Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea

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Informazioni sul volume

Digital Platforms and Global Law focuses on digital platforms and identifies their relevant legal profiles in terms of transnational and international law. It qualifies digital platforms as private legal orders, which exercise the legislative, executive, and (para)jurisdictional power within them. Starting from this assumption, the author studies the relationship between these orders and state, transnational, and international orders.

The book first explores the reasons for the inadequacy of the current regulatory matrix and goes on to detail the need for a new paradigm; a shift from the current matrix of market regulation to one of negotiation. The author then examines the lack of effectiveness of current tools and explores how better versions, tools of uniform law, are emerging.

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Digital platforms are transnational companies. Compared to traditional transnational companies, however, digital platforms have additional elements that lead to their classification as legal systems. They exercise regulatory powers when they adopt the behavioural policies of the community of users of which they are composed; executive powers, when they take action to enforce the rules adopted; and jurisdictional powers, when they establish independent dispute resolution systems – de facto, arbitration systems. More refined systems (that of Facebook, for instance) provide for real courts, as well as guarantees and protections similar to those of a state.

If we add to these elements an autonomous payment system and, potentially, in the near future, an autonomous currency (whether a cryptocurrency, or a stablecoin pegged to one given currency or to a basket of currencies, is of little importance for our purposes), the private ordering of platforms becomes complete and increasingly autonomous, almost independent: in other words, sovereign.

This is the starting point for a new presentation of digital platforms, for they are multinational companies, but have evolved to the point of constituting real legal systems.

This new presentation follows a dual path. The first path consists of the relationship between these private systems and the other existing public and private orders. In the first place, state systems are relevant. The classifications developed in this book seem useful here, and particularly the distinction between the platforms' internal and external environments. The legal approach allows us to provide assumptions and justifications for such a distinction. Private international law provides all the tools (starting from renvoi between legal systems) to define and qualify the relationships between digital platforms and states, and shows the ineffectiveness of the regulatory tools presently used, which do not grasp the evolution of the platforms at institutional level.

From another point of view, public international law makes it possible to define the relationship between the private transnational systems of digital platforms and international law. The path is different if one follows either the monist or the dualist approach, but the outcome is the same. It is no coincidence, therefore, that the most refined tool examined, i.e. Facebook's Oversight Board, supplements its internal norms not by referring to state laws but to the principles of public international law, beginning with those on the protection of human rights.

The relationship between the platforms' private transnational systems and the lex mercatoria – when the latter should be recognized as an order, which is still the subject of heated and

articulated controversies – exists when the lex mercatoria evolves (via arbitration awards or generally accepted principles and practices (GAPP)) by applying the internal policies of digital platforms. It is a predictable development, if the principles and paths of the European regulatory circle apply.

It is therefore not only possible but, I believe, entirely probable that another question arising is the relationship between one transnational digital order and another (i.e., between two digital platforms). The more the lex mercatoria develops in terms of digital systems, the more these will be able to integrate and share rules and principles, not just protocols and standards.

The second path concerns the possible qualification of digital transnational private legal systems as subjects of law. Their being transnational is beyond doubt. But are they also subjects of international law? Again, the path is different if one follows the monist theories based on decentralization or the dualist theories based on the pluralism of legal systems.

The outcome here appears different at first sight, since the subjectivity of digital transnational legal systems seems admissible in international law according to the monist approach, but is denied by dualist theories.

This divergence, however, becomes merely apparent if we follow the dualist approach of Arangio-Ruiz, which defines the subjects of international law as de facto 'powers', as they both exist and are independent. For Arangio-Ruiz, natural and legal persons are not subjects of international law.

Conversely, international organizations (among others) are subjects of international law. They have internal law (which governs relations within the organization) and external law (which governs relations between the international organization and other subjects of international law). Arangio-Ruiz defines the internal law of international organizations as international interindividual law.

Well, the analogy with digital platforms is evident. They too are powers, like international organizations, and constitute a legal system whose law, which applies to the community of users, is 'international interindividual'. Digital platforms can then also qualify as subjects of international law, insofar as they participate in the interstate law of international relations.

This conclusion, on closer inspection, coincides with a branch of evolution of the theory of global law, defined as the law of non-state governance communities.

It can be affirmed, based on the evidence of Chapter 2 and the conclusions drawn in Chapter 4, that there is a global law of digital platforms.

Compared to this, the regulatory matrix used so far by states to tackle the rise of digital platforms is inadequate, for the reasons illustrated in Chapter 1, and because it does not take into account the legal evolution of digital platforms highlighted in Chapters 2 and 4.
Therefore, the need for a new paradigm arises: a new matrix equipped with new tools. The playing field must shift from the current matrix of market regulation – which governs the relationships between companies and between states and companies – to that of negotiation, which presupposes a relationship between peers. This evolution does not conflict with what is already considered, in the European Union, to be the main evolution of regulation: self-regulation (the 'law of digital platforms'), which then becomes co-regulation via negotiation with independent authorities and national governments.

If the paradigm change that I propose is consistent with the current developments of the institutions and of the markets, then the tools of uniform law that are emerging – the negotiation between private and public norms and the codification of private law – become central. We may see such codification as the first phase of regulation (self-regulation) or, shifting our analysis to the level of legal systems, the internal law of platforms: what Arangio-Ruiz calls international interindividual law.
The centrality of these tools is not new: during the 1980s, the codification of uniform law was already one of the assumptions and premises of globalization, which developed strongly in the 1990s. They will be useful again, in the different form that I am suggesting here, to regulate digital globalization too, which is no less rapid than the general globalization of the 1990s, but bears implications that go far beyond the markets.
The new paradigm is described in the last section of the final chapter.