Are there really no barriers to electronic commerce? Electronic evidence will decide

Thomas Cavro Dupont asks how should companies best prepare for the European Commission's e-commerce sector inquiry

315 million Europeans use the internet every day. In the digital era, the internet has ultimately redefined the way we do business on a daily basis. Just the thought that today the largest online retailer, Alibaba, has no actual inventory or physical outlets; the largest accommodation provider, Airbnb, has no real estate and that many users communicate via Twitter and Facebook, two of the most popular media owners that actually do not create content, means we are amid a digital revolution.

Competing fairly in the digital market

In the wake of these rapid digital developments, one of the major challenges for governments is to push legislators to keep up and adapt to these changes. One recent example which illustrates these challenges is the current situation of territoriality of rights which exists in Europe in the film industry. This ultimately means that certain video content on Youtube for example might be available in the United Kingdom but not in France due to the licensing of rights. Recently new video-sharing applications such as Twitter's Periscope or Meerkat could pose a new challenge for owners of intellectual property rights since they allow users to share online video content they have recorded anywhere in the world for free.

The newly designated Competition Commissioner, Margrethe Vestager recently mentioned that *"We have to make our European companies ready to compete in the digital economy at fair prices for consumers"*. Under the leadership of the European Commission, Vestager had stressed on several occasions that she intended to extend the Single Market for physical goods to the digital world in order to achieve a Digital Single Market. This is because the European Commission (EC) had already identified shortcomings due to the legal fragmentation and technical barriers to cross-border online trade that exist in Europe.

Most importantly, Vestager pointed out that in 2014 one European consumer in two used e-commerce but only 15% did so across national borders and only 7% of small and medium sizes enterprises (SME's) sell cross-border.

The competition sector inquiry

As a consequence thereof, the EC decided to launch a competition sector inquiry into e-commerce on the 6th of May 2015 focusing *"particularly on potential barriers erected by companies to cross-border online trade in goods and services where e-commerce is most widespread such as electronics, clothing and shoes, as well as digital content"*. Some of these barriers include diverging e-commerce rules across EU member states and regulatory obstacles as well as technical barriers.

These barriers erected by companies include geo-blocking which prevent consumers from accessing the best priced products over the internet based on their physical location (eg. an online clothing retailer might either deny a consumer based in Germany access to their UK retail website or re-route them to a German local store where retail prices are considerably higher compared to their UK website). Geo-blocking might identify a consumer's location via their internet IP address, residence or credit card details.

In addition, according to the EC, European consumers could save €11.7 billion each year if they could choose from a full range of EU goods and services when shopping online. Moving from 28 diverse national markets to a single digital market could also contribute €415 billion per year to the European economy and create 3.8 million jobs. Hence, the e-commerce sector has become one the main focal points for the EC within the framework of the Digital Single market.

E-tailers should be sufficiently prepared from a technical standpoint... since most of the evidence relating to the e-commerce inquiry will be electronically stored information

The EC inquiry which started on 6th of May 2015 will most certainly affect major corporations including Amazon, eBay, Paypal, Zalando as e-tailers and Apple (via their Apple Store) and Google (via Google Play) as providers of digital content through apps and e-books. As indicated by the EC, this competition sector inquiry will cover all current 28 EU member states.

Although several sectors in particular have been mentioned by the EC, it seems there will be a particular focus on the online sale of consumer electronics and consumer electrical products where the EC has already carried dawn raids on 10th March 2015. Market tests have also been recently carried out by several national competition authorities in the online hotel booking platforms sector although the EC has not yet opened its own investigation. The EC will also attach importance for its inquiry to the consumer complaints that have been reported to the ECC-Net (European network that reports on cross-border consumer transactions).

To this effect, most of consumer complaints referred to the distribution of goods and services (namely, electronic goods, clothes, books, music and data downloads), tourism and leisure (travel agencies and accommodation providers) and rental and leasing services (eg. online car rental services).

What form will this investigation into the e-commerce sector take? The EC can be expected to make use of its investigative powers and send out numerous information requests to the e-tailers, suppliers and internet platforms. Pursuant to Regulation n°1/2003 the EC is entitled to request any corporate documents, both in paper and electronic format that are related to the investigation. The EC also has the power in the context of a sector inquiry to carry out dawn raids or unannounced inspections at the premises of the company being investigated.

In the context of a dawn raid, the EC is empowered to: (1) to enter any premises, land and means of transport of undertakings and associations of undertakings; (2) to examine the books and other records related to the business, irrespective of the medium in which they are stored; (3) to take or obtain in any form copies of or extracts from such books or records; (4) to seal any business premises and books or records for the period and to the extent necessary

for the inspection; (5) to ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

What will the investigation mean for companies and how should they prepare?

In practice, companies affected by this investigation will have to rapidly identify within their corporate repositories the requested documents in order to comply with the frequently tight deadlines set by the EC. Most importantly, if companies fail to supply the requested information before the deadline or supply incorrect or misleading information, they could risk fines of up to 1% of their total turnover in the preceding business year which could well cause financial distress for many companies. The EC is also empowered to impose periodic penalty payments (eg. fines levied on a daily basis until the EC request is complied with) on companies that fail to provide the necessary information. Periodic penalty payments can reach up to 5% of the average daily turnover of the company in question in the preceding business year.

How can companies who sell goods and services online best prepare for this? It is crucial for companies to be fully prepared for these potential information requests with the necessary technical means to identify and analyse information currently under scrutiny within tight timeframes. To this effect, document review platforms that include keyword searching and other advanced analytics such as predictive coding can be a very useful tool and ally for companies in these situations since potentially relevant information will be identified more rapidly and high fines will be avoided.

How technology can assist companies

In this vein, predictive coding is a document review technology that allows computers to predict and suggest particular document classifications (such as 'responsive' or 'hot document') based on coding decisions made by human subject matter experts. To this end, an expert 'trains' the system using a representative sample of the entire document set by categorising different documents. Once the system has been correctly trained it will be in a position to

apply its 'learned knowledge' to the rest of the universe of documents by making suggestions as to how documents should be categorised.

In the context of electronic discovery and requests for information by authorities, this technology can find key documents faster since it prioritises potentially relevant documents in a document set thereby allowing reviewers to address potential concerns in a timely fashion. Predictive coding also enables the identification of potentially relevant documents with fewer human reviewers, thereby saving hours, days, and potentially weeks of document review and of course legal costs.

Interestingly, the Antitrust Division of the US Department of Justice has already embraced the full advantages offered by ediscovery technologies through the use of TAR (Technology Assisted Review) also commonly known as predictive coding or Computer Assisted Review (CAR) in US merger cases – namely in second requests. Furthermore, many judgments have been issued in the US in an array of different matters whereby Judges have recognized the advantages of using predictive coding both in terms of accuracy, time and costs savings.

As concerns the acceptance of predictive coding in Europe, an Irish Court (High Court of Ireland) has also recently approved the use of this technology saying *"The evidence establishes, that in discovery of large datasets, technology assisted review using predictive coding is at least as accurate as, and, probably more accurate than, the manual or linear method in identifying relevant documents"*. In this judgment, Judge J Fullam also underlined that *"If one were to assume that TAR will only be equally as effective, but no more effective, than a manual review ,the fact remains that using TAR will still allow for a more expeditious and economical discovery process"*. Judge J Fullam concludes his reasoning stating that *"I am satisfied that, provided the process has sufficient transparency, Technology Assisted Review using predictive coding discharges a party's discovery obligations […]"*.

Although the EC has not yet taken an official and public stance on the use of predictive coding it has encouraged the use of ediscovery technologies and electronic evidence tools by companies in the context of investigations. In

this sense, the European Competition Network, which is composed of all national competition authorities of the European Union, has recently called for increased powers for competition authorities to gather digital evidence in the context of antitrust investigations as well as a closer co-operation in terms of ediscovery of companies being investigated. Many national competition authorities in Europe such as the CMA (Competition and Markets Authority in the UK) have also increased their digital and forensic capabilities to uncover anticompetitive behaviour by using data analytic tools.

In practice, this means the EC and European national competition authorities in general expect that companies have the appropriate technology and forensic tools to identify electronic evidence efficiently and rapidly. The fact remains that the EC and other authorities in Europe and around the globe use review platforms and advanced analytics (including predictive coding technology) to identify key documents more rapidly, most of the time in cases where datasets are composed of millions of documents. Sometimes it is really about finding 'a needle in a haystack' or an incriminating document in an immense dataset within a timeframe of several weeks. This means if companies do not use the same tools as the Authorities they would be at a competitive disadvantage in terms of identifying electronic evidence rapidly.

The information requests issued by the EC in this e-commerce inquiry will most likely require companies to submit electronic evidence directly to the EC and to use electronic evidence tools to identify electronic documents in their corporate repositories.

To this effect, since December 2009 the EC introduced a web-based application or 'eQuestionnaire' in its market investigations. Although this questionnaire was originally conceived for merger investigations it can also be used in the context of antitrust investigations. This application provides respondents with a modern, secure and efficient web-based workspace to submit their replies to the EC. Companies are able to fill in the questionnaire directly online or, if preferred, export the questionnaire to a text editor, complete the responses there and upload the replies as well as relevant files (if needed) and into the application afterwards.

Be sufficiently prepared from a technical standpoint

In summary, all of the developments described above underline that e-tailers should be sufficiently prepared from a technical standpoint with forensic tools for identifying and mining relevant data and sophisticated (including the use of predictive coding) to locate and analyse data within their repositories since most of the evidence relating to the e-commerce inquiry will be electronically stored information (ESI). This will allow them to respond to potential information requests within the prescribed time-limits and avoid heavy fines.

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