global Financial Crisis ring true today:

For companies and consumers, timely, transparent and predictable application of the law is arguably more important than ever. Staying true to competition principles is not a luxury, to pursue only when there is a perception we can afford it; quite the contrary. In tough times, we need to be vigilant to ensure that lasting harm to competition does not result from unscrupulous exploitation of vulnerable consumers and business, or even a well-meaning but misguided relaxation of standards. [..] [J]ust as the *Competition Act* applies during times of prosperity to prevent conduct that deprives markets of the innovation, efficiency and productivity that would otherwise be fostered, it is of equal, or greater, importance during times of economic hardship.[3]

The lessons of the Great Depression may also be prescient during this period. Academic study points to the loosening of the application of competition laws and policies in the late 1920s and early 1930s as a factor that may have contributed to wage and price fixing and a deepening and prolongation of the Great Depression.[4] During this period, the welfare of firms took priority over the welfare of consumers. Consequences included restricted output, higher prices and reduced consumer purchasing power.[5]

Based upon experience in past crises, not many proposed transactions involving distressed firms raise competition issues. A very small proportion of cases involve both substantive competition issues and failing firm claims. Where there is little prospect of a substantial prevention or lessening of competition, proposed transactions in Canada generally receive the necessary guidance to proceed to complete the transaction within fourteen days. This has continued to be the case so far during the COVID-19 crisis in Canada. For the very small minority of proposed transactions that may raise competition concerns worthy of investigation that also involve failing firm claims, it remains a priority to maintain the rigor of an evidence-based review.

Now is not the time to relax our standards, including for proposed transactions that present substantive competition issues in a failing firm context. Permitting strategic acquisitions that may harm competition over the short and long term to proceed will hamper recovery efforts. Parties to such proposed transactions subject to review in Canada can expect that the Canadian Competition Bureau ("CCB") will try to work as quickly as possible to evaluate the evidence based upon the criteria set out in our merger enforcement guidelines with respect to failing firms. Parties can also expect that where we see competition concerns and a lack of evidence to support the failing firm factor, the CCB will continue to vigorously enforce the merger provisions of the Canadian *Competition Act* (the "Act").

The remainder of this article examines Canada's merger control framework and summarizes the CCB's approach to acquisitions of failing firms and how it compares to the approach of other agencies internationally.

2 Christine A. Varney, Assistant Attorney General, Antitrust Division., U.S. Department of Justice, *Vigorous Antitrust enforcement in this Challenging Era*, May 12, 2009, available at https://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era.

3 Speech made by Melanie L. Aitken, Interim Commissioner of Competition, February 12, 2009, Northwinds Professional Institute, 2009 Competition law and policy forum, Cambridge, Ontario, available at https://web.archive.org/web/20150219152934/http:/www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02994.html.

4 Alan J. Meese, Ball professor of Law, William & Mary Law school, article "*Competition Policy and the Great Depression: lessons learned and a new way forward*," Cornell Journal of Law and Public Policy, Vol. 23, No. 2, 2013, page 256 and page 335 available at https://www.lawschool.cornell.edu/research/JLPP/upload/Meese-final.pdf.

5 Christine A. Varney, *supra* note 2.

III. CANADA'S APPROACH TO THE FAILING FIRM FACTOR

A. Canada's Merger Regime

Canada has a prosecutorial model for mergers that is similar in many respects to the United States. There is an *ex ante* merger regime for proposed transactions that meet certain thresholds which provides that parties are required to notify the Commissioner of Competition (the "Commissioner") and provide certain prescribed information. Absent positive clearance from the Commissioner, parties may not take steps to complete a proposed transaction that is subject to notification for a period of thirty days. For more complex proposed transactions that require further information to be examined, the Commissioner may issue a supplementary information request. The issuance of such a request triggers a second statutory waiting period that prohibits parties from taking steps toward closing a proposed transaction until thirty days after the parties have provided all of the information requested.

Where the Commissioner has concerns that a proposed transaction may substantially prevent or lessen competition, he may apply to the Competition Tribunal, comprised of Federal Court of Canada judges and lay members who generally have expertise in competition law or economics, for an order to remedy the likely substantial prevention or lessening of competition. The Act provides a one-year period following completion of any transaction (regardless of whether subject to the *ex ante* regime or not) for the Commissioner to file an application to challenge. The Commissioner has the burden to prove, on a balance of probabilities, that the merger is likely to substantially prevent or lessen competition.

Section 93 of the Act sets out a non-exhaustive list of factors that the Competition Tribunal may consider in determining whether a transaction is likely to substantially prevent or lessen competition. These factors also guide the CCB in its review of proposed transactions. The "failing firm factor" is one of the factors enumerated in section 93 of the Act. Subsection 93(*b*) states:

> *In determining, for the purposes of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:*
> *(…)*
> *(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail.*

B. CCB's Approach to Evaluating the Failing Firm Factor

Failing firm claims are not treated as a defense to an otherwise anti-competitive merger under the Act. These claims are assessed as part of the competitive effects analysis of a proposed transaction. For the vast majority of proposed transactions that are unlikely to lead to a substantial prevention or lessening of competition based upon minimal overlap between the parties or the evaluation of other factors such as barriers to entry and effective remaining competition, failing firm is not a factor that is operative in the review. It is only in a very small minority of transactions where there is a likely competition issue that the CCB is likely to take an in-depth review of the available evidence supporting the failing firm factor.

The CCB's analytical approach to the assessment of claims made pursuant to subsection 93(*b*) is outlined in its Merger Enforcement Guidelines ("MEGs").[6] Part 13 of the MEGs provides that the CCB considers a firm to be failing if: (i) it is insolvent or is likely to become insolvent; (ii) it has initiated or is likely to initiate voluntary bankruptcy proceedings; or (iii) it has been, or is likely to be, petitioned into bankruptcy or receivership. The MEGs contemplate that, if the imminent failure of a firm and the exit of assets from the market are likely, the loss of the actual or future competitive influence of the failing firm is not attributable to the merger. Based upon personal experience, parties to proposed transactions may initially argue that the failing firm factor applies due to general claims of financial difficulty but it is fairly rare for the financial position of the firm to meet the requirements of these three circumstances.

The insolvency or likely insolvency must relate to the business where competition concerns arise. If the portion of a company's business that is responsible for the relevant market in which competition concerns arise is not failing and is an identifiable part of the business such as a division or subsidiary, it is less likely that the CCB will consider the failing firm factor to apply since exit of assets from the relevant market may not be viewed as likely. On the other hand, the CCB may examine the factor carefully where the larger enterprise may not be failing but the operating division or subsidiary that is relevant to the competition concerns otherwise meet the failing firm criteria.

6 Available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

When the CCB concludes that a firm is likely to meet the requirement of imminent failure and likely exit, it examines the likelihood of various counterfactual scenarios and the expected levels of competition in the market under such scenarios prior to concluding that a merger involving a failing firm is not likely to result in a substantial lessening or prevention of competition. These counterfactual scenarios include: the restructuring or retrenchment of the failing firm; the liquidation of the failing firm's assets; or, the sale of the firm's assets to a competitively preferable purchaser.

It is the examination of the third counterfactual that some in the legal and business community in Canada argue should be relaxed in a crisis environment on the basis that failing firms may not have the time and liquidity to permit a full shop of the assets relevant to the competition analysis in order to demonstrate an evidentiary foundation for the assessment that a competitively preferable purchaser does not exist. As indicated in the MEGs, when no such shop has been conducted, the CCB may request that an independent third party be engaged to carry out a search for alternative buyers before the failing firm rationale is accepted. When parties claim that a thorough search for alternate buyers has been conducted, the CCB will require documents and information showing such *bona fide* attempts have taken place.

Recent experience in examining the failing firm factor in the context of a distressed business demonstrates that where the CCB is provided with the information it needs to evaluate the failing firm factor, it can complete its review quickly so that the rigor necessary to protect competition and the pragmatic urgency presented by a situation involving a truly financially distressed business need not be at odds.

C. Recent CCB Experience Evaluating the Failing Firm Factor

American Iron & Total Metal Recovery[7]

The CCB evaluated the failing firm factor in its investigation related to the acquisition of Total Metal Recovery ("TMR") by American Iron & Metal Company Inc. ("AIM"), the two largest scrap metal processors in the Canadian province of Quebec. The merging parties initially submitted pre-merger notification filings in early November 2019. The filings were subsequently withdrawn after the parties determined that the proposed transaction did not trigger the thresholds for notification under the Act. The CCB initiated a formal inquiry into the transaction on December 5, 2019. On December 17, 2019, AIM entered into a court enforceable Consent Preservation Agreement with the Commissioner to preserve and maintain the assets of TMR for a period of 60 days following the closing of the transaction. The transaction closed on December 20, 2019.

In January 2020, the CCB sought and obtained orders to compel information from the merged parties as well as from a third party who had expressed interest in purchasing TMR. The recipients of the orders were required to produce information to the CCB under tight timeframes prior to expiry of the court enforceable preservation agreement.

The CCB examined the likelihood of three counterfactual scenarios: the restructuring or retrenchment of the failing firm, the sale of the firm to a competitively preferable purchaser, and liquidation of the failing firm's assets.

With respect to the first counterfactual, the CCB determined based upon review of the available evidence that further attempts at the retrenchment or restructuring of TMR would not have prevented its failure nor enabled it to survive as a meaningful competitor.

With respect to the second counterfactual, the CCB examined:

- the extent that one or more alternative buyers expressed interest in buying the failing firm;
- evidence demonstrating the steps taken by the failing firm and the interested buyer in relation to negotiations and attempts to finalize a deal;
- evidence from an interested purchaser to assess how effective or competitive that interested party would be if they were successful in purchasing the failing firm; and
- evidence pertinent to the ability of an alternative buyer to finalize a transaction in a timely way in order to assess its viability as an alternative to the potentially anti-competitive merger under review.

7 CCB's April 29, 2020 statement is available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

The CCB determined that a thorough search for potential alternative purchasers of TMR had been conducted, but that no competitively preferable purchaser to AIM existed.

With respect to the third counterfactual, the CCB considered whether liquidation of the failing firm's assets would nonetheless be a materially better competitive alternative to a merger that may raise competition issues. Because liquidation is disruptive to all parties involved and may not result in an efficient allocation of resources, there are very limited circumstances under which the CCB may determine that liquidation is the preferable outcome. In this case, the CCB determined that liquidation of TMR's individual assets would not have been a determining factor in facilitating entry of a competing shredder operation within the Quebec marketplace and was not likely to result in a materially higher level of competition than if the merger did not proceed.

The CCB ultimately concluded that the failing firm factor was met and the transaction proceeded without challenge.

This case example demonstrates that the CCB can work quickly within the exigencies presented in a true failing firm context without relaxing its standards. The CCB reviewed the parties' and third parties' internal documents, expert financial analysis and conducted in person interviews with dozens of stakeholders across the province of Quebec. The CCB completed its entire investigation in two months including a holiday period when it is often more challenging to gather evidence from key market participants.

Transcontinental Inc. & Quebecor Media Inc.[8]

Transcontinental Inc. ("Transcontinental") and Quebecor Media Inc.'s ("QMI") merger is another acquisition where the CCB faced claims about the financial health and viability of the firms and conducted its analysis within a short period of time. On January 13, 2014 the CCB was notified about the acquisition of all of the Quebecor Media's 74 community newspapers in Quebec, including web, mobile and printed formats, as well as some regional offices and pre-press by Transcontinental Inc. On December 9, 2013, QMI also announced that it was ceasing door-to-door distribution of community newspapers and flyers in Quebec.

The parties argued that many of the newspapers being purchased through the transaction were experiencing serious financial difficultly and, as a result, should not be considered vigorous or effective competitors.

After an extensive review of QMI's internal documents and consultation with its financial expert, the CCB concluded that QMI's distribution network was in a state of financial distress, despite past strategic changes aimed at getting the business to break-even. The evidence also indicated that there was no likely buyer for the distribution network (alone or in concert with the sale of certain newspapers) due to the network's current financial state, high fixed costs, and the need for a strong reputation. The CCB found that liquidation was unlikely to spur or facilitate entry due to the limited assets available for sale. Ultimately, the CCB concluded that QMI's exit from distribution was unlikely to result in a substantial lessening or prevention of competition as a result of the proposed transaction.

With respect to the newspaper business, the CCB carefully reviewed the parties' financial statements, and retained the expertise of an accounting firm and determined that at least one of the parties' newspapers was in financial distress in the vast majority of markets where the parties competed.

On May 28, 2014, the CCB reached a consent agreement with Transcontinental which tested the parties' arguments regarding the financial distress of many of the newspapers. The aim of the consent agreement was to preserve competition in the sale of advertising in community newspapers in several areas in the province of Quebec by requiring that 34[9] community newspapers be put up for sale. Out of the newspapers put up for sale, 14 subsequently found buyers,[10] and 19 were discontinued by Transcontinental.[11]

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8 CCB's May 28, 2014 statement is available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03740.html.

9 Following July 24, 2014 Competition Tribunal Order allowing an application to vary a consent agreement, 33 newspapers were required to be divested. The Order is available at https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463166/1/document.do.

10 CCB's September 3, 2014 statement is available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03807.html.

11 Transcontinental's announcement of the results of the divestiture process is available at https://tctranscontinental.com/company-overview/news-room/press-releases/transcontinental-inc-announces-results-sale-process.

IV. INTERNATIONAL CONTEXT

The CCB's approach to failing firm claims anticipated in the context of the COVID-19 does not appear to be remarkably different to its key international merger enforcement partners. As recently stated by the Organisation for Economic Co-operation and Development ("OECD"), the overall approach to merger assessments remains unchanged and the approach to failing firm defense appears similar across jurisdictions.[12]

A. United States

Since a 1930 U.S. Supreme Court decision,[13] failing firm is treated at law as a defense in the U.S. The parties to a merger therefore have the burden to prove it. Despite the legal distinction between a factor in Canada and a defense in the U.S., the approach to the analysis of a failing firm claim is similar. In the U.S. Horizontal Merger Guidelines ("Merger Guidelines")[14] published jointly by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), merging companies invoking the failing firm defense are guided to provide evidence to establish all of the following three elements: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger. The DOJ and FTC do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the three circumstances are met. [15]

Similarly, the need for continued rigor during the COVID-19 crisis period has been emphasized by enforcement officials, including the head of the FTC's Bureau of Competition, Ian Conner, who has indicated that the FTC will continue to closely scrutinize failing firm claims by merging parties:

> [. . .] [P]arties contemplating such an argument should understand that the Bureau will not relax the stringent conditions that define a genuinely "failing" firm. We will continue to apply the test set out in the Guidelines and reflected in our long-standing practice, and in doing so we will require the same level of substantiation as we required before the COVID pandemic. As I noted previously, we have not relaxed, and will not relax, the intensity of our scrutiny or the vigor of our enforcement efforts. Consumers deserve the protection of the antitrust laws now as much as ever. [16]

Recently, parties were claiming the failing firm defense in Dairy Farmers of America, Inc. ("DFA") and Prairie Farms Dairy Inc. ("Prairie Farms") acquisition of Dean Foods Company ("Dean"),[17] which resulted in a divestiture of certain assets in May 2020. The case involved the acquisition by DFA, the largest cooperative of dairy farmers in the United States, and by Prairie Farms, of Dean, the largest milk processor in the country. In a nutshell, Dean filed for bankruptcy on November 12, 2019 and the United States Bankruptcy Court for the Southern District of Texas ordered an accelerated auction process because of Dean's liquidity condition, which continued to worsen and was exacerbated by shrinking demand for milk caused by the pandemic. Dean informed the bankruptcy court of its worsening financial condition and that it would not be able to pay farmers for raw milk or be certain that it could continue to process fluid milk beyond May 2020. After a short bidding process, DFA was selected as the winning bidder and agreed to purchase 44 of Dean's 57 fluid milk processing plants and other related assets for $433 million. Additionally, Prairie Farms won 8 Dean's fluid milk processing plants and related assets, in the South and Midwest for $75 million.

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12 OECD Webinar on Merger Control in Times of Crisis, May 26, 2020. Some materials are available at http://www.oecd.org/daf/competition/competition-policy-responses-to-covid-19.htm.

13 See *International Shoe v. FTC*, 280 U.S. 291 (1930).

14 Available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

15 *Id.* Section 11. Failure and Exiting Assets, page 32.

16 Ian Conner, On "Failing" Firms – and Miraculous Recoveries, Federal Trade Commission: Competition Matters Blog (May 27, 2020, 10:13 AM), available at https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

17 The Department of Justice May 1, 2020 announcement is available at https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa, and the Proposed final Judgment is available at https://www.justice.gov/opa/press-release/file/1273021/download.

The DOJ approved the Prairie Farms' acquisition of fluid milk processing plants from Dean in the South and Midwest after concluding that the plants at issue likely would be shut down if not purchased by Prairie Farms because of Dean's distressed financial condition and the lack of alternate operators who could timely buy the plants. In this scenario, the lack of alternative buyers indicated that while applying a failing firm analysis to what otherwise might have been an anticompetitive acquisition, the DOJ undertook the additional analysis as to whether other buyers with fewer anticompetitive implications were viable.

On the other hand, the DOJ filed a civil antitrust lawsuit to block the DFA's acquisition of 3 fluid milk plants from Dean and requested a divestiture of these plants and associated assets. Regarding the proposed settlement with DFA, Assistant Attorney General Makan Delrahim stated:

> This is a tumultuous time for the dairy industry, with the two largest fluid milk processors, Dean and Borden Dairy Company, in bankruptcy, and a pandemic causing demand for milk by schools and restaurants to collapse. In the face of these challenges and Dean's worsening financial condition, the department conducted a fast but comprehensive investigation, and our actions today preserve competition for fluid milk processing in northeastern Illinois, Wisconsin, and in New England.[18]

This milk processing case illustrates that, similar to CCB, rigor and speed are possible, even in an industry experiencing challenges during the COVID-19 pandemic.

B. United Kingdom

Another example of the recent analysis of the failing firm claim is the Amazon and Deliveroo case in the United Kingdom.[19] In April 2020, the Competition and Markets Authority ("CMA") provisionally approved the proposed acquisition by Amazon, which operates across a large number of sectors, including delivery and logistics network, of certain rights and a minority shareholding in Deliveroo, a London based online food delivery company. The CMA's investigation related to, *inter alia*, the assessment of whether Amazon's $575 million investment in Deliveroo might reduce competition in the food delivery sector, in particular by discouraging Amazon from re-entering the online restaurant food market and further developing its presence within the online convenience grocery delivery market in the UK. Parties argued that the impact of the pandemic would make Deliveroo's business fail and it would exit the market without Amazon's investment. In its provisional findings, the CMA concluded that (i) Deliveroo, which has experienced a significant decline in revenue as a result of the COVID-19 crisis, was likely to exit the market unless it received the additional funding available through the transaction in question; (ii) no less anti-competitive investor was available; and (iii) the loss of Deliveroo as a competitor would have been more detrimental to competition and to consumers than approving the transaction. However, in June 2020, after reviewing additional evidence, the CMA published revised provisional findings.[20] In the light of additional evidence, including large volumes of internal documents from the parties, a survey of over 3,000 consumers, and extensive submissions from interested third parties, the CMA concluded that Deliveroo was not a failing firm. The provisional conclusion remains that the acquisition should be cleared, but this decision is based specifically on the impact of the transaction on competition between the two businesses and not the failing firm claims of Deliveroo.

This case illustrates that despite the need for an urgent decision in the coronavirus outbreak, a thorough analysis of the available evidence may be conducted by antitrust authorities.[21]

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18 The Department of Justice May 1, 2020 announcement, *supra* note 17.

19 CMA's April 17, 2020 statement is available at https://www.gov.uk/government/news/cma-provisionally-clears-amazon-s-investment-in-deliveroo. The CMA asked for public comments on its provisional approval and will make a final decision shortly.

20 CMA's June 24, 2020 statement is available at https://www.gov.uk/government/news/cma-revises-provisional-findings-in-amazon-deliveroo-case.

21 For additional guidance on merger assessments during the COVID-19 pandemic by CMA, see https://www.gov.uk/government/publications/merger-assessments-during-the-coronavirus-covid-19-pandemic/merger-assessments-during-the-coronavirus-covid-19-pandemic.

C. Directorate General for Competition of the European Commission

With respect to the Directorate General for Competition of the European Commission ("DG Comp"), it examines similar factors to the CCB and the U.S. antitrust enforcement agencies. The DG Comp's horizontal merger guidelines note that the following three cumulative criteria are especially relevant: (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 a merger, the assets of the failing firm would inevitably exit the market.[22] These conditions have been applied by DG Comp, for instance, in the Aegean/Olympic merger in 2013,[23] which took place in the wake of a global financial distress. The European Commission has explicitly recognized the seriousness of the current global situation[24] and the DG Comp has not indicated any relaxation of its standards during the current crisis.

D. Australian Competition and Consumer Commission

Lastly, the Australian Competition and Consumer Commission ("ACCC") is no different. ACCC provided some guidance on its approach to merger reviews in the context of COVID-19 by advising that "[it] will take into account not only the present situation but also the longer-term impact on competition of any change in the structure of markets."[25] This is consistent with CCB's approach and the international response to the merger analysis during COVID-19.

V. CONCLUSION

As a public enforcement agency, the CCB must resist calls to relax its rigorous standards during the crisis period in order to make sure that it is doing its part to promote an early and vibrant recovery for the Canadian economy over the short and long term. Relaxing standards in the failing firm context to permit opportunistic strategic acquisitions that are likely to enhance the market power of the merged firm will not assist this important objective. It is even more important in this context to maintain the rigor of our standards and evidence-based decision-making. With the right information and early cooperation from merging parties, CCB can maintain its standards and meet the exigencies of businesses in true financial distress.

22 European Commission, 2004, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 89-91, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN

23 COMP/M. 6796-Aegean/Olympic II, No 139/2004 available at https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf.

24 European Commission, Coordinated economic response to the COVID-10 Outbreak, 3 March 2020, available at https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf.

25 ACCC Media Release, "COVID-19 pandemic – what it means for ACCC merger clearances, authorisations, notifications and CTMs," March 27, 2020, available at https://www.accc.gov.au/update/covid-19-pandemic-what-it-means-for-accc-merger-clearances-authorisations-notifications-and-ctms.

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