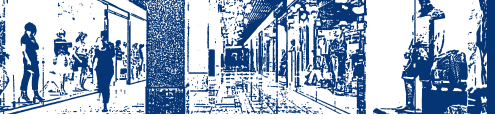
ARTICLES

Martine de Koning
Kennedy Van der Laan, Amsterdam
martine.de.koning@kvdl.nl

Fair competition: ambient intelligence, smart marketing and loyalty programmes

The retail sector increasingly uses databases filled with (potential) customers' behaviour for smart marketing purposes. This involves large-scale recording and analysis ('data mining') of information about the customer's preferences and behaviour, for example through supermarket discount cards and frequent-flyer programmes. In recent years, this kind of information is increasingly collected in online databases, which (by using cookies, for example) store data on browsing behaviour, like search queries, clicking on advertisements, registration and online purchases of physical/digital goods and services in webstores.

This information is recorded, analysed and used to proactively target customers in a 'tailored' fashion using (direct) marketing. This varies from showing recent buying history ('last time you purchased') or related products ('other buyers also purchased…'), to 'behavioural advertising'. An example of the latter is displaying ads for a pair of trainers because the customer was reading articles on a sports website earlier. Or a TV store that sends SMS/push messages with special offers when a customer walks by its windows. When the customer opens such a message, this behaviour can also be tracked and analysed. All this information is stored and analysed in order to measure the effectiveness of advertising methods. Because of the variety of available information, very sophisticated customer profiles can be generated, which offer new possibilities in marketing.



The above examples show only a small portion of the possibilities, which can be summarised by the term 'big data'.

A question that arises is whether – and under what circumstances – the use of big data can be anticompetitive under EU laws and, if so, what the consequences are.

Economic and social relevance and legal framework

Big data is growing quickly in both scale and commercial value. Customer data is a relevant factor in determining the value of a company, for example, when merging or floating the company on the stock market. The more specific the data, the more value it has: see, for example, Facebook, Linkedin and the Chinese Renren.

The current online possibilities change the retail landscape. 'Bricks and mortar' retailers are struggling to survive, in part due to the success of e-commerce. At the same time, the demands and behaviour of consumers has changed. Today's customer is quite different than a customer 50 years ago. Not only are the customers changing, the products themselves are too. Physical products are making place for virtual or 'streaming' products. See, for example, the music industry: CD sales have been dropping for years, while the demand for online music keeps growing. The music industry has to develop new business models, like streaming and/or downloading music (see, for example, iTunes, Spotify and 22tracks). This influences not only sales, but also distribution: artists increasingly choose to produce their music themselves and publish online, rather than enlist a record company. Nowadays, becoming a 'star' is achieved not by sending a demo to a record company, but by uploading a video on YouTube.

These developments have legal implications as well, for example in the area of contract law and customer protection regulations, protection of personal data, privacy and intellectual property. Those implications have been the subject of extensive scholarship. The boundaries set by competition rules have, until recently, been receiving less 'spotlight'.

Fair competition

Joaquín Almunia, the European Commission member responsible for competition, emphasises the significance of smart marketing and relevant customer data.[1] It is imaginable, however, that large companies will abuse customer data or find other methods of restricting competition with customer data. There is not much Dutch competition case law on this particular topic, but it has recently caught the eye of Dutch politicians and the Dutch Competition Authority.[2]

At the European level, complaints about online searching and advertising get filed regularly. Google is currently under antitrust investigation because of how Google shows its own hyperlinks compared to the vertical (specialised) search services and content of its competitors, and because of Google's search advertising agreements and the relation to Google's own Adwords network.[3] Microsoft got fined for tying Internet Explorer to Windows and non-compliance regarding interoperability.[4] However, little to no research or case law exists on new methods of smart marketing and big data. There is of course abundant case law and literature on the role of advertising and marketing in various markets, the definition of such markets, including in the digital realm, and analysis of barriers to entry, price-elasticity, etc.

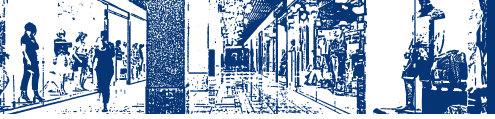
From a competition point of view, the regular competition rules should apply to smart marketing and big data: (1) the prohibition of abuse of a dominant position on the market; (2) the cartel prohibition; and (3) merger control. In mergers where these kinds of databases and marketing techniques play a role, there should be an investigation into what – if any – anti-competitive effects may emerge. The unusual commercial value of these databases deserves special attention. Basically, fair competition means that consumers should not be *locked in*, meaning that a customer should be able to switch from one supplier to another, relatively easily. In this context, the *right of portability* becomes relevant. This is the right for customers to transfer their personal data from one supplier to another. For example, a customer should be able to take his Facebook profile that he dedicates a considerable amount of time to, and move it to another provider of social network services. The draft of the new General Data Protection Regulation proposed by the European Commission includes a right of data portability.[5] If, however, switching suppliers is difficult, for example, in the context of a specific loyalty programme or by the necessity of access to information in the database of a dominant market player (*lock in*), competition may be at stake. To determine whether competition rules are

violated, one must determine the relevant product market and the relevant geographical market, and take the market shares in these markets into consideration.

Defining the market in Dutch and European merger cases

The Google/DoubleClick merger case is illustrative.[6] Google wanted to acquire DoubleClick, which was a company active on the online 'display advertising' market (as opposed to adserving technology for text-based advertisements). Google had been active mainly on the online advertising space market, on the publishing market (Google search) and as an intermediary with an advertising network (AdSense). It was assumed that the online advertising market should be seen separate from the offline advertising market, because target audiences can be reached much more accurately on the internet by recording and analysing browsing data, such as geographic location, surfing behaviour and buying history. There are possibly sub-markets for types of advertising (like text/graphical display ads or search/non-search ads) or distribution channels. Because a restriction in competition was in this case considered unlikely, the relevant market was not analysed in any further detail. The definition of the geographical market for online advertising mainly follows country and language borders, and the market for advertising intermediaries includes at least the EEA. The EEA was also considered to be the geographical market of adserving technology. Google was at the time the largest company in its market, while Doubleclick was an important player with potential in the intermediary market. No real competition between both companies existed. Therefore, the merger was approved. According to the European Commission, other players would be able to fill the competition gap on the market. Google also does adserving, but there were no signs of an improved starting point for Google in this market. It was also investigated whether Google would be able to conduct anticompetitive foreclosure (tying, selective price increases, decreased quality, 'tweaking' by giving priority to Adsense ads) but no risks were perceived because other large companies such as Microsoft, Yahoo and AOL also offered the same product combinations and only a small portion of the customer base purchases both products.

In the Dutch Gouden Gids (Yellow Pages) and Telefoongids (White Pages) merger case, the antitrust authority approved the merger, after a favourable evaluation on the 'efficiencies'. The authority did not impose any remedies, which is exceptional in a second stage. In the first stage, the authority had identified objections because the authority had assumed separate markets for paper and online advertising. The online market for phone directories was growing fast, and this growth was largely independent of the paper editions. The question was raised whether the online directories could compete with online search engines. A characteristic of online directories is that they are aimed at local users and local advertisers. Mutual links between search engines and directories indicate that these services are complementary, as opposed to substitutions. In the second stage, the authority no longer assumed separate product markets. Both parties had decided to integrate their online and offline activities, which was expected to bring synergy benefits. The lack of significance of a separate market definition is clearly demonstrated by the large number of advertisers who indicated they would stop advertising in the paper editions and would not switch to another advertising medium. Additionally, the competitors, to which an advertiser may switch when prices change, are quite differentiated. This also hinders defining markets. There is not one specific alternative advertising medium, but the diversity of advertising options creates competitive pressure. Since the market is two-sided, loss of quality or increases in price of the integrated product is unlikely. The negative effects of 'crowding out' (lower attention because of a high number of advertisements in a certain section) are not of such nature that the advantages of the integration are undone. A small number of advertisers may experience disadvantages, but this does not outweigh the advantages for a larger group of advertisers. In the second stage, the authority assumed there is a disciplining effect between the online and offline product, relevance of 'quitters' and a disciplining effect by a wealth of online alternatives. In an international context, the Dutch authority is quite progressive, because it acknowledges the complexity and the risk of being overtaken by rapid developments in the online world. Furthermore, accepting the efficiency argument is remarkable.



Specific aspects of internet services, big data and smart marketing

It is important to distinguish between the clients (advertisers), who pay for showing their advertisements, and the customers (consumers) who use the service of product and get to see the ads. It is also relevant if and where competition exists with other products or with offline equivalents. This was the case in Microsoft/Yahoo,[7] which constituted a concentration in the online search and advertisement markets. In the advertising market, costs and results count more than product characteristics (like banners, TV commercials or pop-ups). The supply to customers is often free of charge, because customers generally refuse to pay for online content.[8] This is contrary to enterprises, which are usually willing to pay for services. Therefore, the markets for consumers and enterprise are usually separate. It makes no sense to apply a SSNIP test on services that are free of charge for customers, since a small increase in price would not lead the customer to switch supplier, since he is not paying for the services anyway. Instead, it should be tested whether there exists a 'two-sided' (or multi-sided) market, meaning a market where different groups or different levels in the supply chain determine the demand (and thus price).

A further complicating factor is that technology evolves rapidly and that user behaviour on the internet changes quickly. There is a risk that a certain market situation or behaviour results in regulatory response, while that market situation or behaviour would have existed only very briefly due to ongoing technological advancements or market developments. A market leader with new technology might be 'hot' for some time, but this does not necessarily mean that it has 'the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers', the classical definition of dominance.[9] The market leader has to keep investing in new developments, and there are several big and influential players with 'deep pockets' that are willing to bring new, competing technologies to the market.

Restriction of competition; lock-in and loyalty programmes

After looking into the definition of internet-related markets and its specifics, let's analyse smart marketing methods. At first glance, it may seem that lock-in would only exist in products or services with a considerably large market share. Market power may be abused when a customer would like to switch to a competing player, but won't switch because he cannot transfer the profile and historical data to the new supplier. At this moment, this does not seem to be a severe problem. Most customers have profiles on several social networking services (Facebook, Twitter, LinkedIn) and use different online shops (Amazon, eBay, etc). Furthermore, it is under the 'essential facilities doctrine' already possible (though not easy) for competitors to gain access to such data, even when intellectual property rights are involved, provided that a compulsory licence is necessary to introduce a new product to the market and there are no reasonable alternatives.[10] With evolving technologies and improving smart marketing methods, it is likely that the seller who uses the best marketing techniques will sell the most products. The question is, however, whether that is because of his superior customer behaviour database analysis (the consumer's surfing behaviour on his site as well as other websites, past buying behaviour, through use of cookies, etc), or because he abuses its market power and creates a lock-in. Serious questions from the field of data protection arise regarding extensive data mining of personally identifiable information, but from a competition point of view, there is nothing to worry about: may the best man win. The competition, however, must be *fair*. If a market player becomes dominant by violating data protection regulations, this is anti-competitive. In such a case, it is more obvious to enforce data protection regulations than to enforce competition laws. Such enforcement is in the Netherlands (and probably other civil law jurisdictions) subject to the 'Schutznorm'-theory, which means that rules meant to protect privacy of individuals should not be exercised to protect competitors. This is arguably a rather theoretical discussion, because a violation of data protection rules will generally be first and foremost a danger to the privacy of individuals, and hopefully (upon compliant) trigger interference of the relevant data protection authority.[11] In addition, under certain circumstances, a doctrine called the 'Langemeier-correction' guards against an unduly strict application of the Schutznorm theory, if it concerns a violation of an unwritten but accepted industry or societal rule and the violator

knew or should have known its existence. In such cases competitors can also invoke data protection rules even though their interests are in principle not protected by these rules.

The chance of lock-in seems somewhat larger where customers gain direct benefits when they stay with a supplier, eg, loyalty discounts or frequent-flyer programmes. In such a case, the question is whether this constitutes abuse of dominance. It follows from European case law[12] that discounts or other benefits may constitute abuse of market power if the discount system ties a customer in such a way that this customer exclusively purchases goods or services from that supplier, so that the discount has a foreclosing effect. The existence of such an effect does not have to be established.[13] Such effect is presumed if a system may, by its nature, restrict competition. This includes all sorts of loyalty benefits, such as progressive volume discounts, target or top slice discounts, tied selling, predatory pricing,[14] etc. In order to establish whether digital smart marketing is abuse in this sense, a full analysis of the discount or loyalty system is necessary. Discounted prices should be compared to the cost prices and other specific aspects of the sale of the product in the relevant market. The (reference) periods to which the rebates relate should also be taken into account. The stronger the 'loyalty' effect, the higher the impact on the market. Various competition authorities have investigated loyalty programmes in this manner.[15]

It gets somewhat more complex when a specific loyalty programme is used by several undertakings. Such a programme will more easily cover a large part of the market. It becomes relevant whether the involved undertakings are competitors or not. If they are not, it may be relevant whether the undertakings are active on different levels of a supply chain, that is, have a vertical relationship. Such an arrangement may additionally require an assessment of the cartel prohibition.[16] In this context, one should take into account the precise (loyalty) benefits for the customers, who may join the loyalty programme (open or closed system), where the loyalty/discounts can be redeemed, how the internal balancing system works, and whether the provisions are transparent and non-discriminatory. Competition may be particularly at risk when the coverage is large, there are foreclosing effects, market entry is impeded, or potential competition is eliminated or restricted.

Information portability and concluding remarks

Information portability, as proposed in the new draft Data Protection Regulation,[17] is a good safeguard against customer lock-in and exclusion effects. Needless to say this only works if the enforcement is effective. Apart from that, current EU competition law seems to offer enough means to prevent customer lock-in by smart marketing methods in the retail sector. Under EU law, effects-based approach should prevail, but it is noted that – in the case of loyalty-discount schemes – case law determines that certain effects are assumed if a scheme shows certain features. Competition law compliance can be enforced through filing tips or complaints of violations with the European Commission or national competition authorities, or via litigation in civil courts. It is important to acknowledge the specifics of internet and technology, and the complexity attached to it when defining a market and determining market shares on such market. Thanks to rapid technological progress and quickly changing customer behaviour, many problems related to the internet and big data may possibly be solved or corrected by the market itself in due course. Regulators and judges should take these complexities into account, and acknowledge the self-correcting capacity of the market. The national and European competition authorities generally seem to be quite aware of this.

Distortion of competition, arising from violation of other rules (such as data protection or e-commerce rules), should in principle be solved by enforcing those rules, for example, through providing the relevant authorities with tips or filing a complaint, even though this seems indirect and the process is not within the competitor's control. In particular circumstances, as an exception to how the law in principle works, competitors may invoke such rules to protect their interests in civil courts. Retailers that are impeded by unfair behaviour of their competitors therefore have more than one way of enforcement.

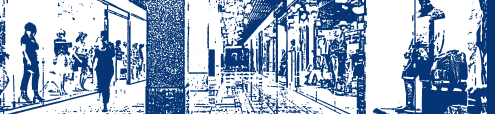
Notes

1 European Commission Speech 12/860 by Joaquín Almunia on 26 November 2012, http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm

2 D66, *Privacy is concurrentiefactor*, 27 November 2012, http://site.d66.nl/d66nl/nieuws/20121127/privacybescherming_is.

3 European Commission Speech 12/372 by Joaquín Almunia on 21 May 2012, http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm.

4 See http://ec.europa.eu/competition/sectors/ICT/microsoft/index.html.



5 Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, art 18 – 'the right to data portability'.
6 Case No COMP/M.4731 (*Google/DoubleClick*).
7 COMP/M.5727, C(2010) 1077 (*Microsoft/Yahoo! Search Business*).
8 COMP/M.6281, C(2011)7279 (*Microsoft/Skype*).
9 ECJ 14 February 1978, case no 27/76, *United Brands*, § 65.
10 For all the criteria, see ECJ 26 November 1998, case no C-7/97 (*Bronner*); ECJ 29 April 2004, case no C-418/01 (*IMS Health*); GC 17 September 2007, case no T-201/04.
11 In this light, it is interesting that in some EU member states, eg, Italy, e-privacy rules are implemented in the competition laws and are regulated by the antitrust authority.
12 See, for example, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, COM(2008) 832 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0832:FIN:EN:PDF; ECJ 13 February 1979, case no, 85/76 (*Hoffman-La Roche/Commission*); GC 17 December 2003, case no T-219/99 (*British Airways/Commission*); appeal: ECJ 15 March 2007, case no C-95/04P; GC 30 September 2003, case no T-203/01 (*Michelin II*); GC 9 September 2010, case no T-155/06 (*Tomra*), appeal: ECJ 19 April 2012, case no C-549/10.
13 Commission decision D(2009) 3726 final (*Intel*), GC 9 September 2010, case no T-155/06 (*Tomra*).
14 ECJ 3 July 2001, case no C-62/86 (*AKZO/Commission*).
15 European Competition Authorities (ECA), Loyalty programmes in civil aviation.
16 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of 14 January 2011 (2011/C 11/01), OJ C 11/1; Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1; Guidelines on Vertical Restraints of 19 May 2010 (2010/C 130/01), OJ C 130/1.
17 *Ibid*, 10.