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Once again platform liability: on the edge of the 'Uber' and 'Airbnb' cases

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Abstract: Online platforms are considered as very powerful economic agents often tending to obtain oligopolistic or even monopolistic positions in the market. In this respect, the liability of platform operators has been constantly discussed among scholars. The sharpest issue in this respect is whether the platform operator may be held liable towards a platform customer for the violations caused by platform suppliers. Unfortunately, this issue has not been duly addressed yet. However, recently adopted CJEU judgements in Asociación Profesional Elite Taxi v Uber Systems Spain, SL (2017) and in Airbnb Ireland (2019) cases may be helpful in this regard. Although the mentioned judgments do not refer to liability issues directly, they still are indirectly linked to the latter. In this article I analyse the approaches provided by the Court of Justice of the European Union (CJEU) in the mentioned cases and discuss their applicability to private disputes, in particular, to disputes on the liability of platform operators. I suggest that under the current regulatory regime established by European secondary legislation these approaches may be extrapolated to liability issues.

1. Introduction

Online (digital) platforms have been considered as disruptive means of modern communication, bargaining process, and social life (Busch, Schulte-Nölke, et al., 2016) which bring to light a novel understanding of pricing, production, and investment decisions (Evans, 2003). First, as professional intermediaries among their users, online platforms support new ways of interaction within communities (Morozov, 2016; de Reuver, 2018). By virtue of this feature online platforms allow ordinary citizens to share their spare resources, which all in all have fundamentally changed modern economy and transferred it into a so-called 'sharing' or 'collaborative' economy (European Commission, 2016). Second, online platforms 'internalize externalities created by one group for the other group' (Evans, 2003, p. 332). Since online platforms bring together distinct groups of users matching supply and demand, they create multi-sided markets where each group of users benefits from the number of actors of the other group (Hein, 2020). Thus, the more users there are on the one side of a platform, the better for the other side and vice versa.

Hence, online platforms nowadays have become powerful entities which have fundamentally changed the market structure and made it triangular-like, where most of the transactions are undertaken not between a customer and a provider, but between the customer and a platform, on the one hand, and the provider and the platform, on the other (Busch, Schulte-Nölke, et al., 2016).

In the light of these changes a plethora of questions have emerged. Since online platforms often act as 'bottlenecks to control and limit interactions in an ecosystem' (Boudreau, 2010; Hein, 2020), the first question is whether online platforms may still be regarded as mere intermediaries or they should be considered as suppliers or providers of goods, works and services. The second question is whether platforms as dominant market entities may be held liable to their customers for violations caused primarily by platform suppliers. Finally, the third question is whether there is a necessary link between the first and the second questions, i.e. that the platform operator may be held liable towards its customers when it may not be regarded as a mere intermediary, but is considered as a supplier of goods and services provided by the platform suppliers.

During the last five years these questions have been raised in case law and have revealed their ambiguous nature. The most prominent cases in this respect have been recently regarded by the Court of Justice of the European Union (CJEU). In its judgement from 20 December 2017 in *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* ('Uber' case) the Court concluded that the services provided by Uber

should be classified as 'a service in the field of transport' and should be excluded from the information society services (Uber Spain, 2017). On the contrary, in the judgement from 19 December 2019 in the *Criminal proceedings against X* ('Airbnb' case) the Court came to the opposite conclusion on the nature of services provided by the respective platform: Airbnb was affirmed to be a pure intermediary providing information society services (Airbnb Ireland, 2019).

There are two things in the judgements that are of particular interest considering platform liability issues.

First, the judgements have proved that platform operators may be considered as providers of the services going beyond mere intermediary or information society services (further in text—'material services'). With respect to private law matters, and in particular to liability issues, the question which stems from this conclusion is: shall the platform operator be held liable to its customers if it is considered as a provider of material services (like Uber)? Or may it be held liable on some other grounds?

Second, the judgements have established certain criteria under which platform operators may be considered as providers of material services (Opinion, 2019). Regarding liability issues, the approach taken by CJEU raises the following question, which I propose to address in the next sections: should platform operators be held liable only when they meet the criteria established by CJEU, or may there be some other criteria?

Although the issues on platform liability have already been raised in literature and some attempts to answer them have been made by scholars (Busch, Dannemann, et al., 2016; Maultzsch, 2018; Twigg-Flesner, 2018), in light of the recent CJEU judgements I will revise these issues and try to find new approaches to address them. In Section 2 I provide a general overview of the concept of online platforms and the status of their users. In Section 3 I outline the nature of services provided by platforms and analyse the approaches taken in the 'Uber' and 'Airbnb' cases. In Section 4 I critically analyse the question of whether approaches elaborated by CJEU in the 'Uber' and 'Airbnb' cases are applicable to liability issues and raise the main problems related to their application. In Section 5 I take a closer look at liability issues and applicability of the approaches elaborated to CJEU. I come to the conclusion that the analysed approaches are generally applicable to liability issues since they go along with the current regulatory regime for the providers of intermediary services established by the Directive 2000/31/EU on electronic commerce (ECD). However, some flaws in this regime will be outlined as well.

2. The notion of 'online platform'

The term 'online platform' is widely used not only in academic literature but in our everyday speech as well. While from the technical perspective platforms are usually defined merely as interfaces often embodied in products, services, or technologies (McIntyre, 2017), from the socio-economic perspective they are regarded as ecosystems containing autonomous agents that interact with each other (Hein, 2020). The term 'online platform' is often used interchangeably with the companies that orchestrate them (platform owners) (van Dijck, 2019). However, for the sake of both theoretical and practical clarity it is important to distinguish the notion of 'online platform' and the term 'operator of an online platform': the former is a kind of 'virtual marketplace' and an ecosystem comprising different agents, whereas the latter is a person or a company who runs the platform (de las Heras Ballell, 2017).

Considering the notion 'online platform' *per se*, it should be borne in mind that it is usually understood rather broadly. The term may encompass social networks, search engines, online payment systems, streaming services, online marketplaces etc. That is why for the sake of clarity I draw on Hein's (2020) classification of platforms according to their ownership model (centralised, consortia-like and decentralised) and functionality. In the latter case two types of online platforms are distinguished: 1) transaction platforms which facilitate direct transactions between users on different sides of the platform (so-called 'online marketplaces'), and 2) non-transaction platforms which sell advertising on one side and sell or give away content on the other (like media platforms) (Katz, 2019). This paper will focus only on transaction platforms, thus, hereinafter the term 'platform' will be used in this narrow meaning.

Economists often call transaction platforms two- or multisided markets (Feld, 2019; Evans, 2003; Ward, 2017) since they facilitate interactions between different groups of users who have opposite purposes by matching the supply on the one side and the demand on the other. Thus, the typical structure of modern online platforms resembles a triangle (Busch, Schulte-Nölke, et al., 2016); Sørensen, 2018). At the 'top' of this triangle, as mentioned above, there is an operator of the online platform who develops (or manages the development of) the website or the app—enabling users to get in contact and to negotiate, drafts contractual framework for users, enters various contracts with users—which all in all help to regulate the relationships between users and defend their rights and interests (de las Heras Ballell, 2017).

The other angles of the triangle are represented by different groups of users who join the platform. From an economic perspective there are complementors who contribute services and customers who receive and use the services produced by complementors (Hein, 2020; McIntyre, 2017). However, in legal literature complementors are usually called suppliers (providers or business users), whereas 'customers' may also be called 'consumers' (Maultzsch, 2018; Busch, Dannemann, et al., 2016 ; de las Heras Ballell, 2017). Suppliers are natural or legal persons who use a platform generally for their commercial purposes, i.e. they offer their goods, services, etc. and become the counterpart to the platform operator in the membership agreement. Customers are users who merely enjoy the opportunities provided by the platform operator, i.e. they buy, rent, get access to the assets offered by the other group of users—suppliers (or providers) (de las Heras Ballell, 2017). They may be consumers (if customers are natural persons) or corporate clients (if customers are entrepreneurs).

Noticeably, platform operators and their users are bound by contracts concluded between them via the platform. There is a contract between a customer and the platform operator as well as a contract between a supplier and the platform operator usually called a 'membership agreement' (de las Heras Ballell, 2017). Also, there is a direct agreement between a supplier and a customer entered into by virtue of the online platform as a service. That is why platforms are usually described as 'contract-based architectures' (de las Heras Ballell, 2017).

3. The nature of services provided by transaction platforms

Services provided by modern online platforms have a sophisticated nature and are classified in different ways.

Basically, these services are identified as *information society services (ISS)*. This concept is defined in Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services and refers to any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. Under this definition 'at a distance' means that the service is provided without the parties being simultaneously present. 'By electronic means' signifies that the service is sent initially and received at its point of destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means (Directive,

2015). Finally, 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request (Directive, 2015).

If services provided by transaction platforms satisfy all the mentioned features of information society services, they may also fall within a narrower concept and be regarded as *intermediary services*. The latter have a different meaning under current EU secondary legislation, which depends on the regulatory scope. In particular, EU Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediary services in Article 2 (2) defines online intermediary services as the ones that (a) allow business users to offer goods or services to consumers, with a view to facilitate initiating direct transactions between those business users and consumers, and (b) that are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers (Regulation 2019). Thus, here the focus is on the middleman position of a transaction platform fostering communication and bargaining process between its users.

Meanwhile, ECD provides a different definition of intermediation services which focuses on liability issues. In particular, in ECD the concept of 'intermediary service providers' refers to the entities which may enjoy a so-called 'safe-harbour regime' and avoid liability for damage caused to their users. According to articles 12 through 14 of ECD intermediary service providers are entities which provide mere conduit, caching or hosting services and satisfy certain conditions.

Considering transaction platforms, it may be sometimes hard to determine their place within the mentioned types of intermediaries. However, most often they are considered as hosting providers. Noticeably, this approach is taken in the Proposal for Digital Services Act, which defines online platforms as providers of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service (Proposal, 2020). Therefore, in accordance with the provisions of article 14 of ECD, transaction platforms may be considered as hosting providers, if (a) they primarily store the information provided by their users, and (b) platform users do not act under the authority or the control of the platform operator (Directive, 2000).

Although most transaction platforms are considered as providers of information society and conversely as providers of intermediary services, some platforms provide services which go beyond the concept of ISS and qualify as *material services*.

Initially it was emphasised in the European agenda for the collaborative economy (European Commission, 2016), but consequently revealed itself in the CJEU case law, in particular, in the 'Uber' and 'Airbnb' cases.

In the 'Uber' case, the CJEU was asked for a preliminary ruling in four questions, the most essential among which was whether the activity carried out by Uber Systems Spain was merely a transport service or an information society service. Based on a careful analysis of all the aspects of this service CJEU came to the general conclusion that intermediation service such as the one at issue was inherently linked to a transport service and, accordingly, was classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU. Apparently, on the one hand, the CJEU confirmed that the service provided by Uber could be called an intermediation one, but, on the other hand, the Court emphasised that the intermediation service was absorbed in the transport service and constituted an integral part of the latter. Therefore, all in all the service at hand could not qualify as an ISS, although partly it had an intermediary nature (Uber Spain, 2017).

In the 'Airbnb' case, the CJEU was asked for a preliminary ruling on much the same issue. The Court again made a careful analysis of the essence of the service provided by the platform at hand and came to the opposite conclusion that an intermediation service such as the one provided by Airbnb Ireland could be regarded as forming an integral part of an overall service, the main component of which was the provision of accommodation. Thus, an intermediation service at hand had to be classified as an 'information society service' under ECD (Airbnb, 2019).

Although the judgements fail to outline particular criteria to distinguish ISS from material services (Chapuis-Doppler, 2020), they may be found in the Advocate General's Opinion of the 'Airbnb' case. In particular, two criteria are mentioned in this regard: (i) the criterion relating to the fact that the platform *offers services having a material content* and (ii) the criterion relating to the fact that the platform *exercises decisive influence on the conditions under which such services are provided* (Opinion, 2019).

The first criterion determines whether the service provided by a platform has been provided by electronic means previously and whether the platform users had had an opportunity to provide their services before the platform appeared. In this regard, where a platform has created a new supply of service via electronic means and where by virtue of this new supply the users have started to provide services they were not able to provide previously, the platform may be considered as the one providing services which have a material content. Uber is a good example in

this regard. However, this criterion is considered by the Advocate General (AG) as not a decisive, but an indicative one (Opinion, 2019). Thus, the criterion relating to the subsequent activity of the platform is more important.

The second criterion identifies whether a platform operator has a *decisive influence* on the economically significant aspects of provision of services by platform users. In this regard the following aspects have been considered as significant: the price, the quality of services (vehicles), the conditions of access to the platform and services provided by its users (conditions of cancelation of orders, termination of the account etc.). This criterion has been considered by the AG as a *determinative* one to clearly distinguish whether a platform provides ISS or services having a material content.

For the sake of clarity and structure, I summarise all the mentioned options in Table 1.

TABLE 1: Platform services

<table>
<tr><th colspan="2">INFORMATION SOCIETY SERVICES</th><th>MATERIAL SERVICES</th></tr>
<tr><td colspan="2">provided by a platform at a distance
sent and received by electronic means facilitated by a platform
provided at the individual request for remuneration via a platform
a platform has not created a new electronic supply for these services and there was an opportunity for the platform suppliers to provide their services before the platform has appeared
a platform does not have a decisive influence on conditions of the services provided by platform suppliers</td><td>a platform has created a new supply for services by electronic means, and users have been given an opportunity to provide their services only once the platform appeared
a platform has a decisive influence on conditions of the services provided by platform suppliers</td></tr>
<tr><td colspan="2">INTERMEDIATION SERVICES</td><td rowspan="3"></td></tr>
<tr><td>FOCUS ON LIABILITY UNDER ECD</td><td>FOCUS ON MIDDLEMAN POSITION UNDER THE REGULATION 2019/1150</td></tr>
<tr><td>A platform operator merely stores the information provided by its users</td><td>A platform operator allows business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and</td></tr>
</table>

• Platform users do not act under the authority or the control of the platform operator.	consumers; • The service is provided by a platform operator to business users on the basis of contracts

4. Formulation of a problem: approaches elaborated by CJEU in the 'Uber' and 'Airbnb' cases and liability issues

The issue of platform liability is one of the most debatable in modern literature on online platforms. In particular, with respect to transaction platforms, the most questionable issue is whether operators of these platforms may be held liable towards platform customers for tortious or contractual violations caused by platform suppliers. Most scholars have answered this question in the affirmative ((Busch, Schulte-Nölke, et al., 2016; Maultzsch, 2018). However, it is still unclear on which grounds platform operators may be held liable and what rationale lies at the basis of their liability.

The CJEU judgements in 'Uber' and 'Airbnb' were obviously adopted without private liability issues in mind. In both cases, the questions passed to CJEU were initially raised in disputes concerning public law issues. In particular, the main issue of the 'Airbnb' case was whether the platform operator violated the public rules on licensing of mediators and managers of buildings. The dispute in the 'Uber' case, although referring to the issues of unfair competition, did not go beyond public law remedies and sanctions.

Meanwhile, the conclusions made by CJEU in these judgements may be of particular interest considering private law issues. Also, they seem to go beyond public issues in which they originated. Hence, approaches developed by CJEU in the mentioned cases may add new remarks to the debate on platform liability. This said, concerning liability issues, the CJEU approaches raise new questions which are worth thorough analysis.

The first question stemming from the CJEU judgements refers to whether platform operators may be held liable only as providers of material services (i.e. as sellers of goods, providers of transport, courrier or other services). Since CJEU concluded that

platforms' services may have a material nature, one may assume that platform operators may be held liable towards their customers, if services provided by platform operators qualify as material, not information society services. However, does it mean that platform operators whose services do not qualify as material ones, but rather as ISS, shall not be held liable towards their customers for the violations caused by platform suppliers? Or shall they still be held liable for such violations on some other grounds?

The second question raised by the CJEU judgements refers to conditions of platforms' liability. Since CJEU developed two criteria under which a platform operator may be considered as a provider of the material service, may these criteria be regarded as conditions to hold platform operators liable towards their customers? Simply put, the question is whether it is correct to consider Uber in any case liable towards passengers for violations caused by taxi-drivers and, vice versa, to let Airbnb avoid liability if it satisfies the conditions of the 'safe harbour' regime provided by articles 12-14 of ECD.

In the next two subsections I analyse these questions in light of recent case law in various countries and approaches elaborated in European legal doctrine.

4.1. The nature of services provided by platform operators and liability issues

The first presumption based on the CJEU judgements regarding liability issues is that a platform operator may be held liable towards platform customers if the one may be considered as a provider of the material services.

This approach has been widely supported in case law and in academic research. The examples may be found in Danish recent case law. For instance, in the case concerning the platform GoLeif.dk, which offered its users to search for airline tickets, compare prices, and buy tickets, the Danish Eastern High Court concluded that the GoLeif.dk platform was directly liable to the passenger who had bought two flights from Copenhagen to Nice and back, but after staying in Nice could not go back to Denmark since the airline went bankrupt. The reasoning in this judgement is grounded in the Court's conclusion which says that although formally the contract was concluded between the plaintiff and the airline and the latter was the one who caused damages to the plaintiff, the operator of GoLeif.dk from the plaintiff's perspective was a person which the passenger had been dealing with directly (Ostergaard, 2019).

Much the same reasoning can be found in two recent groundbreaking judgements

of the US courts of appeals concerning Amazon.com. The first case which confirms the thesis is *Oberdorf v. Amazon.com Inc*. in which the plaintiff sued Amazon.com for the damages caused by a defective dog collar she bought on the defendant's platform. The US Court of Appeals for the Third Circuit based on a very scrupulous analysis of the nature of the relationship between Amazon and its users concluded that Amazon.com should be considered as a 'seller' of the defective product. Thus, the platform operator should be held liable towards the plaintiff, i.e. towards the platform customer who suffered damages because of the defective product she had bought (Oberdorf, 2019; Busch, 2019). The other case *Angela Bolger v. Amazon.com LLC* concerned much the same issue: the plaintiff sued Amazon.com for the damages caused by a defective replacement laptop computer battery she had bought on Amazon. The California Court of Appeal emphasised that Amazon was a link in the chain of product distribution even if it was not a seller as commonly understood. And just like in *Oberdorf v. Amazon.com Inc*. the Court concluded that 'Amazon's active participation in the sale, through payment processing, storage, shipping, and customer service, was what made it strictly liable' (Bolger, 2020, p. 43).

On the other hand, some academics suggest taking a wider perspective on the issue of liability of transactional platforms. That is why platforms are considered liable towards their customers even if their services do not go beyond information society services.

From this perspective platform operators are bound by the duty of care about their users which stems from the contract between the platform operator, on the one side, and platform customers, on the other (Working Group on the Collaborative Economy et al, 2016). Therefore, in case of non-performance or defective performance of a contract by a platform supplier the platform operator may be held liable for the breach of its duty of care since the operator failed to ensure that the suppliers registered on his platform are reliable and that the information they give about their goods or services is true.

Yet another approach to determine the grounds for liability of platform operators has been developed by the authors of the Discussion Draft of a Directive on Online Intermediary Platforms (Discussion Draft, 2016) and of Model Rules on Online Platforms (Model Rules, 2020). In article 18 (1) of the Draft (article 20 (1) of the Model Rules) it is suggested that the platform operator should be held liable for the non-performance of the supplier-customer contract if the customer can reasonably rely on the platform operator having a predominant influence over the supplier (Discussion Draft, 2016). Presumably, the authors of the Draft do not mean

to hold a platform operator liable towards its customers as a seller of goods or a provider of the material services. On the contrary, the authors suggest holding the platform operator liable if from the customer's perspective the operator has a special (predominant) influence on the supplier.

4.2. Criteria developed by CJEU and private liability issues

The main criterion developed by CJEU in the 'Uber' and 'Airbnb' cases comes down to the idea that a platform operator may be considered as a provider of a material service if it has a *decisive influence* on the economically significant aspects of provision of services by platform users. Since this approach primarily focuses on the way the platform operator *objectively* arranges its relationships with suppliers of goods and services (i.e., arranges payment and rating systems, determines the content of agreements with suppliers, etc.) I will call it the *objective approach* moving forward.

Apparently, this approach recently has been widely supported in the US case law concerning liability issues. In particular, in *Oberdorf v. Amazon.com Inc*. the US Court of Appeals for the Third Circuit, among other criteria allowing Amazon.com to be held liable, mentioned that Amazon exerted *substantial control* over third-party vendors, since (a) third-party vendors could communicate with the customer only through Amazon, (b) Amazon was fully capable, in its sole discretion, of removing unsafe products from its website, (c) Amazon was uniquely positioned to receive reports of defective products, which in turn could lead to such products being removed from circulation, and (d) Amazon could adjust the commission-based fees that it charged to third-party vendors based on the risk that the third-party vendor presents (Oberdorf, 2019).

Much the same approach has been taken by the California Court of Appeal in *Angela Bolger v. Amazon.com LLC*. The Court emphasised:

'Amazon is no mere bystander to the vast digital and physical apparatus it designed and controls. It chose to set up its website in a certain way […] it chose to regulate third-party sellers' contact with its customers […] and most importantly it chose to allow the sale at issue here to occur in the manner described above'.

Based on this observation the Court concluded that Amazon should be held liable towards the plaintiff since it was an "integral part of the overall producing and marketing enterprise" (Bolger, 2020, p. 44).

However, by this time, a slightly different approach has been developed which fo-

cuses not on the way the respective platform operator made the arrangements, but on how *the users perceived* the operator's role in the respective relationships. Thus, I will call it the *subjective approach* to liability issues. Examples may be found in recent Danish case law. In the case on *GoLeif.dk platform* the Danish Eastern High Court concluded that the platform was directly liable to the plaintiff since *the consumer* could assume they were dealing with GoLeif.dk directly and the GoLeif.dk website did not make it sufficiently clear that customers were not trading with GoLeif.dk, but instead with the airline delivering the flight (Ostergaard, 2019). In the same vein, in a case concerning Booking.com, the Danish Western High Court concluded that the accommodation platform could not be held liable for the host's violations since the appellant *should have understood* that they entered into an overnight stay with the place of residence, and that Booking.com alone acted as an intermediary of the agreement (Ostergaard, 2019).

The subjective approach was also supported by European scholars (Busch, Dannemann, et al., 2016) and created a basis for the Discussion Draft of a Directive on Online Intermediary Platforms and for the Model Rules on Online Platforms (Model Rules, 2020). According to article 18 of the Discussion Draft, and to article 20 of the Model Rules, a platform operator may be held liable towards a platform customer if the customer can *reasonably rely on the platform operator* having a predominant influence over the supplier. Apparently, here the focus is again on how the platform appears from the customer's perspective (Busch, Dannemann, et al., 2016; Maultzsch, 2018; Model Rules, 2020), which is typical of the subjective approach.

Thus, there are two basic approaches to determine whether a platform operator is liable towards platform customers – subjective and objective ones, and both approaches are equally supported by scholars and courts. In the next Section I will carefully analyse which approach fits the discussed liability issues better.

5. The approaches developed in the 'Uber' and 'Airbnb' cases and the theory of civil liability

When trying to extrapolate approaches developed in the 'Uber' and 'Airbnb' cases to private liability issues, it is crucial to analyse them from the perspective of fundamental theory of private liability.

To make the analysis in this section more illustrative let us first list the most common violations causing damages to customers of transaction platforms. It should be borne in mind that unlike sharing or streaming platforms where deployment of

illegal content is the most widespread violation, transaction platforms may deal with a wide range of wrongful acts performed by platform suppliers.

First, like in both cases concerning *Amazon.com* the violations may come down to the distribution of defective products injuring buyers and damaging their property. Apparently, here we deal with product liability.

Secondly, it may also be a breach of a contract between a supplier on one side and a customer on the other, for instance, the sale of goods of low quality, late delivery of goods to customers, undue performance of service agreements (like late arrival of a taxi). Thirdly, the violation may come down to a fraudulent activity via a platform when a supplier pretends to offer goods or services, however, purporting only to get money from customers without any performance in return. In these two cases we deal with contractual liability. If a supplier delivers goods of a bad quality or unduly performs services, the supplier breaches a contract concluded with a customer. Likewise, there is a breach of the supplier-customer contract where the supplier purports to cheat customers offering them goods or services that she is not going to sell or perform.

Thus, the liability issues should be analysed in accordance with the type of relationships arising from the violations listed above, and the product liability issues should be regarded separately from issues concerning contractual liability.

5.1. The 'Uber' and 'Airbnb' judgements and product liability

Product liability is a kind of tort liability for production and distribution of defective products. Although liability issues are traditionally attributed to national legislation, basic rules on product liability are harmonised at the Union level in Product Liability Directive (Directive 85/374/EEC).

The main idea of the Directive is that the producer of the defective product should be strictly liable for the damage caused by the product. Thus, this Directive lays down the liability for the defective products on their producers (Art. 1). However, where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (Art. 3(3)).

Apparently, the Directive determines the persons liable towards customers rather rigidly and does not leave any room for the persons who are not literally 'producers' or 'suppliers' of a product. That is why the European Commission in its latest

Report on the application of the Directive emphasised that "some of the concepts that were clear-cut in 1985, such as 'product' and 'producer' or 'defect' and 'damage' are less so today" and that "industry is increasingly integrated into dispersed multi-actor and global value chains with strong service components" (Report, 2018, n.p.).

Transaction platforms are good examples of this problem: introducing themselves as merely intermediaries between sellers and buyers, generally they may not be held liable towards customers. However, sometimes this rigid approach disturbs a fair balance between the business and consumer protection. Due to structural peculiarities of platforms as well as strong influence of platform operators on the communication between platform users it may be sometimes extremely hard for a consumer to identify the seller of a product and to communicate or sue the latter directly.

In this respect the approaches taken by CJEU in the 'Uber' and 'Airbnb' cases may serve as a roadmap. If some transaction platforms may under certain criteria qualify as providers of material services, then platforms serving as online marketplaces for goods may also be considered as sellers of goods who thus are liable for damages caused by defective products. In this regard objective criteria to distinguish pure intermediaries from providers of material services may also be helpful. Thus, if the service provided by a platform has created new opportunities for sellers and if the platform operator has a *decisive influence* on the economically significant aspects of distribution of goods by platform users, the operator should be considered as a seller of goods.

Noticeably, much the same view has been expressed exactly in product liability cases, in particular, in *Oberdorf v. Amazon.com Inc*. and in *Angela Bolger v. Amazon.com LLC*. In both cases Amazon.com has been considered as the seller of defective products since the platform exerted *substantial* control (obviously synonym to the CJEU's *'decisive influence'*) over third-party vendors (Oberdorf, 2019), and could and did exert pressure on upstream distributors to enhance safety (Bolger, 2020).

This proves that approaches developed by CJEU are generally applicable to product liability cases.

However, American courts went further by distinguishing intermediary platforms from platforms qualifying as sellers. In particular, in *Angela Bolger v. Amazon.com LLC* the Court paid special attention to the fact that Amazon could in a particular case 'be the only member of that enterprise reasonably available to the injured

plaintiff,' and that Amazon, like conventional retailers, 'could be the only member of the distribution chain reasonably available to an injured plaintiff who purchased a product on its website' (Bolger, 2019, p. 26). Thus, the availability of suppliers of a platform and the possibility to communicate with them directly is not less important in this context.

Following this idea some amendments to European secondary legislation on product liability may be suggested. Current wording of Article 3 of the Product Liability Directive, which identifies persons who may be held liable for damages caused by defective products, will hardly help to resolve disputes concerning platform operators since the latter are not literally suppliers or producers. Thus, this provision should be revised so as to provide for an opportunity to lay down product liability on a platform operator. The conditions under which the platform operator may be considered as the seller may be the following: (a) the platform operator has a decisive influence on the economically significant aspects of the distribution of goods and (b) the operator is the only member of the distribution chain reasonably available to the buyers.

5.2. The 'Uber' and 'Airbnb' judgements and the contract liability for the breach of contracts between platform users

Private liability issues concerning platform operators may stem from the sale of goods of low quality, undue performance of services, fake offers of goods or services to customers by the supplier etc. With respect to the mentioned types of violations, several options concerning liability of platform operators may be suggested.

Option 1. A platform operator is liable as the party to the contract with the customer

Unlike product liability analysed in the previous subsection, here we deal with contract liability. According to a general rule a contract is binding only upon its parties (article 1.3. of UNIDROIT Principles of International Commercial Contracts (UNIDROIT, 2016), article II.–1:103 (1) of Draft Common Frames of References (Bar et al, 2008) and thus it is only a party to the contract (an obligor) who may be held liable for its breach.

From this perspective a platform operator generally may not be held liable for the breach of a contract since the latter is concluded between platform users. However, the conclusion will be the opposite if the platform operator is considered *as a party to the contract* concluded with the platform customer, which is possible if the

operator qualifies as the seller of goods or the provider of respective services.

Although the presumption may seem rather weird, it has a rationale, which is confirmed by CJEU case law, in particular in *Ms Sabrina Wathelet and the Bietheres & Fils SPRL garage* ('Wathelet' case). In this case Ms Wathelet purchased a second-hand vehicle from the Bietheres garage. Although Ms Wathelet thought she had bought the vehicle belonging to Bietheres garage, in fact the vehicle belonged to Ms Donckels, herself a private individual, and the garage acted on behalf of the latter. Later the vehicle broke down and was taken by Ms Wathelet to the Bietheres garage to be repaired for free, but the garage refused to repair it under guarantee since it was not the seller of the vehicle, but merely an intermediary. Therefore, the main issue of the case was whether Ms Wathelet could enjoy the right to require the seller (Bietheres garage) to repair the vehicle she bought, which was established by Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. The CJEU in this case was asked whether the term "seller" under Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees must be interpreted as covering not only a trader who, as seller, transfers ownership of consumer goods to a consumer, but also a trader who acts as intermediary for a non-trade seller.

The Court mentioned that "the concept of 'seller' can be interpreted as covering a trader who acts on behalf of a private individual where, *from the point of view of the consumer,* he presents himself as the seller of consumer goods under a contract in the course of his trade, business or profession" (Wathelet, 2016, n.p.). Following this vein the Court concluded that in the circumstances 'in which the consumer can easily be misled in the light of the conditions in which the sale is carried out, it is necessary to afford the latter enhanced protection'. And 'therefore, the seller's liability, in accordance with Directive 1999/44, must be capable of being imposed on an intermediary who, by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold' (Wathelet, 2016, n.p.).

This approach may be applied to transaction platforms. However, certain additional issues should also be taken into account. Recently adopted Directive 2019/2161 modernising European Union consumer protection rules (Directive, 2019) establishes additional information requirements for online marketplaces. In particular, it supplements Directive 2011/83/EU on consumer protection with Article 6a, which, among other, requires providers of online marketplaces to provide the consumer in a clear and comprehensible manner with the information on how the obligations

related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, and the information on whether the third party offering the goods, services or digital content is a trader or not. Therefore, the fact that the provider of the online marketplace (i.e. the platform operator) (a) informs platform customers that contract obligations are shared between him and platform suppliers, or (b) fails to inform customers that only platform suppliers carry out all the contractual obligations or provides this information in an inappropriate manner—may also indicate that from the consumers' point of view the operator presents himself as the platform supplier.

Apparently, the conclusion expressed in the 'Wathelet' case is generally in line with the basic approach expressed in the 'Uber' and 'Aribnb' judgements. Moreover, it may be regarded as a link between the 'Uber' ('Airbnb') judgements, which address only the issue of the nature of services provided by platform operators, and the private liability issues, which are touched upon in the 'Wathelet' case.

However, the criteria under which an intermediary may be considered as a seller or as a provider of material services in the 'Wathelet' case, on the one hand, and in the 'Uber' and 'Airbnb' cases, on the other, obviously are different. The criteria in the 'Uber' ('Airbnb') cases as mentioned above are *objective* since they are based on the objective nature of the relationships between a platform operator and platform users. However, the criteria developed in the 'Wathelet' case are of *subjective* nature since they focus on how a consumer perceives the role of the counterparty and whether the consumer has enough information that the contract is concluded with an intermediary, not the seller directly.

Considering the issue of private liability of platform operators, the *subjective* criterion developed in the 'Wathelet' case as well as other judgements of national courts (e.g. the judgement of Danish Eastern High Court on the GoLeif.dk platform, see Ostergaard, 2019) seem to be more relevant [1].

Therefore, since liability of platform operators is a private law issue the subjective criteria seems to be more relevant. Thus, the focus should be on whether the platform customer could reasonably be considered as a party to a sales contract with

1. Subjective or mixed (subjective-objective) criteria and standards generally are more common for private law. In particular, subjective standard underlies the contract theory of interpretation (a contract shall be interpreted according to the common intention of the parties (article 4.1. of UNIDROIT Principles), the theory of mistake as a ground for the avoidance of a contract (the mistake must be of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms, article 3.2.2. of UNIDROIT Principles) etc.

another customer. However, it does not downplay the meaning of the objective criteria which may be indicative in this regard. Apparently, it is impossible to determine whether a customer could reasonably consider the platform operator as a counterparty to the sales contract without taking into account the architecture of the platform, the relationships between the platform operators and platform users etc. In this regard whether the platform operator has observed his information duties mentioned above under the newly adopted Directive 2019/2161 modernising European Union consumer protection rules should also be taken into account.

Option 2. A platform operator is liable for negligence

Unlike the previous option, which is based on the presumption that platform operators may be held liable as parties to supplier-customer contracts, this option stems from the presumption that platform operators may be held liable even if they cannot be considered as parties to the contracts, i.e. on a non-contractual basis.

In most countries all over the world the law on non-contractual obligations generates the duties of careful conduct in relation to the interests of another protected by law. The concept is based on the standard of care which must be exercised under the circumstances of the case by a reasonably prudent person (Bar et al, 2008) [2]. What follows from this standard is that if a person fails to exercise reasonable care, it acts negligently and thus is liable for damages caused to the injured person (BGB, article 276).

Extrapolating the concept to platforms it may be assumed that if a platform supplier fails to duly perform the supplier-customer contract, the platform operator may be held liable towards the platform customer since the operator failed to exercise her duty of care. Indeed, the platform operator is responsible for the arrangement of a safe and well-ordered online marketplace which may be available only to conscious and prudent users (both suppliers and customers). Accordingly, when the operator violates this duty making the platform available for rogues it may be assumed to be held liable for the damages caused to its users by this violation under provisions of tort law.

However, the fact that a platform supplier has breached a contract concluded with a platform customer does not itself mean that the platform operator has not exercised the duty of care. A key element of this duty is that it must be *reasonable* to

2. This standard is mostly attributed to German legal tradition and to common law case law, although *mutatis mutandis* it may be found in other legal traditions as well (Lahe, 2004).

hold a person liable under certain circumstances. If some of suppliers registered on the platform do not duly perform their contract obligations, it may hardly be a reason to blame the platform operator for the breach of the duty of care since the latter is not able to predict which of the users will be prudent suppliers and which of them will not.

Moreover, the platform operator generally will rely on the ECD rules providing liability exemptions for hosting providers. According to Article 14 of ECD a platform operator may not be held liable if the one satisfies at least one of the conditions mentioned in this article. The first condition is that the platform operator does not have actual knowledge of illegal activity or information, and as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent (constructive knowledge) (Baistrocchi, 2002). The other condition is that upon obtaining such knowledge or awareness, the platform operator acts expeditiously to remove or to disable access to the information (Directive, 2000).

Having regard to the current wording of article 14 and to the nature of transaction platforms, it may be concluded that in most cases platform operators will be exempted from liability and prove that they meet the mentioned conditions.

First, a platform operator in most cases will easily prove that the one did not have actual or constructive knowledge about the illegal activity of its users. According to article 15 of ECD there is no general obligation to monitor the information or activity of platform users imposed on platform operators. Thus, traditional systems of assessment of the users' activity which are widely used by modern platforms, such as rating systems and comments, *per se* do not evidence that the platform operator has had knowledge of illegal activity or information placed on the platform. These systems generally do not address the information about platform users to the platform operator directly. On the contrary, they are created for platform users in the first place and allow the latter, not the platform operator, to assess the activity of platform suppliers.

Second, it is questionable whether the undue performance of contracts by platform suppliers may qualify as an *illegal* activity under article 14 of ECD. Generally undue performance (or a lack of performance) qualifies as a breach of obligations stemming from a contract, but not from the statutory provisions. Only if the supplier provides a fraudulent activity via the platform (e.g. places fake offers of goods or services), may this activity be considered illegal.

Third, in practice it will be hard to prove that the platform operator failed to expeditiously remove certain information from the platform. Again, since there is no general obligation to monitor the information, nor a general obligation to seek facts or circumstances indicating illegal activity, it is hard to prove when exactly the platform operator has obtained knowledge and when the one had to remove the information stored on the platform.

However, despite the mentioned obstacles to hold platform operators liable towards platform customers, in certain cases it still may be possible.

For example, if the supplier constantly or temporarily fails to duly perform contract obligations (delivers goods or services not in due time, distributes goods of low quality etc.), but the customers are notified about these facts by a rating system and comments of other users, it is their choice to enter a contract with the supplier. In this situation it cannot be said that the platform operator has failed to exercise the duty of care.

However, if the supplier fails to duly perform contract obligations, but it is not reflected in the rating or in comments since the platform operator has been deleting or amending them (even automatically), this will evidence that the platform operator has had an actual knowledge and has taken an active editorial role. Thus, according to the CJEU reasoning provided in *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* in this situation the platform operator may not be exempted from liability (Google France, 2010). From the tort law perspective, the operator will be considered as the one who failed to exercise his duty of care. This conclusion is also supported by the recently adopted Directive (EU) 2019/2161 modernising European Union consumer protection rules (Directive, 2019), which, among other, supplements Annex I of Unfair Commercial Practices Directive 2005/29/EC ('Commercial practices which are in all circumstances considered unfair') with the new types of practices. In particular, providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking as well as submitting or commissioning legal or natural persons to submit false consumer reviews in order to promote products—are both considered as unfair commercial practices. Thus, if a platform operator uses these practices it may not be exempted from liability under the 'safe harbour' provisions of ECD.

The mentioned solutions, unfortunately, do not entirely fit into the current regulatory regime established by the EU Directive on electronic commerce (ECD). However, they are necessary to provide for a balance between the interests of platform

users and platform operators. Thus, article 14 of ECD needs to be amended. For example, the term 'illegal information' and 'illegal activity' should be replaced with a broader term, like 'harmful', 'deceptive', 'misleading', which will allow platform users to seek defence in the case of a platform operator constantly breaching its duty of care and ignoring customer reports and comments about the undue activity of suppliers registered on the platform. Moreover, provisions of article 14 of ECD should be balanced with the mentioned provisions of Directive (EU) 2019/2161 modernising European Union consumer protection rules. These suggestions may be taken into account while discussing provisions of the lately introduced Proposal for Digital Services Act.

Conclusion

Recent CJEU judgements in the 'Uber' and 'Airbnb' cases have revealed a lot of issues concerning transaction platforms. Although these judgements were adopted in disputes concerning primarily public law issues, approaches developed by CJEU may be used to solve the issues concerning liability of platform operators as well.

With respect to product liability, the CJEU approaches are decisive to determine when a platform operator may be held liable for damages caused by a defective product distributed via the platform. Based on these approaches the operator bears liability towards customers when the one may be considered as a seller of the defective product. In turn, the platform operator may be considered as the seller where the one has a decisive influence on the conditions of negotiations and communication between platform users. In this regard the fact that the platform operator is the only member of the distribution chain reasonably available to the buyers may be indicative.

Considering liability for the breach of supplier-customer contracts caused by a platform supplier, the CJEU approaches may also be applied, however, with certain exemptions and modifications. Apparently, the platform operator may be held liable for the breach of the contract if the one qualifies as a seller or a provider of the material services and thus as a party to the contract concluded with the customer. This approach stems directly from the 'Uber' and 'Airbnb' judgements. However, in the described cases the criteria by which the operator may be considered as a party to the supplier-customer contract differ from the criteria developed by CJEU. Unlike the objective criteria established by CJEU, with respect to contract liability issues the focus should be on subjective criteria. Thus, the platform operator may be held liable if from the consumer perception the operator is a seller or a provider of the material services and thus a party to a contract.

However, this is not the only condition to hold the platform operator liable for the breach of a supplier-customer contract. Even if the platform operator does not qualify as a party to this contract, the one still may be held liable towards customers for the failure to exercise the duty of care. The main conditions in this regard are: (a) the operator is informed about the violations or fraudulent activity performed by a platform supplier but does not remove the respective information on the services (goods) or the supplier's account in whole, or (b) the operator interferes with the comments left by customers and amends them so as to make a false impression that the supplier is a prudent and honest platform user. However, to make this option possible, the amendments to article 14 of ECD suggested in the article are needed.

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