

A Solution in Search of a Problem: Senator Warren's Misguided Call for a Big Tech Break Up

Senator Elizabeth Warren (D-MA) has set out an extreme agenda to break up big tech. She is calling for legislation that would require large tech platforms to be designated as "Platform Utilities" and broken apart from any participant on that platform. She also vows that her administration would appoint regulators committed to reversing illegal and anti-competitive tech mergers.

Warren's policies are misguided and premature. Undeniably, the big tech platforms have resulted in innovations enabling the launch of new products and services resulting in many benefits to consumers. That is due to the nature of a free market economy which provides incentives of firms to innovate and grow. When the rewards of that innovation are removed, and firms are restricted in growth the economy can suffer through less innovation and aggressive competition.

Senator Warren suggests a radical restructuring of the market. But we do know from decades of deregulation of other industries that when the government tries to impose a structure on the market consumers lose from less competition and innovation. Moreover, such a restructured market may lead to even greater regulation.

Our antitrust enforcers have taken notice of leading tech services, but are wisely taking a reasonable approach. Indeed, the head of the DOJ's Antitrust Division, Makan Delrahim, has said that "Big is not bad. Big behaving badly is bad." FTC Chairman Joseph Simons has also noted that "big is not necessarily bad" and that "often times companies get big because they are successful with the consumer. They offer good service at low price and that's a good thing and we don't want to interfere with that." Delrahim and Simons are right on point. After all, U.S. antitrust agencies rightly focus on consumer harm rather than condemn tech platforms simply for being big. The question for antitrust enforcers is not whether companies are too large, but whether they engage in exclusionary anticompetitive behavior that harms consumers. The focus should be on what big platforms are doing and not merely how big those platforms are.

Lawmakers should remain skeptical of any sweeping demands to use legislation or populist antitrust enforcement to regulate or break up tech platforms that provide so many benefits to consumers. The antitrust laws are not an industrial engineering tool to break up companies. They should not be used to limit the size of companies or the scope of their business. In fact, when antitrust laws have been used in that fashion, the policy has failed. For example, in United Shoe, years ago, the district court entered a remedy limiting the company to a 25% market share. Years later, United Shoe went out of business. The free market, not the legislatures, courts, or the antitrust agencies, should determine how prices, competition, and innovation interact in the technology marketplace.

Senator Warren goes so far as to propose reversing what she describes as "illegal" tech mergers including Amazon's acquisition of Whole Foods and Zappos; Facebook's acquisitions of WhatsApp and Instagram; and Google's acquisition of Waze, Nest, and DoubleClick. But there is simply no evidence that any of those transactions have resulted in any anticompetitive effects.

Consummated mergers can certainly be challenged under Section 7 of the Clayton Act, but the bar is higher because there needs to be actual evidence of anticompetitive behavior. The lighter standards used in proposed mergers are not applicable. The standard for challenging consummated mergers is appropriately more difficult under the law because if a merger is actually anticompetitive, there should

be evidence of clear anticompetitive price effects, reduction of output, and/or decreased innovation. To date, there is simply no evidence that any tech mergers have resulted in decreased output, less innovation, or higher prices. In fact, the tech industry is broadly characterized by robust competition.

Senator Warren says she wants everyone to play by the rules. The tech platforms have been investigated for years and there is no credible evidence that any of the tech platforms are not playing by the rules or have engaged in unlawful monopolization or that they have stifled innovation that warrants their breakup. The antitrust laws do not punish companies for successes achieved through innovation or growth that has resulted in increased economies of scale and networks that become more valuable with more users.

Competition and innovation are alive and well. New products and services are introduced every day. Apple and Google are involved in an intense rivalry to produce new products. Walmart, attracted by Amazon's stellar performance, has sought to bulk its online delivery platform and become a significant online retailer. The new and exciting world of Artificial Intelligence ("AI") has attracted heavy investments from some of tech's biggest firms, including Facebook, Amazon, and Google. Yet, their presence has not deterred AI startups. For example, from January 2015 and January 2018, AI startups increased at a rate of 2.1 times while total active startups only increased 1.3 times.

Thus, the government should steer clear of meddling in healthy competitive tech markets, especially by engaging in industrial engineering. The government's role should be to aggressively enforce the antitrust laws, investigate allegations of bad behavior, bring enforcement actions, remedy any competitive problems, prevent anticompetitive mergers, but let the markets decide winners and losers. That way consumers will receive the real benefits of competition.

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