



DATA POOLS AND COMPETITION LAW

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Data in the Digital Economy

Relevance of data to gain and hold market power

Singularities of data

Diversity and quantity increase the **value of data** – Combination

The importance to **control data sources** → Strategy of big techs to impose themselves as «data catching leaders» (e.g. imposing a technology or standard: Amazon domestic IoT devices).

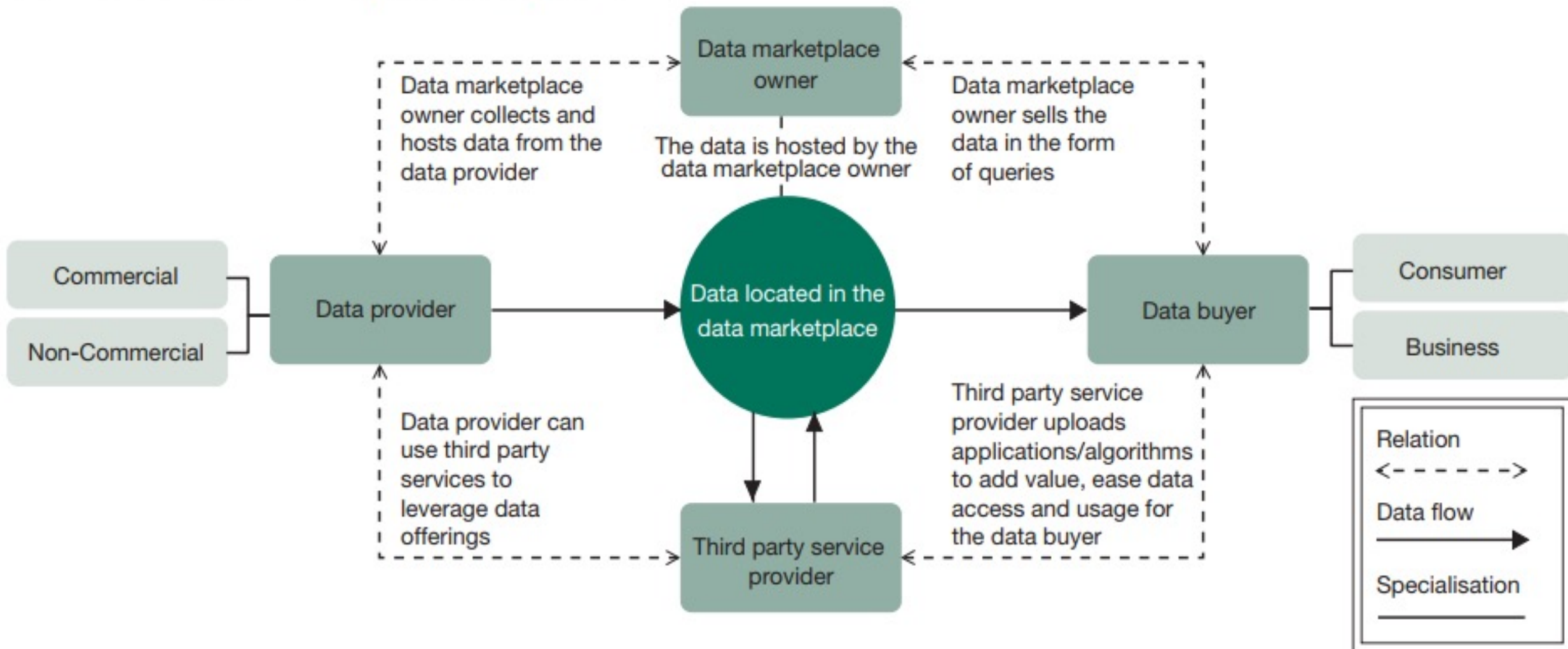
The impact of **time**: the older data, the less value

Data is relevant **not only for digital** industries, but also for brick-and-mortar activities

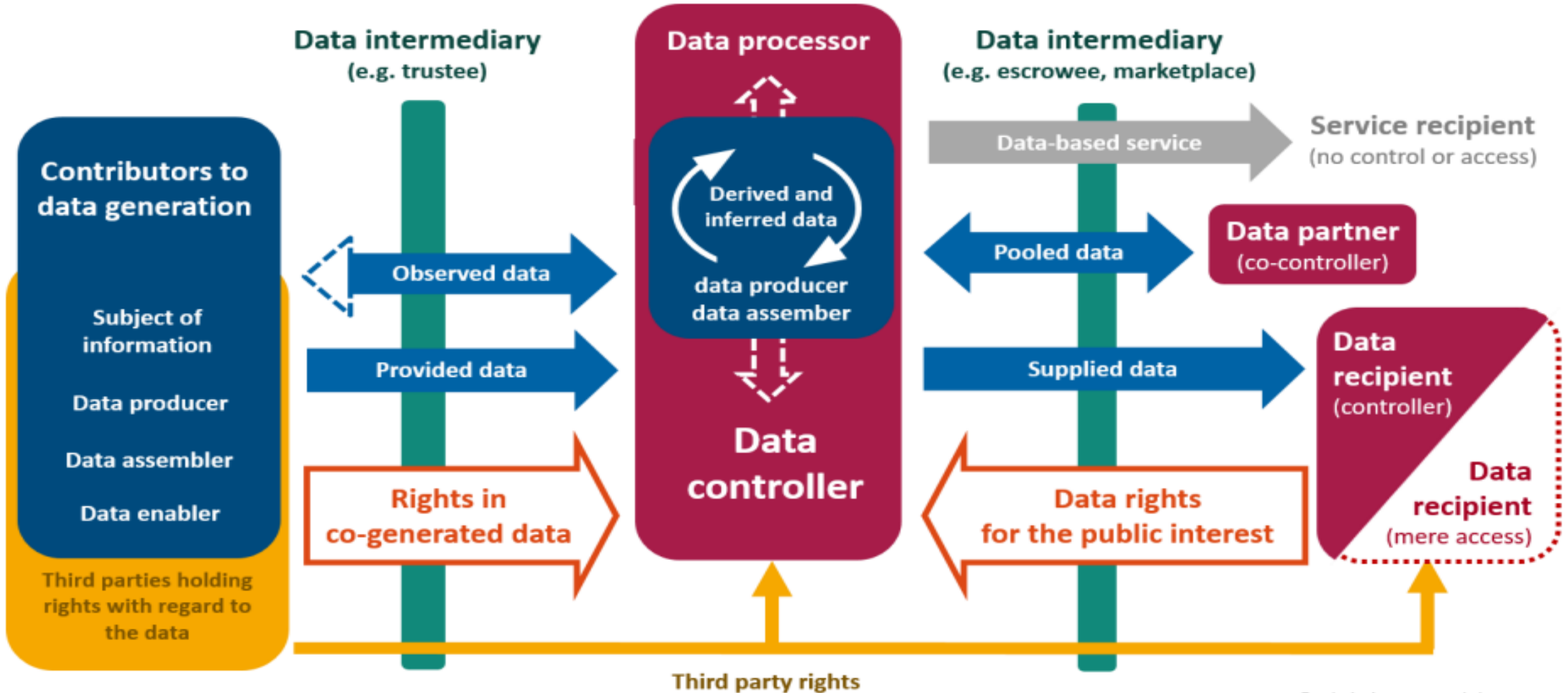


The need to foster a market for data: contracts and intermediaries

Role model of data marketplace ecosystems



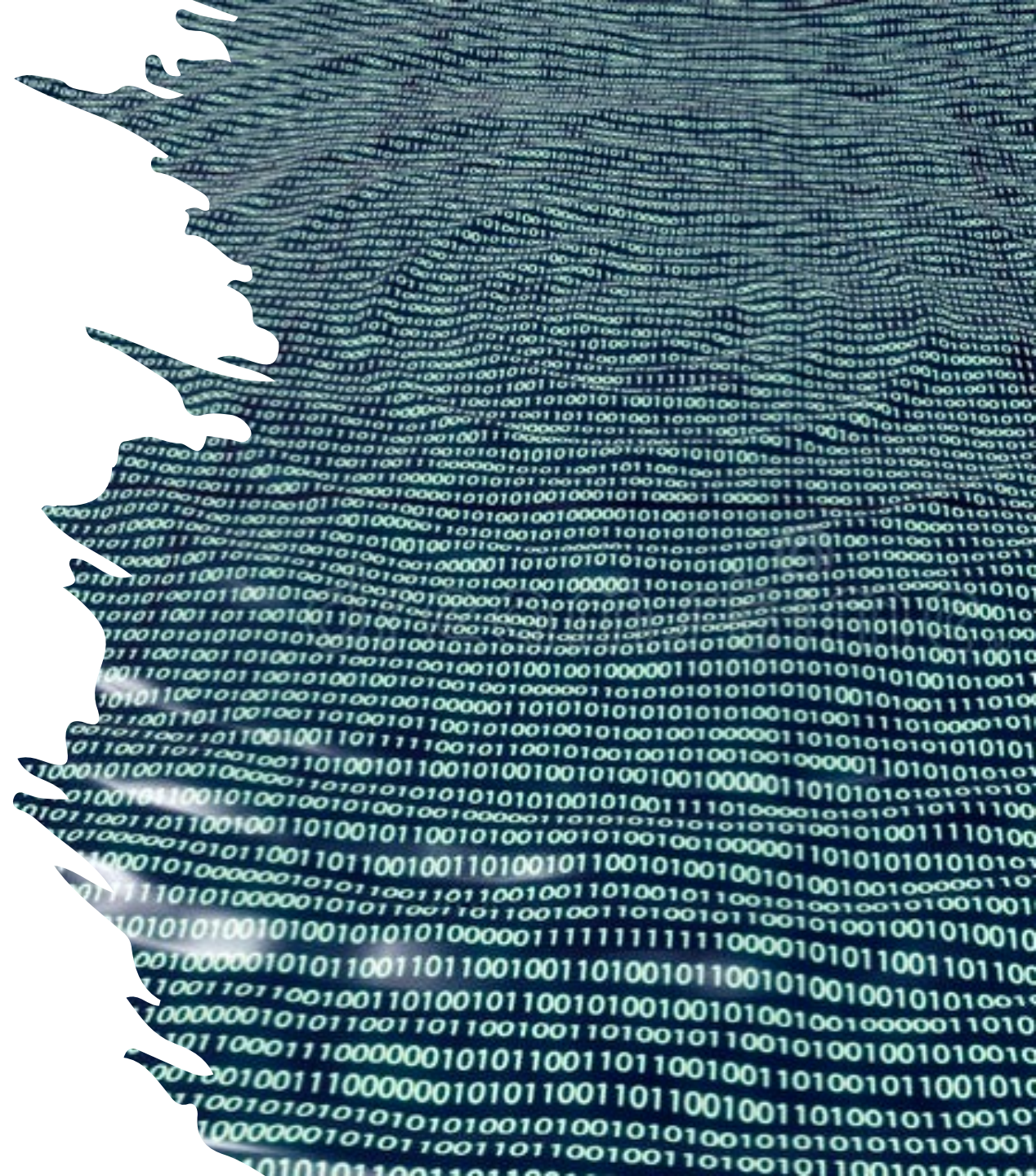
Data sharing and access contracts



What's a data pool?

A contract for data pooling is one under which two or more parties (the ‘data partners’) undertake to share data in a data pool by

- (a) transferring particular data to a medium that is jointly controlled by the data partners or that is controlled by a data trustee or escrowee or other third party acting on behalf of the data partners; or
- (b) granting each other access to particular data or the possibility to exploit particular data sources, with or without the involvement of a third party.





Kinds of data pools

Private data
pools – closed
data platforms

Public data
pools – open
data schemes

CONTRACTS FOR THE POOLING OF DATA

SCOPE:

- Two or more parties (partners) commit to share data in a consortium (pool) accessible for all of them

MODALITIES:

- **POOL IN A JOINTLY CONTROLLED MEDIUM:**
 - Data is transferred to a pool jointly controlled by the partners
- **INTERMEDIATED POOL**
 - Data is transferred to a medium controlled by a trustee, escrowee or other third party on behalf of the partners
- **DECENTRALIZED DATA POOL**
 - Partners just grant reciprocal access to data or the possibility to exploit certain data sources with no need for the intervention of a third party

DATA POOLS MANAGEMENT

Partners rights



RIGHT TO USE DATA:

Partners may only use data for the scope agreed in the contract

Data may be used for purposes which the relevant data partner could reasonably expect to be accepted by other data partners (unless inconsistent with the contract)

According to relevant regulation



GRANT THIRD PARTIES ACCESS TO THE POOL:

Data partners may engage data processors

But may otherwise pass data from the data pool or data derived from such data, on to third parties only under the conditions agreed upon the data partners

Partners rights

NEW IP RIGHTS:

- Belong to the partner or partners who conducted the activity leading to the creation of the new right

PARTNER LEAVE FROM THE POOL:

- Duty to return the data supplied by that relevant partner (not kept in the pool), BUT:
- Data derived from that data remains in the pool, EXCEPT:
 - Data essentially identical with the original data
- Upon leaving the data pool, a data partner is entitled to a copy of any data in the pool that has been derived, in whole or in a substantial part, from data supplied by that data partner

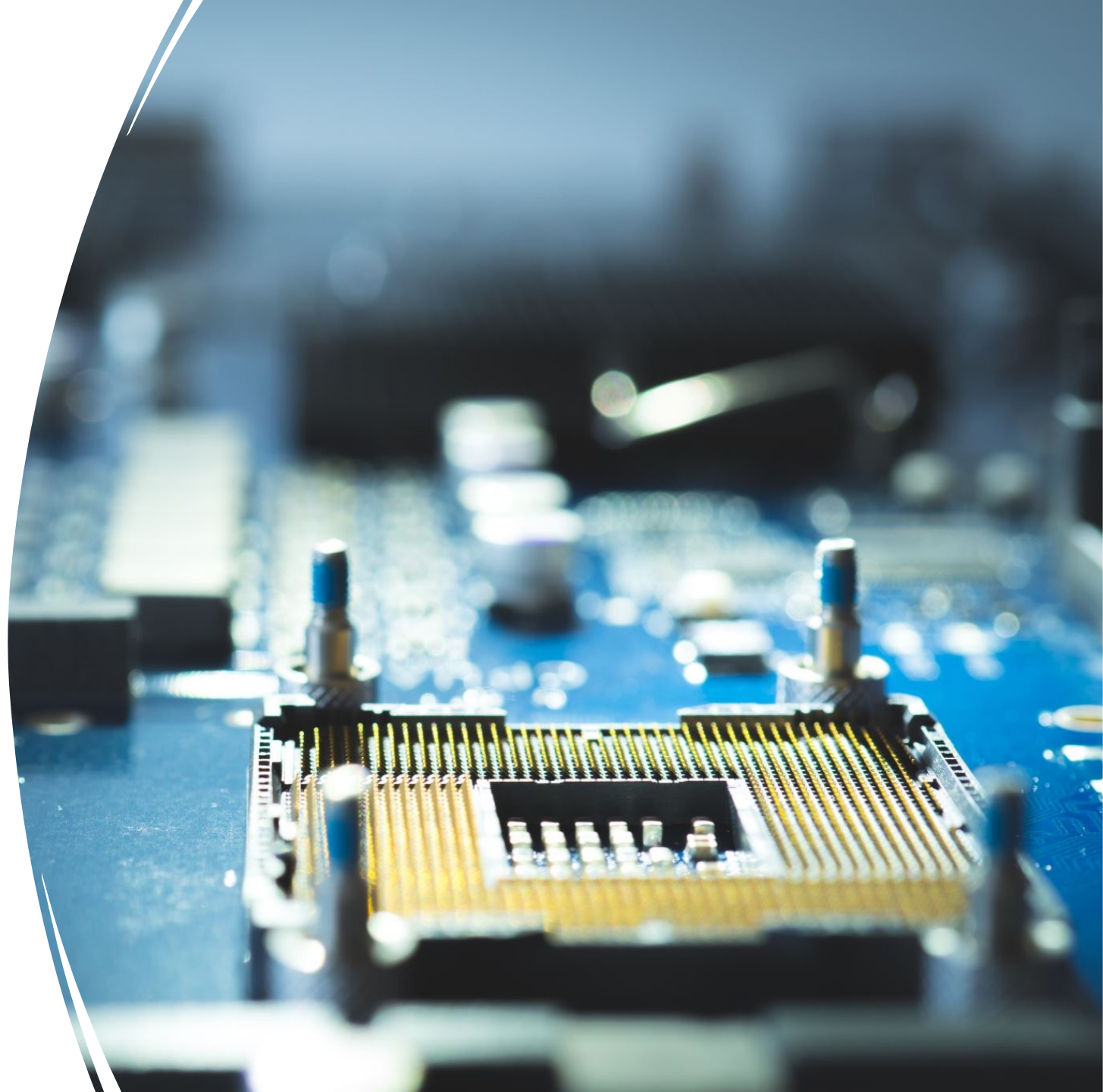
Relevance of data combination for industry: examples

- Self-driving vehicles
- Personalized medicine and pharma
- AI



Advantages of the combination of data


- Creation of new products and services
- Improving existing products and services
- Train algorithms and AI
- Reduce costs and increase efficiency
- Tailor made products: The products match better with the buyer needs



Risks of data pools (for competition)

- Facilitate collusion
- Allow market foreclosure and exclusion of actual/potential competitors
- Market abuses (e.g. hinder innovation)
- GAFAM strategy: previous strategy to set the data pool standard and control it. E.g. Amazon and domestic IoT devices





Need to set safe harbours for the building of data pools

Convenience of a guide from Competition
Authorities (e.g. Data sharing guidelines)

Legal framework

- Regulation (EU) 2022/868 - Data Governance Act
- Proposal for a regulation on Data Act
- OTHER RULES (that might serve as a guide):
 - Horizontal cooperation
 - R&D Guidelines
 - Standard Setting
 - (Patent) Pools
 - Information Exchanges

RISKS FOR COMPETITION LAW

- 1) RISK OF COLLUSION
- 2) RISK OF MARKET FORECLOSURE
- 3) RISK OF ABUSIVE CONDUCTS



Horizontal Guidelines (proposal)

«By artificially increasing transparency between competitors in the market, the exchange of commercially sensitive information can facilitate coordination of undertakings' competitive behaviour and result in restrictions of competition.

An exchange of commercially sensitive information in itself may allow undertakings to reach a common understanding on the terms of coordination which can lead to a collusive outcome on the market»

Information exchanges

- (i) raw and unorganised digital content that will need processing in order to make it useful (raw data);
 - (ii) pre-processed data, that has already been prepared and validated;
 - (iii) data that has been manipulated in order to produce meaningful information, of any form
 - (iv) any other type of information, including non-digital information.
- It includes physical information sharing and data sharing between actual or potential competitors.

```
mirror_mod = modifier_ob.  
set mirror object to mirror.  
mirror_mod.mirror_object  
operation == "MIRROR_X":  
mirror_mod.use_x = True  
mirror_mod.use_y = False  
mirror_mod.use_z = False  
operation == "MIRROR_Y":  
mirror_mod.use_x = False  
mirror_mod.use_y = True  
mirror_mod.use_z = False  
operation == "MIRROR_Z":  
mirror_mod.use_x = False  
mirror_mod.use_y = False  
mirror_mod.use_z = True  
  
#selection at the end -add  
mirror_ob.select= 1  
modifier_ob.select=1  
context.scene.objects.active  
("Selected" + str(modifier_ob.  
mirror_ob.select = 0  
= bpy.context.selected_object  
data.objects[one.name].select  
  
print("please select exactly  
  
-- OPERATOR CLASSES ----  
  
types.Operator):  
on X mirror to the selected  
object.mirror_mirror_x"  
mirror X"  
  
context):  
context.active_object is not
```



Ways the pool can be organized

- Information can be **directly** exchanged between competitors (in the form of a unilateral disclosure or in a bi- or multilateral exchange)
- or **indirectly** by or through:
 - a **third party** (such as a service provider, platform, online tool or algorithm)
 - **common agency** (for example, a trade association)
 - a **market research organization** (e.g. Asnef)
 - or through **suppliers or retailers** (e.g. platforms – booking.com)

Categories of data (and their impact on antitrust)

- A) Commercially sensitive information
- B) *PARTICULAR* commercially sensitive information
- C) Public information
- D) Data needed for industry, technology or product development
- E) Compulsory information – Information duties imposed by Regulation



Commercially sensitive information

Art. 101.1 applies if **it's likely to influence the commercial strategy** of competitors

- a. E.g. if information, once exchanged, reduces uncertainty regarding one or several **competitors' future or recent actions**
- b. E.g. relevant information for an undertaking to protect in order to **maintain or improve its competitive position** in the market.
- c. E.g. information on **prices**





PARTICULARLY commercially sensitive information

Restriction by object

- a. The exchange with competitors of an undertaking's *pricing* and *pricing intentions*
- b. The exchange with competitors of an undertaking's current and future *production capacities*
- c. The exchange with competitors of an undertaking's *intended commercial strategy*
- d. The exchange with competitors of an undertaking's *arrangements relating to current and future demand*
- e. The exchange with competitors of an undertaking's *future sales*
- f. The exchange with competitors of an undertaking's *current state and its business strategy*
- g. The exchange with competitors of future *product characteristics which are relevant for consumers*
- h. The exchange with competitors of information concerning positions on the market and *strategies at auctions for financial products*

Public information



Information that is generally equally accessible (in terms of costs of access) to all competitors and customers.

- Not if the costs involved in collecting the information deter other undertakings and customers from doing

Unlike to infringe 101.1 TFEU



Data concerning
industry, technology
or product
development
(technical data pools)

- Similar to **patent pools** – Should fall under the Technology Transfer Guidelines?
- Need to promote an «**all-industry sharing of data**» for the development of technology, innovation or R&D (e.g. development of IA or connected vehicles).
- **Risk of market foreclosure** → Exclusion of actual or potential competitors



Ways companies may avoid the risk of collusion

BLIND SHARING: To the development of an industry data can be shared in a BLIND WAY: «Companies could send their data to a platform and get back aggregated data, with no indication of the company it comes from».

LIMIT INFORMATION: Undertakings that want to (or need to) exchange information can put measures in place to restrict the access to information and/or control how information is used. – Prevent the anticompetitive use of sensible information.

- *Participants to a data pool should in principle only have access to their own information, and the final, aggregated, information of other participants. Technical and practical measures can ensure that a participant is unable to obtain commercially sensitive information from other participants → e.g. by granting the control of the pool to a third non-competitor part.*

II) RISK OF MARKET FORECLOSURE

When data is needed for an industry

Competitive foreclosure on the same market where the exchange takes place or on a related market:

- a) **On the same market:** Foreclosure on the same market can occur when the exchange of commercially sensitive information places competitors that do not take part in the exchange at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system.
- b) It cannot be excluded that information exchange may also lead to anti-competitive foreclosure of third parties **in a related market**. For instance, vertically integrated companies that exchange information in an upstream market may gain market power and collude to raise the price of a key component for a market downstream.



3rd parties access to the pool

If the information is strategic for competition in the market: need to grant access in **FRAND terms** →
Like standards, patent pools...

Need to grant access to any undertaking:

1. Allow access **to any** undertaking
2. **Transparent procedure** to adopt the standard
3. Access granted on **FRAND** terms
4. **Interoperability**

No strategic for competition (essential pool) – No obligation to share

Thank you!

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