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Android and Forking Restrictions: On the Hidden Closedness of "Open"*

*Simonetta Vezzoso***

ABSTRACT: The Google Android Decision was announced by the European Commission on 18 July 2018. The Commission found that three restrictions related to Android and Android apps that Google imposed on mobile device manufacturers and network operators infringed Article 102 TFEU. These restrictions, according to the Commission, "have enabled Google to use Android as a vehicle to cement the dominance of its search engine".

The Android Decision is not yet public. The prohibition of Google's tying practices on the Android platform has already attracted significant attention by early commentators, also due to the proximity to other high profile antitrust cases. Against the backdrop of the still limited information available, the article proposes some first reflections on another conduct sanctioned by the Android Decision, namely Google's forking restriction imposed on device manufacturers. In particular, the article describes a possible reasoning underpinning Google's anti-fragmentation justification based on the economics of two-sided platforms. This justification stems from a purely "transactional view" of platforms. The article concludes that this view is only partially suitable to provide an accurate description of complex innovation ecosystems for the purposes of competition policy enforcement.

KEYWORDS: abuse of dominance, software platform, forking, tying, platform.

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Private Enforcement and Market Regulation*

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ABSTRACT: The article examines the technique of private enforcement as a juridical instrument to protect the market in combination with the punitive sanction mechanisms of public law.

After a first definition of private enforcement, we investigate the position taken by the European Commission on the use of private enforcement, verifying its function with respect to the objectives of market protection.

The main instruments of private enforcement are therefore considered: civil liability, termination of the contract, nullity of the contract, injunction. We will focus on the main constraints to the application of the abovementioned instruments of private enforcement proposing solutions in the light of an overcoming of the boundaries between public law and private law.

As highlighted in Directive 2014/104/EU, "the practical effect of the prohibitions laid down requires that anyone – be they an individual, including consumers and undertakings, or a public authority – can claim compensation before national courts for the harm caused to them by an infringement of those provisions." For this reason it is important to consider all the different private enforcement tools and try to remove the obstacles to their effective functioning.

Private law is activated on the action of individuals who exercise the rights recognised by the law. Individuals being closer to the emergence of the problem are able to represent the violation of the interests at stake according to the logic proper to the principle of subsidiarity.

The Principle of subsidiarity states that a wider and greater body, such as a government, should not exercise functions that can be carried out efficiently by a smaller one, such as an individual or a private group, acting independently.

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KEYWORDS: Market Regulation, Private enforcement, EU Law

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Cybersecurity and Liability in a Big Data World*

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ABSTRACT: The interplay between big data and cloud computing is at the same time undoubtedly promising, challenging and puzzling. The current technological landscape is not without paradoxes and risks, which under certain circumstances may raise liability issues for market operators. In this article we illustrate the several challenges in terms of security and resilience that market operators face as their overcoming is of strategic importance for businesses wishing to be deemed privacy-respectful and reliable market actors. After a brief overview of the potentialities and drawbacks deriving from the combination of big data and cloud computing, this article illustrates the challenges and the obligations imposed by the European institutions on providers processing personal data – pursuant to the General Data Protection Regulation – and on providers of digital services and essential services – according to the NIS Directive. We also survey the European institutions' push towards the development and adoption of codes of conduct, standards and certificates, as well as their last proposal for a new Cybersecurity Act. We conclude by showing that, despite this articulate framework, big data and cloud service providers still leverage on their strong market power to use "contractual shields" and escape liability.

KEYWORDS: Big data, security, liability, NIS Directive, GDPR, cloud, ISP, Cybersecurity Act

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Big Data Competition and Market Power*

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ABSTRACT: Big data are considered at the same time a promising driver of economic development and a concern for possible manipulation and privacy intrusion. Data diffusion and their uncertain appropriability can make property rights regarding data less precise than those regarding traditional goods.
The article reviews some economic features of data. In many digital markets data can be considered a relevant input for production but hardly an essential facility.
Many data are collected in two-sided market platforms and on the one side, they are used to personalise services and to add quality, while on the other side of the platform they contribute to make advertising collection more efficient. So, the transfer of personal data can be considered an implicit price for many free information services. Consumers are usually unaware of subsequent pervasive use of their personal data, and therefore give them away easily. Big data can amplify competitive advantages and related dominant positions, leveraging on information asymmetries.
A dominant position obtained through collection and processing of big amounts of personal data allow practices such as first-degree price discrimination, personalised advertising, and artificial degradation of services that can sometimes be considered competitive abuse, but it is difficult that data alone allow to maintain a true dominant position.

KEYWORDS: big data, data protection, personal data, privacy, value of data, value of privacy, relevant market for data

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Mind the Gap! ECN+ Directive Proposal on its Way to Eliminate Deficiencies of Regulation 1/2003: Polish Perspective

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ABSTRACT: This article aims at answering the question whether the Commission's proposal intended to empower Member States' competition authorities to be more effective enforcers (ECN+ Directive) actually brings effective solutions to all weaknesses of Regulation 1/2003, which influenced an inefficient application of Articles 101 and 102 TFEU in some Member States (among them Poland, which will be taken as a point of reference).

The first part of the article constitutes a review upon the application of Regulation 1/2003 in Poland. Interestingly, the beginning of its enforcement coincides with the total period of application of EU law in Poland, since the country joined the EU on the same day the Regulation entered into force. The problem with Regulation 1/2003 is that it does not seem to enhance the enforcement of the Community's competition rules by national enforcers, including NCAs and courts. The reason for this failure lies *inter alia* in the deficiencies of the principles adopted in the Regulation itself, including a lack of procedural unification (or at least some harmonisation) in cases where European substantive law is to be applied.

In the second part of the article, the content of the Commission's proposal on ECN+ Directive is analysed in order to find whether new regulations are able to solve problems identified in the Polish application of the Treaty's provisions. The article concludes with an overall assessment of the proposed Directive and a list of conditions for effective implementation of the Directive.

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KEYWORDS: ECN+; competition authority; empowerment; national enforcer; Regulation 1/2003.

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EU Case Law Developments on Age Discrimination

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ABSTRACT: The principle of non-discrimination on grounds of age has been declared an autonomous EU law principle by the European Court of Justice. This principle has been specified in a Directive, but its scope of application is currently limited to employment and occupational activities. The Directive protects both younger and older workers from being directly or indirectly discriminated due to their age. However, given the specificity of age as a factor of discrimination, the Directive allows the Member States to apply some derogations to this principle if, within the context of national law, they are objectively and reasonably justified by a legitimate aim.

In the present contribution, we intend to analyse the Court's application and interpretation of the principle of non-discrimination on grounds of age as established in the Directive and comment on some of the most relevant preliminary rulings. In many of these rulings, the Court was asked whether the Directive precludes national norms which establish a mandatory retirement age or foresee the termination of the employment contract when the worker reaches a certain age.

The Court's interpretation of the principle of non-discrimination on grounds of age, as established in the Directive, could contribute to easing some of the EU´s current economic, social and demographic challenges and to the improvement of European workers' lives; however, the Court seems to accept Member States' derogations to this principle too easily.

KEYWORDS: Age discrimination – youth unemployment – labour market – employment policy – intergenerational balance

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