ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA

Consumers & SMEs
in the Digital Single Market
Jean Monnet Centre of Excellence

Digi-ConSME
Jean Monnet Centre of Excellence

NEWSLETTER 1/2021

NEWS from
JEAN MONNET CENTER OF EXCELLENCE
Consumers & SMEs in the Digital Single Market

Conferences

The IP & Innovation Researchers of Asia (IPIRA) Network is pleased to announce the
Third IP & Innovation Researchers of Asia (IPIRA) Conference
which will be held on
24-27th March 2021 ONLINE

The Digi-ConSME Conference
Integrated reporting and SMEs in the Digital Single Market
will be held on
26th May 2021 ONLINE

ConSME Position

SMEs, Digital Markets and the New Approach to European Competition Policy
by Professor Emanuela Carbonara, University of Bologna, Full Professor of Economic Policy.
In order to protect users and to create a more competitive and efficient environment in digital markets, in December 2020 the European Commission has proposed the Digital Services Act and the Digital Markets Act. These two legislative initiatives are introducing a very innovative framework into European Competition Law. On the one hand, the Commission is considering adopting a form of ex-ante regulation, formulating a blacklist of unlawful and forbidden behaviors and a whitelist of obligations for dominant market operators (platforms), identified as gatekeepers. On the other hand, the DG Competition would be granted the power to impose remedies in digital markets without the need to identify a specific competition law infringement. This legal innovation follows the changed attitude toward the big platforms, both in Europe and in the United States. Currently, there is a heated debate about the opportunity and the potential effects of these Acts, that, in many aspects, would represent a major departure from the more effect-based, rule of reason approach followed by the Commission in its recent past. An aspect that, so far, seems to be missing from the discussion is the impact that this act will have on European small and medium enterprises,

operating either in the digital services sector, or in other sectors but using platforms to distribute and develop their products. Recent data seem to reveal that SMEs benefitted from the opportunity to access digital markets to sell their products online during the Covid-19 pandemic. Moreover, platforms seem to be characterized by undeniable scale and network economies. The return to a sort of a per-se competition policy in the guise of regulation might have an ambiguous impact on market structure, with its effects bypassing the boundaries of the markets for digital services and spreading to the more traditional sectors of goods and services that are relying more and more on online distribution.

Current issues in Financial Reporting affecting SMEs: Non-Financial Reporting

by Professor Robin Jarvis, Brunel University and Special Adviser to the European Federation of Accountants and Auditors (EFAA) for SMEs.

Since 2017 around 8,000 European companies that employ more than 500 have been required to submit non-financial information reporting (EC Directive 2014/95/EU). The Directive focuses on the reporting of environment, social and labour issues, respect for human rights, and the fight against corruption and bribery – with the aim of presenting company's sustainability performance This legislation has been supported by other EU initiatives including Action Plan Financing Sustainability Growth (2018) and the Green Deal. But large companies employing more than 500 employees represent a very small proportion of enterprises in EU member states. For example, companies employing more than 500 employees in Austria represent only 0.09 percent of their enterprises. For issues relating to the environment, in particular, it is recognized that SMEs due to their number can be very influential in climate related matters.

The European Commission recognizing the limitations of the previous legislation carried out a public consultation in 2020 to revise the Non- Financial Information Directive. Some of the questions in the consultation addressed SMEs. This reflects the growing importance of these issues to SME stakeholders.

It should however, be recognized that SMEs in some situations and EU member states do have to comply with disclosure regulations. SMEs trading with large businesses through a supply chain are invariably required to meet their customers requirements in terms of the legislation placed upon them. Therefore, whilst there may not be no specific requirements for SMEs to report on issues such as the environment, social and labour issues they are obliged to meet the requirements of their large customers who do need to report on these issues. There is an increase in interest in the performance of companies beyond the financial numbers at EU Member State regulation level. EU Member states often impose their own non-financial reporting requirements on SMEs. The European Federation of Accountants and Auditors (EFAA) for SMEs in November 2018 published a Survey of Non-Financial Reporting Requirements for SMEs in Europe details the Member States and their requirements for Non-Financial Reporting[1].

There seems to be a consensus, at present, that it would be inappropriate that SMEs should be regulated to disclose on climate related issues and other social matters from an EU regulation perspective. This view rest8 on the argument of the burdensome nature of regulation placed upon SMEs. The main SME organisation that represents a significant number of SMEs in Europe - SME United supports this position. However, there is some discussions about the possibility of particular sectors that SMEs operate in being regulated to disclosing climate relate issues. Climate related issues are recognised as such an important element of the EU political positioning that arguably it is likely that all SMEs will be required to disclose climate related matters in the future.

[1] https://www.efaa.com/cms/upload/efaa_files/pdf/News/20181119_NFRbySMEsReport-FINAL.pdf

Publications

In our newsletter, we'll suggest you interesting publications provided by the members of our Centre.
This time we propose you:

1. Borghi M., *Exceptions as users' rights in EU copyright law*, paper.
   ABSTRACT: The paper explores possible ways of construing copyright exceptions as users' rights within the EU legal framework. It discusses some basic principles on the legal nature of exceptions, and then focuses more specifically on EU law and the jurisprudence of the Court of Justice of the European Union (CJEU). The paper shows that the CJEU has moved away from a strict interpretation of exceptions as "derogations" to general principles of copyright protection, towards recognition of exceptions as bearing autonomous legal status. Indeed, in its recent jurisprudence, the Court has interpreted statutory exceptions and limitations both as independent sources of rights and as statements of fundamental rights recognized in the EU Charter. These include, most notably, freedom of expression and information. While the approach has the potential to lead to full recognition of users' rights, EU law is bound by the recognition of intellectual property as a fundamental right in the highly controversial Article 17(2) of the EU Charter. The Court has repeatedly cautioned against an "absolutist" approach to this provision. Accordingly, this paper argues that exceptions to copyright should be better understood as justified "control" of the use of property, rather than forms of "dispossession" in the public interest. Against this background, two central provisions of the recent DSM Copyright Directive are examined, namely: the prohibition of contractual override and the provisions made for the use of out-of-commerce works by cultural institutions. The paper concludes by clarifying the conditions upon which these provisions can be construed as strong statements in *favour* of users' rights, and thereby achieve their intention to promote certain free uses of copyright works.

2. E. Carbonara, G. Gianfreda, E. Santarelli, G. Vallanti, *The impact of intellectual property rights on labor productivity: do constitutions matter?*, Fortcoming in Industrial and Corporate Change, doi: 10.1093/icc/dtab003
   ABSTRACT: Focusing on a sample of 22 industries and 22 OECD countries and controlling for a full set of year-, industry-, and country fixed effects (and their interactions), we first show that intellectual property rights (IPRs) protection, by means of both constitutional provisions and ordinary laws, is positively associated with the dynamics industry-level labor productivity. Disentangling the impact of constitutional provisions from that of ordinary laws, we then show that constitutional provisions protecting IPRs positively affect the differential in labor productivity between high and low R&D intensive industries. This effect is driven by the mutually reinforcing impact of constitutional IPRs protection and R&D investment in the high R&D intensive industries. Furthermore, the impact of constitutions appears to be stronger in those countries where IPRs protection by ordinary laws is weaker.
   Albeit not directly related to competition law, this article deals with the impact that legal rules regarding IPRs have on the productivity of labor employed also in SMEs.

3. Ferretti F., *Peer-to-Peer Lending and EU Credit Laws: A Creditworthiness Assessment, Credit-Risk Analysis or … Neither of the Two?,* in German Law Journal, Volume 22, Issue 1, pp. 102 – 121. DOI: https://doi.org/10.1017/glj.2020.100.

ABSTRACT: The Article deals with the protection of consumer borrowers and lending investors in peer-to-peer lending within the legal framework provided by EU credit laws. This is the legal framework for EU Member States in the area of loans to consumers. In particular, the article analyses the business model of taking lending decisions on financial technologies ("Fintech") and big data vis-à-vis the legal obligation of the creditworthiness assessment by lenders. At the same time, it extends the applicability of such a business model to the credit-risk analysis undertaken in the interest of lenders. Ultimately, it questions to what extent EU law caters for peer-to-peer lending, and and to what extent consumers and lenders can find protection. It hints that peer-to-peer lending presents risks for both consumers and lenders, falling short of legal obligations and established practices for their protection.

4. Kosta E., *Algorithmic state surveillance: Challenging the notion of agency in human rights*, in Regulation & Governance, 2020, DOI: 10.1111/rego.12331.
   ABSTRACT: This paper explores the extent to which current interpretations of the notion of agency, as traditionally perceived under human rights law, pose challenges to human rights protection in light of algorithmic surveillance. After examining the notion of agency under the European Convention on Human Rights as a criterion for applications' admissibility, the paper looks into the safeguards of notification and of redress–crucial safeguards developed by the Court in secret surveillance cases–which are used as examples to illustrate their insufficiency in light of algorithmic surveillance. The use of algorithms creates new surveillance methods and challenges fundamental presuppositions on the notion of agency in human rights protection. Focusing on the victim status does not provide a viable solution to problems arising from the use of Artificial Intelligence in state surveillance. The paper thus raises questions for further research concluding that a new way of thinking about agency for the protection of human rights in the context of algorithmic surveillance is needed in order to offer effective protection to individuals.

5. Olha O. Cherednychenko, *Financial Regulation and Civil Liability in European Law*
   ABSTRACT: Financial regulation is commonly associated with a set of ex ante rules imposed by government on the financial sector in the public interest and accompanied by mechanisms of public supervision and enforcement, usually by administrative agencies, to deter violations. In contrast to this sector-specific public regulation, civil liability has been traditionally conceived as an ex post remedy in contract or tort that can be relied upon by the aggrieved party against the wrongdoer, typically before a civil court, to obtain compensation for damage suffered. As such, civil liability is a major corrective tool of private law, which primarily seeks to ensure the balance between the interests of private individuals through their respective rights and remedies. Yet, a strict functional separation between financial regulation and civil liability along these lines is not reflected in the current legal framework for financial markets that has been profoundly shaped by EU law. The intricate interplay between financial regulation and civil liability in the legal order of the European Union provided the theme for the recently published book Financial Regulation and Civil Liability in European Law (Olha O. Cherednychenko & Mads Andenas (eds), Edward Elgar, 2020). The framing chapter by Olha Cherednychenko presents the research design and major findings of this book project, mapping and analysing the original assessments by the contributing authors. In particular, the chapter considers the level of coordination between financial regulation and civil liability achieved throughout different sectors of financial services and activities, such as payments, credit, and securities, as well as among the various actors involved in public, private, and hybrid

enforcement, such as courts, alternative dispute resolution bodies, and financial regulators. Combining the top-down and bottom-up comparative legal analysis, law and economics, and experimentalist governance, the study shows that a coordinated approach to the interplay between financial regulation and civil liability is currently lacking, both at EU and national level. It also outlines directions for cross-sector and cross-actor coordination to develop more fully at EU and national level. Overall, the chapter highlights the need to fundamentally rethink the role of civil liability, and private law remedies more generally, as a regulatory and compensatory tool in European financial law, and sets out an analytical framework – with both theoretical and empirical components – for further inquiry. A more coordinated approach to EU financial regulation and private law remedies would break down the boundaries between public and private law, viewing these two areas of law as distinct but closely interrelated.

6. Olha O. Cherednychenko. *Two Sides of the Same Coin: EU Financial Regulation and Private Law*, in European Business Organization Law Review 2021.
   ABSTRACT: The article by Olha Cherednychenko in European Business Organization Law Review 2021 explores the interplay between EU financial regulation and private law. Today, legislators, courts, financial regulators and other actors at the EU and national level face major new challenges in safeguarding public and private interests in an increasingly digital and sustainability-minded environment surrounding financial markets. Innovative ways of addressing tensions between the common good and the individual preferences of market actors are needed to address these challenges. However, at present, the efforts to develop workable solutions are seriously hampered by the gap between the two areas of law that profoundly shape the financial markets—financial regulation and private law—in the current European policy discourse and legal scholarship. This article is an attempt to systematically rethink the role of private law in the regulatory and enforcement landscape for financial markets and its relationship with public regulation more generally. It argues that financial regulation and private law are not two parallel universes, but rather two sides of the same coin, each of which has a critical role to play in safeguarding public and private interests. Examining EU financial regulation through the 'private law' lens would enable us to unveil a complex interplay between the regulatory dimension, contractual settings and private law remedies that we need to better understand in order to be able to better regulate financial markets. Conversely, examining national private law through the European 'regulatory' lens would allow us to unpack the potential of traditional private law to contribute to the objectives of EU financial regulation, while at the same time realising justice between private parties.

7. Stefanelli M.A., *La nuova Strategia Europea per le PMI. Innovazioni giuridiche digitali: la Piattaforma europea "Fit for the Future" e i "Digital Innovation Hub"*, in Innovazione e Diritto, 2020, n. 3, pp. 1-17.
   ABSTRACT: The study analyzes the new European strategy for SMEs for a more sustainable and digital Europe, focusing on the implementation of the Digital Single Market. The relevance of new legal instruments such as the "Fit for the Future" Platform and the Digital Innovation Hubs (DIHs) underline how the relationship between SMEs and digital capitalism is increasingly close as well as how it is increasingly urgent and necessary to define a new relationship between regulated and regulator.

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