



WHY EX-POST EVALUATION IS SO IMPORTANT (AND SO LITTLE USED) IN ANTITRUST



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Why Ex-Post Evaluation Is Important

Time Warner Cable increased its prices just 10 days after the state regulator approved its merger with Charter.² Even if it's too soon to determine whether this price increase is a direct consequence of the merger, it is a potential sign that the decision might have been detrimental to consumers.

Several questions arise from the observation of post-decision conducts like the one above. Could the regulator have anticipated such behavior from the analysis of previous media mergers (e.g. AT&T/DirecTV³)? Do competition authorities know what happens after a merger approval? Would knowing it be useful for the adoption of future merger decisions in the same or other industries? The ex-post evaluation of the impact of a decision helps anticipate the effects of future decisions and so improve the effectiveness of competition policy. Moreover, it provides indications on how well competition authorities are performing and how to take the appropriate decisions to improve their future performance.

This article explores the benefits of conducting a more extensive analysis into what happens after an antitrust or merger decision is adopted and explains why this does not happen more often. That is, the article

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² Time Warner Cable Increases Rates in New York After \$55B Merger with Charter was approved (January 20, 2016) <http://www.vcpost.com/articles/114646/20160120/time-warner-cable-increases-rates-new-york-55b-merger-charter.htm>

³ Why the AT&T-DirecTV merger might actually limit choices for consumers (July 27, 2015) <http://www.consumerreports.org/cro/news/2015/07/at-t-directv-merger-limit-choices-consumers/index.htm>





explores why the ex-post analysis of antitrust and mergers decisions is important, how it can be performed and what the obstacles to the implementation of ex-post evaluation programs are.

The ex-post analysis of competition policy is essential in order to evaluate the extent to which competition policy is being useful to society. Despite the fact that the role of competition policy has become increasingly important throughout the world and the number of competition authorities has grown exponentially, there is still little evidence of the consequences of such phenomena and the extent to which competition policy and Competition Authorities are ultimately helping and benefiting consumers.

There is little information on whether the application of competition law is too harsh or too lenient. Even if the literature has made an extensive analysis of the problems with under-application and over-application of competition policy, it is not clear how far we are from an optimal scenario.⁴ In addition, it is not clear whether competition policy is having sufficient deterrent effects.⁵ Ex-post analysis is essential to evaluating whether the level of application of competition law is adequate or whether Competition Authorities should modify certain preconceived ideas about their activities.

The article starts by stating the objectives of the ex-post evaluation of competition policies (section 2). Next, it proposes an evaluation strategy (section 3) and, finally, it explores potential obstacles that could distort, prevent or delay the implementation of evaluation programs (section 4).

The Objectives Of Ex-Post Evaluation

The objectives of ex-post evaluation can be summarized in three items: to analyze the effectiveness of Competition Authorities' past interventions, to improve the performance of future interventions and to enhance transparency and accountability of Competition Authorities.⁶

The main goal of ex-post evaluation is to assess how competition policies and antitrust agencies perform. To do so, one has to determine what would have happened in the absence of intervention by a Competition Authority, and then measure the degree to which the intervention by the antitrust agency has contributed to enhance consumer welfare in comparison with the counterfactual scenario.

The design of an ex-post evaluation methodology should assess to what extent competition agencies have reached their goals and quantify the impact of their interventions on consumer welfare. Such quantification should not only consider direct effects on consumer welfare but also the potential deterrence effect on future anticompetitive conducts.

The ex-post evaluation of impact provides essential feedback for improving future antitrust and merger decisions. Knowing the effectiveness of past decisions and remedies allows the fine-tuning of the application of competition law in the future. It does not only help improve antitrust decisions but also internal organization decisions regarding prioritization and resource allocation. Given the limited resources of antitrust agencies, it is essential to allocate those resources to activities and markets with a larger contribution to social welfare and that maximize the cost/benefit ratio of the intervention. In this context, analyzing the impact of past decisions

⁴ For a review of the problems of selecting an optimal level of antitrust enforcement see: William M. L. (1983), "Optimal Sanctions for Antitrust Violations", 50 U. CHI. L. REV. 652; Wils, W. P. J. (2006), "Optimal Antitrust Fines: Theory and Practice". *World Competition*, Vol. 29, No. 2; and Padilla, J. and D. S. Evans (2005), "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach", *University of Chicago Law Review*, Vol. 72

⁵ Numerous articles have explored the deterring effect of cartel fines. See, for example, Motta, M., (2008), "On Cartel Deterrence and Fines in the European Union". *European Competition Law Review* 29: 209-220, and Connor, J. M. (2007). *Optimal deterrence and private international cartels. Working Paper.*

⁶ Kovacic, E. (2006), "Using ex-post evaluations to improve performance of competition policy authorities", *Journal of Corporation Law*, Vol. 31, No. 2, pp. 503.





provides essential feedback that is useful for improving strategic decision-making regarding prioritization and resource allocation.

Finally, the independent character of Competition Authorities requires a high degree of transparency and accountability. Ex-post analysis is useful to audit their activities and also to increase the public awareness about the benefits from competition.

Ex-post analysis is especially relevant in the presence of “new competition trends” or “sectoral merger waves”. For example, the European Commission is currently dealing with several issues in Internet markets such as the case against Google or the sector inquiries about geo-blocking and internet-based platforms. The follow-up of any measure adopted in the context of such initiatives would be very relevant for future interventions in Internet markets.

A similar situation occurs in “sectoral merger waves”, when economic or technologic changes in a specific industry unleash a series of mergers, such as the mergers in the airline industry occurred from the beginning of this century (KLM-Air France, Iberia-BA, AA-US Airways...) and the current mergers in the telecoms industry in different European countries (e.g. EE/BT and Telefónica/Hutchison in the UK and VODAFONE/ONO and ORANGE/JAZZTEL in Spain).

The evaluation of the effects of the mergers themselves and of the effectiveness of the remedies imposed would be crucial to monitor the evolution of the market and to assess future mergers in the industry.

An Ex-Post Evaluation Strategy

Ideally, ex-post impact analysis should be conducted on a case-by-case basis. The global impact of antitrust agency activities would be thus obtained from the aggregation of individual impacts. A detailed impact assessment of all the activities of an agency is, however, not feasible due to the complexity of the exercise and the amount of resources required.⁷ A more realistic and feasible alternative would be a system that combines both the evaluation of global performance of competition policy and authorities, using general proxy indicators, and a detailed analysis of the impact of the most relevant cases.

The selection of relevant indicators for an ex-post analysis should be based on a trade-off between the informative value of the indicators and the difficulty of obtaining the required information. Three layers of indicators can be established depending on the extent to which impact can be directly or indirectly measured⁸:

1. *Activity Indicators*, such as the number of decisions, the number of market investigations and the resources consumed. These indicators reflect the level of activity of a competition authority. They can be calculated for most activities but they provide limited information about the impact of the authorities' interventions.

2. *Relevance Indicators*, such as the market value of the industries affected by a decision or the amount of sanctions imposed. These indicators reflect the scope and potential impact of actions performed by antitrust agencies and, thus, can only be calculated for interventions that involve remedies or recommendations, or that affect a specific market or industry.

3. *Impact Indicators*, such as the ex-post evolution of prices and concentration measures. These indicators reflect the actual effects of intervention on competition and consumer welfare. They should be the main aim of

⁷ Gunnar, N. and D. Reinder (2008), “Competition Policy: What are the Costs and Benefits of Measuring its Costs and Benefits?”, *De Economist*, Vol. 156, No. 4, pp. 349-364.

⁸ See Delgado, J., H. Otero and E. Pérez-Asenjo (2016), “Assessment of Antitrust Agencies' Impact and Performance: An Analytical Framework”, *Journal of Antitrust Enforcement*. doi:10.1093/jaenfo/jnw003





the ex-post evaluation exercise, but, given the difficulty in calculating the impact on welfare of many of the agencies' activities, they can often cover only a limited proportion of the activities of competition authorities.

Obstacles To The Implementation Of Ex-Post Evaluation Programmes

Even though there are powerful reasons to develop ex-post evaluation schemes, the evidence shows their use is fairly rare. According to the OECD,⁹ only sixteen Competition Authorities out of 46 (35 percent of the total surveyed) regularly perform a quantification of the benefits generated by their interventions; and in many cases, the analysis has a very limited scope. For instance, only 13 percent of the authorities surveyed quantify the benefits from competition advocacy.

There are structural obstacles limiting the implementation of ex-post analysis schemes, related mostly to the complexity of the analysis and the amount of resources and data needed. However, this does not seem an important obstacle if one first admits that ex-post analysis is as relevant in deterring anticompetitive conducts as other activities, such as cartel prosecution, and second, one adapts the scope and complexity of the exercise to the resources available, in the same way that other activities of the agency are dimensioned.

A related structural obstacle is the availability of public statistics and industry data. The poorer the quality of public statistics and industry data, the greater the effort required to gather the necessary data to perform a rigorous ex-post analysis. The difficulty in gathering sound market data partially explains why Competition Authorities in emerging economies do not engage in ex-post evaluation. However, it is precisely at the initial phases of implementation of a competition policy system when ex-post evaluation is most crucial, given that corrective measures can probably be more easily adopted, and that such measures can produce profound benefits in the long run.

The implementation and development of ex-post analysis also faces other obstacles related to behavioral factors.¹⁰

First, Competition Authorities do not necessarily always behave as welfare-maximizing institutions. Competition Authorities, as many large organizations, will suffer from the so-called "principal-agent problem": each of the individuals and groups of individual within the institution will have their own objective functions which aggregation will not necessarily coincide with the objective function of the institution.

For example, staff members might be more concerned about their own career goals than about consumer welfare. Consequently, those workers could be reluctant to implement an ex-post analysis program if they perceive that the system can be used to scrutinize their work and can ultimately affect their career prospects in a negative way.

Both individuals and institutions tend to prioritize tasks that provide them with higher short-term visibility rather than investing in tasks that produce long term results, such as ex-post evaluation programs. Individuals and institutions might be more interested in performing activities in industries with higher internal and external visibility such as internet-related industries and flagship cases, while relegating other activities that do not attract immediate public attention. In such a way, public opinion might have a positive perception of the agency's work but the impact on welfare might not be necessarily maximized.

⁹ Organisation for Economic Co-operation and Development (OECD) (2013), "Evaluation of competition enforcement and advocacy activities: the results of an OECD survey", February, DAF/COMP/WP2(2012)7/FINAL.

¹⁰ See presentation of J. E. Harrington "Investigating the investigators: what does a competition agency maximize?" at the Fourth International Conference on Competition and Regulation (CRESSE), July 2009, for a review of behavioural obstacles, available at http://www.cresse.info/uploadfiles/KP_2009_Harrington.pdf





These misaligned objectives are not only present among the authorities' technical staff, but also among term-appointed Commissioners. As their term is limited, Commissioners will tend to favor activities that produce short-run benefits and relegate those whose benefits will materialize after their term is over. Ex-post evaluation programs imply important costs today and will only produce results in the medium and long-term. Thus, they are likely to be left out of the agenda of "myopic" Commissioners (unless the results can be publicly attributed to them in the future).

Second, the implementation of ex-post analysis could also change agents' behavior. Both institutions and individuals might have incentives to maximize the value of indicators, which might not be equivalent to maximizing consumer welfare. Some simple indicators, such as the number of cases handled and the amount of fines imposed, could give us significant information about the activity of the institution but are not necessarily correlated to consumer welfare. Ex-post evaluation indicators should be carefully designed to avoid opportunism by the assessed institutions and individuals. Also, the analysis of the indicators should be aware of such limitations. The institutions might need to put in place detection mechanisms to avoid the misuse of indicators, and should limit staff rewards based on over-simplistic indicators.

Competition Authorities as institutions could also oppose any system of ex-post analysis, as more transparency over previous cases could be used against their own decisions in courts. Acknowledging their own errors could be perceived as a sign of weakness by courts.

Finally, Competition Authorities might have multiple priorities, other than consumer welfare. This is especially relevant in the case convergent authorities that are responsible for both competition policy and industry regulation, where industry objectives and political motivations could interfere with competition policy objectives.¹¹ Under such circumstances, the definition of ex-post analysis methodologies could be especially challenging, since those methodologies should internalize the difficult trade-off between different objectives.

Conclusions

Competition policy has acquired a central role in an increasing number of jurisdictions and there is a wide consensus about the benefits from competition for society. Making sure that competition policy and competition authorities maximize welfare in an effective and efficient way is therefore a central element for any competition policy system. The ex-post evaluation of competition policy interventions helps to make sure that competition policy works, provides useful feedback to improve future interventions and increases the accountability of public agencies.

However, the implementation of ex-post evaluation programs faces a number of structural and behavioral obstacles. In addition to problems related to data availability, institutions and individuals might be reluctant to go through with the implementation of evaluation programs, especially if their objectives differ from the theoretical objective of competition policy, which is typically the maximization of social welfare.

Both the design and the implementation of ex-post evaluation programs should be aware of the problems caused by the misalignment of objectives and of the likely change in agents' behavior that the adoption of an ex-post evaluation program might imply.

Very few competition authorities perform a comprehensive evaluation of their activities. Further efforts are needed in this direction to improve competition policy-making and guarantee that competition policy benefits consumers. The lack of incentives for Competition Authorities to implement self-evaluation programs

¹¹ For a review of the priority setting problems arising from the integration of regulatory and antitrust agencies see Delgado, J. and E. V. Mariscal (2014), "Integrating Regulatory and Antitrust Powers: Does It Work?" *Competition Policy International*, Vol. 10, No. 1, Spring 2014.





might be overcome through the adoption of incentive mechanisms, such as making part of their budget depend on performance, or facilitating the comparison of performance between different competition authorities. To this end, collaboration between agencies in the design and implementation of evaluation programs and their coordination through multilateral institutions such as the OECD and the ICN might be a useful tool for accelerating the implementation of ex-post evaluation programs and improving the overall quality of competition policies.

The ex-post evaluation of competition policy interventions is as important for deterring anticompetitive conducts as prosecuting cartels and limiting the exercise of market power. It should therefore be an integral part of any competition policy system.

