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Senator Warner's retrogressive proposals could lead to arbitrary and capricious interventions that would harm entrepreneurs and consumers
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Last week, I objected to Senator Warner relying on the flawed AOL/Time Warner merger conditions as a template for tech regulatory policy, but there is a much deeper problem contained in his proposals. Although he does not explicitly say "big is bad" when discussing competition issues, the thrust of much of what he recommends would serve to erode the power of larger firms in favor of smaller firms without offering a justification for why this would result in a superior state of affairs. And he makes these recommendations without respect to whether those firms actually engage in conduct that is harmful to consumers.

In the Data Portability section, Warner says that "As platforms grow in size and scope, network effects and lock-in effects increase; consumers face diminished incentives to contract with new providers, particularly if they have to once again provide a full set of data to access desired functions." Thus, he recommends a data portability mandate, which would theoretically serve to benefit startups by providing them with the data that large firms possess. The necessary implication here is that it is a *per se* good that small firms be benefited and large firms diminished, as the proposal is not grounded in any evaluation of the competitive behavior of the firms to which such a mandate would apply.

Warner also proposes an "interoperability" requirement on "dominant platforms" (which I criticized previously) in situations where, "data portability alone will not produce procompetitive outcomes." Again, the necessary implication is that it is a *per se* good that established platforms share their services with start ups without respect to any competitive analysis of how those firms are behaving. The goal is preemptively to "blunt their ability to leverage their dominance over one market or feature into complementary or adjacent markets or products."

Perhaps most perniciously, Warner recommends treating large platforms as essential facilities in some circumstances. To this end he states that:

> Legislation could define thresholds – for instance, user base size, market share, or level of dependence of wider ecosystems – beyond which certain core functions/platforms/apps would constitute 'essential facilities', requiring a platform to provide third party access on fair, reasonable and non-discriminatory (FRAND) terms and preventing platforms from engaging in self-dealing or preferential conduct.

But, as I've previously noted with respect to imposing "essential facilities" requirements on tech platforms,

> [T]he essential facilities doctrine is widely criticized, by pretty much everyone. In their respected treatise, Antitrust Law, Herbert Hovenkamp and Philip Areeda have said that "the essential facility doctrine is both harmful and unnecessary and should be abandoned"; Michael Boudin has noted that the doctrine is full of "embarrassing weaknesses"; and Gregory Werden has opined that "Courts should reject the doctrine."

Indeed, as I also noted, "the Supreme Court declined to recognize the essential facilities doctrine as a distinct rule in Trinko, where it instead characterized the exclusionary conduct in Aspen Skiing as 'at or near the outer boundary' of Sherman Act § 2 liability."

In short, it's very difficult to know when access to a firm's internal functions might be critical to the facilitation of a market. It simply cannot be true that a firm becomes bound under onerous essential facilities requirements (or classification as a public utility) simply because other firms find it more convenient to use its services than to develop their own.

The truth of what is actually happening in these cases, however, is that third-party firms are *choosing* to anchor their business to the processes of another firm which generates an "asset specificity" problem that they then seek the government to remedy:

> A content provider that makes itself dependent upon another company for distribution (or vice versa, of course) takes a significant risk. Although it may benefit from greater access to users, it places itself at the mercy of the other — or at least faces great difficulty (and great cost) adapting to unanticipated, crucial changes in distribution over which it has no control.

This is naturally a calculated risk that a firm may choose to make, but *it is a risk*. To pry open Google or Facebook for the benefit of competitors that choose to play to Google and Facebook's user base, rather than opening markets of their own, punishes the large players for being successful while also rewarding behavior that shies away from innovation. Further, such a policy would punish the large platforms whenever they innovate with their services in any way that might frustrate third-party "integrators" (see, e.g., Foundem's claims that Google's algorithm updates meant to improve search quality for users harmed Foundem's search rankings).

Rather than encouraging innovation, blessing this form of asset specificity would have the perverse result of entrenching the status quo.

In all of these recommendations from Senator Warner, there is no claim that any of the targeted firms will have behaved anticompetitively, but merely that they are above a certain size. This is to say that, in some cases, big is bad.

Senator Warner's policies would harm competition and innovation

As Geoffrey Manne and Gus Hurwitz have recently noted these views run completely counter to the last half-century or more of economic and legal learning that has occurred in antitrust law. From its murky, politically-motivated origins through the early 60's when the Structure-Conduct-Performance ("SCP") interpretive framework was ascendant, antitrust law was more or less guided by the gut feeling of regulators that big business necessarily harmed the competitive process.

Thus, at its height with SCP, "big is bad" antitrust relied on presumptions that large firms over a certain arbitrary threshold were harmful and should be subjected to more searching judicial scrutiny when merging or conducting business.

A paradigmatic example of this approach can be found in *Von's Grocery* where the Supreme Court prevented the merger of two relatively small grocery chains. Combined, the two chains would have constitutes a mere 9 percent of the market, yet the Supreme Court, relying on the SCP aversion to concentration in itself, prevented the merger despite any procompetitive justifications that would have allowed the combined entity to compete more effectively in a market that was coming to be dominated by large supermarkets.

As Manne and Hurwitz observe: "this decision meant breaking up a merger that did not harm consumers, on the one hand, while preventing firms from remaining competitive in an evolving market by achieving efficient scale, on the other." And this gets to the central defect of Senator Warner's proposals. He ties his decisions to interfere in the operations of large tech firms to their size without respect to any demonstrable harm to consumers.

To approach antitrust this way — that is, to roll the clock back to a period before there was a well-defined and administrable standard for antitrust — is to open the door for regulation by political whim. But the value of the contemporary consumer welfare test is that it provides knowable guidance that limits both the undemocratic conduct of politically motivated enforcers as well as the opportunities for private firms to engage in regulatory capture. As Manne and Hurwitz observe:

> Perhaps the greatest virtue of the consumer welfare standard is not that it is the best antitrust standard (although it is) — it's simply that it is a standard. The story of antitrust law for most of the 20th century was one of standard-less enforcement for political ends. It was a tool by which any entrenched industry could harness the force of the state to maintain power or stifle competition.

While it is unlikely that Senator Warner intends to entrench politically powerful incumbents, or enable regulation by whim, those are the likely effects of his proposals.

Antitrust law has a rich set of tools for dealing with competitive harm. Introducing legislation to define arbitrary thresholds for limiting the potential power of firms will ultimately undermine the power of those tools and erode the welfare of consumers.

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