The antitrust implications of relationship marketing
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Abstract

By definition, firms engaged in relationship marketing favor one another, which can be desirable because it promotes advantageous strategic and competitive positioning. However, antitrust legislation mandates that firms avoid favored treatment of trading partners if it adversely affects competition or excessively affects the free flow of goods and services to consumers—potentially an unintended consequence of relationship marketing. Therefore, a firm’s commitment to the marketing concept may diminish if strengthening channel relations reduce competition and possibly customer benefits. To anticipate future antitrust problems induced by relationship marketing, public policy makers and scholars should scrutinize new-market-dominating mergers, business-to-business online exchanges, tying agreements, and price discrimination.

Keywords: Antitrust; Relationship marketing; Business-to-business; Collaboration

1. Introduction

To enhance their competitiveness, firms increasingly forge long-term relationships with strategic partners. Such efforts are supported by a substantial marketing literature on long-term relationships within buyer–seller channel alliances (Anderson and Narus, 1984; Boyle and Dwyer, 1995; Bucklin and Sengupta, 1993; Day, 2000; Dwyer et al., 1987; Ganesan, 1994; Macneil, 1980; Mohr and Spekman, 1994; Morgan and Hunt, 1994; Varadarajan and Ratarjan, 1986; Wilson, 1995; Zaheer and Venkatraman, 1995). This literature focuses on the development, enhancement, and maintenance of enduring relationships among exchange partners.

Exchange relationships built upon mutual dependence can help firms to achieve their objectives (Buchanan, 1992; James, 2000). Channel members that collaborate can be more responsive and proactive in meeting their customers’ demands (Eqos Systems, 2000). Through favored treatment of key partners, such relationships can conduce firms to lower customers’ costs, increase product quality, and increase customers’ satisfaction, while reducing expenses, achieving economies of scale, gaining access to markets and/or technical information, and creating barriers to entry (Dwyer et al., 1987; Gundlach and Murphy, 1993). Thus, the extant research supports what seems intuitive to many marketing scholars and practitioners—building relationships with key channel members’ benefits collaborating firms.

Because a firm cannot build close relationships with all its suppliers and customers, it will often try to collaborate extensively with a few of them (MacDonald, 1995). Relationship marketing has been widely promoted, and empirically supported, as a means of promoting collaborative business-to-business efforts (Morgan and Hunt, 1994; Anderson and Narus, 1990; Kalwani and Naravandas, 1995; Gundlach et al., 1995; Mohr and Spekman, 1994). Rarely, if ever, is such promotion of relationship marketing tempered with a cautionary note regarding antitrust implications. If such relationships limit competition substantially or discriminate among different classes of distributors, then they may violate antitrust statutes—an unintended consequence. To explore relationship marketing from an antitrust perspective, the exposition proceeds as follows. First, the three foundational US antitrust acts—the Sherman Antitrust Act of 1890, the Clayton Act of 1914, and the Robinson–Patman Act of 1936—and the basics of relationship marketing are discussed selectively. Second, potential
conflicts between antitrust legislation and relationship marketing activities are illustrated. Finally, a few ways for firms to avoid these conflicts are broached.

2. Brief overview of antitrust legislation

Through antitrust legislation, governments ensure inter-firm competition without otherwise interfering with pricing or output decisions. Specifically, the objectives of antitrust legislation are twofold:

- to ensure competition sufficient for low-priced yet high-quality products; and
- to ensure a level playing field for competitors (Klein, 1999).

Under US antitrust laws, illegal business practices must have the potential to, or be proven to, affect competition adversely, such as when competition is limited or impeded by the joint actions of two or more firms, or when competitors act in a suspiciously uniform manner. Clearly, such practices are limited to industries with high concentration ratios (i.e., industries in which a handful of competitors makes the lion’s share of sales).


The Sherman Act, the first US Federal antitrust law (Pitofsky, 2000), set the foundation for prohibiting antitrust behaviors that restrain trade or commerce (Antitrust Organization, 1994; Klein, 1999). This sweeping act is the main source of US antitrust law; subsequent acts only expanded its scope (Antitrust Organization, 2000; Legal Information Institute, 2000). The Clayton Act permitted US courts to address anticompetitive behaviors at inception (Antitrust Organization, 2000). The Robinson–Patman Act, which amends Section 2 of the Clayton Act, prohibits price discrimination between purchasers of goods of “like grade and quality” (Brobeck et al., 1999). Violations of the Sherman Act can result in criminal felonies, whereas violations of the Clayton, FTC, or Robinson–Patman Acts are civil offenses that carry no criminal penalties (Klein, 1999). Nonetheless, firms found guilty of antitrust violations in the US Federal courts may be assessed treble damages (Gleim, 2000; Mueller, 1996).

The Robinson–Patman Act, Clayton Act, and Sherman Act circumscribe various activities that may, as a consequence, limit the competitiveness of firms. These acts are complementary; likewise, the tests of illegality under each act are complementary (US Code, 2000). Thus, firms can be prosecuted simultaneously under multiple acts and the charges need not be independent. (Readers who require more background about these acts should see Appendix A.)

Other Western countries have antitrust governing rules that encompass many of the same ideas as the US Antitrust Acts. The Competition Act of Canada promotes and maintains fair competition so consumers can benefit from lower prices, product choice, and quality services (Competition Bureau, 2001). Article 82 of the European Economic Community Treaty, similar to Section 2 of the Sherman Act, prohibits abuse of a dominant market position within the European Common Market (Berry, 2001). Australia’s Trade Practices Act of 1974 is considered a comprehensive antitrust regime based upon previous domestic experience and, in part, on US antitrust laws (Berry, 2001). New Zealand’s Commerce Act of 1986 is based on Australia’s Trade Practices Act of 1974 (Berry, 2001). Therefore, the topic of this paper has implications in a broad international context.

3. Relationship marketing

Relationship marketing focuses on attracting, maintaining, and enhancing relationships between firms (Dwyer et al., 1987). Under this framework, exchange partners singularly and jointly benefit from acting concordant with their respective interests (Webster, 1992). Relational exchanges and enduring sets of transactions are preferred to discrete transactions and short duration interactions (Varadarajan and Rajaratnam, 1986) because the former can enhance firms’ competitiveness. Firms engaged in relationship marketing value and maintain relationships with their exchange partners because of the superior outcomes derived from purposeful cooperation (Gundlach and Murphy, 1993; Moorman et al., 1992).

Relationship marketing encourages firms to develop a strategic competitive advantage (Aaker, 1998) by:

1. fostering intense, difficult-to-duplicate marketing relationships with key trading partners (Buchanan, 1992; Day, 2000);
2. vertically integrating, even to the point of creating exclusive dealing or sole-source relationships (Weitz and Jap, 1995); and
3. collaborating with competitors (Hamel et al., 1989).

By focusing their efforts on several key trading partners, firms can reduce transaction expenses (Anderson and Weitz, 1986; Kalwani and Naravandas, 1995), increase the quality of goods, lower costs to customers, increase customer satisfaction (Kalwani and Naravandas, 1995), access markets and/or technical information that leverages complementary strengths and achieves economies of scale (Wilson...
and Moller, 1992), absorb new knowledge, transform core competencies, and change the bases of competition (Osland and Yaprap, 1995). Relationship marketing seems strategically sound for many firms because these outcomes often lead to sustainable competitive advantages (Aaker, 1998).

In addition to financial rewards, relationship marketing assumes that exchange partners may experience personal, noneconomic benefits and engage in social exchange (MacNeil, 1980). As a result, empirical studies on relationship marketing also study the effect of noneconomic variables—such as commitment, trust, communication, cooperation, interdependence, and power—on firm performance, perceived effectiveness, and relationship outcome (Anderson and Narus, 1990; Boyle and Dwyer, 1995; Bucklin and Sengupta, 1993; Fontenot and Wilson, 1997; Ganesan, 1994; Mohr and Spekman, 1994; Morgan and Hunt, 1994; Wilson, 1995).

Commitment and trust are the central variables in most relationship marketing models (Fontenot and Wilson, 1997). Generally considered a firm’s resolve to perform an activity as promised, commitment derives from a firm’s “enduring desire to maintain a valued relationship” (Moorman et al., 1992, p. 316). Firms commit to one another only when the relationship is considered important (Morgan and Hunt, 1994).

Trust in relationship marketing encourages firms to wave formal contractual agreements. Trust is Firm A’s belief that (1) Firm B will perform promised actions that yield positive outcomes for Firm A, and (2) Firm B will not ordinarily take unexpected actions that yield negative outcomes for Firm A (Anderson and Narus, 1990; Doney and Cannon, 1997). In a relationship, it reduces the risks of interdependency and is related to uncertainty level, adequacy of information for making decisions, predictability of decision consequences, and decision confidence (Mayer et al., 1995; Morgan and Hunt, 1994; Zaheer and Venkatraman, 1995).

Commitment and trust in marketing relationships encourage marketers to preserve relationship investments (Morgan and Hunt, 1994). By deterring ex ante and ex post opportunism, and hence reducing transaction acts, trust and commitment allow marketers to view high-risk actions as prudent (Morgan and Hunt, 1994). Opportunistic behaviors reduce the trust and commitment that make established partnerships preferable to myopic, and temporarily more profitable, alternatives.

With the benefits of commitment and trust come liabilities, e.g., when manufacturers negotiate tying contracts or requirements agreements with their distributors (Gundlach et al., 1995). Commitment is often manipulated by demanding high mutual investment, by involving relationship-specific assets, or by other means of collateralizing significant economic resources (Sollner, 1999). Such commitments may lead firms to protect those investments in ways that unfairly limit competition.

Trusting firms favor relationship-specific investments involving financial, physical, organizational, and informational resources (Heide and John, 1988; Hunt and Morgan, 1995; Smith and Barclay, 1995). Assuming such investments and finite resources, trusting firms should reduce their interactions with other firms and focus on furthering their existing relationships and safeguarding their expenditures. In doing so, their actions may unintentionally restrict trade with competing firms, thereby posing antitrust threats.

Thus, the goal of relationship marketing is to form mutually beneficial alliances that must restrict trade among rivals by creating barriers to entry (Goldberg, 1979; Williamson, 1979). If such dealings are coercive, restrict competition, or inhibit innovation, they may violate various antitrust statutes even if they result from a committed exchange relationship, a vertical integration, or collaboration with competitors. Consequently, stakeholders such as employees, customers, communities, channel members, competitors, and governments may be harmed.

4. Problematic antitrust behaviors

Colluding on prices (Sherman Act), entering into mergers or other relationships that may lessen competition substantially (Clayton Act), or engaging in activities that unduly restrain competition (Sherman Act), whether through relationship marketing activities or otherwise, is illegal. Some outcomes propounded as benefits of relationship marketing, such as creating barriers to entry, lowering costs, and restraining trade among rivals, may violate antitrust structures when large firms are involved.

If relationship marketing promotes efficiency, productivity, and effectiveness, then business practice may improve. For small, independent, privately owned firms, relationship marketing is a viable and valuable approach to long-term success. Small firms in a relationship generally cannot pose an antitrust threat because they cannot sufficiently restrict competition (Brobeck et al., 1999). Although antitrust laws apply equally to corporations, partnerships, sole proprietorships, individuals, trade associations, professionals, and nonprofit organizations (Pitofsky, 2000), small firms rarely have the resources or power to restrict trade or limit competition substantially. In contrast, marketing relationships between large firms pose a more eminent antitrust threat because they have such resources or power, especially in oligopolistic industries (e.g., automobile manufacturers) (Edgerton, 1957).

For example, the marketing relationship between Microsoft and Intel is so close that the term ‘Wintel’ was coined. The term describes the combination of an Intel-made CPU with a Microsoft Windows operating system (Webopedia, 2000). The so-called Wintel monopoly (Cooper, 1999) created a de facto yet proprietary industry standard—PCs running Microsoft operating systems optimized for Intel microprocessors—by which both companies could stifle software and hardware competition (Reinhardt, 1996). Microsoft used Windows to overpower competing operating
systems like DR-DOS (from Digital Research and later Novell) (Spaulding, 2000), OS/2 (from IBM), and Pink (from Taligent, a joint venture by IBM, Apple, and Hewlett Packard) (Cotter and Potel, 1995). From the secure competitive position provided by a de facto standard operating system, Microsoft could also overpower competing business applications like Quattro Pro (versus Excel) or Wordstar and WordPerfect (versus Word) (Liebowitz and Margolis, 1999).

Concurrently, Intel surmounted microprocessor competitors like Advanced Micro Devices, Cyrix, and Motorola (Savage, 1999). The Intel Inside advertising campaign was meant to induce the same FUD (fear, uncertainty, and doubt) about alternative suppliers that IBM induced in an earlier generation of computer buyers (as per the long-lived maxim “No one was ever fired for buying IBM”) (Shnier, 1996). Thus, PC makers, fearful that building PCs with alternative microprocessors or operating systems would incite Wintel to punish them by restricting supply or raising prices (Sager et al., 1996), often ignored such alternatives to the detriment of consumers.

Once PCs not preloaded with a Windows 3.1, 95, or 98 operating system and compatible office software (e.g., Word, Excel) became noncompetitive, Microsoft could dominate price negotiations with PC makers. Large and loyal makers were charged favorable prices. For example, Compaq and Dell, with whom Microsoft has invertebrate and profitable relationships, paid less than IBM because IBM refused to abandon OS/2 (France et al., 1999). By such actions, Microsoft deterred IBM from growing market share for OS/2 (France et al., 1999).

Microsoft used its quasi-monopoly in operating systems (Shiver and Hiltzik, 2000) to dictate its relationships with vendors (Jackson, 2000). For example, content providers wanting a position on Window’s Active Desktop (i.e., a shortcut icon linked to either an application or a URL) were limited to 1-year agreements with Microsoft and forbidden from entering into agreements with computer platform competitors like Sun or Netscape (Harris, 1998). Thus, Microsoft used subterfuge and barter to coerce vendors into compliance (Jackson, 2000), resulting in consumer choice reduction.

4.1. New-market-dominating mergers

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that restrain trade or commerce (US Code, 2000). Joint actions that unreasonably restrain trade by purpose or effect are violations (Antitrust Organization, 1994). For example, Archer Daniel Midland violated Section 1 when it restricted trade by conspiring with competitors to fix the prices and allocations of lysine and citric acid (Castillo, 1996).

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize (US Code, 2000). Monopolization requires possession of market power and some misuse of that power (US Code, 2000). Large firms that dominate a market as a result of natural business success from growth, a superior product, or business acumen are not automatically guilty of monopolization under Section 2 (US Code, 2000). However, if a monopoly is willfully acquired through collaboration between channel members, as might occur in relationship marketing, then the firm with monopoly power has violated Section 2. For example, consider the proposed merger between Time Warner and America Online (AOL). Because local cable companies have historically been monopolies and Time Warner owns the cable television systems that supply roughly 20% of US households (Hargreaves et al., 2000), both the FTC and competing Internet service providers (ISPs) are concerned about equal access to these newly opened high-speed Internet pipelines (Associated Press, 2000). AOL’s 90 million subscribers make it the dominant ISP; in contrast, Microsoft’s MSN.com service is second with only 17 million subscribers (Carney and Yang, 2000). Although AOL has agreed to provide equal access to all ISPs (Hargreaves et al., 2000), without a dissent degree, these promises are nonbinding; thus, the FTC is resisting approval of the merger until formal agreements are reached.

The FTC has blocked similar mergers that threatened to create monopolistic power as defined by the Sherman and Clayton acts. One concern about the AOL–Time Warner merger is that the resulting firm will have a huge first mover advantage over competing ISP and content providers (Hargreaves et al., 2000). First movers often set the industry standard and use their initial financial returns to perpetuate technological advances that foster long-term survival (Aaker, 1998; Klepper and Simons, 2000). For the combined AOL–Time Warner, the cost advantage should snowball as it attracts new clients to its portals, which will increase traffic, attract more clients, ad infinitum. Furthermore, the long-term competitiveness of many current competitors may depend upon their merging into four or five firms of sufficient size, which would create an oligopoly that could reduce consumer choice (Hargreaves et al., 2000).

4.2. Business-to-business online exchanges

The Internet has created a new domain for antitrust activity. Among the FTC’s latest concerns are business-to-business online exchanges (Burt and Hicks, 2000). By providing trading partners with real-time information about product availability and prices (Glasner, 2000), these exchanges can increase order speed and efficiency. The exchange of information between competitors violates Section 1 of the Sherman Act per se if that information leads to an understanding between competitors or parallel actions by competitors such that trade is restricted or competition is lessened (Brobeck et al., 1999).

Although online cooperatives can benefit from competing firms of all sizes, the antitrust implications are especially pertinent to large firms. If the dominant firms in an industry...
form an online exchange, then antitrust concerns require that exchange to benefit all possible participants (Glasner, 2000). The FTC is undecided about how to regulate these new exchanges.

Online exchanges have come under FTC scrutiny because they require extensive sharing of information about pricing, joint buying, and selling (Burt, 2000; Burt and Hicks, 2000). One example of such an exchange is MyAircraft, which claims to be “uniquely positioned to provide maximum value to companies in the aerospace industry” (MyAircraft, 2000). Launched in early 2000, MyAircraft is an aircraft parts exchange cooperative among Honeywell International, United Technologies, BF Goodrich, and i2 Technologies. This cooperative provides one-stop shopping for aerospace products and services as well as supply management expertise. In this latter regard, cooperative members have access to previously unavailable information about other aerospace firms—such as scheduling, projects, pricing, buying, and sourcing—that could create an unfair advantage. The FTC has yet to decide whether the combined economic power of this cooperative poses an antitrust threat.

Another recently attempted collaborative effort among competitors is Covisint, an online exchange through which automakers can pool their efforts to buy materials, parts, and services, thereby increasing their purchase leverage while decreasing their costs (Fisher, 2000; Hicks, 2000a). Initially conceived by General Motors, Ford, and Daimler Chrysler, Covisint now includes Renault SA, Nissan, Toyota, Delphi Automotive Systems, Dana, and others (Tellez, 2000). Experts predict that US automakers will spend roughly US$240 billion annually through Covisint (Ramirez, 2000). The antitrust threat, relative to the Robinson–Patman Act, is that cooperative members can charge other members less than they can charge nonmembers for goods of like grade and quality. Nonetheless, this proposed exchange should win FTC approval if its founders can preclude coercive, low-price agreements with suppliers (Volpe, 2000).

4.3. Tying agreements

Tying agreements represent a commitment that manufacturers frequently make to independent sales agents, distributors’ representatives, wholesalers, retailers, and other manufacturers. If refusing to sell to others significantly lessens or even eliminates competition, then the commitment between a manufacturer and the sales agent or representative violates the Clayton Act. Furthermore, this type of contract hurts stakeholders such as customers because it limits their choices.

In collaborative channel relationships, a firm can gain control of one market by tying its product in that market to a dominant product in another market and then selling the joint product at a single price (Belloni, 1979). A successful tying agreement might involve joint marketing and distribution by firms that offer complementary, yet nonsubstitutable, goods. Marketers engaged in tying programs should ensure that stakeholders—in this case competitors and customers—are unharmed.

The Clayton Act prohibits the sale of goods on the “condition, agreement, or understanding” that the lessee or purchaser will not use or deal in the goods of a competitor if there is a substantial anticompetitive effect (US Code, 2000). As under Section 1 of the Sherman Act, this agreement need not be formal or expressed. Trust in relationship marketing implies that an agreement, written or verbal, can be believed (Lindskold, 1978). Trust also reflects the extent to which a firm safeguards the welfare of a trading partner; limiting competition is one way to safeguard this welfare (Aaker, 1998). Such acts of trust may violate the Clayton Act to the extent that competition is substantially restrained. For example, Telectron, a manufacturer of radio controls, accused Overhead Door, a competitor that acquired Advance Industries in 1971, of violating Section 3 of the Clayton Act by coercing its distributors to buy Advance controls rather than Telectron controls (Marcus, 1987). The US District Court of Minnesota, Fourth Division, found Overhead Door guilty of using coercion to tie the purchase of one of its products to the purchase of another of its products (Marcus, 1987). The court ordered Overhead Door to pay Telectron US$1,081,209.00 in damages.

Generally, Section 3 violations of the Clayton Act are difficult to prove because prosecutors must show that (1) the defendant made a sale on the condition that the buyer will not deal in the goods of the sellers’ competitors; (2) the contract has the effect of substantially lessening competition in the relevant market; and (3) the plaintiff was injured in his business or property as a result of the defendant’s actions (US Code, 2000). Although numerous Section 3 violations have been claimed, the courts have substantiated few of them because all three conditions are rarely shown. For example, defendants often fail to show that competition was substantially lessened in a given market (see Glasser, 1996; Wanger, 1995).

4.4. Price discrimination

Both the Clayton Act and the Robinson–Patman Act prohibit activities between trading partners that reduce competition. Price differentials may be justified, under the Robinson–Patman Act, when differences in the cost of manufacture, sale, or delivery result from differing methods or quantities in which products are sold or delivered (Brobeck et al., 1999; US Code, 2000).

Offering different promotions or pricing schedules to indirectly competing customers, such as stores in different geographical regions or customers with vastly different assortments (e.g., a hardware store versus a supermarket), does not violate the Robinson–Patman Act, nor does varying prices or promotions across customers to match competitors in a given market or to accommodate region-specific market factors (Person, 1999). Violations of the
Robinson–Patman Act require a nonuniform offer to all customers in the same markets and arise when cost savings are arbitrarily passed along without clear indications of intercustomer differences (US Code, 2000).

In a price discrimination challenge under the Robinson–Patman Act, Taylor Publishing accused Jostens, the market leader in scholastic yearbooks, of sham pricing (Brown, 1999). Specifically, Taylor Publishing accused Jostens of winning yearbook accounts by first offering customers a low-cost, bare bones product and then—having won their trust and commitment—convincing the client to upgrade their order with additional, high-profit-margin features. Jostens’ allegedly trained their sales representatives in this sales tactic. Students—the ultimate customers and one stakeholder group—suffered from this misuse of a marketing relationship.

In the largest Robinson–Patman Act settlement, Penguin Books was found guilty of granting special pricing considerations to large chain bookstores (e.g., Barnes and Noble) but not to independent booksellers (Madison, 1997). Large publishers (e.g., Viking and Random House) had previously been found guilty of price discrimination and ordered to change their anticompetitive practices. Penguin Books wanted to maintain its special relationships with large chain bookstores because the publisher is expanding 16 times faster than book retailers are in general (Madison, 1997). No longer able to favor these chains as it had previously, Penguin Books replaced its old unacceptable practices with a new practice—instead of giving direct discounts to these large chains, it simply asked for a partial payment of roughly 80% on invoices. This new practice hurt the small and independent booksellers that could not compete on price against the larger chains.

Committing a national seller to specific local distributors may discourage the seller from selling or distributing its products to other local distributors. For example, manufacturers often rely on exclusive distributors or protected sales territories. These types of agreements, or tying contracts, violate antitrust if they deny competitors free access to the tied product market.

5. Discussion

Although relationship marketing is touted as a strategically advantageous practice, some limitations pertain. Firms must be cautious because relationship marketing may encourage antitrust actions. The risks are less for small, privately owned firms and may be more acceptable to their stakeholders, but for large or publicly held firms, relationship marketing may lessen competitive activities to an illegal degree. Given that antitrust violators can incur substantial penalties, the interests of stakeholders may mitigate the attractiveness and viability of relationship marketing for such firms. Table 1 summarizes the three foundational US antitrust laws, the relationship marketing activities that may prove problematic, and general signs that suggest antitrust violations.

Firms risk civil and/or criminal prosecution when they engage in price fixing or in relationship marketing activities that restrict rivals’ activities. Antitrust litigation is costly and can divert resources otherwise available to improve firms’ competitive positions; firms may incur ponderous expenses until litigation is resolved even if later found innocent. Additionally, the adverse publicity concomitant with antitrust suits may reduce firms’ customer loyalty or tarnish their reputations, which in turn hurts stakeholders by reducing shareholder equity, employee earnings (via layoff, suspensions, and salary cuts), and revenue to host communities.

Firms that develop an intense marketing relationship should consider their joint actions’ potential to encourage or restrict competition (Glasner, 2000). These firms should conduct an antitrust audit to review problematic areas such as intercustomer variation in pricing, policies for selecting trading partners, policies for excluding a class of buyers or sellers, and deteriorating competitive conditions to preclude questionable activities and accompanying FTC scrutiny (Brobeck et al., 1999). Such self— but not do-it-yourself— regulation could be performed by an outside organization, such as Ernst and Young or Arthur Andersen LLP, which would first define standards and then conduct an independent review (Hicks, 2000b).

Beyond the use of an external agency to perform an antitrust audit, the outcome is contingent upon the thoroughness and accuracy of the information provided. An audit can reveal unsuspected antitrust threats and clarify potential antitrust behaviors. The initial step of an audit would define the potential antitrust violations relevant to the focal organization. In the information-gathering stage, the company would clearly define the market(s) in which they compete as well as the number and relative market share of competitors. Sales contracts, selling relationships, and selling formats are articulated in detail along with all pricing schedules (written or verbalized). These elements are the starting point for an antitrust audit.

The second step examines the various areas to which the company might be at risk of an antitrust violation. Identifying potential violations of the Sherman, Clayton, and Robinson–Patman Acts begin differently. Potential Sherman Act violation identification begins with examining the degree to which the company monopolizes any market within which they compete, or the degree to which the company’s relationships with trading partners unreasonably or unnecessarily restrains trade. Potential Clayton Act violation identification begins by examining the conditions or the degree of pressure, if any, the company places on trading partners regarding the products they sell and buy. Potential Robinson–Patman Act violation identification begins with examining the pricing policies of the company. A small firm in a highly competitive market would clearly not represent a monopoly threat and would be able to summarily sidestep continuing the audit process as it pertains to Sherman Act violations.
The third step in an antitrust audit involves an analysis of the information gathered in light of the potential violations. From the analysis, a strategic summary and action plan can be developed. As with any audit, the company officers should be briefed and individuals should be assigned the responsibility for following through on the action plan. The final step sets up a system for feedback and checking progress.

Traben and Partners (2001), a management consulting firm, recommends that businesses conduct an audit when there is a significant change or anticipated change in an organization. Such times include when an organization plans reorganization, the management changes, a company experiences difficulty achieving its goals, and a firm enters a new market. Such audits can serve as an early warning to the company before changes that might lead to violations.

Another way to avoid antitrust violations is to involve the FTC during the early planning stages of any activity that might cause a firm to dominate a market or to gain monopoly power. In general, the FTC is unconcerned about partnerships among firms with less than 20% market share (Hicks, 2000a) because their potential to impact the market is minimal. Partnerships that exceed a 20% share can take several proactive steps to avoid antitrust violations. For example, in forming online cooperative exchanges, channel members can:

1. hire an antitrust attorney,
2. hire outside executives to head the new entity;
3. develop policies and guidelines that limit competitors’ access to product and pricing information;


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<tr>
<th>Act</th>
<th>Summary</th>
<th>Example of problematic relationship marketing behaviors</th>
<th>US Department of Justice: warning signs of problematic actions</th>
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<tr>
<td>Sherman Antitrust Act</td>
<td>Main provision prohibits any joint actions that restrain trade.</td>
<td>Relationship marketing depends on mutual trust between trading partners, which allows waiving of formal contractual negotiations. Under this section, an agreement need not be formal or expressed; it may be inferred from any dealing between buyer and seller.</td>
<td>● Bidders seem to win bids on a fixed rotation. ● Unusual and unexplainable large dollar difference between the winning bid and all other bids.</td>
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<tr>
<td>Section 1</td>
<td>Prohibits joint actions by two or more companies that unreasonably or unnecessarily restrain trade.</td>
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<td>Section 2</td>
<td>Prohibits any act of monopolization or attempted monopolization of any market.</td>
<td>To streamline channel functions and to reduce costs associated with duplicate relations, firms in partnering relationships cultivate one or several key trading partners. In other words, firms restrictively align themselves with immediate channel members, which excludes competitors. Because these trading partners account for a major portion of sales or profits, the risk of losing those partners is high, which keeps firms loyal. Thus, close and mutually dependent relationships with channel members act as a barrier to entry.</td>
<td>● Competitors submit identical bids. ● Same company—repeatedly the low bidder—awarded contracts for a certain service or in a particular area. ● Fewer competitors than normal submit bids on a project.</td>
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<td>Clayton Act</td>
<td>Enacted in 1914 to clarify and strengthen the Sherman Antitrust Act.</td>
<td>One trading partner may pressure (or require) another trading partner to purchase most or all of a needed product component from it (i.e., a “requirements” contract). Cherry picking is avoided by having the sale of some items contingent upon the sale of other items (i.e., a “tying agreement”).</td>
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<td>Section 3</td>
<td>Prohibits the sale of a company’s products on the condition that the customer not deal in competitive products, where the effect is to substantially lessen competition or tends to create a monopoly.</td>
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<td>Robinson–Patman Act</td>
<td>A 1936 amendment to the Clayton Act, primarily motivated by concern over chain stores. Prohibits price discrimination between purchasers of goods of like grade and quality.</td>
<td>To further a lucrative, long-term relationship between a major wholesaler and a chain store, the wholesaler may offer price incentives to the chain store that are unavailable to small, independent retailers.</td>
<td>● Any evidence that two sellers of similar products agreed to price their products a certain way. ● The same bidder bids substantially higher on some bids than on others, yet with no cost reason to explain the difference. ● Large price changes involving more than one seller of similar products, particularly if price changes of equal amount and occur at the same time.</td>
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4. train employees on how to secure competitive information properly;
5. open the exchange to all buyers and sellers in the market; and
6. cultivate a procompetitive image (Glasner, 2000; Hicks, 2000a).

Enforcement of antitrust legislation in the US presents several conundrums for businesses engaging in relationship marketing. Though the acts have been amended through the years, many situations facing business today could not have been predicted when the acts were written. This means that, in some situations, ascertaining if a company is violating antitrust laws because of its novel situation may be difficult. Antitrust laws have not been consistently enforced or even interpreted similarly across different situation through time because of US economic and political environments.

Several caveats are present as a result of recent political changes and technological advances. For example, the FTC is broadening its focus significantly to include more global antitrust issues because of the 1993 enactment of the North American Free Trade Agreement (NAFTA) among the US, Canada, and Mexico (Swindle, 1998). In addition, the FTC is uncertain on how to judge issues of antitrust, specifically mergers and collaborations, among high-tech firms. Rapid technological advancements make it very difficult to predict whether these mergers are likely to cause anticompetitive effects as rapid change and growth reduce the possibility that the collaboration could exercise market power (Swindle, 1999). These are among the challenges businesses will continue to encounter in the future.

5.1. Directions for future research

Future research programs should include in-depth case studies about the types of firms and relationship marketing activities that lead to antitrust violations. One primary source for firms and activities is current FTC or US Department of Justice cases. Another timely research program could focus on antitrust and e-commerce. When antitrust laws were first penned, the Internet did not exist. Clearly, the new concerns posed by e-commerce could instigate the FTC to revise current antitrust legislation.

Acknowledgements

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Appendix A. US antitrust acts

A.1. Sherman Antitrust Act

The Sherman Act provides criminal sanctions and civil penalties against parties involved in antitrust activities. Section 1 prohibits every contract, combination, or conspiracy, among parties—competitors, distributors, retailers, and/or customers—that unreasonably or unnecessarily restrains trade (US Code, 2000). Unacceptable working agreements need not be written contracts; mere understandings, which may be inferred from similar actions by competitors (horizontal agreements) or between manufacturers, distributors, and retailers (vertical agreements), are sufficient (Anonymous, 1919). Because agreements may be inferred from parallel actions undertaken after innocent communications between agents, firms should avoid even the appearance of understandings with other firms (Bue, 1972). In contrast, working together is legal unless it unfairly restricts trade (Anonymous, 1925); similarly, if two firms act likewise as a result of market conditions, such actions are legal (Brobeck et al., 1999).

Firms that individually or jointly try to monopolize markets violate Section 2 of the Sherman Act. Generally, a greater than 50% market share, the possession of market power, or some misuse of market power is necessary before a question of monopolization arises (Boyle, 1980). Most Section 2 violations result from misuses or abuses of economic power fostered by large size, financial resources, or patent position (Van Graafeiland et al., 1980). An unfortunate consequence of increased market share and the resulting power is the potential for abuse in even ordinary business practices (Brobeck et al., 1999). Section 2 violations are joint actions that effect or are meant to affect an unreasonable restraint of trade (US Code, 2000). For example, monopolization is ruled when firms embrace opportunities that preclude other firms from embracing the same opportunities.

A.2. Clayton Act

The Clayton Act prohibits practices not expressly covered by the general language of the Sherman Act. Unlike the Sherman Act, it restricts practices that the courts deemed beyond the realm of Sherman Act but nonetheless may lessen competition substantially among goods (but not services) sellers (US Code, 2000). The Clayton Act was crafted to protect public interests; it does not restrict a firm’s freedom to act in its best interest if such actions follow from efforts to secure fair opportunities for honest gains (Denman et al., 1939).

Section 3 prohibits any lease, sale, or contract for sale of goods on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the goods of a competitor that would significantly diminish competition (Becker, 2000; US Code, 2000; Warren et al., 1962). Section 3 also pertains to less obvious situations, such as requirements contracts (Brobeck et al., 1999). Under such contracts, sales are predicated on buying all or most of a firm’s requirement from a seller or buying another product from a seller (i.e., tying agreement). As
with Section 1 of the Sherman Act, agreements need not be formal or expressed; they may be inferred from any dealings between buyers and sellers, especially when buyers are coerced to comply with sellers’ conditions (Brobeck et al., 1999).

A.3. Robinson–Patman Act

The Robinson–Patman Act, an amendment to Section 2 of the Clayton Act, prohibits firms engaged in interstate commerce from charging different prices for goods of like grade and quality when such pricing would lessen competition or create a monopoly (US Code, 2000). Specifically, it prohibits discrimination that may lessen competition substantially (Warren et al., 1968), encourage monopolies, or injure, destroy, or prevent competition with persons who grant or knowingly benefit from price discrimination (Clark, 1959). Sometimes called the Anti Chain Store Act (Brobeck et al., 1999), it was intended to protect independent retailers from chain store competitors (Coxe, 1949).

Under this act, manufacturers or goods sellers should preclude special pricing or services to a subset of distributors (Goldberg, 1963). All distributors should be equally able to obtain promotional services, provisions for markdown allowances and returns, or other marketing services (US Code, 2000). Equal but different pricing is permitted if the price differentials are reflected in cost differences yielded by differing production methods or order-size-related scale economies (Clark, 1959). In sum, Robinson–Patman Act violations are actions caused by inconsistent interfirm pricing.

References


