L'État Digital

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ALGORITHM CHANGES ADMINISTRATION AND AUTHORITATIVE ACTING: TOWARDS WHICH OBJECTIVE?

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Outline

This presentation can be splitted into two parts, distinct but strictly interconnected.

1. The general part: how is the State changing its identity before the Digital Administration? (De Minico)

2. The special part: Algorithms, private powers and digital rights – a new constitutional role for antitrust law? (De Tullio).

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Part I

How is the State changing its identity before the Digital Administration?

Pr. Giovanna De Minico

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A pro-active role for the State: being called to do what was previously prohibited

1. The digitalisation revolution entails a *de facto* and legal assumption: the dialogue between citizens and Public power must move from the world of atoms to the field of bits.
2. The legal duty for the State to provide every citizen with the access to an Internet adequate to let each person participate to the advantages of E.Society.
3. The old Universal Service Directive 2002/19 is behind us.

The new European Electronic Communications Code 2018/1972 (art. 84) enriches the basket of universal services with the social right to access not without heavy caveats.

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The *pros and cons* of a right to a 'tamed' access

1) Art. 84 states: "Member States shall ensure that all consumers in their territories have access at an affordable price, in light of specific national conditions, to an available adequate broadband internet access service and to voice communications services at the quality specified in their territories, including the underlying connection, at a fixed location".

2) This provision lacks an *ex ante* quality and quantity determination, equal for all European citizens.

3) The E.C. has preferred letting each State free to choose case by case the step of broadband ladder rather than imposing an abstract, common and universal measure.

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Negative consequences of a territorial diversified right to access

1) The rule: who has more is entitled to ask more prevents the realization of substantial equality among European citizens.

2) It is a vitious circle in that the super fast broad band is given to those already utilizing it. By contrast, it denies an adequate speed to those not accustomed to need it.

3) The definition of functional broadband, since this might be likely to Create just an arbitrary list of accessible internet services, unlike a neutral minimum quality link, may thus in the future give rise to discriminatory practices detrimental to end-users (Opinion of the E.E.S.C. on the proposal for a Directive of the EP and of the Council establishing the European electronic communications code (Recast) (*COM(2016) 590 final — 2016*).

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Future prospects

1) National regulatory authorities should further define the minimum Internet access service functionality on the basis of BEREC guidelines with a view to ensuring a consistent EU-wide approach, whilst offering Member States the necessary flexibility (*Committee on the Internal Market and Consumer Protection, Opinion, 2016/2018).*

2) My opinion: to claim a legal right to a 'decent' broadband connection at an affordable price, supported by public vouchers, and at a reasonable speed needed for applications - video conferencing and uploading large files to social media - and to take part to the E-services.

3) To sum up: at the moment the right to access to high speed Internet is a promised revolution, not yet realized, except for the recent evolution of the E.C. (*2030 Digital Compass: the European way for the Digital Decade*, COM(2021) 118 final).

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Further duties of the State before algorithmic Administration

1) The duty to promote the Copernican revolution: from paper to digital act; from the service in presence to the remote one (adaptive interpretation of artt. 97 It. Const. and 41 EUCFRs).

2) How must the State move towards this direction?

A) Stimulate the Administration to overcome its cultural digital divide implementing public electronic skills (see. E.C., Digital Compass, above).
B) Minimize the burden for citizens (once only).
C) Guarantee a meaningful disclosure of algorithmic logic (art. 15, GDPR).
D) Ensure a full judicial review of algorithmic acts.

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New European Rules

Without prejudice to the existence of the ongoing European regulations (DSA E.C. 825/20; DMA E.C. 842/20; Fr. Resolution E.P. 0186/2020), necessity of a legal, clear and common framework for all States aiming to an anthropocentric approach.
This means rolling out a new catalogue of fundamental rights of E.citizen involved in an algorithmic decision-making. In particular:

A) the right to privacy, once consent-based, becomes a new positive right to take part in the *ex ante* prognosis procedure.

B) The right to be informed about the existence of automated decision-making.

C) The right to request the rectification of wrong data.

D) The right to discuss with a human officer in order to reverse the algorithmic prediction and overturn it. Human oversight must not be a *fictio iuris*, like a rubber-stamp, but implies his authority and competence to change the decision.

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The extent of the judicial review

The new catalogue of fundamental rights must encompass a full judicial review on the algorithmic public act.

How this can be achieved?

The judge must be put in the condition to open the black box to reach the source code. No trade secret may be opposed to the judge.

Consequently the judge draws instead of P.A. a new fair and unbiased algorithm or just order to it how to do in the future. Under these premises the algoritmic act does not create a 'patina of fairness', being challenged before the judge.

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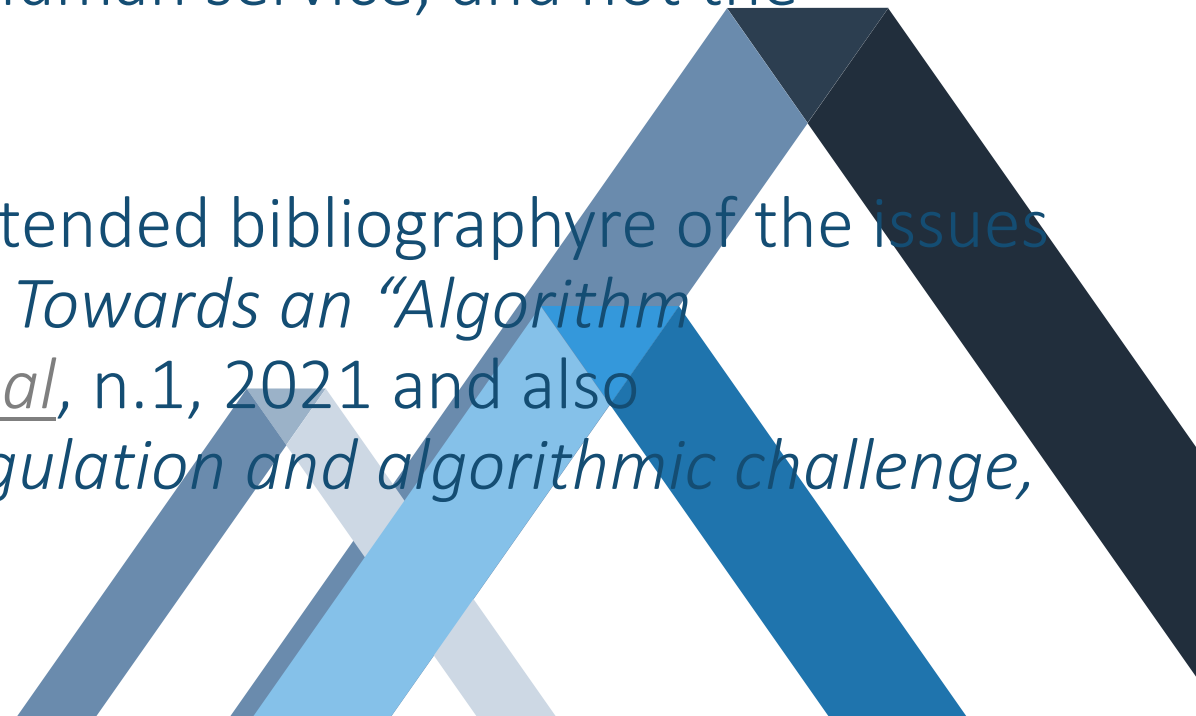
Conclusive remarks

My proposal is to draw an algorithm constitutional by design, based upon a binding and light regulation in compliance with the constitutional traditions common to the Member States (art. 6, co. 3, TEU).

In this way the technology will be at the human service, and not the opposite.

For a more detailed illustration and an extended bibliographyre of the issues delt with here, please refer to my essays: *Towards an "Algorithm constitutional by design"*, at *Biolaw Journal*, n.1, 2021 and also *Fundamentall rights, European Digital regulation and algorithmic challenge,* forthcoming in *EBLR* 2021 .



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Part II

Algorithms, Private Powers and Digital Rights: a Constitutional Reading of Competition Law

Dr. Maria Francesca De Tullio

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Algorithms, Private Powers and Digital Rights: a Constitutional Reading of Competition Law

1. Problem definition – «fake news» as a case study
2. Proposals for a Constitutionally Oriented Competition Law
3. An Early Assessment of Digital Markets Act

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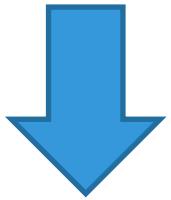
Problem definition – «fake news» as a case study

- Public Responsibility – The French Loi n° 2018-1202 du 22 décembre 2018
- Private Responsibility – The German *Netzwerkdurchsetzungsgesetz* (BGBl. I S. 3352).
- Self-regulation – EU Code of Practice against disinformation (2018-2021)



- The EU proposal of the Digital Services Act (2020/0361 (COD))

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Problem definition – «fake news» as a case study

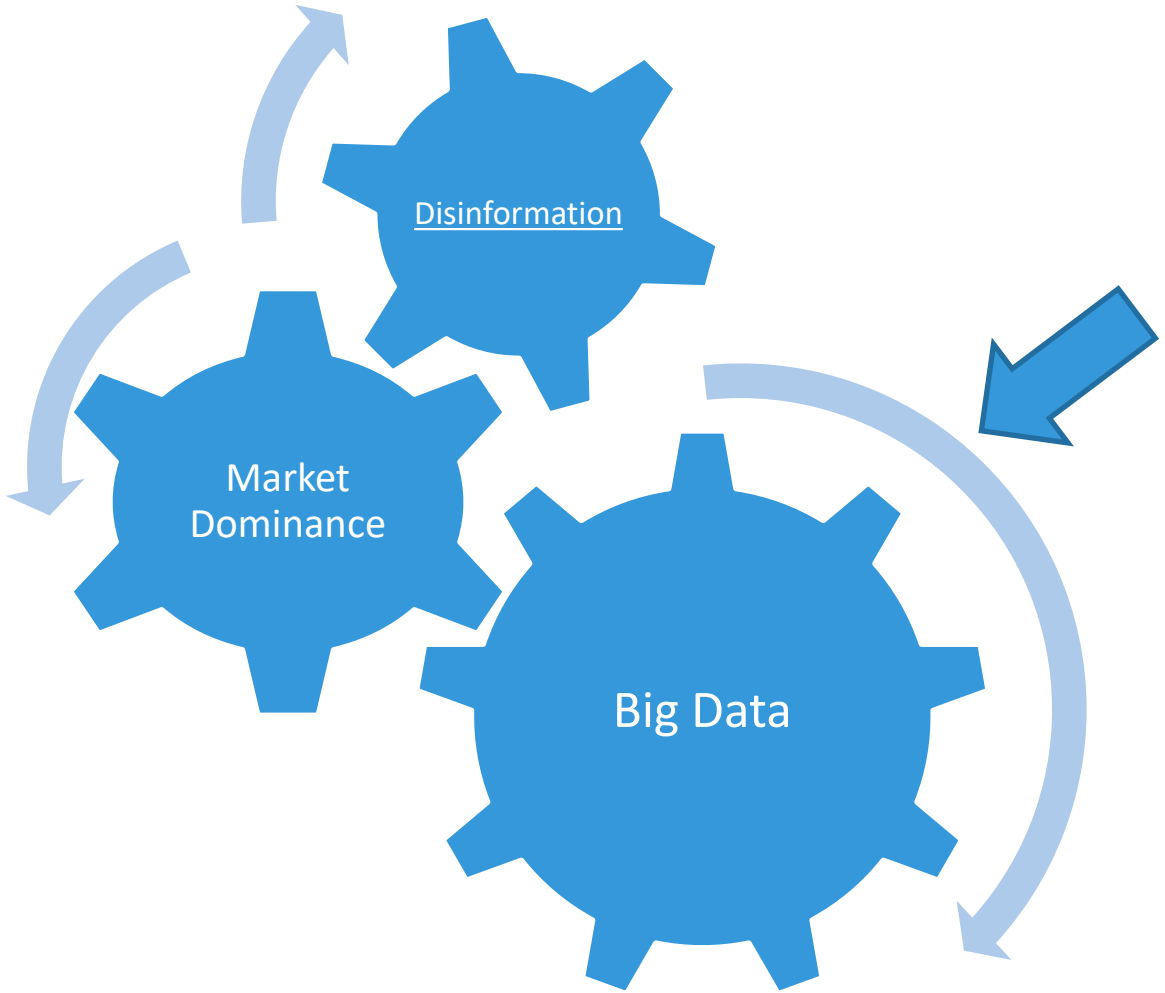
An assessment of possible risks:

- Public or private limitation of free speech
- Controversial coordination with how EU regulates the liability of the Internet Service Provider
- The doubtful effectiveness of the measures generate

proportionality concerns

Problem definition – «fake news» as a case study

- The structural roots of the issue: GAFAM as bottlenecks of information favouring click-baits



- Direct and Indirect Network Effects (Macchiati, 2010)
- Unfair negotiation of privacy conditions (Schermer et al., 2014; Peugeot, 2014)

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Proposals for a Constitutionally Oriented Competition Law – Integrating privacy in Competition law

(De Tullio, 2020)

- General antitrust regulation (Drexl, 2016; De Minico, 2019)
  - Damage to Privacy as an abuse of market dominance
  - Relevance of Privacy in Mergers and Acquisitions
- Asymmetrical regulation: Data as essential facility (Orefice, 2016)
- A special antitrust regulation for online platforms?

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An Early Assessment of Digital Markets Act (2020/0374 (COD))

- Transparency obligations - Access to campaigns and data generated through the platforms
- Non-discrimination
- Ban of exclusivity clauses

Prevention of anti-competitive behaviour

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