


## OPINION

## Merger regulators don't have crystal balls, but we have backstops if they get it wrong

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The great Yogi Berra once quoted a famous Danish proverb: “Predictions are hard ... especially about the future.” Apparently, Mr. Berra was not just a remarkable baseball player, he was also a competition law and antitrust scholar. He understood – and, indeed, most people understand – something that disciples of what has become known as “hipster anti-trust” apparently do not – that while hindsight may be 20/20, no optometrist can help you see the future.

Over the past few years, there has been an increasing chorus of voices suggesting that mergers consummated years ago, generally acquisitions of nascent firms by large players in the tech sector, should not have been permitted. A column in this space recently advanced the argument with respect to Facebook’s acquisition of WhatsApp and Instagram. In our view, however, the argument is mistaken, for a number of reasons.

Firstly, as noted above, you have to be able to accurately foresee the future to stop the right mergers. It is an impossible task to get this correct every time – especially acquisitions of small, emerging firms whose potential is very difficult to predict in a fast-moving, dynamic environment. No one – no official, no agency, no regulator, however insightful or well informed – can do that.

Secondly, if you want to increase your chance of stopping the acquisition of nascent firms, which will result, down the line, in an injury to competition, you need to stop a host of transactions that will not hurt competition – that, in

fact, are good for the economy – because at the early stages you cannot tell the difference. While the examples of Instagram and WhatsApp are often used, Facebook has acquired literally hundreds of other companies. So has Google. So have many other digital giants. The vast majority of these acquisitions were good for the economy.

Thirdly, who can say with confidence that Instagram and WhatsApp themselves would have been successful unless Facebook acquired them? Maybe they need its deep pockets and market presence to be what they became? So, it turns out hindsight isn't 20/20 either, because we don't know what might have been.

Finally, the prospect of a company being able to sell its innovation to a larger firm is itself a driving force for innovation. Not every tech venture will succeed. But to have a strong tech startup ecosystem, there needs to be larger players who will be willing and able to support investment and ultimately provide an ability for investors to realize the value of their investment. Not every startup will be a winner, but Canada should be careful not to change its competition laws to dissuade new tech investments or the startup ecosystem.

While we do not think that stopping scores of mergers on the “what if” principle is the right solution, fortunately Canada's competition law, similar to that in the United States, does have a backstop in case the regulator gets it wrong. When a company that holds a dominant market position engages in conduct that excludes or harms rivals, the Competition Bureau can go to court and seek remedies to stop the conduct from continuing and, if necessary, reduce the market power of the dominant firm.

Because an abuse of dominance challenge looks at what a company has done or is doing, the Competition Bureau does not face nearly the same obstacles to bringing a court challenge. These are still complex cases, but much less uncertain than trying to foresee what Instagram might be a decade hence.

The Competition Bureau released a white paper just two years ago on Big Data and innovation in competition policy. It reached a number of important conclusions that continue to apply today, including not condemning firms because they are “big” or possess “big data.” At the end of the day, the bureau concluded that it does have the tools it needs to ensure fair competition in the economy, and that “competition law and policy should continue to rely on market forces to lead to beneficial outcomes”.

That is the right conclusion. Innovative firms will continue to find new ways to compete with existing market participants. Today's giants will not be tomorrow's. Change comes suddenly and unexpectedly.

TikTok launched less than four years ago and has hundreds of millions of users. Consumers who put a premium on privacy in their searches can use

DuckDuckGo or other engines. While Apple has a significant presence in North America, foreign competitors Samsung and Huawei continue to challenge the company for market share.

Twenty years ago it was feared that Microsoft would hold the world in its power for decades. Microsoft is still an important company, but it is today not even among the FANGs (Facebook, Amazon, Netflix and Google). Where will tomorrow's dominant firm come from? We don't know – and no one else does either. But we do know that all glory (and market power) is fleeting, and that we have tools to address its abuse.

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