SCOPE OF PLATFORM OPERATOR'S LIABILITY: THREE CATEGORIES OF CASES

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Annotation. Various online platforms play an increasingly crucial role in everyone's life. Given the growing power of platforms, the question of their liability for harm that may result from intentional or negligent exploitation of the opportunities created by platforms naturally arises.

The aim of the work is to analyze the jurisprudence addressing tort liability of platform operator for the damage caused by the third person while using the platform. The issue is addressed from the perspective of the scope of liability concept (known as 'remoteness of damage' in common law countries). The main objective is to conceptualize the factors that make online platform operator responsible for the damage caused by others with the use of opportunities platform creates.

The methodology of the study is based on the analysis of the case law of American courts, judgments of the Court of Justice of the European Union as well as EU directives and regulations. The study addresses three distinct categories of cases where the issue of intermediary liability is relevant: violation of fundamental human rights, copyright infringement and product liability.

Conclusions. When assessing the remoteness of the causal link between the actions (omissions) of the platform operator and the damage caused by the user of the platform (or, what is the same, when determining the scope of the platform operator's liability), one should first consider the degree of control on the part of the platform operator. For transactional platforms, such control is reflected in the influence on the essential terms of transactions concluded via the platform; for media platforms, it is reflected in the possibilities of content moderation, with due regard to the development of technology.

In addition, when determining the scope of liability, a number of economic variables should be taken into account, such as the total social utility of lawful uses of the platform compared to the social disutility of illegal uses of the platform; the accessibility of claims against direct tortfeasors and the cost of proceedings against them as compared to the cost of proceedings against the platform operator; and whether the platform operator is the least cost avoider.

Key words: platform liability; intermediary liability; causation; remoteness; scope of liability; product liability.

1. Introduction.

Various online platforms today play an increasingly crucial role in everyone's life. Through platforms we connect with friends, colleagues, and like-minded people, collaborate on joint projects, learn about the news, buy goods, order services, and even find life partners. Platforms facilitate communication, match supply and demand, and substantially reduce transaction costs. The emergence and proliferation of online platforms has had such a profound impact on the structure of the economic system that today we speak of a platform economy [1-2] and digital capitalism [3]. The coverage of the largest online platforms is so enormous that in terms of their 'population', platforms exceed states . The impact of platforms on the enjoyment of human rights (such as the right to access information, freedom of expression, the right to privacy, etc.) is so significant that it is

proposed to subject platforms to human rights obligations originally addressed exclusively to states [5–7]. Given the growing power of platforms, the question of their liability for harm that may result from intentional or negligent exploitation of the opportunities created by platforms naturally arises.

From a tort law perspective, the distinctive feature of the situation is that the damage is caused by one user of the platform to another user. The platform itself serves merely as an environment, or ecosystem, in which the harmful incident occurs. In such a setup, the first thing that comes to mind is that the platform should not be responsible for the actions of a third party (personal responsibility principle).

If, for example, the attackers who kidnapped a child to demand a ransom from the parents contacted them by phone, no one would think of the phone company as an accomplice to kidnapping. Can we apply the same reasoning to platforms? After all, they only provide opportunities for communication between users, and supposedly should not be responsible for how people use these opportunities. It seems that at the dawn of the platform economy, this assumption served as a starting point.

However, little by little, the approach to the responsibility of online platforms is shifting. The shift is reflected in Facebook founder Mark Zuckerberg's testimony to Congress following the scandal involving the leakage of personal data [8]. The introductory part of his speech indicates a paradigm shift: from viewing a platform as a neutral space that creates opportunities and is not responsible for how people use them, to understanding that a platform is an ecosystem that can and should function in a way that prevents or at least minimizes the misuse of the opportunities it creates.

2. Analysis of scientific publications.

Platform liability for damage caused by third party content (also known as 'intermediary liability') has gained much attention in academic literature. The latest studies include 'The Oxford Handbook of Online Intermediary Liability' edited by Giancarlo F. Frosio [9], 'A New Framework for Intermediary Liability : Copyright, Causation and Control on the Internet' by Kylie Pappalardo [10], 'Fundamental Rights Protection Online : The Future Regulation of Intermediaries' edited by Bilyana Petkova and Ojanen Tuomas [11], 'The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US' by Folkert Wilman [12] and numerous papers in law journals.

3. The aim of this work is to analyze the jurisprudence addressing tort liability of platform operator for the damage caused by the third person while using the platform. The issue is addressed from the perspective of the scope of liability concept (known as 'remoteness of damage' in common law countries). The main objective is to conceptualize the factors that make online platform operator responsible for the damage caused with the use of opportunities platform creates.

4. Review and discussion.

1. Taxonomy of cases. There are three broad categories of cases that raise the issue of platform operator's liability for harm caused by third parties using the platform.

The first category involves violations of fundamental human rights, such as the right to life, health, bodily integrity, freedom, honor, dignity, and others. For example, if the victim was injured in a terrorist attack orchestrated through a social network. This category also includes cases where the injury to life, health or property occurred as a result of the victim's own actions, who committed such actions being motivated by the content posted on the platform, or such content misled the victim as to the safety of such actions.

The second category includes copyright infringement cases where platform users share copyrighted materials without the license from the copyright holder. For example, when a person uploads on YouTube a movie that has just been released in theaters without the permission of the producing company.

The third category consists of cases involving the liability of online marketplaces for damage caused by defective products sold on the platform by one user to another. For example, if a person buys a defective television set from a seller on Amazon and it catches fire when turned on and causes injury to the buyer's health and property.

These three categories of cases have in common the fact that they involve the liability of platforms for damage that is not a direct consequence of the platform's own actions, but rather was caused by a third party using the opportunities that the platform provided. At the same time, there are some distinctions between the categories that have resulted in differing approaches of the courts to their consideration.

2. Violation of fundamental human rights. Social media platforms enable people to communicate and share ideas on a global scale. However, people can communicate with evil intentions (e.g., criminals conspiring to commit crimes), and ideas can incite hatred and propagate violence. Terrorist organizations create social media accounts and use these accounts to spread propaganda, recruit members, fuel animosity, orchestrate attacks and broadcast their atrocious crimes to a wide audience for the purpose of intimidation (See: [13]). But does it make media platforms responsible for the consequences of the terrorists' actions?

Another example is when a platform hosts advice or other content that may encourage people to take actions detrimental to their well-being. This also raises the question of the platform's liability for harmful consequences.

Both categories occurred in American case law. And in each case, Section 230 of the Communications Decency Act of 1996 (CDA) provided a 'shield' from liability for online platforms. According to it 'no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.

Thus, the point of the rule is that an online platform shall not be treated as a 'publisher or speaker' of information (content) posted on the platform by its users. Therefore, the platform should not be liable for any harm that may be caused by this information or content (as a publisher or speaker would have been).

By introducing the safe harbor for online platforms, the legislator sought to promote the freedom of speech (the sacredness of which is a hallmark of American legal culture [14]), the growth of a free market of ideas, and the advancement of digital communication technologies. Making platforms liable as publishers of everything users post on those platforms would have a 'chilling effect' [13, p. 529; 15]: out of fear of liability, platforms would tend to restrict user expression. Plus, the burden of screening everything that is hosted could become prohibitive and lead to the decline of social media.

The immunity from liability provided by § 230 CDA applies if: (i) the action is brought against a defendant who is a 'provider or user of an interactive computer service' as defined in § 230(f)(2) CDA; (ii) the claim effectively treats defendant as a 'publisher or speaker' of information; and (iii) the information is provided by another person [16].

Thus, under US law the platform is immune from liability when it acts as a publisher or speaker of the content provided by a third party. Therefore, in order to overcome this immunity, plaintiffs have to prove either that the platform was 'more than' a publisher or speaker, namely that it was involved in the development of the impugned content; or that the action does not concern the platform's activities as a publisher or speaker, but rather the platform's activities in some other capacity, for example, as a manufacturer of a defective product (the defective product being the platform itself, its algorithms, software or applications).

The successful use of the second string of argument is illustrated by two recent cases: Lemmon v. Snap, Inc. [17] and A.M v. Omegle.com LLC [18].

In Lemmon v. Snap, Inc. the Court introduced a test for determining whether an action concerns the defendant's activities as a publisher. An action concerns the defendant's activities as a publisher if the due discharge of the duty that the plaintiff considers to have been violated would have required

the defendant to review, edit or remove third-party content; if, however, some other actions were needed to properly discharge the duty, the action does not concern the defendant's activities as a publisher. In the latter case, the immunity does not apply.

In the Lemmon case, three young men were killed when they drove off the highway at a speed of over 100 miles per hour. At that moment, the driver was filming the speedometer for Snapchat using a special 'Speed Filter', believing that once the speed exceeded one hundred miles per hour, he would earn 'points' on the social network. Preventing this harm did not require reviewing, editing, or deleting content provided by a third party. What was needed was to develop a safe platform design that would not induce users to take actions endangering their life and limb.

3. Copyright infringement. Within the European Union, there is also a 'safe harbor' or 'shield' that protects platforms from liability for damage caused by third-party content hosted on the platform. It is the provision of Article 14 of Directive 2000/31/EC on e-commerce. It is also contained in Article 6 of Regulation (EU) 2022/2065 of October 19, 2022 (Digital Services Act, DSA):

'Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider: (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content'.

The safe harbor regime operates in tandem with the principle according to which monitoring of all the content before it is posted on the platform is not required and neither is the proactive cross-cutting screening of the posted content (see: Article 15 of Directive 2000/31/EC on e-commerce and Article 8 of the DSA).

Important clarifications on the application of these provisions were made by the Court of Justice of the European Union (CJEU) in Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C 682/18) and Elsevier Inc. v Cyando AG (C 683/18) [19].

In these cases, the CJEU was asked the following questions: (1) can it be deemed that by hosting a third party content, YouTube makes a public communication of a copyrighted work within the meaning of Article 3(1) of the Copyright Directive? (2) does the activity of a video hosting platform fall within the scope of Article 14 of Directive 2000/31/EC on e-commerce? and (3) must actual knowledge of the illegal activity relate to the concrete illegal activity under Article 14(1) of the E-Commerce Directive?

As to the first question, the CJEU answered in the negative. The mere operation of a platform and the fact that someone has used it to share a copyrighted work without the authorization of the copyright holder does not, in itself, make the platform liable for the harm caused by copyright infringement. Unless the role of the platform in the infringing communication of the protected material was more than just providing users with the opportunity to publish any content. The Court gave a number of examples when the latter may be the case.

Firstly, 'where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it'[19]. Since there is no general obligation to inspect all content before it is uploaded to the platform (Article 15 of Directive 2000/31/EC), nor is there an obligation to proactively monitor content that has already been uploaded, it means that the platform operator has 'specific knowledge' of copyright infringement only when it receives a complaint about the respective content. Therefore, only then does the platform operator have an obligation to react. Failure to fulfill this obligation makes the operator responsible for the illegal communication of copyrighted material.

The second example is 'when operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform'[19].

This example reflects the universal duty of care imposed on everyone under tort law, i.e. the duty to take such precautionary measures as a reasonably prudent person would be expected to take in a similar situation in order to avoid harming others. Essentially, this example means that platform operators are obliged to implement technological solutions to prevent copyright infringement. However, the Court did not specify what these solutions should be. For example, it could be algorithms that automatically identify copyrighted content for subsequent reaction in an automatic or human-controlled mode. However, given the absence of proactive screening duties, it should be assumed that the Court was referring only to technological means for filing complaints and their consideration.

The third example is 'where the operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform'[19].

The CJEU answered the second question in the affirmative:

'the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision [Article 14 of Directive 2000/31/EC on electronic commerce], provided that that operator does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform'[19].

Finally, with regard to the third question, the Court noted that in order for the immunity not to apply, the platform operator 'must have knowledge of or awareness of specific illegal acts committed by its users'. This approach of specific knowledge is notably reminiscent of the approach of the ECtHR in cases concerning the responsibility of the state for damage caused by criminal acts of third parties (non-state agents): the ECtHR finds the state liable only if it knew or should have known about a specific forthcoming crime [20, para 68].

4. Product liability. Product liability cases arise in relation to so called 'transactional' platforms [21, p. 4] or 'marketplaces' - the platforms that bring two parties to a future contract together in an online environment. They facilitate the match between supply and demand in the markets for goods, services, and works. The usual bilateral structure of a contract (buyer-seller, tenant-landlord, customer-contractor, etc.) turns into a triangular structure where two parties contact each other with the facilitation and intermediation of a third party - the platform operator [21, p. 4].

On the one hand, the operator of the virtual 'marketplace' where the transaction occurs is not technically a seller. Yet, on the other hand, to consider the platform merely a neutral venue for trading or a channel of communication between the two parties would mean to overlook the reality of the fact that the platform services are interwoven into the overall transaction cycle between the two parties (finding a counterparty, concluding a contract, performing the contract and resolving disputes over the contract) and the platform operator has a significant impact on the progress of relations throughout this cycle. Therefore, whenever defective product (work or service) sold through the platform causes injury to life, limb or property of the consumer, the question of platform operator's liability has been rightfully raised.

In the case of Bolger v. Amazon Com LLC (2020) [22], the plaintiff, Ms. Bolger, purchased a laptop battery via the online marketplace Amazon. A few months later, the battery exploded while in use, causing severe burns to the plaintiff. Ms. Bolger filed a lawsuit against the platform operator, Amazon.com, LLC. She based her claims on the rules of strict product liability.

The court thoroughly examined the role of the platform in the transaction and concluded that this role was so significant that Amazon should be considered a link in the vertical distribution chain of the goods, because Amazon (a) created the virtual environment (website) in which the seller offered its products; (b) actively attracted prospective buyers (c) determined the conditions of the seller's participation and charged a fee for the use of the platform (in the form of a percentage of the sale price); (d) had physical possession of the goods, storing them in its own warehouses; (e) received payment for the goods from the buyer; (f) delivered the goods to the buyer in packaging with its

own branding; (g) controlled communication between the seller and the buyer, prohibiting and technically making it impossible for them to communicate outside the platform.

All of the above indicates that Amazon has engaged in the overall production and marketing chain in such a way that making it strictly liable for defective products is consistent with the goals pursued by strict product liability. These goals include enhancing product safety, maximum protection of the consumers, and effective allocation of costs across the production and marketing chain that brought the product to the consumer.

Similar conclusions have been reached by American courts in other cases [23-24].

In her study, Natalia Filatova-Bilous observed important similarities between the reasoning of the US courts and the reasoning of the CJEU in cases involving Uber and Airbnb platforms [21]. Despite the fact that the cases before the CJEU concerned public law issues, she argues that the conclusions reached by the CJEU can also be relevant to the issue of platforms' liability under private law [21, p. 9-10].

Thus, in the case of Asociación Profesional Élite Taxi v Uber Systems Spain SL, (C-434/15) [25], the CJEU was asked how Uber's activities should be treated - as 'an information society service' within the meaning of Directive 98/34, or as 'a service in the field of transport' (Filatova-Bilous calls it a 'material' service).

As is well known, Uber connects non-professional drivers on their own cars with customers who seek a ride around the city through a mobile application developed by the company.

The court concluded that the service provided by the company is 'more than' an information society service [25, para 37], as it is an integral part of the overall service, the main component of which is the transportation of a passenger [25, para 40]. Justifying this conclusion, the Court noted that

'without [Uber mobile application] (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion'.

These conclusions were reiterated by the CJEU in the case of Uber France SAS v. Nabil Bensalem, C-320/16 [26].

Thus, the key criterion under which Uber's service was recognized as a service in the field of transport, rather than merely an information society service, is that the company exercised a decisive influence over the terms of the transportation service. And that is why the company is 'more than' a neutral intermediary that provides communication.

In this respect, the reasoning of the CJEU, as observed by Filatova-Bilous, resembles the reasoning of the American courts, which also point to the significant involvement of the platform in the overall production and marketing cycle as a factor that allows to hold the platform liable for defective products [21, p. 15-16].

5. Conclusions.

In the three above-mentioned categories of cases it is not the principal tortfeasor (the one who directly caused the damage) who is brought to court, but rather the online platform that was used by the tortfeasor. In this fact setting, the 'but for' test is indisputably satisfied: if it were not for the platform, the paths of the tortfeasor and the injured person would not have crossed (the CJEU notes it in para 39 of the Uber Spain case (C-434/15) stating that '[without the mobile application] (i) drivers

would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers' [25, para 39]). However, the 'but for' test does not provide a final answer on the issue of legally relevant causation.

Therefore, the scope of liability issue (remoteness of damage) is particularly acute in these cases - as it happens each time the progress of mankind (in science, technology, economics, medicine, etc.) tests the boundaries of tort law, and calls for decision-making based on policy considerations.

Courts that find the causal link between the activities of the platform operator and the damage caused by the platform user too remote often draw an analogy with traditional means of communication, such as postal services and the telephone (implying that one cannot hold a telephone company liable for all the crimes committed with the use of telephone).

However, there is a fundamental difference between postal or telephone communication, on the one hand, and modern digital online platforms, on the other. It is the degree of control over the content of messages exchanged by users. Phone companies and postal services do not have any such control, while platform operators do, to varying degrees. On social media platforms, this control is exerted through content moderation (see [27]).

The control argument is echoed in the judgments of the US courts that point to control as a touchstone for the product liability of online marketplaces, and in the judgments of the CJEU, which deems the 'decisive influence' indicative of the platform's information services being an integral part of a tangible service provided in the real world. Overall, control is what makes a digital intermediary 'more than' just a neutral channel of communication between users.

If one were to place platforms among different means of communication, it would be somewhere between telephone and media: a platform is not as neutral as a telephone, but on the other hand, it does not control the content of messages as much as a print media publisher. The possibilities of content moderation are limited, as the algorithms for detecting illegal content based on artificial intelligence are not perfect and not sufficiently sensitive to the context [13, pp. 499, 527, 529, 540, 569; 28, p. 340-341].

Overly strict liability of media platforms can lead to excessive censorship of the Internet: fearing liability, media platforms will likely block legal content as well [28, p. 340-341]. The spread of this type of false positives poses a serious threat to freedom of speech.

With this in mind, both the US and the EU have created 'safe harbors' for online platforms, designed to protect freedom of speech and the development of technology from the chilling effect the fear of overwhelming liability entails.

However, the safe harbor has its limits: according to the DSA, immunity from liability is available provided that the platform operator promptly addresses illegal content once it becomes aware of it (Article 6 of the DSA). At the same time, the operator is not obliged to proactively search for illegal content (Article 6 DSA). This rule requires only reactive actions ex post.

In our opinion, the next step should be taken: liability should also be imposed for failure to take proactive measures within the framework of content moderation, provided that the detection of illegal content is technically possible and could reasonably be expected from a prudent platform operator acting in similar circumstances. The standard of a reasonably prudent operator, with due regard for the real advancement of AI technologies for automated identification of illegal content, will ensure the fair balance between the goal of preventing harm and competing public interests.

Thus, when assessing the remoteness of the causal link between the actions (omissions) of the platform operator and the damage caused by the user of the platform (or, what is the same, when determining the scope of the platform operator's liability), one should first of all take into account the degree of control on the part of the platform operator. For transactional platforms, such control is reflected in the influence on the essential terms of transactions concluded via the platform; for media platforms, it is reflected in the possibilities of content moderation, with due regard to the development of technology.

Finally, when determining the scope of liability, a number of economic variables should be taken into account, such as the total social utility of lawful uses of the platform compared to the social disutility of illegal uses of the platform [28]; the accessibility of claims against direct tortfeasors and the cost of proceedings against them as compared to the cost of proceedings against the platform operator [29, p. 15]; and whether the platform operator is the least cost avoider [30].

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