

Know your ABCs, know your Data

The Digital Age has not only transformed the way companies communicate and absorb information, it has also paved the way to the evolution of competition law standards. Indeed, over the last two decades, competition authorities around the world have gradually transitioned from a 'common features' approach to an 'effects based' approach where law and economics have become far more integrated than ever before. As a result, competition law's appetite for information has considerably increased and such appetite has been underlined in the European Commission's and the UK Competition and Markets Authority's recent cases.

Whether it is merger control review, a cartel investigation or market study, a greater weight is placed on the inferences that competition authorities can draw from contemporaneous documents to support their competition law analysis and enforcement. Locating, identifying and searching for the relevant documents has never been more crucial to companies. Yet, the Digital Age has only made this process more complex and difficult. Each step presents its own sets of challenges.

Inventus and Euclid Law teamed up to write a series of articles which will guide companies and their legal and compliance teams on how to tackle each step and overcome the challenges that come with it.

How to navigate through the Information Age

In the last ten years, the volume of data created worldwide has increased over 40 times and it is expected to grow to over 175 zettabytes by 2025. To put it simply, 1 zettabyte equates to an oceanic 1,000,000,000,000 gigabytes and when you think that 1 GB can contain anything between 5,000 and 15,000 documents, one can only dread the outcome. Conversely, the variety of data created by businesses has continued to grow exponentially as data storage has become cheaper.

What is also changing is the range of media upon which potentially discoverable information can be located and where these media are held. As remote access became faster and more reliable, data is now often stored on a remote server in another jurisdiction or more commonly nowadays on the cloud.

This evolution creates a new host of challenges be it for the in-house lawyers, the compliance teams or their external legal advisers. A decade ago, the main source of electronic information was predominantly email data, followed by Microsoft suite of documents. Today, however, relevant business information is just as likely to be found on smartphones, databases, applications, social media sites or instant messaging servers. Even the data format has changed and may not be in a written format at all, especially in the insurance, trading and financial worlds where many hours of audio recordings –

telephone conversations, instant messaging, chat rooms, digital dictations, voicemails and the like – are now deemed to contain potentially relevant information.

The then simple task of locating, identifying, searching and collecting data has become more of a dreading contemplation for any in-house lawyer and external advisers. Yet, this simple task is key as competition authorities increasingly rely on a company's internal documents and data. Recent fines imposed by the European Commission and the UK Competition and Markets Authority's ("CMA") for failing to submit these documents properly is a reflection of the importance to this process and its outcome.

Topology, mapping the IT terrain.

The key to a successful collection exercise is to understand the topology of the client's IT infrastructure to ensure that when the times comes, you know what to collect, how to collect and from where to collect it.

The process of creating a comprehensive inventory of an organisation's data is paramount. This data inventory or map, though it actually does need not be a graphical representation of data, should include information about what types and formats of data the organisation creates, uses, and stores, with further details on who is in charge of this data, where it is stored and when does it get archived or deleted.

This inventory or data map ought to be a living document that is updated over time as users leave or move within the organisation, data streams and sources disappear, change or are added; and as new forms of backups and archiving systems are added to the infrastructure. Regularly maintaining such inventories, allow your organisation to be ready and prepared for regulatory compliance document request or respond to the threat of litigation knowing at all times where the data lies. GDPR and data protection laws are a fierce obstacle which must be overcome before any collection can be undertaken. Knowing where your data is stored will allow you to pre-empt some of these challenges which result otherwise in delays and penalties.

On balance, be proportionate.

With today's profusion of data, it can be quite difficult to find that elusive equilibrium between collecting too little data and collecting too much data. Under-collect, and you might find yourself needing to recollect data again. Over-collect, and you may have to filter heavily prior to processing to avoid increasing costs.

Full disk imaging (a complete sector-by-sector copy of a hard drive's data) may be the golden standard for the acquisition of data from laptops and other computers. In many cases however, this approach may be excessive and unnecessary. A targeted or logical image may amply suffice, even though at times, a full disk image may be faster than copying selective data from a drive or may just be the only option if you need to delve deeper in the history of the documents.

What should be avoided though, in most scenarios, is a targeted collection using keyword searches and other similar filtering technologies, especially if these rely on non-forensic tools to run these searches. Even Forensic tools should not be used to run keyword searches on site as not all documents have extracted text (text that is searchable), this task should be reserved after the collection exercise. If at all necessary, then a mobile indexing engine should be deployed on site so that keyword searches can be executed reliably against an indexed dataset.

A more efficient approach is to collect broadly data sources that are likely to contain pertinent files without falling into over-collection and, post-collection, process the relevant subsets of data, run the appropriate keyword searches, apply analytics and any other forms of filtering and culling while maintaining proportionality.

Either way, do not underestimate the need and importance of working closely with your external legal and technology advisers. The CMA's recent fine of £27,000 which it imposed on Rentokil is a formidable illustration. In August this year, the CMA fined Rentokil for failing to provide, without reasonable excuse, the information requested by the CMA during its investigation of the merger with MPCL Limited (formerly Mitie Pest Control Ltd).¹ Rentokil argued that it had received the CMA approval regarding its internal document search methodology, which it had then complied in good faith. However, the CMA argued that the company was ultimately responsible for ensuring that the manual searched it conducted produced sufficiently robust results.

To DIY or ask the IT guy?

It can be tempting to use an organisation's own resources to perform the collection, either by using the employees to self-collect or involving the IT department to do so. The first approach is considered to be the riskiest, as employees may overlook relevant data or may even alter or delete specific information if their own conduct is under investigation, or will probably and irrevocably change the metadata or properties of the documents when they perform the copying.

This issue can also be exacerbated when IT departments are tasked with performing collections. While some IT departments in many organisations have the necessary specialist software to perform forensically sound collections, this option can pose challenges as they may not fully understand the scope or the legal ramifications of a case or lack the experience in collecting data within a regulatory framework, or may simply not have the resources internally to carry out the task within the timeframe and dedication required.

1

https://assets.publishing.service.gov.uk/media/5d53cabde5274a42d9112ada/Rentokil_Penalty_Notice_.pdf

Get the right tools for the job!

More than tools, make sure you get the right people for the job. If the IT department of the organisation has the know-how, bandwidth and the necessary tools, this could be an effective and cost-efficient approach. Otherwise, make sure you engage from the outset your external lawyers and the services of a certified forensics examiner or an outside provider with a demonstrable pedigree. While the latter involves costs, from modest to high, depending on the type and volume of data and on whether data can be collected remotely or must be collected in situ, do remember however that the collection piece is usually the cheapest element of discovery project but the one that could have an irreversible effect on your matter if not carried out correctly.

Specialists will have the appropriate expertise, equipment, procedures and documentation to carry out such work and will be prepared to provide witness statements if necessary to defend the methodology used. Many organisations have started to use a hybrid methodology which involves using both internal IT capabilities with the assistance of an external provider. Careful consideration of the most appropriate methodology under the circumstances of the matter at hand by legal counsel is key and a clear audit trail of actions should be recorded.

Salted, pickled and preserved.

One of the first step Legal Counsel should always consider before doing anything is data preservation. Data preservation is the act of conserving and maintaining both the safety and integrity of data.

This step is an integral part of any data collection and in some cases takes place way before it, if a legal hold has been issued. Inadvertently deleting, altering or permanently damaging data to the point of spoliation is a real risk as data is a fragile commodity and could also incur criminal penalties. Make sure therefore that you have a tight grip on your organisation's IT infrastructure, understands where your data is located, use the correct resources internal and external, and tools available to identify, extract and collect the relevant data. Ensure that it is adequately preserved.

More about the Authors



Jérôme Torres Lozano is Inventus's Director of Professional Services based in London.

Jérôme has over 15 years' experience in e-Disclosure and Computer Forensics, first with Kroll Ontrack and latterly with Consilio. He established Computer Forensics divisions, managed and lead global e-Discovery project management teams, and as Director of Professional Services, Jérôme advises clients around the world on all technical and workflow aspects of their e-Discovery needs.



Marie Leppard is a partner at Euclid Law, The Competition Law Firm. Before joining Euclid Law, Marie was a senior associate at Clifford Chance's antitrust practice (London and Paris).

Marie assists clients on French, UK and EU antitrust investigations, complex multi-jurisdictional mergers and abuse of dominance cases. Marie's practice focuses mainly on cartel investigations. Marie has worked on numerous high-profile cross-border cartel investigations before the European Commission, the CMA, the FCA and the US Department of Justice.

Marie has also vast experience in providing clients with compliance framework and training as well as advising on the use of the latest technologies and artificial intelligence in internal audits and cartel investigations.

About Euclid



Euclid Law was created by experienced competition lawyers with a common desire to build a new competition law firm that is agile, collaborative, highly commercial in its thinking, innovative in its approach to delivering results and free from the constraints of larger law firms.

Our core expertise covers all aspects of competition law, including cartels and anti-competitive agreements, merger control, abuse of dominance, state aid, competition litigation, market investigations as well as audit and compliance. With offices in both London and Brussels, in-depth experience and a network of contacts in key jurisdictions around the world built up over many years of practice, we have the ability to advise clients across Europe and worldwide. We represent clients before EU, UK, German and Belgian authorities and courts.

More information on: <https://euclid-law.eu/>

About Inventus



A leading legal support services provider focused on reducing the costs and risks associated with the discovery and compliance processes through the effective use of technology solutions. Inventus has been providing services to corporate legal departments, law firms, and government agencies since 1991.

More information on: <https://www.uk.inventus.com/>