

# MARKET AND COMPETITION LAW REVIEW

**M&  
CLR**

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EDITORIAL

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## Editorial

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The editorial board is pleased to publish the last issue of the second volume of the *Market and Competition Law Review (M&CLR)*, edited by Universidade Católica Editora.

This volume is devoted to digital disruption and competition policy, with the view to verify whether traditional private and public competition enforcement is able to deal with the data era, and whether it is desirable to adjust or even replace categories that are proven to be mainly suited to tackle anticompetitive conducts associated with stable innovations in markets where static competition prevails.

There is in fact no doubt that what we experience as deeply new is the emergence of a datification where, on the one hand, data and services are traded and used across sectors and borders and, on the other hand, the data-driven innovations generate an unsolicited domino effect for the sole fact of insisting in the digital ecosystem.

Moreover, thanks to the digital technologies, innovations rely on and benefit from some of their inherent structural features, such as interconnection and network effects, disintermediation and scalability, providing rapid access to a potentially global customer base. If the data-driven innovation is disruptive, the process of creative destruction is much faster, and it affects the network at different layers and with different intensity, but always in an accelerated and dynamic way.

The implications for competition law and policy are enormous, because disruptive inventions create new markets and affect all the others, and revolutionise products design policy and market players' business models at large.

With this in mind, the opening article by Simonetta Vezzoso focuses on the intersection between intellectual property and competition law,



commenting on the effectiveness of the EU Google Android decision, very recently announced but still unpublished. In the article, Simonetta analyses the forking restrictions imposed by Google on device manufacturers and the sanction applied, coming to the conclusion that, whereas Android is an open source code, Google's conduct, as represented by the Commission, prevented a number of manufacturers from developing and selling devices based on an Amazon's Android fork called "Fire OS", thus exclusionary affecting the market and in the end enabling the dominant firm to use Android as a vehicle to cement the dominance of its search engine. In the author's opinion, even endorsing the *fil rouge* proposed by the Commission, the decision cannot be interpreted as a public enforcement success because of the limited impact of the sanction applied, which is unable to affect Google's business strategy.

Subsequently, Prof. Sara Landini enlarges the perspective, examining the interplay between private enforcement and market regulation in the new millennium, advocating the virtues of private law instruments as having a relevant impact on the effectiveness of rules, including those of public interest.

In the author's line of reasoning, whenever a rule of public interest also identifies individual rights, it is important, and for the purpose of the effectiveness of the law itself, the level of protection according to the rules of private law of such rights operated by the individual who has suffered damage due to violation of the law is also important, particularly in what regards safeguards that ensure effective legal protection and the effective enforcement of material claims.

Afterwards, Prof. Maria Lillà Montagnani insists together with Mirta Antonella Cavallo on the contractual safeguards used by cloud computing and big data operators to avoid liabilities arising from the General Data Protection Regulation and the proposed new Cybersecurity Act. In the article, the authors illustrate the security and resilience issues that market operators face in the digital economy, since overcoming those challenges is of strategic importance for businesses wishing to be deemed privacy-respectful and reliable market actors, coming to the conclusion that, despite a very dynamic and articulate EU legal framework, big data and cloud service providers still leverage their strong bargaining power as a "contractual shield" and to escape liability.

In the following article, Prof. Marco Gambaro devotes his analysis to big data as both a key driver of economic development and a possible privacy

concern, coming however to the conclusion that, even though collection and processing of big amounts of personal data allow practices integrating price discrimination, personalised advertising and artificial degradation of services, it is hard, from an economic perspective, that data alone qualify for a sufficient asset to maintain a stable dominant position. Therefore, in this scenario, a new wave of consumer protection regulations is foreseeable which will tend to slightly rebalance information and power asymmetries between firms and consumers, taking into account the new digital landscape.

The second section of this Issue concerns legislation and case comments and contains two contributions: Agata Jurkowska-Gomułka reflects on the relevance of the Proposal for a Directive of the European Parliament and of the Council to empower Member States' competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market (known as the ECN+ Directive Proposal), and Catarina Vieira Peres analyses the recent EU case law developments on age discrimination.

In the third section, Sílvia Venda Bessa reviews the book of Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*.

Porto, October 2018