AOL/Time Warner merger conditions are a template for disastrous tech policy
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Senator Mark Warner has proposed 20 policy prescriptions for bringing "big tech" to heel. The proposals — which run the gamut from policing foreign advertising on social networks to regulating feared competitive harms — provide much interesting material for Congress to consider.

On the positive side, Senator Warner introduces the idea that online platforms may be able to function as least-cost avoiders with respect to certain tortious behavior of their users. He advocates for platforms to implement technology that would help control the spread of content that courts have found violated certain rights of third-parties.

Yet, on other accounts — specifically the imposition of an "interoperability" mandate on platforms — his proposals risk doing more harm than good.

The interoperability mandate was included by Senator Warner in order to "blunt [tech platforms'] ability to leverage their dominance over one market or feature into complementary or adjacent markets or products." According to Senator Warner, such a measure would enable startups to offset the advantages that arise from network effects on large tech platforms by building their services more easily on the backs of successful incumbents.

Whatever you think of the moats created by network effects, the example of "successful" previous regulation on this issue that Senator Warner relies upon is perplexing:

> A prominent template for [imposing interoperability requirements] was in the AOL/Time Warner merger, where the FCC identified instant messaging as the 'killer app' – the app so popular and dominant that it would drive consumers to continue to pay for AOL service despite the existence of more innovative and efficient email and internet connectivity services. To address this, the FCC required AOL to make its instant messaging service (AIM, which also included a social graph) interoperable with at least one rival immediately and with two other rivals within 6 months.

But the AOL/Time Warner merger and the FCC's conditions provide an example that demonstrates the exact *opposite* of what Senator Warner suggests. The much-feared 2001 megamerger prompted, as the Senator notes, fears that the new company would be able to leverage its dominance in the nascent instant messaging market to extend its influence into adjacent product markets.

Except, by 2003, despite it being unclear that AOL had developed interoperable systems, two large competitors had arisen that did *not* run interoperable IM networks (Yahoo! and Microsoft). In that same period, AOL's previously 100% IM market share had declined by about half. By 2009, after eight years of heavy losses, Time Warner shed AOL, and by last year AIM was completely dead.

Not only was it not clear that AOL was able to make AIM interoperable, AIM was never able to catch up once better, rival services launched. What the conditions did do, however, was prevent AOL from launching competitive video chat services as it flailed about in the wake of the deal, thus forcing it to miss out on a market opportunity available to unencumbered competitors like Microsoft and Yahoo!

And all of this of course ignores the practical impossibility entailed in interfering in highly integrated technology platforms.

The AOL/Time Warner merger conditions are no template for successful tech regulation. Congress would be ill-advised to rely upon such templates for crafting policy around tech and innovation.

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