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# How to avoid regulatory antitrust scrutiny: The behavioral defense

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**Abstract** Firms, especially those with high profit margins, are often scrutinized by regulatory authorities that suspect them of anticompetitive practices such as cartel formation. In this article I introduce a behavioral approach of competing that suggests firms with even the highest of margins are actually competing aggressively against each other, rather than colluding as the regulatory authorities might suggest. Firms using the behavioral approach can signal to antitrust authorities that their intent is not to restrain competition. Four mechanisms show this competitive orientation: (1) competitive intensity, (2) competitive complexity, (3) attack imitation, and (4) competitive action speed.


## 1. Competitive and suspected anticompetitive behavior of firms

Firms with high profit margins often come under the scrutiny of regulatory authorities (Cahan, 1992) because antitrust authorities postulate that high accounting returns are indicative of the monopolistic power of a firm. However, monopolistic power does not always lead to antitrust penalties. For example, Microsoft was charged with having monopoly power in the computing market (Wilcox, 1999) but was not burdened with any kind of antitrust penalties because its aggressive behavior of 55 competitive moves—five times more than its nearest competitors (Grimm, Lee, & Smith, 2005)—left no reason for antitrust authorities to suspect it of exercising its monopolistic power. Microsoft's recent declining focus on the computing business, however, has resulted in less aggressive competitive behavior. Consequently, the European antitrust commission has charged it with alleged anticompetitive practices (Hartung, 2014). Similarly, two auction houses in the United States, Christie's and Sotheby's, competed strongly against each other in the early 1990s. They cut commission rates drastically to be paid by sellers, and sometimes even made donations to sellers' favorite charities and extended financial guarantees to them. Many such competitive moves were common until 1995, when the auction houses abruptly announced they were going to charge fixed prices from sellers and no other extension services were going to be offered. Regulatory authorities later discovered

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this happened as a result of Christie's and Sotheby's colluding amongst themselves (Ashenfelter & Graddy, 2005).

Competitive authorities opine that firms with significant market powers are likelier to behave less competitively; for example, by forming cartels. This implies that firms with the highest market share in an industry are more likely to collude and control the market (Levenstein & Suslow, 2006). Even the duration of a cartel can increase with an increase in market power of the firm. Hence, well-performing firms in the industry are often investigated by regulatory authorities for anticompetitive practices for which they are sometimes guilty and sometimes not.

How can firms with good strategic intent avoid unnecessary scrutiny by regulatory authorities? When allegations of anticompetitive practices are hurled at them, how can these firms prove themselves innocent? In this study I have tried to answer these questions by introducing the theory and practice of behavioral dynamics of competition (D'Aveni, 1994; Ferrier, Smith, & Grimm, 1999). The study of competitive dynamics reflects how focal firms' competitive actions influence competitors' responses and vice versa. This legal approach focuses on competitive moves taken by firms in a given time period. Broadly, more competitive moves reflect high competitive aggressiveness of firms. Companies that are competitively aggressive are less likely to form cartels, and even if they attract antitrust attention, it is easier for them to prove themselves legitimate and within legal boundaries. Thus, I suggest that firms' competitive behavior is a strong indication of their competitive intent and signals regulatory authorities on the competitive intent of the firm. Hence, firms should make numerous competitive moves and countermoves, not only to raise value for investors and customers but also to justify their fair competitive behavior to various regulatory authorities.

## 2. Traditional measures of competition

Antitrust authorities generally rely on a few traditional measures of competition to assess the market power of firms and the likelihood of anticompetitive practices: the four firm concentration ratio (CR), the Herfindahl index (HF), and the price-cost margin (Bishop & Walker, 2002). As regards the CR and the HF, the higher these values, the lower the competition in the industry. But in duopoly markets (where firms have high market power), firms like Boeing and Airbus, Nike and Adidas, or Coke and Pepsi have hardly depicted anticompetitive behavior compared to firms in oligopolistic markets. For example, in 2008, Unilever, Procter & Gamble, Colgate, Cussons, and Woolworths colluded to fix prices of detergents in the Australian market. Similarly, in Germany, Mars, Hershey, Nestlé, Kraft Foods, and Cadbury were alleged to have participated in antitrust activities in 2010 (Lorin, 2008). In France, players like Unilever, Colgate-Palmolive, Henkel, and Procter & Gamble were found to be guilty of cartel formation by the European Union (Colchester & Passariello, 2011). Furthermore, in emerging markets like India, oligopolistic players such as those in the milk and cement industries have been accused of anticompetitive behavior via cartel formation (Edwin, 2012). Thus, despite having high market power and the ability to manipulate markets, firms in duopolistic markets have successfully kept regulatory authorities at bay while those in oligopolistic markets like Cadbury or Unilever—supposedly to be more competitive—have caught the attention of regulatory authorities. How was this possible? Duopoly firms, despite having high market power, always signal aggressive competitive behavior to regulatory authorities, unlike the oligopolistic firms mentioned above.

When considering the parameters of CR or HF, policy makers now realize limitations. For example, high market power does not imply anticompetitive behavior, as explained above. Regulators now focus on the price-cost margin approach, which relies on profit margin and profitability differences of firms in the industry, to predict likelihood of cartel formation (Boone, 2004): the greater the profit margin, the lesser the competition. For example, De Beers, which enjoyed a premium profit margin in the diamond industry—as it controlled the majority of the diamond supply—was consequently charged with cartel formation by U.S. Government authorities. But at the same time, in the computing industry, firms such as Apple—whose profit margin was around 20%—behaved far more competitively compared to firms in the lighting industry, like Philips. Philips had a profit margin of 4.5% and yet was found to indulge in anticompetitive practices of cartel formation (Meller, 2009). According to the profit-margin approach, when competitive intensity in the industry increases, efficient firms perform much better, causing profits to shift from less efficient to more efficient firms. Consequently, the profitability gap between firms increases. But firms' efficient operation depends largely on their competitive strategies. Hence, as they operate on economies of scale, low-cost players will be more efficient compared to firms pursuing a differentiation strategy. But this does not imply that differentiated players are less competitive; it means they are simply less efficient by virtue of high investments in marketing and research and development. Even though relative profit difference can indicate competition level, this method has its own weaknesses.

Furthermore, when all firms in an industry operate at the same efficiency level, there may not be any profit shifting. For example, there is hardly any profitability difference between Coke and Pepsi despite the fact that the two rivals compete aggressively with each other (Bhasin, 2011). Similarly, the retail beverage players in India also have few profitability differences despite the fact that rivalry is intense between them.

However, antitrust authorities continue to use such measures to gauge anticompetitive practices by different firms in an industry. Consequently, firms sometimes unnecessarily come under the scrutiny of these authorities. To keep these authorities at arm's length, firms should focus not only on their competitive strategy but also on other aspects of competitive behavior. This implies that even though differentiated players earn higher profit margins compared to low-cost players, both types of firms should compete aggressively on several aspects so as to reflect their true competitive intent to policy makers. To explain effective competitive behavior, I introduce the behavioral approach of competitive dynamics.

## 3. Behavioral approach of competition

Within the behavioral approach of competitive dynamics, a firm's competitive intent is determined by its competitive orientation. Competitive orientation is defined as "the ability and the will to identify, to analyze, and to respond to competitors' actions" (Gatignon & Xuereb, 1997, p. 78). The competitive dynamics theory explains the nature of dyadic competition between two rival firms: the market leader and a follower or challenger (Ferrier et al., 1999). It specifically focuses on the sequence of actions and reactions of rival firms. This behavioral approach measures the competitive intent of firms. It explores the nature and intensity of actions firms take to compete against rival firms. This kind of rivalry between market leader and follower may sometimes result in displacement of market share and profit difference, but sometimes it may not (Ferrier et al., 1999). It is up to regulators to interpret the behaviors.

Since the behavioral approach of competition relies on the competitive intent of firms, achieving superior profits or other aspects of financial performance is not important in this approach. For example, Visa and MasterCard are practically a duopoly. They are the only two major credit card processors and account for a total worldwide market share of 65% (Koley, 2014). Even though they have maintained almost similar market share globally, they are believed to be highly competitive (Trefis Team, 2013). Similarly, the leading newspapers of India, namely *The Times of India* and the *Hindustan Times*, have maintained the same market share in the past few years (Rathore, 2013). A stagnant market share does not imply that no competitive activities have been effectuated by the two rivals. On the contrary, the dyad has been recorded many times for the cutthroat competition between themselves. Similarly, the rivalries between Pepsi and Coke and Nike and Adidas are not considered as mere competitions but rather as wars due to the aggressive competitive actions and counteractions executed by these firms (Bhasin, 2011). Thus, by displaying more competitive actions, firms can satisfy regulatory authorities and avoid charges of anticompetitive behavior.

The question then arises as to how a firm should behave to compete aggressively. Firms need to explore several dimensions of competition to be behaviorally competitive. Next, I explain several dimensions of firms' competitive behavior.

## 4. Competition through the behavioral approach

Firms can rely on the platform of competitive dynamics as suggested by Ferrier and Lee (2002) and focus on several competitive moves and countermoves to compete aggressively in a particular industry. I extend this approach and explain how firms can signal bold competitive conduct to several potential penalty-imposing authorities.

### 4.1. Classification of competitive actions

According to Ferrier and Lee (2002), market-based competitive actions like pricing discounts, marketing and promotional campaigns, new product introductions, and moves related to internationalization, spying, legal infringement, and capacity expansion are indicative of a firm's competitive intent. They suggested this approach to explore the competitive dynamics between a market leader and follower. A firm may occupy any position in the industry depending on its overall revenues and market share, but as long as it is competing aggressively, it can keep itself out of regulatory authorities' suspect frame. Though Ferrier et al. (1999) suggested a dyadic competition approach (i.e., competitive moves and countermoves) to be examined between a market leader and follower, this approach can be extended to an industry with more than two competitors. In the following, I demonstrate how firms that competed aggressively by virtue of their competitive dynamics behavior neither indulged in any cartel formation nor were suspected by regulatory agencies of anticompetitive behavior. On the other hand, firms that did not initiate competitive activities were accused of the anticompetitive practice of cartel formation.

Using cases of the water purifier and cement industries in India, I now describe the behavioral approach of competition and explain why such firms are less likely to form cartels. I have divided the Indian water purification industry into two strategic groups based on consumer segments that the associated companies cater to. Eureka Forbes water purifier is positioned for middle and upper-middle income segments. Tata Swach and Pureit water purifiers are positioned for the lower income segment and are launched by Tata Chemicals and Hindustan Unilever respectively. For this analysis I will focus on the lower income segment.

I also compare the water purifier industry of India with the cement industry, which has recently been accused of cartel formation involving 11 players (Pani, 2012). However, for the sake of simplicity, I consider only three of these: Gujarat Ambuja, ACC Cements, and Ultratech Cements. Despite cement being considered a commodity, firms in India have tried to differentiate this product by virtue of investment in advertising and marketing (India Brand Equity Foundation, n.d.).

## 4.2. Measuring competitive orientation and intent through activities

Through the lens of competitive dynamics, managers should focus on four categories of competitive actions: competitive intensity, complexity of competitive actions, attack imitation, and competitive action speed.

### 4.2.1. Competitive intensity

Competitive intensity refers to the average number of competitive actions taken by leading players in an industry in a given year (Ferrier & Lee, 2002). This is measured as the ratio of total number of competitive moves by firms to total number of firms. For illustrative purposes I focus on leading players, but a firm can figure out on its own whether or not it rates high in competitive intensity.

During 2011, water purifier players Tata Chemicals and Hindustan Unilever undertook four competitive moves: promotion, introduction of a new product, capacity expansion, and legal litigations. In the same year, the three largest cement businesses made three competitive moves, including capacity expansion plans by Ultratech Cement (Edwin, 2012). Individually Gujarat Ambuja and ACC Cements did not participate in any competitive activity, consequently lowering the industry average to 0.33. Such acts raise the suspicion of antitrust authorities, which then wonder if firms have colluded and are purposely not competing aggressively against each other.

At the other end of the competitive spectrum, in the water purifier industry Tata Swach launched two variants of a water purifier: Magic and Smart Magic (Tata Chemicals Limited, 2011). The same year, Hindustan Unilever's Pureit water purifier signed a celebrity endorsement deal (Best Media Info, 2011). In addition, the two companies were under legal infringement wars over the issue of negative comparative advertising (Press Trust of India, 2011). Tata Swach further intended to expand to the poorest regions of the country. In sum, the two players were aggressive regarding competitive moves, and therefore less likely to attract the attention of anticompetitive authorities.

### 4.2.2. Complexity of competitive actions

The second measure of competitiveness considers how many different types of actions are implemented by the competitors. The competition becomes more intense and aggressive with heterogeneity (Ferrier et al., 1999). For example, in the Indian water purifier market, Tata Swach and Pureit competed against each other on many dimensions. Both aggressively focused on establishing distribution channels in rural markets and promoting their purifiers. They also filed legal suits against each other for broadcasting negative comparative advertisements and for demeaning each other's products (Press Trust of India, 2011). Unilever claimed that the information provided in the media by Tata regarding the Swach purifier was misleading regarding the product's safety and quality standards. For its part, Tata Chemicals sued Unilever for campaigning against Tata Swach by virtue of a negative comparative advertisement in the print media. Both companies also launched new variants of purifiers in the low-cost category. Complexity of competitive moves can be calculated using the following formula (Ferrier & Lee, 2002):

$$1\text{-}\sum p_i^2,\ \text{where}$$

$p_i$ = proportion of one type of competitive action to the total number of competitive actions.

As the formula implies, lesser the proportion of one additional type of activity is more heterogeneity and hence competitive intensity. Therefore, in the case of the water purifier industry, heterogeneity and complexity comes out to be 0.75 (four different actions were implemented), whereas in the case of the cement industry it was examined to be 0. This is because only one type of competitive action (i.e., capacity expansion) was implemented (Mishra, 2011).

Thus, managers should not only enhance their competitive intensity but also make sure that these moves represent enough heterogeneity. For example, had all players in the cement industry commissioned capacity expansion moves, it would have still caught the eyes of regulatory authorities. Capacity enhancement, which is directly related to the demand-supply dimension, is especially related to cartel forming tendencies of a firm.

#### 4.2.3. Attack imitation

Attack imitation measures how closely competitors imitate each other in market-based moves. For example, if one company invests in market penetration, its rival might also focus on penetrating the same or different markets. When all the rivals penetrate in a similar manner then attack imitation is high, leading to institutionalization of strategy (Smith, Grimm, Gannon, & Chen, 1991). More imitation results in higher competitive intensity in the industry because this indicates firms are interested in capturing and defending market share. By virtue of imitation, firms try to reduce competitors' first-mover advantage. Though firms need to maintain their uniqueness in terms of competitive positioning, in some aspects they also need to execute moves of competitors. Only then can they create and defend their market share and hence behave aggressively as per the behavioral competitive dynamics theory of competition. Thus, if the competition urges investment in new product development, then behaviorally competitive firms should invest in new product development. If the competition demands aggressive advertising, then competitive firms should advertise aggressively. In the case of Tata Swach and Hindustan Unilever, both players invested in market penetration almost simultaneously (Tata Chemicals Limited, 2011), indicating imitation and hence competitive behavior.

#### 4.2.4. Competitive action speed

Competitive action speed refers to the actual time gap between various strategic actions taken by firms: the smaller the time lag, the greater the competitive intensity. A speedy competitive move helps firms establish new competitive advantages for themselves and erode the same for competitors (D'Aveni, 1994). The formula is the average of the sum of time gap between two sequential competitive moves divided by the number of total competitive actions taken by major players in the market. At the individual firm level, this would be the average of the sum of time gap between two sequential competitive actions divided by the number of total competitive actions of individual firms.

In 2012, Hindustan Unilever launched an advanced Pureit water purifier in India (Pani, 2012). Then, just 5 months later, it announced the launch of a low-cost model in the same market: the Pureit Marvella (Hindustan Unilever Limited, n.d.). Similarly, Tata Chemicals ventured into rural areas to distribute the Tata Swach and 5 months later announced the model's online purchase facility via its specially created website (Tata Chemicals Limited, 2011). Thus, two competitive actions were taken by these players within 5 months, unlike in the cement industry where the average competitive speed is more than 1 year (only one competitive action was taken).

As can be seen, the water purifier players were not only heterogeneous in their competitive moves, but also implemented new competitive moves frequently. This reflects their intent to compete in the market rather than collude. Conversely, the competitive behavior of the cement industry players depicts that the firms were not aggressive in their competitive moves. Since they decided to fix prices and control the cement supply, they had no reason to invest in advertising or in new variant development.

A competitively aggressive firm should make sure that its competitive action speed is higher or at par with the industry average. Slow players in the market are the target of authorities for anticompetitive practices. Thus, if a firm participates in similar or different types of competitive actions, it would be recognized as a competitively aggressive firm.

## 5. Limitations of the approach

Despite its merits, the behavioral approach of competition has its own limitations. I have focused on only partial aspects of competitive actions. Sometimes a firm can take a major competitive action that changes the dynamics of competition and the industry structure as well. For example, the direct selling model initiated by Dell and the mini-mill concept introduced by Nucor are instances in which changes occurred in just one aspect of competition: the distribution system and manufacturing technology, respectively. However, these innovations changed the dynamics of competition in the computing and steel industries. It is difficult to state if in the field of competitive dynamics, magnitude of competitive action (i.e., major competitive moves, which are more strategic) or frequency of action should receive/be given more weight. Maybe managers should find a balance. Moreover, the magnitude and intensity of these actions would depend on the depths of the firm's pockets. Resource-rich firms have a greater ability to maintain balance between magnitude and intensity of competitive moves; thus, they could focus on both aspects of competitive moves. Resource-poor firms could focus on the frequency or intensity of competitive moves. In whichever way, unless firms depict their competitive intent in their behavior, they are likely to be unnecessarily scrutinized by regulatory authorities.

To justify their intent to compete, firms may also signal their plan of action. For example, Sony recently unleashed its expansion plans in Africa ("Sony Reveals," 2013). Though a signal may be false in nature, it gives some idea about firms' expected competitive moves. But firms that repeatedly send false signals to stakeholders soon lose their credibility in the market. Therefore, firms should try to reflect only their true intent through signaling.

In explaining the approach of competitive dynamics, I focused only on market-based actions. Sometimes efficiency-based actions also enhance overall competitiveness of the firm and, later, the industry. For example, when Bharti Airtel, India's largest telecom service provider, outsourced its network management services to other suppliers (e.g., Ericsson) this was seen as a major efficiency-based move. The move raised the overall competitiveness of Bharti Airtel (2004), which became the first profitable telecom service provider of India. Thus, apart from market-based moves, firms may also enhance their efficiency-based moves to justify and raise their overall competitiveness.

## 6. Conclusion

Competitive regulations have always been troublesome for firms (Utton, 2011). Managers do not like policy makers to interfere in their business conduct; they prefer not to put control of innovation in the hands of government. Antitrust authorities always aim to reduce the market power of firms by making the market structure more oligopolistic or fragmented and hence promoting competition (Ghosal & Gallo, 2001). Similarly, policy makers sometimes charge managers with anticompetitive practices like cartel formation when companies actually may not be involved in this activity (Reeves & Stucke, 2011). Policy makers, in general, influence business practices in many ways. Firms do not want them to implement policies that further block their routes of competitive advantages. Broadly, firms that compete dynamically are rarely questioned by competitive authorities. Thus, the behavioral approach of competition helps firms to demonstrate their true competitive intent and relay positive signals to regulatory authorities regarding healthy competition. A firm cannot control the industry. However, by focusing on intensity, heterogeneity, and speed of its competitive moves, it can at least ensure that regulatory authorities do not unnecessarily scrutinize a competitively aggressive firm, and even if they do, that the firm is able to prove itself innocent despite having high market power or profit margin. Therefore, by reflecting the competitive intent—and by assertive competitive dynamics—a firm can keep regulatory authorities at bay.

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