



# THE NEXT STEP IN THE BATTLE FOR DATA? EU COMMISSION OPENS FORMAL INVESTIGATION INTO IRELAND'S INSURANCE MARKET

20 May 2019 | Europe  
Legal Briefings

---

On 14 May 2019, the EU Commission ("**the Commission**") [announced](#) that it has opened a formal antitrust investigation into Insurance Ireland, an association of insurance companies active in Ireland ("**Investigation**"). The association administers a database (Insurance Link), to which its member companies contribute insurance claims data on an ongoing basis. Insurance Ireland makes this database available to its members to facilitate the detection of potentially fraudulent behavior by insurance claimants. The opening of proceedings follows [unannounced inspections](#) in Ireland in July 2017.

Unlike in other cases where competitors have exchanged information, the Commission does not appear to be concerned about the data sharing as such. The Commission explicitly states that the data pooling in question probably contributes to effective competition and benefits consumers. Instead, the Commission wants to assess whether newcomers to the Irish insurance market were unfairly prevented from accessing the database and whether this might have had the effect of placing these companies at a competitive disadvantage vis-à-vis those companies with access. If the Commission can substantiate these allegations during its investigation, it is likely to treat this as an infringement against Article 101 Treaty on the Functioning of the European Union ("TFEU").

## **BACKGROUND AND WIDER CONTEXT OF THE INVESTIGATION: ACCESS TO DATA AND ANTITRUST**

While this investigation concerns a more traditional arrangement of data pooling/information exchange and not big data of a dominant platform, it can also be seen as an interesting development in the context of the wider debate of the importance of access to data for competition. Only at the beginning of April 2019 EU Commissioner Margrethe Vestager published a report "Competition Policy in the Digital Era" by her panel of digital experts (the "[EC Expert Report](#)", see also our [e-bulletin](#)). The EC Expert Report discusses, amongst other things, access to data under competition law in data pooling (page 94 et seq.). This topic has also been picked up by the Japan Fair Trade Commission in a [report](#) published in 2017. Last but not least the FCO's president Andreas Mundt indicated very recently that the market power of the tech giants might warrant data access remedies.

Against this background, the Commission's Investigation into Insurance Ireland is interesting for three reasons: (1) The Commission investigates an infringement under Article 101 TFEU and not under Article 102 TFEU. (2) It has been acknowledged so far that exclusionary data sharing could be an infringement of Article 101 TFEU - however neither the concept itself nor the remedies are clear cut. (3) This Investigation could provide the Commission with a chance to lay out fundamental principles with regard to access to data as an antitrust remedy.

## **ARTICLE 101 OR ARTICLE 102 CASE: DOMINANCE OR CONCERTED PRACTICE?**

In this context it is interesting to look at the exact concern raised by the Commission: at the time of dawn raid (2017) the Commission [referred](#) to both Articles 101 and 102 TFEU, its recent [announcement](#) that it has opened proceedings only refers to Article 101 TFEU. Whether this is related to the specific facts of the case or whether the Commission is not convinced on the legal side that the prohibition of abuse of a dominant position under Article 102 TFEU might be an appropriate tool to enforce data access is unclear. At least, as the recent EC Expert Report has outlined in some detail, access to data as a remedy in dominance cases sits oddly with the traditional Essential Facility doctrine that is deployed in other access cases. In particular, the Essential Facility doctrine was developed for access to infrastructure, which is different from data in many important ways. However, it is too early to conclude that the Commission is not prepared to use the abuse of dominance regime to force data access. In addition, it remains important to bear in mind that Articles 101 and 102 TFEU are fundamentally different in scope: While Article 102 TFEU – if and to the extent applicable – could give access to all relevant data held by the dominant company that is indispensable for competitors to compete, Article 101 TFEU can only give access to data that is actually shared between undertakings (i.e. that is the subject of the agreement between independent undertakings). In essence, a different benchmark applies: Under Article 102 TFEU the substantive question is whether data held by a dominant company is indispensable to compete effectively. This is unsurprisingly a very high threshold as in principle a dominant company is not obliged to share its data (or give access to its property, including intellectual property) except in exceptional and well defined circumstances. Under Article 101 TFEU, the access is limited from the outset to the pooled data – even where this might not be sufficient to compete, but access may be more easily mandated as a quid pro quo to allow the data pooling between competitors in the first place.

## **EXCLUSIONARY DATA SHARING AND ARTICLE 101 TFEU**

While data pooling – as EU Commissioner Vestager has pointed out at the Websummit in Lisbon 2018 – gives smaller enterprises a chance to produce large datasets to compete with the tech giants, the Insurance Ireland case shows that such data pooling could also lead to anti-competitive effects. Such effects have been identified by The European Court of Justice ("ECJ") in its John Deere judgement as early as 1998. The ECJ held that exclusive data sharing can give the cooperating undertakings a significant competitive advantage over others. That case concerned an information exchange system between tractor manufacturers in the UK; however, the Commission had based its case primarily on the anti-competitive effect of the exchange itself: The exchanged information identified actual sales of individual competitors which caused anti-competitive effects. So the Commission's decision and the ECJ was silent on the point of whether competitors could get access to the exchanged data. In its later Asnef-Equifax decision of 2006 (concerning the banking sector), the ECJ reiterated that an exchange of information can give the cooperating entities a competitive advantage. The ECJ then went one step further than in John Deere and held that Article 101 TFEU requires access "in a non-discriminatory manner". This case law is echoed in the Commission's guidelines on the application of Article 101 TFEU on horizontal co-operation ("[Horizontal Guidelines](#)"). The Horizontal Guidelines state that information sharing might have anti-competitive effects if it is exclusionary and places unaffiliated competitors at a significant disadvantage. But they do not lay out in greater detail at what point the exclusionary effect becomes an infringement of Article 101 (1) TFEU, and they do not spell out what an access remedy would look like to remedy such an infringement.

Prior to its expiry in March 2017, the [Block Exemption Regulation \("BER"\) for the Insurance Sector](#) exempted the joint compilation of data needed for the calculation of average costs to cover a specified risk from the application of Article 101 (1) TFEU. This exemption was subject to the condition that these compilations of data were made "available" for other insurance companies on "reasonable, affordable and non-discriminatory" terms. The BER covered only a narrowly defined type of data and did not provide guidance on how to determine whether the price for access was affordable or not. In a [report](#) to the EU Parliament and Council on the functioning of the BER the Commission stated that a more flexible approach might be needed that "can be more easily adapted to changing circumstances" than was provided by the BER. Nevertheless, the BER and its conditions could provide a starting point for scoping what a right to data access under Article 101 TFEU may look like.

## **OPPORTUNITY TO LAY OUT FUNDAMENTAL PRINCIPLES?**

Under these circumstances the Insurance Ireland Case is an opportunity for the Commission to give specific guidance on the conditions under which undertakings are obliged to give access to data in accordance with Article 101 TFEU. In particular, the Commission could address:

- what type of data warrants an obligation to give access to competitors;
- in what form access has to be granted;
- what the conditions for access could be (in particular, the question arises whether the data-pool could charge new entrants (who could not contribute datasets, at the outset at least) more than the incumbent cooperating partners; in a similar vein, the "FRAND cases" in the patent context have demonstrated that the terms of access can be difficult to assess).

## **WHAT IS AT STAKE FOR COMPANIES?**

In the meantime this Investigation should be a reason for other data-driven undertakings that are currently engaged in comparable information exchanges to revisit their self-assessments. But it may also have repercussions for more traditional schemes of information exchange (e.g. benchmarking and R&D co-operations) with changes potentially required to ensure competition law compliance.

In cases of doubt it may be an option for companies, trade associations, etc., to approach the Commission or National regulators pro-actively. The EC Expert Report recognised that new and complicated matters were at stake, and explicitly recommended that the Commission engages with the issues by providing guidance letters or "no infringement" decisions. These could give some comfort to market participants seeking to exchange information without giving access to all of their competitors.

In any event it remains a key priority for companies with data-driven business models to understand potential antitrust concerns with regard to data gathering, data sharing or data access early on and to adapt their practices accordingly. After all, antitrust law with its enforcement tools is an extremely sharp sword – as can already be seen from the Ireland Insurance case.



# KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**KYRIAKOS  
FOUNTOUKAKOS**

EMEA REGIONAL  
HEAD OF PRACTICE –  
COMPETITION,  
REGULATION AND  
TRADE, BRUSSELS  
+44 7920 455 155  
Kyriakos.Fountoukakos@hsf.com



**ANDRÉ PRETORIUS**  
PARTNER, LONDON

+44 20 7466 2738  
Andre.Pretorius@hsf.com



**DR MARCEL NUYS**  
PARTNER, GERMANY

+49 211 975 59065  
Marcel.Nuys@hsf.com



**DR FLORIAN  
HUERKAMP, MJUR  
(OXFORD)**  
COUNSEL, GERMANY

+49 211 975 59063  
Florian.huerkamp@hsf.com



**PETER ROWLAND**  
OF COUNSEL,  
BRUSSELS

+32 2 518 1847  
Peter.Rowland@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2022