AMERICAN ECONOMIC LIBERTIES PROJECT

ACCESS TO MARKETS: GATEKEEPER TACTICS

Dominant corporations use many tactics to acquire and maintain power over relevant markets. They do this to keep out new businesses, crush their competition, and boost their own profit margins. The inexhaustive list below describes some tactics commonly used in a broad range of sectors. Corporations will often employ several of these together or use their power in one line of business to acquire market share in another.

Cartels and collusion: A set of companies—often in the same industry—that agree to collectively do something illegal are known as cartels. Cartels may reduce the supply of a good or service to artificially inflate prices, or they may agree to sell a product at the same price—something known as price fixing. Cartels may also carve up a market between them, or collectively agree to terms and prices when bidding for a contract. These forms of collusion all violate the Sherman Act, America's most prominent antimonopoly law, and may be criminally prosecuted five years from occurrence. One recent example is an alleged deal between Facebook and Google to divide the online advertising market between them.[1]

Coercive contract terms and exclusionary contracts: Exclusionary contracts are binding agreements that suppliers or businesses must sign that prevent them from working with or supplying other companies. Larger firms with more market power can effectively force parties who want to do business with them to sign. These contracts ultimately restrict the freedom of business operations and are most common between parties along a supply chain. Gore-Tex, for instance, forced businesses who used its breathable fabric to not work with any competitors who made rival material.[2]

Copycatting: The imitation of a product or service by a dominant corporation so that it closely resembles a rival's successful product or service. The copycat firm may sell the product or service for a lower price or use its existing market power to gain market share over the company it copied. For example, Amazon is well known for launching copycat products after third-party merchants successfully market and sell original versions through its store.[3]

1 Gilad Edelman, "Texas Accuses Google and Facebook of an Illegal Conspiracy," *Wired*, December 16, 2020. https://www.wired.com/story/texas-accuses-google-facebook-illegal-conspiracy/

2 Mike Kessler, "Insane in the Membrane," Outside, March 7, 2012. https://www.outsideonline.com/1898541/insane-membrane

3 Jaron Schneider, "Peak Design Calls Out Amazon for 'Copycatting' the Everyday Sling Bag," PetaPixel, March 3, 2021. https://petapixel.com/2021/03/03/peak-design-calls-out-amazon-for-copycatting-the-everyday-sling-bag/

Erecting tollbooths: A business strategy or model used by middlemen to unnecessarily extract a percent of a transaction—putting themselves between businesses and their customers. The practice is often abusive and allows monopolistic corporations to accentuate their market power by demanding unfair cuts of those transactions. Apple uses this tactic with its app store model, collecting 15-30% of each app purchase from app developers, and restricts apps from building their own in-app payment systems.[4] Tollbooths like this are increasingly common across a range of markets.

Fear and Intimidation: Many dominant companies use their market power to intimidate their competitors and prevent them from speaking out or fighting back for fear of retaliation. This fear can take many forms: the fear of losing a relationship as a supplier, or fear of being targeted by legal action or any of the other tactics mentioned in this document. Many entrepreneurs we speak to are afraid of taking on the giants publicly because they fear it would ultimately hurt their businesses.

Predatory pricing: When companies use below-cost pricing to undercut rivals or market entrants, gain market share, and then use that market power to set above-market level prices or fees. Predatory pricing is technically illegal, but rarely enforced, as U.S. case law now requires plaintiffs to prove that the offending corporation could or did "recoup" its losses on the underpriced goods. This view ignores the way a monopolist such as Amazon might use predatory pricing to gain market power beyond a specific product, which may bolster other lines of revenue, potentially in different markets.

Self-preferencing: Self-preferencing occurs when a company takes actions or designs systems to favor its own products or services over those of its competitors. This often excludes or makes it challenging for newer firms trying to compete or enter a market. For example, Google preferences its own search verticals, such as Google Shopping[5] or its business listings, over rival shopping or business search verticals such as Yelp.[6]

4 https://www.nbcnews.com/tech/tech-news/apple-critics-form-coalition-challenge-app-store-fees-rcna137

5 Karen Gilchrist and Anita Balakrishnan, "EU hits Google with a record antitrust fine of $2.7 billion," *CNBC*, June 27, 2019. https://www.cnbc.com/2017/06/27/eu-hits-google-with-a-record-antitrust-fine-of-2-point-7-billion.html

6 Lauren Feiner, "Yelp gives senators its list of grievances against Google in antitrust hearing," *CNBC*, March 10, 2020. https://www.cnbc.com/2020/03/10/yelp-testifies-against-google-in-antitrust-senate-hearing.html

Tying: Tying is when companies bundle products or services together and sell them as a package, in essence stipulating that they will only sell a product or service on the condition that the buyer purchase a different (or tied) product from them as well. The purchaser may even be forbidden from buying a product from another supplier, but more often it is the bundling of services that makes it difficult for a consumer or business to purchase separate products or services. Tying is often used to exclude competitors by leveraging dominance in one market into dominance in another. Microsoft faced antitrust charges in the 1990s for tying the purchase of its computers with its search engine, Internet Explorer, as well as making it extremely difficult for consumers to install other non-Microsoft software on its computers.

Vertical integration: Mergers, acquisitions, or other actions that combine corporations at different stages of a supply chain to create dominance over an entire ecosystem of supply. This often means that companies can hike prices or extract "economic rents" from customers or producers at different stages of the supply chain. For example, the chicken industry is vertically integrated, with major poultry processors (output) also owning the inputs, like chicken stock and feed mills, that are sold to farmers.

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