



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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Please mind the data gap!

Digital markets and getting access to data: antitrust developments from IMS Health to the Digital Markets Act

Speakers: Claudia Berg, Covington & Burling LLP (**CB**)
Professor Annabelle Gawer, University of Surrey (**AG**)
Tom Reynolds, Information Commissioner's Office (**TR**)
Chaired by Jason Logendra, CLA Committee (**JL**)

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Introductions

Jason Logendra introduced the panel and opened the session. JL then introduced the key themes that will be explored in the discussion, which included the importance and consequent regulation of access to data, the competition issues arising from such access and topics in this realm that continue to be unexplored.

Why is access to data important?

Claudia Berg emphasised how all AI and foundation models today are trained on vast amounts of data. These are primarily from three sources: (i) scraping the internet; (ii) buying data from entities that commercially sell it; and (iii) collecting data from users with their consent.

Annabelle Gawer reflected on how digital goods blur the lines between consumption and the generation of data:

- Some companies excel at capturing and creating value from this data. Data can be used to build detailed user profiles, allowing companies like Amazon to aggregate data from multiple sources and markets.
- This feedback loop drives innovation, particularly in retail and supermarkets, where granular data informs product innovation and testing. Traditional sectors, such as the automotive industry, are seeing entries from big tech companies like Google and Apple, which offer new services by leveraging user data.

Speaking from an economic perspective, Tom Reynolds stated that digital markets gather and use data in unprecedented quantities, often as a byproduct of other activities:

- They benefit from economies of scale and scope, with data being non-rivalrous. While these and other features can lead to benefits for consumers they can also create barriers to entry as incumbents leverage feedback loops and network effects to achieve critical mass, stifling new entrants and making consumers feel locked in.



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- Dominant firms can reinforce market power by restricting data access, preventing smaller competitors from entering new markets. Regulatory measures like the Digital Markets Act (DMA) in the EU and the Digital Markets Competition and Consumer Act (DMCCA) in the UK therefore aim to balance access and restrictions to data.

How is access to data regulated and how has it changed?

CB reflected on the evolution of case law

- Historically, cases like *IMS Health* and its discussion of the "brick structure", show that data access has long been contentious.
- Now, the "data wars" highlight disputes over data ownership and access, for example, Reddit is suing Anthropic for scraping user posts, and Getty Images is suing Stability AI for using its images without permission.
- Innovations like Android Auto have further complicated the traditional landscape..

AG reflected on recent advancements:

- Sweden's automotive sector, supported by the government, encourages both incumbent firms and new entrants to innovate digitally by utilizing pooled vehicle data.
- In smart cities, data-sharing schemes aim to optimize services such as road maintenance and lighting, while also providing data to innovators for the generation of new services.
- However, implementation faces challenges such as connecting data streams and ensuring interoperability, often encountering roadblocks due to the multiple actors' divergent incentives. The promise of data sharing is compelling but practical execution remains difficult, with extensive coordination required.

TR and CB then discussed Article 20 of the GDPR which grants individuals the right to data portability, focusing on user control. In contrast, the UK's approach places the obligation on firms. New regulations like Article 6.9 of the DMA and the DMCC enhance data portability to promote market fairness and contestability, requiring "gatekeepers" to provide continuous, real-time access. This creates potential conflicts between user rights and market objectives, necessitating judicial balance.

The tensions between privacy and competition law

The panel discussed several pieces of tension between competition law and privacy:

- AG highlighted unresolved issues around data portability and interoperability, questioning where the interface for data sharing can be within complex, interdependent modules. In the automotive industry, for example, if taken literally, this would be akin to force car manufacturers to open their architecture to rivals, raising concerns about which information must be shared and who decides what is proprietary. The DMA lacks on this, leaving implementation dependent on product design specifics.
- CB stressed the need for secure data sharing, while AG discussed multiple trade-offs, including openness, security, safety, and aligning private incentives with market contestability. CB and AG acknowledged that all companies, especially "gatekeepers", have both privacy and antitrust obligations, and privacy should be taken equally seriously.



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TR focused on tensions in EU law particularly:

- There are unresolved issues in Article 6.9 and 6.10 of the DMA, which form unexplored territory. The scope of data includes "provided, observed, and inferred", with the first two covered under GDPR rules. The inclusion of inferred data under the DMA could raise issues, particularly regarding its fairness to "gatekeepers", as it is developed through investment and past innovations.
- APIs were a significant topic during the DMA drafting, with concerns about contaminated data and the challenges of implementing standards and interoperability. Article 48 could be a backstop in these circumstances, allowing standardisation bodies to step in and assist with these challenges.
- An open issue is also which parties need to be provided with data. The DMA mentions organisations that have "engaged" with people, but the definition of "engaged" is unclear, as to whether it means parties who have been consulted, those who are interested, or something else altogether.

What lies ahead for data access regulation

CB reflected on upcoming judicial and legislative action:

- Several issues are currently being addressed in court, including the Google trial in the USA. Suggested remedies in that case have included giving access to search data.
- CB also discussed the vigorous parliamentary debate over the data use and access bill, particularly the extent to which models can access copyrighted material. This debate will involve balancing the needs of AI developers with the interests of creative industries..

AG raised the importance of addressing concerns on interoperability:

- The rules are currently applicable to a small group of impactful companies which creates a difficulty due to the suite of products these companies offer, which creates multiple entry points and types of data to be shared.
- There is a lack of clarity on what types of data can be shared, in which format, and through which interface. AG emphasized the need for multiple "doors" to allow external actors to connect to these access products, pointing out the complex nature of data as both an input and output.