

Facebook and the Pros and Cons of Ex Post Merger Reviews

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The [Federal Trade Commission](#) and [46 state attorneys general](#) (along with the District of Columbia and the Territory of Guam) filed their long-awaited complaints against Facebook Dec. 9. The crux of the arguments in both lawsuits is that Facebook pursued a series of acquisitions over the past decade that aimed to cement its prominent position in the “personal social media networking” market.

Make no mistake, if successfully prosecuted, these cases would represent one of the most fundamental shifts in antitrust law since passage of the Hart-Scott-Rodino Act in 1976. That law required antitrust authorities to be notified of proposed mergers and acquisitions that exceed certain value thresholds, essentially shifting the paradigm for merger enforcement from *ex-post* to *ex-ante* review.

While the prevailing paradigm does not explicitly preclude antitrust enforcers from taking a second bite of the apple via *ex-post* enforcement, it has created an assumption among that regulatory clearance of a merger makes subsequent antitrust proceedings extremely unlikely.

Indeed, the very point of *ex-ante* merger regulations is that *ex-post* enforcement, notably in the form of breakups, has tremendous social costs. It can [scupper economies of scale and network effects](#) on which both consumers and firms have come to rely. Moreover, the threat of costly subsequent legal proceedings will hang over firms’ pre- and post-merger investment decisions, and may thus reduce incentives to invest.

With their complaints, the FTC and state AGs threaten to undo this *status quo*. Even if current antitrust law allows it, pursuing this course of action threatens to quash the implicit assumption that regulatory clearance generally shields a merger from future antitrust scrutiny. *Ex-post* review of mergers and acquisitions does also entail some positive features, but the Facebook complaints fail to consider these complicated trade-offs. This oversight could hamper tech and other U.S. industries.

Mergers and uncertainty

[Merger decisions are probabilistic](#). Of the thousands of corporate acquisitions each year, only a handful end up deemed “successful.” These relatively few success stories have to pay for the duds in order to preserve the incentive to invest.

Switching from *ex-ante* to *ex-post* review enables authorities to focus their attention on the most lucrative deals. It stands to reason that they will not want to launch *ex-post* antitrust proceedings against bankrupt firms whose assets have already been stripped. Instead, as with the Facebook complaint, authorities are far more likely to pursue high-profile cases that boost their political capital.

This would be unproblematic if:

1. Authorities would commit to *ex-post* prosecution only of anticompetitive mergers; and
2. If parties could reasonably anticipate whether their deals would be deemed anticompetitive in the future.

If those were the conditions, *ex-post* enforcement would merely reduce the incentive to partake in problematic mergers. It would leave welfare-enhancing deals unscathed. But where firms could not have *ex-ante* knowledge that a given deal would be deemed anticompetitive, the associated error-costs should weigh against prosecuting such mergers *ex post*, even if such enforcement might appear desirable. The deterrent effect that would arise from such prosecutions would be applied by the market to all mergers, including efficient ones. Put differently, authorities might get the *ex-post* assessment right in one case, such as the Facebook proceedings, but the bigger picture remains that they could be wrong in many other cases. Firms will perceive this threat and it may hinder their investments.

There is also reason to doubt that either of the ideal conditions for *ex-post* enforcement could realistically be met in practice. *Ex-ante* merger proceedings involve significant uncertainty. Indeed, antitrust-merger clearance decisions routinely have an [impact on the merging parties' stock prices](#). If management and investors knew whether their transactions would be cleared, those effects would be priced-in when a deal is announced, not when it is cleared or blocked. Indeed, if firms knew a given merger would be blocked, they would not waste their resources pursuing it. This demonstrates that *ex-ante* merger proceedings involve uncertainty for the merging parties.

Unless the answer is markedly different for *ex-post* merger reviews, authorities should proceed with caution. If parties cannot properly self-assess their deals, the threat of *ex-post* proceedings will weigh on pre- and post-merger investments (a breakup effectively amounts to expropriating investments that are dependent upon the divested assets).

Furthermore, because authorities will likely focus *ex-post* reviews on the most lucrative deals, their incentive effects can be particularly pronounced. Parties may fear that the most successful mergers will be broken up. This could have wide-reaching effects for all merging firms that do not know whether they might become “the next Facebook.”

Accordingly, for *ex-post* merger reviews to be justified, it is essential that:

1. Their outcomes be predictable for the parties; and that
2. Analyzing the deals after the fact leads to better decision-making (fewer false

acquittals and convictions) than *ex-ante* reviews would yield.

If these conditions are not in place, *ex-post* assessments will needlessly weigh down innovation, investment and procompetitive merger activity in the economy.

Hindsight does not disentangle efficiency from market power

So, could *ex-post* merger reviews be so predictable and effective as to alleviate the uncertainties described above, along with the costs they entail?

Based on the recently filed Facebook complaints, the answer appears to be no. We simply do not know what the counterfactual to Facebook's acquisitions of Instagram and WhatsApp would look like. Hindsight does not tell us whether Facebook's acquisitions led to efficiencies that allowed it to thrive (a pro-competitive scenario), or whether Facebook merely used these deals to kill off competitors and maintain its monopoly (an anticompetitive scenario).

As Sam Bowman and I have argued elsewhere, when [discussing the leaked emails that spurred the current proceedings and on which the complaints rely heavily](#):

These email exchanges may not paint a particularly positive picture of Zuckerberg's intent in doing the merger, and it is possible that at the time they may have caused antitrust agencies to scrutinise the merger more carefully. But **they do not tell us that the acquisition was ultimately harmful to consumers, or about the counterfactual of the merger being blocked.**

While we know that Instagram became enormously popular in the years following the merger, it is not clear that it would have been just as successful without the deal, or that Facebook and its other products would be less popular today.

Moreover, it fails to account for the fact that Facebook had the resources to quickly scale Instagram up to a level that provided immediate benefits to an enormous number of users, instead of waiting for the app to potentially grow to such scale organically.

In fact, contrary to what some have argued, hindsight might even complicate matters ([again from Sam and me](#)):

Today's commentators have the benefit of hindsight. This inherently biases contemporary takes on the Facebook/Instagram merger. For instance, **it seems almost self-evident with hindsight that Facebook would succeed and that entry in the social media space would only occur at the fringes of existing**

platforms (the combined Facebook/Instagram platform) – think of the emergence of TikTok. However, **at the time of the merger, such an outcome was anything but a foregone conclusion.**

In other words, *ex-post* reviews will, by definition, focus on mergers where today's outcomes seem preordained — when, in fact, they were probabilistic. This will skew decisions toward finding anticompetitive conduct. If authorities think that Instagram was destined to become great, they are more likely to find that Facebook's acquisition was anticompetitive because they implicitly dismiss the idea that it was the merger itself that made Instagram great.

Authorities might also confuse correlation for causality. For instance, the state AGs' complaint ties Facebook's acquisitions of Instagram and WhatsApp to the degradation of these services, notably in terms of privacy and advertising loads. As the complaint lays out:

127. Following the acquisition, Facebook also degraded Instagram users' privacy by matching Instagram and Facebook Blue accounts so that Facebook could use information that users had shared with Facebook Blue to serve ads to those users on Instagram.

180. Facebook's acquisition of WhatsApp thus substantially lessened competition [...]. Moreover, Facebook's subsequent degradation of the acquired firm's privacy features reduced consumer choice by eliminating a viable, competitive, privacy-focused option

But these changes may have nothing to do with Facebook's acquisition of these services. At the time, nearly all tech startups focused on [growth over profits](#) in their formative years. It should be no surprise that the platforms imposed higher "prices" to users after their acquisition by Facebook; they were maturing. Further monetizing their platform would have been the logical next step, even absent the mergers.

It is just as hard to determine whether post-merger developments actually harmed consumers. For example, the FTC complaint argues that Facebook stopped developing its own photo-sharing capabilities after the Instagram acquisition, which the commission cites as evidence that the deal neutralized a competitor:

98. Less than two weeks after the acquisition was announced, Mr. Zuckerberg suggested canceling or scaling back investment in Facebook's own mobile photo app as a direct result of the Instagram deal.

But it is not obvious that Facebook or consumers would have gained anything from the duplication of R&D efforts if Facebook continued to develop its own photo-sharing app.

More importantly, this discontinuation is not evidence that Instagram could have overthrown Facebook. In other words, the fact that Instagram provided better photo-sharing capabilities does necessarily imply that it could also provide a versatile platform that posed a threat to Facebook.

Finally, if Instagram's stellar growth and photo-sharing capabilities were certain to overthrow Facebook's monopoly, why do the plaintiffs ignore the competitive threat posed by the likes of TikTok today? Neither of the complaints makes any mention of TikTok, even though it currently has well over [1 billion monthly active users](#). The FTC and state AGs would have us believe that Instagram posed an existential threat to Facebook in 2012 but that Facebook faces no such threat from TikTok today. It is exceedingly unlikely that both these statements could be true, yet both are essential to the plaintiffs' case.

Some appropriate responses

None of this is to say that *ex-post* review of mergers and acquisitions should be categorically out of the question. Rather, such proceedings should be initiated only with appropriate caution and consideration for their broader consequences.

When undertaking reviews of past mergers, authorities do not necessarily need to impose remedies every time they find a merger was wrongly cleared. The findings of these *ex-post* reviews could simply be used to adjust existing merger thresholds and presumptions. This would effectively create a feedback loop where false acquittals lead to meaningful policy reforms in the future.

At the very least, it may be appropriate for policymakers to set a higher bar for findings of anticompetitive harm and imposition of remedies in such cases. This would reduce the undesirable deterrent effects that such reviews may otherwise entail, while reserving *ex-post* remedies for the most problematic cases.

Finally, a tougher system of *ex-post* review could be used to allow authorities to take more risks during *ex-ante* proceedings. Indeed, when in doubt, they could effectively experiment by allowing marginal mergers to proceed, with the understanding that bad decisions could be clawed back afterwards. In that regard, it might also be useful to set precise deadlines for such reviews and to outline the types of concerns that might prompt scrutiny or warrant divestitures.

In short, some form of *ex-post* review may well be desirable. It could help antitrust authorities to learn what works and subsequently to make useful changes to *ex-ante* merger-review systems. But this would necessitate deep reflection on the many ramifications of *ex-post* reassessments. Legislative reform or, at the least, publication of guidance documents by authorities, seem like essential first steps.

Unfortunately, this is the exact opposite of what the Facebook proceedings would achieve. Plaintiffs have chosen to ignore these complex trade-offs in pursuit of a case with extremely

dubious underlying merits. Success for the plaintiffs would thus prove a pyrrhic victory, destroying far more than it intends to achieve.

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