

# Competitive Assessment of Data Pooling

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# What is data pooling ?

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- **Data**
  - From **different sources**
  - **Combined**
  - Into a **single data set**
  - Often accessible on a **reciprocity basis**
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- May be the result of a **cooperation**
  - May be an **input** useful or necessary to operate on a market

# A few precedents

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- Finnish Competition Authority, **ScanTrack** investigation, 2008
  - AC Nielsen pooled very granular in-store sales information from 3 leading Finnish retailers (with their consent and on a reciprocity basis) ; investigation closed after retailers discontinued the use of the service.
- **UK Tractors** (IV/31.370-31.446 ; C-7/95 P)
  - Volume of sales per product and per geography allowing manufacturer/dealer *"to react immediately and thus to neutralize"* whatever initiative taken by a market player to increase sales.
- **Asnef-Equifax** (C-238/05)
  - National Association of Financial Institutions intended to set up a mutual register containing creditworthiness information on debtors
  - ECJ : no anti-competitive effects in principle provided that : (i) the relevant market or markets are not highly concentrated, (ii) system does not permit lenders to be identified and (iii) the conditions of access and use by financial institutions are not discriminatory.

# Competitive assessment under 101 TFEU

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## **1 - Constitution of the pool**

- Is the pool the result of an agreement or a concerted practice ?
- Does it have a restrictive object or effect ?
- If yes, is it counterbalanced by efficiencies ?

## **2 - Access to the pool**

- When is access mandatory ?
- How should access be granted ?

# Constitution of the pool

## AGREEMENT/CONCERTED PRACTICE ?

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- No if set up and managed by a **third party** using **its own independent access** to data
  - Comm. UE, 03/01/98, *Wirtschaftsvereinigung Stahl*, § 58 : "(...) they are not agreements between competitors capable of being caught by Article 65 of the ECSC Treaty or Article 85 of the EC Treaty. Specialist organizations carry out studies on the basis of surveys at the point of sale."
- By contrast, **voluntarily contributing** data to the pool in exchange of receiving data from others characterizes an agreement/concerted practice :
  - *Asnef-Equifax*, §30 : "(...) the necessary participation of the credit institutions in that register inevitably entails a certain amount of cooperation between competitors in the form of an indirect exchange of credit information"

# Constitution of the pool

## ANTI-COMPETITIVE OBJECT OR EFFECT ?

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- **No** if participants to the pool are **not competitors** (potential competition must be looked at esp. on emerging markets)
- If participants are competitors, pooling must be assessed as an **information exchange between competitors** (see EU Commission's Guidelines on Horizontal Agreements ("Horiz. Guidelines")) :
  - Restriction **by object** if pooled information is obviously strategic (e.g. on future prices or quantities)
  - Restriction **by effect** depending on a number of criteria (Horiz. Guidelines)
    - Market characteristics (e.g. transparency, concentration)
    - Nature of information : price, quantities, costs, demand, etc.
    - Public or confidential ; Anonymous or not ; aggregated or detailed ; historical or current or future ;
    - Periodicity of update

# Constitution of the pool

## ANTI-COMPETITIVE OBJECT OR EFFECT ?

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- Specific **pro-competitive aspects** of data pools
  - **Impossibility** to constitute a pool **independently**
    - See by analogy Horiz. Guidelines, § 130 : *"If, on the basis of objective factors, the parties are not able to carry out the necessary R&D independently (...) the R&D agreement will normally not have any restrictive effect on competition"*
  - Pooling as a way for small players to **challenge market leaders**
    - Comm. Vestager, 26/09/16: *« (...) a big online bookstore can use its data from billions of purchases, to work out which books I might want to buy. But smaller rivals, without so much data, might not be able to give me such good recommendations"*
  - Pooling as a way to increase **consumers mobility**
    - *"(...) by reducing the significance of the information held by financial institutions regarding their own customers, such registers appear, in principle, to be capable of increasing the mobility of consumers of credit. In addition, those registers are apt to make it easier for new competitors to enter the market "* (Asnef-Equifax, §56)

# Constitution of the pool

## ANTI-COMPETITIVE OBJECT OR EFFECT ?

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- Specific **anti-competitive aspects** of data pools
  - Might **reduce incentive to innovate/differentiate** in data collection (see by analogy R&D agreements, § 127 of Horiz. Guidelines)
  - May facilitate **coordination on use** of data, hence influence competition on neighbouring markets (e.g. can pricing algorithms trained by pooled data lead to the same results among data suppliers ?)
  - **Restrictions to the use of pooled data** must be carefully weighted (see by analogy § 140 of the Horiz. Guidelines re R&D agreements) ; probably acceptable if strictly necessary to the functioning and integrity of the pool, provided that they are non-discriminatory.
  - **Exclusivity** granted to the pool by data supplier : is there an objective justification ?
  - Same question with regard to **restrictions to pool exit**



# Constitution of the pool

## EXEMPTION UNDER 101 §3

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- In a data-driven economy, it may **foster innovation**
- Data pooling can be a way to **reduce risks** e.g. in insurance sector (*Asnef Equifax* ; specific exemption applying in the insurance sector until 2017)
- Fair share to consumers : e.g. protection of consumers against overindebtedness (*Asnef-Equifax*, § 67)
- Indispensability : limit the information contributed to the pool to what is strictly necessary to achieve its purpose

# Access to the pool

## WHEN IS ACCESS MANDATORY ?

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- *Asnef-Equifax (§60) : « If (...) accessibility were not guaranteed, some of those operators would be **placed at a disadvantage**, since they would have less information for the purpose of risk assessment, which would also not facilitate the entry of new operators on to the market ».*
- Horiz. Guidelines employ stricter wording : foreclosure « *is only possible if the information concerned is **very strategic** for competition **and** covers a **significant part of the relevant market** » (§70)*
- Granting access **does not give immunity** when information exchanged is strategic. See *John Deere*, § 98 : those who are outside the pool may suffer a competitive disadvantage even though they are not refused an access to the pool ; adhering to the pool can also put them at a disadvantage as it obliges them to disclose sensitive information

# Access to the pool

## HOW SHOULD ACCESS BE GRANTED ?

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- *Asnef-Equifax* : access must be **non-discriminatory**
- Insurance block exemption (Reg. 267/2010, expired in March 2017) : some data pools block exempted provided that they were (*inter alia*) available on **FRAND terms** including to non-participants and new entrants
- Access must be assessed in all its aspects (e.g. not only cost but also technical requirements)
- Access in the spotlight : see EU Commission's formal probe into Insurance Ireland (data pooling in the motor insurance sector)

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# Thank you !



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