SUDEUROPA

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Istituto Superiore Europeo di Studi Politici
Rete dei CDE della Commissione europea

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via dei Tre Mulini, 14
89124 Reggio Calabria
tel.: 0965.814954
www.laruffaeditore.it
segreteria@laruffaeditore.it

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NORMATIVA, GIURISPRUDENZA E PRASSI INTERNAZIONALE

La Rubrica, in questo fascicolo, presenta due contributi.
Il primo è il testo della risoluzione dell'Assemblea Generale delle Nazioni Unite sull'aggressione dell'Ukraina, ad introdurla, un commento di Marina Mancini che descrive in modo efficace la differenza tra Assemblea Generale e Consiglio di Sicurezza.

Il secondo contributo è di Angela Busacca la quale affronta uno dei temi che, interdisciplinarmente, sta occupando uno spazio sempre crescente nel dibattito scientifico: la *platform economy*. Con riferimento al Regolamento del Parlamento Europeo e del Consiglio del 20 giugno 2019, n.2019/1150, Busacca discute la mediazione che viene prevista.

Marina Mancini è professore associato di diritto internazionale nel Dipartimento di Giursprudenza Economia e Scienze umane nell'Università Mediterranea dove insegna anche Diritto dell'Unione Europea. Nel 2023 è stata nominata membro dell'Human Rights Review Panel, European Union Rule of Law Mission in Kosovo.
Tra le sue pubblicazioni più recenti: *Italy's Implementation of the Rome Statute of the International Criminal Court and Its Amendments*, in "Italian yearbook of international law", n. XXXI - 2021, 2022; *Quale giustizia per i crimini delle forze russe in Ucraina?*, in "Affarinternazionali", n. 10.03.22, 2022; *Il primo processo per crimini di guerra all'esercito russo*, in "Affarinternazionali", n. 17.05.22, 2022; *Le Nazioni Unite e la lotta contro la tratta di esseri umani*, *La Comunità Internazionale Quaderno 20*, Editoriale Scientifica, Napoli, 2021; *Aggressione. L'Italia ratifica gli emendamenti allo Statuto della Cpi*, in "Affarinternazionali", n. 08.11.21, 2021; *The Agreement between Greece and Italy on the Delimitation of Their Respective Maritime Zones*, in "Italian

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Angela Busacca è professore aggregato di Diritto dell'Informatica presso il Dipartimento di Giurisprudenza Economia e Scienze umane dell'Università Mediterranea dove insegna anche Diritto Sportivo.
Tra le sue pubblicazioni: *Art. 86 Trattamento ed accesso del pubblico ai documenti ufficiali - Aggiornamento 2022*, in Riccio, Scorza, Belisario, *GDPR e normativa privacy. II edizione*, Milano, 2022; *Art. 88 - Trattamento dei dati nell'ambito dei rapporti di lavoro - Aggiornamento 2022*, in Riccio, Scorza, Belisario, *GDPR e normativa privacy. II edizione*, Milano, 2022; *Art. 87 - Trattamento del numero di identificazione nazionale - Aggiornamento 2022*, in Riccio, Scorza, Belisario, *GDPR e normativa privacy. II edizione*, Torino, 2022; *Il fenomeno degli abusi sessuali nel mondo sportivo*, in Ines C. Iglesias Canle, Maria José Bravo Bosch, *Libertad sexual y violencia sexual*, Tirant Lo Blanch, Valencia, 2022; *Using AI for Justice*, in Domenico Marino Melchiorre Monaca, *Artificial Intelligence and Economics*, Springer, 2022; *Social Media Targeting vs Consumer Data Protection?*, in "Sudeuropa", 2021.

Platform to Business mediation (P2B) in EU Regulation 2019/1150

Angela Busacca[*]

Platform economy, contractual asymmetry, and protection of business users

In recent years, the evolution of e-commerce has seen the consolidation of the role of digital platforms proposing themselves as new models of e-marketplace and networks. This new business model is not limited to only facilitating exchanges between business users and consumers and the conclusion of commercial agreements, including non-business users (according to the consumer-to-consumer exchange model, C2C) but also to creating shared knowledge and data analysis circuits to improve the supply of goods and services[1].

These phenomena are rapidly expanding, and they differ from the traditional e-commerce model based on the website of a single on-line seller, allowing the interaction of different groups of business users. By using data analysis tools and consumer profiling, they are able to achieve an ever-greater personalization of marketing strategies and communication tools, to influence choices, and also to control the regulation and correctness of on-line purchase and transactions, by collecting and verifying consumer feedback and comments.

In this new dynamic of exchanges, which is called "the platform economy", the platforms are not limited to playing a role of mere intermediaries, but take on a more incisive role, and determine a new structural model which impacts the organization of production, distribution and

[*] *Università Mediterranea.*

[1] M. E. Bucalo, *I servizi delle piattaforme on line fra giurisprudenza sovranazionale e interna e necessità di regolamentazione dell'economia collaborativa. Riflessioni a partire dal caso Airbnb*, in "Federalismi.it", 2020, n. 22, p. 66; I. Pais, *La platform economy: aspetti metodologici e prospettive di ricerca*, in "Rivista internazionale di scienze sociali", 2019, n. 1, p. 143.

labor[2] as well as customer relations[3]; as stated in the doctrine, in the relationship between business users and consumers, platforms act as guarantors of a safe and efficient exchange, adopting tools that foster trust and guarantee the correct functioning of the market[4].

In particular, it is easy to verify the practical impact of these statements taking into account some digital intermediaries which are considered the most important examples currently in the platform economy: Booking and Airbnb, with reference to the hotel and hospitality sector; Amazon, Alibaba and eBay for sale of goods; Uber for mobility services. The emergence of these digital intermediaries has not only changed the structure of the market, but in many respects has innovated contractual dynamics in relationships with consumers and between business users. Regarding the latter profile, it seems appropriate to underline how part of the doctrine has identified a modality of organization in the platform economy, based on the analysis and sharing of data (in particular of the so-called Big Data), able to generate advantages both for professionals and consumers, according to what we could define as a win-win logic.

However, although it underlines the undoubted advantages of the new dynamics (companies able to offer goods and services increasingly tailored to the needs and preferences of consumers), this consideration reflects only a part of the phenomenon, because, at the same time, the new market structure determines the emergence of increasingly asymmetrical relationships between platforms and users (whether they are business users or consumers), with evident imbalances to the advantage of the digital intermediaries[5]. In particular, reading the general conditions and terms of use (which the platforms offer to professional users to make an agreement that allows access and positioning on the e-marketplace), the situation of asymmetry appears clear. In the agreement, certain clauses are often indicated that unilaterally give the platform the possibility to suspend the account or limit its object, to modify the con-

[2] M. Weiss, *La "platform economy" e le principali sfide per il diritto del lavoro*, in "Diritto delle relazioni industriali", 2018, n. 3, p.715 ss.

[3] C. Busch – H. Schulte-Nölke – A. Wiewiórowska-Domagalska – F. Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?,* in "EuMCL Journal of European Consumer and Market Law", 2016, n. 4, p. 133.

[4] G. Smorto, *La tutela del contraente debole nella platform economy dopo il Regolamento UE 2019/1150 e la Direttiva UE 2019/2161 (c.d. Omnibus)*, in V. Falce (a cura di) *Fairness e innovazione nel mercato digitale,* Torino, 2020, p. 49 ss.

[5] S. Scandola, *Marchi, piattaforme e motori di ricerca nell'era del capitalismo digitale*, in "Il Foro italiano", 2020, n. 4, p. 226 ss.

tract conditions with implicit acceptance on the part of the user (with consent determined only by continued use of the platform), to terminate the contract and to choose the applicable law and the competent court. Alongside the vexatious nature of some contractual clauses, a further profile of asymmetry can be seen in the information circuit, which also characterizes relations in the platform economy. Often, the information relating to the methods and systems of positioning within the platform are incomplete, also in relation to the methods of resolving (any) disputes both with recourse to justice and with on-line dispute resolution (ODR) or claims management. It follows that in absence of clear information on procedures and operating modes, access to justice can be difficult for business users, especially if they belong to the category of small and medium enterprises (SME).

With these considerations, it emerges how the platform economy, in representing a new, interesting way of developing e-commerce, nevertheless reveals the weakness of the category of business users, especially if they are SMEs (according to the meaning of the Annex to Recommendation 2003/361/EC), accentuating a gap already underlined several times in the regulatory framework on e-commerce. Indeed, it has been highlighted in doctrine how the European legislator has shown itself to be very attentive to consumer protection, with a series of Directives and Regulations addressed not only to the regulation of contract stipulation and execution (Directive 2011/83/EU "relating to new consumer rights"[6]), but also to access to justice and the possibility of using ODR (Regulation 2013/524/EU, "relating to the resolution of online consumer disputes"). However, in the face of a lack of regulation with regard to SMEs which, in the general consideration of B2B contracts, suffer from a condition of endemic weakness there is still much to resolve.

Regulation EU 2019/1150: general profiles

To tackle some situations of asymmetry and economic dependence that can determine "*potential frictions in the economy of online platforms*" (recital 2) and to offer tools for rebalancing contractual positions, also with a view to enforcing trust in the market, the European Parliament and the Council adopted Regulation n.1150, 20 June 2019, "*on promoting*

[6] C. Wendehorst, *Platform intermediary services and duties under the E-Commerce Directive and the Consumer Rights Directive*, in "EuMCL Journal of European Consumer and Market Law", 2016, n. 1, p. 30 s.

fairness and transparency for business users of online intermediation services"[7]. This Regulation is part of the more general framework of reform of digital market regulation and the choice to offer protection based on equalization tools of the contractual conditions to business users and client companies is notable, such as clarity and transparency of clauses, timing of interval for weighing the choices on proposals for unilateral amendments and methods of resolving disputes through complaints and mediation as an alternative to recourse to justice.

In particular, the Regulation applies to "online intermediation services" and "online search engines": establishment or residence in the EU of the user is a criterion for determining the territorial scope of application (art.1 paragraph 2: *business users and corporate website users that have their place of establishment or residence in the EU and that, through those online intermediation services or online search engines, offer goods or services to consumers located in the EU*), while the place of establishment or residence of digital intermediaries is not mentioned.

By quickly examining the main provisions relating to the stipulation of the contract, the Regulation foresees that the general conditions are drawn up in *simple and understandable* language, must be easily available and include a series of information relating to the right of intermediaries to suspend and interrupt services. Furthermore, it is envisaged that, in the event of proposals for unilateral modification of the contract, these will be provided on a "durable medium" and always contemplate a period of at least 15 days for "notice" before the effective entry into force, while recognizing the business user the right to terminate the contract in the same notice period (Article 3). To guarantee good faith in the relationships between digital intermediaries and business users, a series of specific contractual clauses are also envisaged to constitute a sort of mandatory content of the contract (Article 8), among which content relating to technical and contractual access (or lack of such access) to personal and non-personal data provided by business users and consumers in the context of e-commerce relationships (Article 9). Furthermore, the Regulation contains some provisions regarding positioning of business users on the platform and information obligations on the positioning parameters and on any variations thereof (Article 5).

[7] C. Busch, *The P2B Regulation (EU) 2019/1150: towards a procedural turn in Eu Platform regulation?* In "EuMCL Journal of European Consumer and Market Law", 2020, n. 1, p. 3; F. Foltran, *Professionisti, consumatori e piattaforme on line: la tutela delle parti deboli nei nuovi equilibri negoziali*, in "Medialaws. Rivista di diritto dei media", 2019, n. 3, p. 162 ss.

With reference to the resolution of any disputes that may arise between platforms and business users, the Regulation also provides, in addition to judicial remedies, an internal complaint-handling system (Article 11) and a mediation procedure as represented in Directive 2008/52/EC (art.12) with the encouragement of setting up specialized mediation bodies for the administration of procedures (art.13).

Platform to Business Mediation (P2B)

Regulation EU 2019/1150 provides a particular type of mediation called Platform-to-Business (P2B) by the first commentators[8], and that stands as a new method, in some ways intermediate, among the already known mediation models of business-to-business (B2B) and business-to-consumer (B2C).

The use of mediation, indicated with specific reference to "*any structured process as defined in point (a) of Article 3 of Directive 2008/52/EC*" (in these terms the definition of art. 2, n.12), on the one hand, appears as part of the general alternative dispute resolution (ADR) widespread program launched by the EU in 2008, and on the other hand, supports the cross-border nature of the relationships between platforms and business users. Recitals 40-43 of the Regulation offer a summary of the inspiring reasons that determined the choice of the European legislator on mediation: it is indicated as a valid opportunity for the resolution of disputes *in a satisfactory way* and with savings in terms of time and money compared to the judicial procedure (recital 40). Moreover, it is characterized by an (unprecedented) duty of good faith which must conform the action of the parties to avoid abuse of mediation by business users (recital 42), as well as encourage specialized training for mediators, both in relation to on-line intermediation services and in relation to the specific industrial sectors in which the services are provided (recital 43). On this last aspect, in particular, the specialization of mediators is considered functional to "*add to the confidence both parties have in the mediation process*" and to "*increase the likelihood of that process leading to a swift, just and satisfactory outcome*" (recital 43).

In the Regulation text, articles 12 and 13 are dedicated to mediation, even if the latter assumes programmatic value by indicating what a development of "specialization" of the bodies appointed to administer P2B mediation should be, and which, if translated into reality, could solve various points emerging from art. 12.

[8] A. Bellan, *Piattaforme, obblighi di monitoraggio e risoluzione delle controversie on line,* in "Il diritto industriale", 2020, n. 2, p. 184 ss.

As already mentioned, the mediation procedure considered is the one provided for by art. 3 of Directive 2008/52/EC, i.e. a procedure on a voluntary basis, with a facilitative (not adjudicative) role, administered by a professional subject (the mediator) who assists the parties in finding an agreement for the resolution of a dispute that has (already) arisen between them or which can be introduced by request of a party, suggestion or order of a judicial authority or according to a provision of law of one of the Member States.

It seems appropriate to emphasize right away that art.12 imposes a series of obligations on digital intermediaries and identifies some requirements for the mediators, but does not indicate any peculiarities regarding the management, phases of the procedure or the characteristics and acts drawn up by the mediators. Therefore, the structure remains unaffected, with collegial sessions and individual sessions, the possibility of formulating a proposal by the mediator (which, as we shall see, may become more relevant in relation to the regulation of costs), and, in the event of a positive outcome, signing an agreement and drafting a report. The only significant innovation, with reference to the relationship between the parties during the procedure, is the right, granted to the business user, to request information "*on the functioning and effectiveness of the mediation*" in relation to the activity of the counterparty (digital intermediary). The request for information can be presented by the business user both before and during the procedure and, from the literal formulation of the norm, it would seem to integrate a duty of disclosure on the part of the intermediary, who cannot refuse access to the information requested (art. 12, paragraph 6).

The element that characterizes this procedure, placing it, as proposed, in an intermediate position between B2B mediation and B2C mediation, is the attention paid to the business user as a weak party of the contract and of the dispute; this element emerges from some points, such as guarantee of legal protection standards of EU law in the case of a mediator providing the service from a country outside the EU (art. 12 paragraph 1), as well as provision of the management of the procedure in the language used for the general terms and contractual conditions (art. 12, paragraph 2, letter c) or the provision of ease of access to the procedure, both in traditional and online mode.

Recourse to mediation is indicated as totally voluntary and, in any case, not prejudicial to the right "*to initiate judicial proceedings at any time before, during or after the mediation process*" (Art. 12, paragraph 5). This

guarantee of access to justice must however, from a systematic interpretation point of view, be read in conjunction with the duty of good faith (already mentioned in Art. 12, paragraph 3: *Notwithstanding the voluntary nature of mediation, providers of online intermediation services and business users shall engage in good faith throughout any mediation attempts conducted pursuant to this article*). From a general reading of Art.12, however, a first point of criticism emerges relating to the question of good faith: a party can, during the mediation process, appeal to the court for a judicial solution without having first concluded the mediation itself. The only possible justification for recourse to this action might be a sort of reaction to an instrumental conduct of the other party who uses the procedure to frustrate the requests for resolution and extend the initiation of recourse to the courts, in the perspective of fighting the abuse of mediation outlined in Recital n. 42.

Another particular and innovative point relates to regulation of the costs of mediation which, as already seen, must be "sustainable" for business users (art. 12 paragraph 2, letter b); however, in accordance with the provisions of Art. 12 paragraph 4, these are not shared in equal parts but rather "*a reasonable part*" is assigned to the digital intermediary, determined by the mediator's suggestion and having regard to many "*relevant elements of the case*" and in particular by taking into account "*the relative merits of the claims of the parties to the dispute, the conduct of the parties, as well as the size and financial strength of the parties relative to one another*".

In relation to this last profile, however, a doubt emerges, since reference to the mediator's suggestion and evaluation of the elements that characterized the conduct of the parties in the process, would lead us to think of an hypothesis in which parties and mediator have reached a resolution of the dispute; therefore it seems difficult to apply to all those processes which, for various reasons, are interrupted without reaching the conclusion of an agreement. In all these cases, in fact, once the non-existence of margins for mediation has been verified, it is not clear how the mediator could make an assessment and suggest a division of costs, in the presence of a high degree of conflict between the parties.

The requirements of P2B dispute mediators

The most significant innovation contained in the Regulation, however, is the obligation on the digital intermediaries to indicate two or more mediators in the terms and conditions "*with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out*

of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 11".

This obligation must be understood, however, referring only to digital intermediaries who do not fall within the definition of SMEs pursuant to the annex of Recommendation 2003/361/EC, as provided for in the last paragraph of Article 12. Also, this element further highlights how the rationale of the Regulation is the protection of the weak part of the relationship: in the case of a digital intermediary that is itself a "small business", it will not be obligatory to indicate the mediators; however, always without prejudice, it will be possible to include a mediation clause in the contract.

The text of the Regulation uses the term "two or more mediators", allowing some to interpret this as reference to single professionals designed to manage the procedure. However, references to the mediation process as provided for by Directive 2008/52/EC (present in Art. 2 n.12 and in recital n. 40) seem to make it more appropriate to address the provision to both public and private mediation bodies (qualification indicated in recital n. 40 but not reported in Art. 12) which are indicated precisely by Directive 2008/52/EC as entitled to administer the processes (clearly excluding the possibility of mediation activities carried out individually by single professional mediators).

Moreover, Art. 13, encouraging training and contacting specialized mediators, refers to "mediation service organizations", not to individual professionals. On these considerations, it seems appropriate to consider that Art. 12 refers to public or private mediation bodies, whose indication becomes mandatory for digital intermediaries. The indication of single mediators, qualified and operating in mediation bodies should be seen in a different light: in this case, the relationship for the administration of the procedure would in any case be stipulated between parties and mediation body and not between the parties and the single mediator. Also, regarding this point, another critical issue proposed by some commentators concerns the hypothesis of indicating professionals in the legal sector who are experts in information and communication technology (ICT) and e-commerce fields and who have a working relationship with law firms. In this case, the lawyer could well perform the functions of negotiator, leading to resolution of the dispute and signing of an agreement, but according to a different scheme from the one provided for by

Art. 12. In this case, in the absence of the requisites and qualification required, we would not be in the presence of a professional mediator but rather, indeed, of a negotiator and the signed agreement could have the value of a negotiation or transaction agreement, but hardly a mediation agreement pursuant to Directive 2008/52/EC.

Art. 12 paragraph 2 provides for a series of requisites that mediators must possess to be indicated by digital intermediaries: they must be impartial and independent (highlighting that any indication on the part of the intermediary does not imply the existence of any previous relationship); must provide mediation services at affordable prices for business users of the online intermediation services in question (in relation to the discipline of costs and expenses, this rule must be read in conjunction with paragraph 4, highlighting the common rationale for the protection of the economically weak part of the relationship); they must be able to provide mediation services in the language in which the contractual terms and conditions are drawn up; they must be easily accessible, both physically (in the place of establishment or residence of the business user) and virtually (through remote communication technologies); they must carry out the procedure "without undue delay", therefore with time efficiency and, on the basis of references to Directive 2008/52/EC, also having regard to the times and limits of mediation process; they must have sufficient knowledge of business-to-business relationships to enable them to contribute effectively to the attempt to settle disputes. On this last point, some considerations appear appropriate: firstly, unlike the provisions of Directive 2008/52/EC, a profile of legal specialization emerges, that is the knowledge of commercial relationships between companies; at the same time, however, this reference appears to be limited by the failure to request specific knowledge in the field of ICT law and online mediation services and search engines. As already mentioned, the training of specialized mediators is encouraged in Art. 13 by the Commission and in cooperation with the Member States and addressed to digital intermediaries and representative associations, "*to, individually or jointly, set up one or more organizations providing mediation services which meet the requirements specified in Article 12(2), for the specific purpose of facilitating the out-of-court settlement of disputes with business users arising in relation to the provision of those services, taking particular account of the cross-border nature of online intermediation services*".

Conclusions

The short period of time that has elapsed from the full entry into force of the Regulation (which applies, as provided for by Art. 19 paragraph 2, from 12 July 2020) does not currently allow to carry out evaluations and empirical surveys of the effectiveness or otherwise of the new P2B mediation, also because, it must be remembered that mediation procedures are, in any case, characterized by privacy and confidentiality (including any information acquired by the business user pursuant to Art. 12 paragraph 6, which must be considered subject to privacy). However, even in consideration of some critical points present in Art. 12, both in terms of designation and requirements of mediators and in terms of cost sharing, the overall system represents in any case a turning point in European legislation on mediation in disputes characterized by asymmetrical positions and, for the first time, emancipates the position of contractual weakness from the status of consumer and promotes a (re)reading of e-business contractual relationships no longer based on the general and abstract figure of the "professional", but aimed at a more conscious consideration of the different contractual positions of the business users present on the Network and the consequently different needs related to them. In the intentions of the European legislator, the mediation procedure maintains the character of voluntariness, but presents a series of indices that make it valid and reliable for the business user and, at the same time, appropriate also for digital intermediaries, especially for those of more significant size increasingly projected into positions of prominence on the market.

Precisely in relation to this last point, however, it remains to add a consideration dictated by the current contingent situation, determined by the health emergency due to the SARS - Covid-19 pandemic[9]; as a result of the measures aimed at containing the contagion through the limitation of movement and in-presence activities and the (temporary) suspension of various commercial activities for sale of goods and supply of services, there has been an exponential increase in online transactions, and various companies and small business are finding, in the e-commerce dimension through platforms, a way to compensate for the suspension of activities, experimenting new ways of relating with customers.

On this consideration and also regarding the increase of using technologies in ADR, the presence of a discipline capable of guaranteeing

[9] V. Aniballi, *Emergenza sanitaria e piattaforme conciliative: una proposta per gestire le transazioni da remoto,* in "giustiziacivile.it", 2020, n. 11, p.1 ss.

greater fairness and transparency in the general conditions of contracts and quick, effective and reliable tools for the resolution of (any) disputes can prove to be an important element to contribute to strengthening the trust and presence of many business users on the platforms, addressing the web dimension not only as a necessity, but at the same time as an opportunity to overcome the current difficult situation[10].

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Abstract

Il Regolamento del Parlamento Europeo e del Consiglio del 20 giugno 2019, n.1150 ha compiuto un primo importante passo nella definizione del quadro normativo della cosiddetta *platform economy,* concentrandosi particolarmente sui rapporti tra utenti business da un lato e piattaforme e motori di ricerca dall'altro. Il Regolamento pone una serie di tutele e vantaggi per gli utenti business, soprattutto per le piccole imprese in materia di risoluzione delle eventuali controversie che dovessero insorgere con le piattaforme/motori di ricerca. Proprio per questa particolare categoria di rapporti viene individuata una nuova forma di mediazione che, pur richiamando la mediazione civile e commerciale (come nella Direttiva 2008/52/CE), offre una procedura con particolari tutele per la parte più debole del rapporto commerciale ed al contempo pone una serie di requisiti per i mediatori, auspicando anche la formazione di organismi di mediazione specializzati.

Parole chiave

Economia delle piattaforme, ODR, Regolamento EU 2019/1150, utenti business, piattaforme/motori di ricerca.

Abstract

Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 took the first important step in defining the legal framework of the so-called platform economy and in particular for digital intermediaries that enjoy dominant positions in the digital single market. EU Regulation 2019/1150/focuses on the relationships between business users on the one hand and platforms and search engines on the other, to place a series of safeguards and advantages for the former, especially for small businesses. In particular, in relation to any disputes that may arise between business users and platforms/search engines, a new form of mediation is identified which, while recalling civil and commercial mediation (as in Directive 2008/52/EC), offers a series of guarantees to the weaker part of the commercial relationship and places a series of requirements for mediators, also hoping for the training of specialized mediation organizations.

Keyword

Platform economy, ODR, EU Regulation 2019/1150, business users, platform/search engines.

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Questo fascicolo

Il secondo fascicolo del 2022 si presenta denso di tematiche. La Rubrica "Diritti umani, oggi" presenta una dimensione poco analizzata nella riflessione sull'ambiente, quella religiosa mentre per "Economie, politiche e società" ad essere discussa è la genitorialità nel momento in cui è lo stesso concetto che chiede nuove qualificazioni o conferme non solo sul fronte pedagogico.
La Rubrica "Lo scacchiere del Mediterraneo nel Medio Oriente" ritorna col format delle tre domane su… destinate a Brexit, Mediterraneo e conflitto russo-ucraino.
La Rubrica "Diritto, religioni e culture" presenta due saggi, uno sull'integrazione della comunità copta, l'altro un commento ad una recente sentenza della Corte di Strasburgo su libertà religiosa e educazione della prole.
Anche la Rubrica "Normativa e prassi internazionale" presenta due contributi: il primo il testo, con commento introduttivo, della risoluzione dell'Assemblea Generale delle Nazioni Unite sull'aggressione dell'Ucraina; il secondo sulla platform economy.
Chiude il fascicolo un saggio nella corrente Law and Humanities che discute due opere della scrittrice argentina Belén López Peiró.

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