

# Economic Law and The Development of Digital Markets, between Ethics and Efficiency

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**Abstract:** Market digitalisation leads law to transpose traditional concepts of economic regulation to another theoretical and practical level. Through the legal balance among ordo-liberal and protectionist approaches, public powers seek to functionalize digital economy to socio-economic development purposes. However, such functionalization is inherently connected to supervision and control over online markets. The object of such evolutionary processes comes to be the relationship between legal subjects. The orientation and the transparency of the online legal relationship represent one of the most advanced goals of modern economic law, attempting to neutralize, through regulation, the inevitable information asymmetry distancing each of the subjects involved from the whole system.

The paper, mainly focusing on certain recent developments in the legal systems of the PRC and the EU will attempt to sketch the relevant issues and some possible solutions.

## Introduction – Market Regulation and the Development of Digital Markets

Digitalisation is an epiphany of the fragmented character of modern global law (Backer, 2012). This assumption, though hardly disputable, stimulates the search for logically feasible legal regimes, fit to sustain the burden of a digital economy. The *fil rouge* of one of these (possible) regimes echoes a well-known approach to economic law: the institutional one (Romano, 1945; Di Gaspare, 2015).

In the era of de-codification (Irti, 1979), economic regulation, partly denying the assumptions already held by Sumner Maine (Sumner Maine, 1861) – who associated the development of modern law with the transition from status to contract – relied

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more and more on *statutes* to create sets of differentiated legal provisions targeting different subjects, i.e. consumers, financial institutions, etc.

Within this pattern, digital economy is no exception. The main regulatory efforts of several legislatures have produced special laws, defining the right and duties of such subjects with regard to economic activities such as e-commerce or, more in general, internet operation, as it happens with cybersecurity regulations. The emergence of digital transactions, however, also changed the spatial dimension of modern economy, reshaping the geography of markets and urging national and supranational legislature to either remove borders or setting new ones.

Economic law contributes to such process through its institutional dynamics. The legal norm, in the economy, is not a mere representation of the legislature's will, but arises from the evolutionary relations involving economic operators, public authorities and consumers. To define a role for the law in this context is no easy task.

It is a common view that digitalisation did not create a "new economy" but is rather a "new tool" to enable market transactions (Pénard, 2006). Such transactions, however, when carried out online, function according to behavioural patterns affected by the detachment of economic actors (e.g. consumers, retailers, etc.) from the geo-physical "space" of traditional markets.

In light of such premises, the main critical relation shaping the evolution of economic law in the digital world is that between digitalisation and competition.

The impact of digitalisation on competition law was already recognized at the end of the last century, when legal scholars realized that the "consumer sovereignty" was indeed expanded by the increase in choice and information provided by electronic trade (Balto, 2000) but, on the other hand, was counterbalanced by other relevant aspects. In the first place, the increasing importance acquired by the role of the intermediary (Balto, 2000), in light of a notion of the internet as an "ensemble of platforms" (Pénard, 2006).

The capacity to process larger and larger quantities of data and transactions, coupled with the detachment from the geographical boundaries of markets led to the creation of huge blocks of market power. As noted by Chinese scholars (Chen Bing, 2018), big data processing bears both incentives and risks for market competition. On the one hand, through data processing economic operators are able to effectively respond to changes in consumers' demands, by enhancing product quality and entering into virtuous

competition cycles with other operators. However, the concentration of such power of processing data into the hands of trans-national operators and platforms – such as social media, online trade platform, etc. – poses a relevant regulatory issue. Furthermore, such concentration is not reflected by a simplification of relational links, which, in the modern internet, are increasingly complex and numerous, so that internet economy is essentially both decentralized and de-structured (Chen Bing, 2019).

The consolidation of dominant position through the management of big data may therefore rely on the variable uses of such data, depending on the individual characteristics of customers. It is a process of domination based on discrimination toward users (Pénard, 2006).

From the perspective of data protection, the main necessity is obviously that of preventing abuses and improper usage of personal data. However, from the perspective of competition regulation, the main issue of how to avoid high barriers to entry the relevant markets (Chen Bing, 2018, Balto, 2000) created, directly or indirectly, by such dominant operators. Furthermore, in long-term perspective, dominant positions could reduce the efficiency of the service provided as well as of consumers' actual freedom of choice.

Even the position of search engines raises complex issues concerning competition. The issue of “neutrality” in internet economic governance (Rotchild, 2016) concerns the (possible) manipulation of data and online research paths, carried out by search engines, in order to direct the netizens towards certain websites or web products (Körber, 2014). Save for global and easily recognizable brands, economic operators may be penalized by their absence from search results connected to specific terms. On the other hand, the algorithms which determine search results have been invoked by web giants such as Google to exclude a direct intervention in the data processing. In other words, the exclusion of certain results would be the natural outcome of a competitive process where most innovative operators are able to provide better websites which are then classified by algorithms according to a quality score (Körber, 2014). It is easy to see how the boundaries between competition, innovation and abuse of dominance are fuzzy.

That of online advertising is a classic example. Search engines function as intermediaries between advertisers and other online publishers. The commercial use of keywords and search paths has been known since the late 1990s. Rapid processes of concentration and acquisitions further consolidated the dominance of a few giants. Acting between

advertisers and consumers the search engine centralizes transactions and matches advertisements with consumers' profiles (Spulber, 2009).

Finally, yet importantly, dominant positions revolving around control of big data enhances the trans-national regulatory powers of digital market operators (e.g. Amazon) over their suppliers. In other words, global operators' codes of conduct (often explicitly addressed to suppliers) directly affect the content of supply contracts stipulated along the global production chains. Moreover, data processing facilitates the elaboration of centrally planned strategies while reducing the costs of strategic displacement of resources.

These issues pertain to the regulatory dimension of globalization (Ruggie, 2017, Milhaupt, 2003, Oshionebo, 2009) and are common to many Multinational Corporations. However, in the digital economy, the phenomenon may be amplified, and the exercise of market powers may be more intense.

Such circumstance, indeed, might also bear positive externalities, such as the diffusion of ethical standards sponsored by such global operators (Riziki Majinge, 2011). On the other hand, there is a clear erosion of states' sovereignty.

As just seen, many issues arising from the digitalisation of modern economy are common all over the world. However, other considerations must be diversified according to the national contexts. In particular, while the prevention of market barriers and dominant positions reflects a static efficiency-driven liberal-democratic view of competition regulation, digitalisation is, on the other hand, also a policy tool. In other words, the establishment of strong and even "dominant" operators may respond to strategic objectives pursued by national governments, especially in developing countries where the digitalisation of economic transactions is an important social development driver.<sup>2</sup>

How does economic law respond to these complex and multi-faceted stimuli?

When faced with the emergence of e-trade contracts, national legislatures, for the most part, proceeded to adapt traditional rules on contracts to the new instruments of economic commerce (Rotchild, 2016). Where the focus of the legislative effort is consumer protection, as in the EU, legislation tends to balance the inherent asymmetry

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2 See the 1st Report by the BRICS Competition Authorities Working Group on Digital Economy, *BRICS in the Digital Economy*.

of the contractual relationship in favour of the consumer, thus emphasizing the transparency dimension and laying out information which are required to be provided, as in the EC Directive 2000/31 on e-commerce.

However, in a digital economy where the status of the operators (intermediaries, search engines, platforms, etc.) increases the divergence between behavioural patterns in economic transactions, market balance cannot rely solely on contractual rules. In particular, the general regimes of market regulation in fields as competition and liability seems to require a diversified effort (Rotchild, 2016), which legislatures have rarely carried out.

Even international law does not offer solid references. The U.N. development vision conceives the digital space as a communication instrument, thus raising the issue of the access to the internet (Sustainable Development Goals – Goal no. 9), but does seek to make digitalisation directly functional to a comprehensive vision of market development. Furthermore, bilateral or regional trade agreements, when including provisions about e-commerce or digital markets, only provide broad promotional measures and do not aim at regulating the phenomenon in a comprehensive manner.

The definition of a new role for economic law in digital markets revolves around at least three critical connections:

- That between market efficiency and public economic policy
- That between contractual rules and liability regimes
- That between consumer protection and competition regulation

It would be impossible to extensively address each one of such points; however, some useful remarks may be drawn thanks to the comparative analysis of those experiences which integrated digital economy in their development doctrines and strategies. By verifying the correspondence or divergence between the theoretical-political view of digital development and the concrete applications of legal rules designed to regulate it, we may be able to comprehend which “poles” of the aforementioned connections are emphasized.

The models selected for the analysis are the Chinese one and the European one. Both of them explicitly upheld and promoted a strategy of “sustainable digital development”.

In paragraph 2, the analysis will focus on the macro-dimension of such strategy, trying to explain the theoretical premises of the integration between digitalisation and development doctrines. In paragraph 3, I will describe how the premises laid out in the discourse of socialist market economy (社会主义市场经济 – *shehuizhuyishichangjingi*) have been interpreted and applied through specific provisions of Chinese economic law. In paragraph 4, I will concentrate on EU law and try to identify some legal rules which are functional to the promotion of a single digital market. In paragraph 5, I will draw some brief conclusions.

## Digitalisation and economic development doctrines in China and Europe

The global debate on digitalisation and economic development gained momentum with the dawn of this century. Its functionalization to sustainable development purposes has, however, been a fragmented and incomplete process.

It was, nonetheless, expectable that a higher level of integration was to be reached by those experiences already emphasizing the public role in development coordination, such as the Chinese one.

Today, the great significance of the Chinese internet in terms of people connected – more than 800 million in 2018 – and revenues generated – almost 500 billion yuan per quarter in 2018 – is a common place among scholars (Chen Bing, 2019).

However, the political discourse as well as the attention of foreign studies focused on the assessment of China as a cyber-power in terms of capacity to process and supervise information flowing (Xi Jinping, 2013; Stevens, 2017). Web sovereignty was thus developed as a principle functional to the protection of public security and public interests rather than to economic development, as also emphasized by Art. 1 of the Cybersecurity law. The notion itself of “cyberspace sovereignty” is somewhat uncertain. Those who oppose it (Mueller, 2019) highlight the pure “open” dimension of certain key features of the internet, such as the internet protocols (IPs).

The Chinese model challenges this view, not by denying the “sharing” character of the internet, but instead by actively promoting a monitoring role for public authorities.

The Chinese legal system, so far, represents the most advanced example of internet sovereignty (Jinghan Zeng, Stevens, Yaru Chen, 2017), not only on account of its

restrictions and boundaries, but also thanks to a complex regulatory settings now revolving around the Cybersecurity Law and, above all, its Art. 37<sup>3</sup> (Moriconi, 2019).

What a superficial interpretation of the political discourse may overlook is, however, the deep integration between cyberspace sovereignty and the coordination of socio-economic development.

This point is less emphasized by foreign scholars, but is clear from the text of the 13th Five-Year Plan, where it states that “we will ensure a thorough understanding of developmental trends in information technology, implement the national cyber development strategy, accelerate the development of digital technology, deepen the integration of information technology into economic and social development, and accelerate the expansion of the information economy”.<sup>4</sup>

It is not possible to address the issue of legal governance of internet in China without clarifying some of those institutional relations pertaining to the “deeper structures” of the Chinese legal system (Kischel, 2019). Network operators and platforms have close ties with the public powers and put some of their information process capacity at disposal of development strategies. Public polls on WeChat have been used to collect opinions of policy fields to be included in long-term development plans.

Social networks are involved in public consultation processes which are now rendered mandatory by the Interim Regulation on Major Administrative Decision-Making Procedures.<sup>5</sup> This legal development actively pursues digitalisation as a mean to enhance deliberative democracy, within the context of a new way of thinking decision-making processes (Wang Shaoguang, Yan Yilong, 2016).

Chinese internet operators are thus viewed as national champions, whose power in the market may be indeed promoted, within the context of a new phase of China’s industrial policy (Hempill, White III, 2013).

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3 The article states that “Personal information and important data collected and produced by critical information infrastructure operators during their operations within the territory of the People’s Republic of China shall be stored within China. If it is indeed necessary to provide such information and data to overseas parties due to business requirements, security assessment shall be conducted in accordance with the measures developed by the national cyberspace administration in conjunction with relevant departments of the State Council, unless it is otherwise prescribed by any law or administrative regulation”.

4 Part VI, Preamble

5 重大行政决策程序暂行条例 (*zhongdaxingzhengjuecechengxuzanxingtiaoli*), see in particular Section 2

Such vision is reflected by the gradual implementation of a national information strategy, aimed at fostering the establishment of great and strong domestic operators (Kalathil, 2017) capable not only to offer new services on a large scale to Chinese citizens but also to operate on foreign markets.

This stance is justified, from a legal perspective, by the affirmation of a notion of economic law upholding the non-neutrality of competition rules, in the sense that market regulation may (or must) respond to considerations pertaining not only to efficiency (both static and dynamic) but also to social issues and national strategies (Shi Jichun, Luo Weiheng, 2019).

Modern socialist market economy, therefore, strives for a connection between digitalisation and market regulation which is ultimately serving the purpose of national socio-economic development. The current struggle against the COVID-19 bears the signs of such connection: online platforms of food delivery (e.g. 美团 – *meituan*) as well as other kinds of trade platforms, social networks and web communication services have been crucial in the daily-life of Chinese quarantined people, limiting to the maximum possible extent the circulation of people buying supplies. However, the diffusion of such online services has reflected, in the past, the promotion of an integrated development strategy based on the digitalisation of Chinese society.

From this perspective, even the critical issue of internet censorship may be interpreted in light of a socio-economic policy pattern, meaning that the exclusion of certain foreign operators from the Chinese web (Google and its subsidiaries above all) fostered the growth of domestic providers of web services, such as Baidu, Youku, Tencent, etc.

The inclusion of digitalisation in the “discourse” of Chinese socio-economic development persuaded the legislature to treat the digital economy as a different theoretical block, to be governed by a separate adjudication system. This is the premise justifying the establishment of the Internet Courts (互联网法院 – *hulianwangfayuan*), which have been given a broad jurisdiction and in fact represent a distinguished branch of the judiciary.<sup>6</sup> To such distinction in the courts’ system does not correspond, however, a special set of substantive rules. In other words, apart from the e-commerce law of 2018, the Chinese legislature did not seek to create a comprehensive body of “internet law”. This is especially true in the field of competition, where internet-related

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6 See the Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Cases by Internet Courts (最高人民法院关于互联网法院审理案件若干问题的规定) of September 2018



disputes are growing but the rules to be applied by judges, in most cases, those designed for traditional competition disputes (Chen Bing, 2019).

The main problem, for Chinese policymakers, in the governance of digital economy is therefore to harmonize the theory with the practice or, in other words, to shape legal standards in order to judge internet-related disputes reconciling the integrated development view with existing legal provisions.

Compared to China, the European Union did not experience a top-down integration of digitalisation into a comprehensive development strategy. While it is certainly true that the Digital Single Market Strategy is in line with wide policy initiatives such as Europe 2020, the promotion and regulation of digital markets, in the European legal culture, stem from consideration of economic efficiency, i.e. benefits for consumers, derived from the *ordo-liberal* notion of social market economy. Productivity gains, reduced transaction costs, innovation and global competitiveness have been considered as the key links between the digitalisation of the EU economy and the single market frameworks (Marcus, Petropoulos, Yeung, 2019).

The Digital Single Market Strategy, as laid out by the Commission, reflects such stance, interpreting the “mission” of EU legislation as the removal of existing regulatory and fiscal barriers preventing a full integration of national digital spaces. On the other hand, the Commission also points out that the dimension of trust is essential for a balanced development of the digital market. On such premise, legislation should reflect upon specific regimes of liability. The Digital Single Market Strategy, as laid out in a 2015 Commission Communication,<sup>7</sup> focused on the role of online platforms, raising doubts about the efficacy of the existing legal regime (that of the e-commerce Directive) in order to enhance the level of responsibility of platforms in monitoring flows of data and information shared. In a subsequent communication,<sup>8</sup> the Commission acknowledged the fact that the e-commerce directive was designed in a period where the role of online platforms was very different from today, but did not support the idea of a comprehensive reassessment of their liability, instead favouring a spot approach focused on specific and sensible areas (such as protection of minors from harmful contents or protection from incitement to hatred).

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7 COM(2015) 192 final.

8 COM(2016) 288 final.

With regard to liability regimes for digital markets operators, further results have been achieved through the adjustment of traditional pillars of EU law (such as producer's liability) to the dynamics of digital economies (Marcus, Petropoulos, Yeung, 2019), as happened with the EU Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. As already noted, EU legislation touches on market regulation only indirectly. Being mostly preoccupied with efficiency considerations, it seeks to ensure the protection of "weaker parties" in economic transactions and most of all consumers. This stance reflects the underlying logic of the social market economy (Art. 3 TFEU) which interprets regulatory efforts in light of the relations between producers and consumers (Somma, 2016). Some authors pointed out that within this framework social instances are not relevant *per se* but only when functional to the realization of economic efficiency in the producer-consumer relation (Somma, 2016). This view may be somewhat extreme, but it helps explaining that the sustainability of the economic regulation of EU digital markets is mainly intended as the removal of internal barriers and the pursuit of the maximum efficiency in terms of consumer benefits regarding prices, services' conditions, etc.

In European law, it is the fundamental right to data protection which alters the purely efficiency-driven approach (Rodotà, 1995; Angiolini, 2020). In particular, Art. 8 of the ECHR and Art. 7 and 8 of the CFREU provided judges and scholars with a basis to test the legitimacy of web operators' behaviours. However, the right to data protection revolves around the position of the individual as a human being (not as a market operator) and does not pursue an integration with a doctrine of socio-economic development, nor does it functionalize digitalisation to an economic policy. Instead, it provides a platform of values against which to balance market freedoms, in light of the principle of proportionality.

Such conclusion is, indeed, in line with the *ordo-liberal* stance on market regulation and competition, which is, however, increasingly challenged by those scholars, who emphasize the porous nature of antitrust law, always exposed to socio-political considerations (Ezrachi, 2017).

In a comparative perspective, the position of digitalisation in economic law shifts between the strive for a balanced socio-economic development and the strive towards market efficiency. Although not mutually exclusive, the two positions characterize the theoretical doctrines underlying the Chinese and European strategies for the development of digital markets.

Now, the analysis must focus on the specific solutions that each one of the two legal orders shaped in order to pursue the goals laid out in their long-term visions.

## The Chinese model and the moral characterization of the internet economy

Three recently issued documents represent, ideally, three pillars of the Chinese system of internet governance: the Cybersecurity Law<sup>9</sup>; the Economic Commerce Law<sup>10</sup> and the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases by Internet Courts.<sup>11</sup>

The implementation of a specific substantive internet law, however, necessarily relies on the basic institutional structure of the socialist market economy and, in the first place, on the system of development planning. Both in the cybersecurity law and in the e-commerce law the commitment to include the addressed activities into development planning activities is one of the core points of the promotional strategy.<sup>12</sup> This means that key projects concerning those fields are, more likely than other projects, to be financed and subsidized through public funds (Sabatino, 2019).

Therefore, relevant operators (network operators, online economic operators) are privileged actors in the macro-economic arena.

Even the establishment of a separate system of internet courts (of first instance) serves the purpose of promoting digitalisation, through the definition of an online procedure law, so that disputes heard by internet courts are, for the most part, dealt with exclusively online or through digital channels.

The core of Chinese internet governance is therefore contained in public law provisions, displaying a strong promotional and organizational nature. The attribution of rights and the definition of specific regimes of liability seems to come second.

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9 中华人民共和国网络安全法 (*zhonghuarenmingongheguowangluoanquanfa*), effective since the 1st of June, 2017.

10 中华人民共和国电子商务法 (*zhonghuagongheguodianshangwufa*), adopted in August, 2018.

11 最高人民法院关于互联网法院审理案件若干问题的规定 (*zuigaorenminfayuanguanquanyuhulianwangfayuanshenlianjianruoganwentideguiding*), effective since the 7th of September, 2018

12 Art. 64 of the e-commerce law; Art. 8 of the cybersecurity law

However, if on the one hand existing legislation adopts a functional view of digital markets, on the other hand, it must develop specific principles in order to regulate the behaviour of digital markets operators for the benefit of socio-economic development of the nation (Zhou Qiang, 2017),

Chinese law addresses the issue by defining sets of moral and ethical rules directed at the relevant actors in the digital markets. In the cybersecurity law, Art. 9 states that “Network operators shall (...) abide by laws and administrative regulations, respect social morality, observe business ethics, have good faith, perform the cybersecurity protection obligation, accept supervision by the government and the public, and undertake social responsibilities”.

Such provision finds a sort of specification in economic legislation such as, for example, the new Art. 12 of the Anti-Unfair Competition Law, which exemplifies conducts of online operators colliding with competition rules.

With specific regard to competition law, Chinese legal scholars questioned the adaptation of traditional legal categories and concepts to the new forms of online competition. In particular, some authors believe that the de-structured nature of digital markets prevents a clear and logic definition of market boundaries and of competitive relationships in the market (Chen Bing, 2019). Therefore, the anti-competitive nature of certain conducts cannot be assessed in a purely objective way, from the perspective of the effects on the disputed relation, thus hindering the effectiveness of competition law. A change of perspective is therefore required. The focus of the judge’s evaluation should be on the behavioural patterns, i.e. the potential that certain behaviours have to hinder competition and damage other parties’ interests (Chen Bing, 2019). According to this author, the “competitive behaviour” (竞争行为 – *jingzhengxingwei*) absorbs the relevance of the “competitive relationship” (竞争关系 – *jingzhengguanxi*). In other words, it is not important to assess whether or not a specific competitive relation exists among the operators, but rather whether or not the behaviour of certain operators is able to endanger market balance.

The theoretical basis for such stance is that in digital markets trends such as globalization and sharing shape new ethical rules (Xie Lanfang, Huang Xijiang, 2018) which guide the conducts of economic operators.

What is the practical consequence of this theory? The most relevant one is the importance acquired by general clauses and broad principles.

So far, Chinese courts appear to rely much more on the adaptation of general principles and clauses than on the specific provisions for the internet (Chen Bing, Xu Wen, 2019). With regard to disputes concerning the unfair online competition, judicial decisions often refer to public interests and business ethics but connect them to general clauses, especially that of Art. 2 of the Anti-Unfair Competition Law, rather than to Art. 12 (Xie Lanfang, Huang Xijian, 2018).

Furthermore, the principles of good faith, honesty and credibility function as “umbrella clauses” to guide the interpretation of online conducts. The judicial practice confirms the theoretical stances of several scholars.

In this context, the task of a specified regulatory effort is assigned by the legislature to the industrial associations. Art. 8 of the E-commerce law and Art. 11 of the Cybersecurity law design an active role for industrial organizations, aimed at self-regulation and improvement, through the issuance of code of conducts and standards as well as through the management of disputes.<sup>13</sup> These provisions, obviously, must be interpreted in light of the particular status of industrial organizations in the Chinese legal system (Xi Jianming, 2010, Yao Xu, Che Liuchang, 2011). Such entities function as connection links between economic operators and public authorities; they follow centrally-planned development strategies and determine business initiative and conditions also in dialogue with public authorities (Sabatino, 2019).

The high degree of affiliation between entrepreneurs and the Communist Party (Xiaojun Yan, Jie Huang, 2017; Melnik, 2019) is well-known. This aspect explains how such institutional relations may support the scheme of internet governance, within the context of the so-called “communicative law-making”, a typical feature of modern Chinese law (Peng He, 2014).

If, the ethical characterization of the digital market in general connects fairly well with the general clauses of economic legislation, the definition of specific liability regimes undergoes continuous struggles. Chinese law, with regard to online transactions, favours, in principle, liability rules rather than validity rules. Therefore, it aims at the subject and not at the contract, whose legal force remains, in principle, untouched by infringements.

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13 Art. 60 of e-commerce law

A particularly strong concept of joint liability is introduced for network operators acting as intermediaries in economic transactions. Art. 38 of the e-commerce law establishes a joint liability for those e-commerce platforms which “know or should know that the goods sold or services provided by operators on platform are not in compliance with the requirements for safeguarding personal and property safety or otherwise infringe upon the legitimate rights and interests of consumers, but fails to take necessary measures”.

However, so far this provision was not really embraced by judges, who are reluctant to fully apply it and, in particular, to recognize the fault of negligence of the intermediaries,<sup>14</sup> thus saving them from joint liability.

It is, nonetheless, a relevant legislative indicator, that shows the tendency of the system toward a special regulatory setting revolving around the acknowledgment of the social function of network operators. On the other hand, the judicial practice shows that while judges easily refer to general provisions in order to develop concrete decisions to new types of economic transactions, with more specific rules the situation is different. Such occurrence, while hindering the practical value of provisions such as Art. 38 of the e-commerce law, reinforces the idea that the development of balanced digital markets is a goal pursued, in the first place, through public law instruments and, in particular, through the coordinative effort of the public authorities condensed in planning directives.

It is therefore, once again, a policy effort directed at the behaviour rather than at market, at the subjects rather than at the object. The same logic applies with regard to provisions about foreign investment, which preserve the national characters of strategic operators on the Chinese internet.

Both the negative list for foreign investments<sup>15</sup> and the negative list for investment in free trade zones<sup>16</sup> explicitly prohibit FDIs in “Internet news information services, Internet publication services, Internet video and audio program services, Internet cultural business (except music), and Internet social networking services”. Though e-commerce platforms are excluded from this negative list, the provisions, in essence,

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14 See, for instance, Decision of August 12th, 2019 of the Wuhan Intermediate People’s Court n. 7131/2019; Decision of 28th of June, 2019 of the Beijing Second Intermediate People’s Court n. 7852/2019

15 See the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2019 version)

16 See the Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2019 version)

ensure that the major internet operators and major data processing operators are Chinese.

The principle of internet sovereignty, in the digital markets, becomes a fluid concept which is not easily detectable by looking at just one regulatory set. Several economic law rules display an underlying logic supporting such regulatory effort. The institutional logic of economic law could, however, help to comprehend and interpret the complex legal framework of Chinese internet governance.

### The European stance, its ordo-liberal core and its recent evolutions

The assessment of digital market regulation in EU law is to be interpreted in light of adherence or deviation from an ordo-liberal approach. As far as the development of digital markets is concerned, EU law did not emphasize the programming dimension of the phenomenon, as it instead does with regard to other sensible policy sectors such as circular economy.

EU law, for the regulation of digital markets, relies on a consolidated set of both statutory and case law concerning mainly consumer protection. Provisions about unfair clauses and practices have been easily adapted to electronic commerce.<sup>17</sup> Moreover, the key concept of effectiveness, intended as effectiveness of EU law and effectiveness of judicial protection (Art. 47 CFREU) functions as a useful interpretative tool, for the CJEU and the national courts, to ensure high levels of protection for consumers (Navarretta, 2017).

Therefore, the legislative efforts have been directed mostly at specifying duties of online operators in terms of information, disclosure and transparency.

According to such approach, both Directive n. 1993/13 (as modified by Directive n. 2011/83) on consumer rights and Directive n. 2005/29 on unfair commercial practices may be applied with a certain efficiency to online transactions (Rotchild, 2016).

In 2019, Directive n. 770 introduced instead a set of special provisions related to contracts for the supply of digital content. The directive, acting upon the legal background concerning producer's liability (Benacchio, 2016), tries to shape a legal

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17 See, for instance, CJEU C-191/15 *Amazon*

regime revolving around the objective aspect of the economic transaction, i.e. the product.

The directive shapes the whole regime of liability of the trader on the basis of the notion of conformity. The legislative technique employed, as well as the remedies provided (bringing the product into conformity, termination of contract and price reduction) are all examples of legislative adaptation.

In other words, the market structures are the same, the only things that change are the material instrument to carry out the transactions.

EU law does not emphasize the ethical dimension of the internet as it happens in China. The regulation of the behaviour of network operators mainly stems from the protection of rights already incorporated in the EU legal order, such as, above all, the right to data privacy.<sup>18</sup>

On the other hand, the protection of intellectual property rights justifies the presence, in the e-commerce directive, of the so-called notice and takedown procedure (Wang, 2018).

In both cases, however, the duty imposed on the network operators is eminently passive. Network operators are not obliged to actively look for infringing materials, but must act upon notice of the interested party. Furthermore, the degree of detail of the notice required by national provisions may be particularly high as well as the burden of proof for the claimant, so that, for instance, ISPs are often asked to expeditiously remove materials contested only when they are manifestly unlawful (Wang, 2018).

In other circumstances, the passive role exercised by network operators is what, in EU law, exempts them from liability. This is the case of the Directive n. 2000/31 on E-commerce, whose Art. 12 and 14 provide for a general exemption from liability for service providers. The CJEU recently clarified<sup>19</sup> that the exemption is, in essence, connected to a purely technical, automatic and passive role of the e-commerce service provider. In other words, to be exempted from liability the provider must not have “control over the information transmitted or cached by his customers” and must not “play an active role in allowing those customers to optimise their online sales activity”.

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18 See CJEU C-131/12 *Google Spain*

19 CJEU C-521/17 *Coöperatieve Vereniging SNB-REACT U.A.*



These aspects are for the national judges to assess. However, the CJEU decision introduces a flexible double concept: the passive role on the one hand and the not-active role on the other, meaning that service providers must not carry out any activity which may imply a processing or management of consumers' data so to influence their freedom of choice.

The efficiency-driven approach is even stronger in the competition field.

In terms of policy, the first goal emphasized by the Digital Single Market Strategy is, obviously, that of creating harmonized market conditions within the Union. Articles 101 and 102 of the TFEU provided a legal basis flexible enough to pursue such objective in the enforcement of competition law (Jozwiak-Gorny, Jozwiak, 2017).

In the seminal decision *Pierre-Fabre*,<sup>20</sup> the CJEU ruled that a business contract clause prohibiting the use of internet as a marketing method is contrary to Art. 101 of the TFEU and not covered by the Block-Exemption Regulation.<sup>21</sup> The exceptions to such rule have been, subsequently, specified by the Court, so that the use of mainstream trade platform (such as, for instance, Amazon) in retail activities may be contractually impeded in order to preserve the image of certain goods, provided that the restrictive clause is proportionate and not discriminatory.<sup>22</sup>

The main preoccupation of the Court has been, therefore, that of harmonizing online market activities with the logic of a diversified free internal market. This was the stance taken by the EU Commission in its 2017 report on the E-commerce Sector Inquiry. Among competition concerns raised by the development of e-commerce, the Commission listed selective distribution agreements and other vertical restraints aimed at restricting online selling and/or advertising.<sup>23</sup>

It only briefly addressed competition issues related to the management of big data by online operators, stating that “the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services”.<sup>24</sup>

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20 CJEU C-409/09

21 Reg. 330/2010

22 CJEU C-230/16 *Coty Germany*

23 See 3.1.1; 3.1.2

24 Point 3.1.3

The EU legislation moves along the same policy lines and recently produced a Regulation to counteract the phenomenon of geo-blocking as well as other forms of discriminatory treatment. The rationale of the intervention is well expressed by Recital n. 1: “In order to realize the full potential of the internal market (...) it is not sufficient to abolish, between Member States, State barriers alone. Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms. That occurs where traders operating in one Member State block or limit access to their online interfaces, such as websites and apps, by customers from other Member States wishing to engage in cross-border transactions (...) It also occurs when certain traders apply different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline”.

However, the variable geometries of competition law allow for interpretative interventions scrutinizing certain critical aspects of online operators’ market power in light of their effects on consumers’ benefits.

It is, in particular, Art. 101 and 102 of the TFEU which empower both the Commission and the National Competition Authorities (NCAs) to assess typical clauses set in online contracts by relevant e-commerce platforms. The most relevant example is undoubtedly that of the Most Favoured Nation (MFN)<sup>25</sup> clauses in online hotel bookings.

Such clauses, in essence, required hotels not to apply, in direct transactions with customers, booking conditions more favourable than the ones provided through an online booking network (such as Booking.com or Expedia) (Colangelo, 2017, Cistaro, 2015).

Certain NCAs, the German *Bundeskartellamt* in first place, insisted upon the infringement of Art. 101 brought on by such clauses (Galli, 2018). According to such view, MFN clauses are by all regards a restrictive vertical agreement, which on one hand diminishes competition among Online Travel Agencies (OTAs) with regard to booking conditions decided by hotels. Consequently, the competition among OTAs concerning fees practiced over hotels is also diminished whereas such fees are instead gradually

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25 The term “Most Favored Nation” is derived from International Economic Law and refers to a clause of a bilateral agreement where a State guarantees to another State that it applies to an agreement the most favorable conditions it applies in the international economic agreements which it takes part in.

increased. In the third place, MFN clauses employed by existing operators constitute barriers for new online platforms to enter the market.

Apart from the *Bundeskartellamt*, which repeatedly ruled for the invalidity of such clauses, other NCAs have often accepted OTAs commitments to restrict the application of such clauses or to counterbalance their effect by offering discounts for consumers (Colangelo, 2017).

However, certain national legislatures have decided to prevent by statutory means the applications of such clauses, by upholding their nullity.<sup>26</sup>

In some cases, as for instance in Italy,<sup>27</sup> the formulation of the legal rule is particularly harsh but at the same time not so clear and has therefore raised criticism. In particular, it does not take into account that MFN clauses may be employed in different forms and may not only prevent *tout cour* hotels from applying better conditions in transactions outside the online platform. They may also require that the better conditions offered to third parties are also offered to the OTAs (Galli, 2018).

The legislatures should therefore ponder deeply the effects that different clauses may have on competition before ruling for their invalidity.

The discussion upon MFN clauses, however, offers at least two arguments up for debate. In the first place, NCAs realized and assessed, in light of Art. 101 of the TFEU, the effects on competition derived from relevant market positions of network operators. Such consideration suggests a gradual shift of paradigm, from a purely promotional one (save for data protection rules) to a mixed one, comprising protection from unjustified restrictions but also evaluation of anti-competitive effects as well as other negative effects for consumers.

In the second place, EU provisions on competition, as well as those on consumer protection, offer a wide set of rules empowering public authorities to intervene on the validity of the contracts through which the online operators exercise their market power.

The connotation of online operators' behaviour is not ethical but "technical", interpreted in light of efficiency and consumers' economic welfare. The result is clear:

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26 For instance, France with the so-called "Loi Macron"

27 Law n. 124/2017, Art. 1 § 166

economic operators may not be compelled to align their strategies to public policies. Their conduct is illegitimate only when it alters market dynamics causing harm to consumers. The focus, here, is on the competitive relation (operator-operator) and on the operator-consumer connection.

Adhering to an *ordo-liberal* logic, the EU model rejects, at least theoretically, the social and ethical interaction between public powers and economic operators. The increasing presence, in the European market, of foreign online operators holding extremely powerful positions, however, inevitably raises concerns. Both consumer law and competition law closely adhere to the paradigm of neo-liberal efficiency. It is instead the new legal framework for foreign investments which displays some interesting developments.

EU Regulation n. 452/2019 required member states to adopt a screening mechanism for foreign investment on grounds of public security and public order (Amicarelli, 2019).

Art. 4 of the Reg. lists factors that may be taken into account when evaluating such broad criteria. Among them are the potential effect of the foreign investments over “critical infrastructure, whether physical or virtual, including (...) media, data processing or storage (...) critical technologies (...) access to sensitive information, including personal data, or the ability to control such information”.

Para. 2 of the article is even more interesting, since it lists the direct or indirect control by the government of a third country, including through ownership or significant funding, as a criterion to assess the effect of FDIs on public security and order.

Even if so far the provision has not led to relevant decisions, its application potential is huge, especially if the notion of indirect control should include subsidies (e.g. tax reductions or preferential credit policies) and selective competition law enforcement practices as it happens with China’s “national champions”, including some of the biggest operators on the global digital market.

Art. 4 of Reg. 452/2019, if compared to the Chinese legislation prohibiting foreign investments in relevant online activities, is certainly much more lenient and liberal and its approach. However, it introduces a standard of evaluation at the European level, common for all member states, which points out economic sectors where foreign presence may be critical. Moreover, Recital n. 36 of Reg. 452/2019 calls for a

“consistent application” of this new Regulation and Reg. n. 139/2004 (i.e. the “Merger Regulation”), in particular its Art. 21(4), according to which “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law”.

Reg. 452/2019, together with the recently issued PRC Foreign Investment Law (and the subsequent lists) follows, indeed, a general trend of public regulation of the internet, i.e. that of investment regulation. In other words, the public interests connected to the diffusion of transnational online operators must, in the first place, be scrutinized from the perspective of foreign investment.

## Comparative Remarks and Conclusions

In a comparative perspective, the approach based on efficiency challenges the approach based on conduct rules and social ethics. In principle, as already noted, the two models may coexist, but in practice, while efficiency-driven models tend to regulate the object of the economic relation (e.g. the competitive relationship, the product, etc.), the ethics-driven model focuses on the behaviour of the subjects involved, widely employing general and even vague clauses, whose interpretation is obviously subjected to variations. This second approach is, in other words, less prone to ensure uniform standards, and is therefore fit to serve the goals of a market system where regulation is not “neutral” and is instead receptive of socio-political instances.

Ideally, an *ordo-liberal* model should embrace competitive neutrality at its highest and regulate digital markets in light of the maximum benefits achievable by consumers when concluding transactions. On the other hand, a socialist market economy should make digital markets functional to public policies. The emphasis on the moral character of the internet, as derived in China not only by the legal literature but also, in the first place, by the Cybersecurity Law, serves the purpose of reconciling public and national interests with the dynamics of a modern economy not anymore subjected to vertical planning.

On such premises, the presence of digitalisation within the discourse of the development doctrines in China and Europe assumes divergent meanings, with divergent practical consequences and divergent roles for economic law. The only field where, both in China and in Europe, the legislative formant aims at scrutinizing online operators’ conducts in light of public policy considerations is that of foreign investments. However, the concrete impact of the newly issued European legislation is

to be seen. Indeed, foreign investments law has been, in recent years, a testing field for the regulation of the online market in other countries such as India, which developed a particularly strict rule<sup>28</sup> regarding foreign investments in the e-commerce sector, prohibiting FDIs in the so-called “inventory model” of e-commerce, that is the model “where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly”.

In other words, such provision wants foreign e-commerce operators (e.g. Amazon) to rely on domestic sellers and act as a mere intermediary or facilitator between the consumer and the producer/retailer.<sup>29</sup> This is, therefore, the field which, more than the others, will keep on emphasizing the principle of internet sovereignty, connected to a coordinated development of digital markets. It seems to be a global trend, in a sector where regulatory efforts are otherwise divergent.

Digital markets are, by definition, fluid and so is their regulation, which does not offer solid grounds to design fully coherent models of governance. The risk of detachment between statutory and living law could be quite high. The selection of a specific perspective to frame the regulation of the internet space is therefore a necessary choice. The Chinese choice to interpret digitalisation ethically is, in the end, a way to reaffirm the political pillars of a socialist market economy in online markets,

In Europe there is no such necessity, nor a comprehensive and legally binding system of socio-economic planning. Digitalisation is therefore sustainable as long as it pursues the very same logic which inspired the whole system of European private law.

This brief comparative overview highlighted how a discussion about “re-thinking” economic law can be inappropriate, since digitalisation has not urged legal orders to shape new instruments nor to alter the balance among existing concepts, with the exception of foreign investment law. It has instead affected the interpretation of the operational standards of the existing norms. In this way, the different socio-legal models mark their political orientation.

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28 See Indian Ministry of Commerce & Industry, Review of policy on Foreign Direct Investment (FDI) in e-commerce, 26th December, 2018

29 The rule was indeed also defined as “Anti-Amazon”

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