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LEGAL APPROACHES TO LIABILITY OF DIGITAL PLATFORM OPERATORS TO CONSUMERS

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LEGAL APPROACHES TO LIABILITY OF DIGITAL PLATFORM OPERATORS TO CONSUMERS

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This article is devoted to the consideration of approaches to the liability of digital platform operators to consumers. Given that the number of digital consumers who use goods (works, services) purchased using digital platforms is growing, it becomes necessary to define the concept and features of such platforms, determine the relationship between them, consumers and suppliers, as well as identify problems of legal liability of digital platforms. The article draws attention to the fact that despite the differences in the terminology used in legislation and literature (digital platforms, digital platform operators, aggregators, owners of aggregators, etc.), all of the above entities have similarities, expressed in the performance of a certain intermediary function between the buyer and the supplier. At the same time, the scope of such mediation can vary significantly depending on the type of digital platform.

The nature of the interaction of a digital platform with its users has a number of specific features, which, in combination, cast doubt on the fairness of this state of affairs and initiate searches to bring the platform to secondary liability. A number of cases on holding digital platform operators accountable are given, on the basis of which it is concluded that at present, in many jurisdictions,

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there are no special provisions on the liability of digital platform operators to consumers. At the same time, the courts, while bringing the operators to liability, identify it with the direct tortfeasor, which makes it possible to use legal mechanisms of strict liability of the seller of goods or service provider, works for their possible shortcomings.

Keywords: e-commerce, aggregator, digital platforms, digital platform operators, consumer, liability, secondary liability, vicarious liability.

I. INTRODUCTION

The spread of electronic commerce, making purchases via the Internet, as well as ordering the performance of work or the provision of services in electronic format, leads to the fact that the methods of making such purchases are also being improved. If earlier this could be done mainly through the website of a particular store, then in the past few years, purchases through marketplaces have become widespread - special Internet sites (and later applications), on which the buyer has the opportunity to choose goods offered by various sellers. There are numerous websites and applications through which you can order various services (taxi, tutors, repair services, etc.), rent an apartment, find a job, and others.

On the one hand, the use of such digital platforms is more economically feasible, since it helps to bring the seller of goods (work, services) closer to the buyer, helps to reduce costs, creates the necessary competition between sellers, which will help reduce prices and improve quality. An important factor should be called time, since the buyer no longer needs to spend time searching for the necessary product on numerous sites, or choose between the services offered

by searching the Internet for a long time. Having a phone and Internet access allows you to order individual services (taxi or delivery) in a few minutes. For example, Uber and Ola in India have deployed cutting edge technologies, attracts committed customers through their mobile applications and enjoys the trust and good will of the public.[1]

On the other hand, buyers of such goods, works, and services need to protect their rights as consumers. When ordering a product via the Internet, a person wants to be sure that he will be sold a good quality product in a complete set, safe for life, health and property of the consumer, without significant flaws, indicating all the necessary information about the product, including service life, expiration date and other important features. And if earlier, having bought some product of inadequate quality in the nearest store, it was possible to quickly exchange it or return it when buying via the Internet, this can be complicated by the return procedure, as well as time spent on it. At the same time, when selling goods through the marketplace, it is not always clear who exactly to contact if your consumer rights are violated - to the marketplace itself or to the seller who sold the goods to you through the platform. And where can I find the seller's contacts? The same applies to service aggregators, since it is not always clear who exactly should be contacted in case of violation of consumer rights when providing a service to a citizen. It is especially important to determine who will be liable in the event of harm to human life and health (for example, as a result of a traffic accident).

The emergence of digital platforms that act as an intermediary between the buyer and seller of goods (works, services) necessitates the study of such entities from the point of view of a possible party in legal relations for the sale of goods, performance of work, provision of services, as well as their role in protecting violated consumer rights and the possible liability of such platforms.

According to George Cheriyan and Simi T.B. "lack of trust between consumer and supplier or retailer is a bigger issue online than it is offline" and it is necessary "to gain consumer trust and confidence in this digital world".[2] Establishing clear and understandable consumer protection rules that interact with aggregators and digital platforms will help build consumer confidence in both e-commerce and trading through aggregators in general.

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1 C. Anirvinna and Arun Kumar Deshmukh, 'Pricing Strategy of Cab Aggregators in India' (2020) 19(4) Journal of Revenue and Pricing Management 248.

2 George Cheriyan and Simi T.B., 'Protecting the Digital Consumers: Challenges and Possible Solution' (2019) 7 International Journal on Consumer Law and Practice 85, 92.

At the same time, neither at the international level, nor at the national level there are clear rules that would regulate both the activities of digital platforms in general and in terms of those legal relations that relate to the protection of consumer rights. Judicial practice is ambiguous due to lack of a unified regulatory framework. In this regard, it is necessary to study the concept and characteristics of such entities, the legal regulation of their activities, the classification of digital platforms, the application of consumer protection legislation to them, as well as determining the degree of their liability towards consumers.

II. THE CONCEPT OF DIGITAL PLATFORMS

It should be noted that both in the legal statutes and in the literature there is no uniformity regarding the name of the entities that are intermediaries between consumers and suppliers of goods (works, services) on the Internet. One can come across concepts as: "digital platform", "digital platform operator", "e-commerce platform operator", "marketplace", "aggregator", etc. At the same time, even the same concept can have a different semantic meaning.

Thus, the concept of "digital platform" is interpreted differently in legal acts and scientific research.

In the literature, one of the hallmarks of digital platforms is the fact that a digital platform uses the Internet for communication between users on all the sides of the platform. At the same time, it is rightly noted that it is difficult to give a single definition, since digital platforms are diverse.[3]

European Economic and Social Committee defines platforms as two-sided or multi-sided markets where users are brought together by a platform operator to facilitate an interaction.[4]

In Russian studies, a digital platform is defined as a system of algorithmic mutually beneficial relationships between a significant number of independent participants in an economic sector (or field of activity) carried out in a single information environment, leading to a reduction in transaction costs through the use of a package of digital technologies for working with data and changes in the division of labor system.[5]

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[3] Pieter Nooren, Nicolai van Gorp, Nico van Eijk, Ronan Ó Fathaigh, 'Should we Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) 10 (3) Policy & Internet 4.

[4] European Economic and Social Committee, *Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe* <https://webapi2016.eesc.europa.eu/v1/documents/eesc-2016-04519-00-01-ac-tra-en.docx/pdf> accessed 20 March 2022.

[5] 'Approaches to definition and typing' (*Digital platforms*) <https://files.data-economy.ru/digital_platforms.pdf> accessed 20 March 2022.

This definition is more technical than legal in nature, but it provides a number of basic features necessary for the legal understanding of this term.

The legislation of different countries is moving towards fixing the concept not of the digital platform itself, but of the digital platform operator *i.e.,* the person who owns or manages the platform.[6]

Another concept that is widely used in literature and practice is that of an aggregator. An aggregator is an electronic trading platform that accumulates offers for the sale of goods/services from various sellers. Example: Ozon, Amazon, Alibaba, eBay, taxi aggregators (Uber), hotel search (booking.com), tour selection services (select-a-tour.com), flight search (aviasales.ru), etc.

For example, an e-commerce aggregator is understood as a subject of civil turnover that owns, operates, manages specialized electronic services/platforms in the information and telecommunications network of the Internet, designed for electronic commerce, which provide participants in civil turnover with the opportunity to search for counterparties, make transactions, execute them, to resolve potential disputes, etc.[7]

By analogy with the operator of digital platforms, it is not the aggregator itself that is determined by law, but the person who owns it. So, in accordance with the Law of the Russian Federation of 07.02.1992 No. 2300-1 "On the Protection of Consumer Rights", the number of subjects to which the norms of this law apply is not the aggregators themselves, but the owners of the aggregators.

Thus, despite the variety of terms used, their main similarity should be noted, which is expressed in the performance of a certain intermediary function between the buyer and the supplier. At the same time, the volume of such mediation can vary significantly depending on the type of digital platform.

III. TYPES OF DIGITAL PLATFORMS AND AGGREGATORS

Just as there is no unity in the definition of digital platforms, aggregators and other possible participants, there is no single classification of such persons.

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[6] For example, such approach using in French Consumer Code and Chinese Law "On Electronic Commerce".

[7] Lyubov V. Kuznetsova, 'Issues of the Civil Liability of E-commerce Aggregators' (2019), in: Rozhkova M.A., ed. *E-Commerce and Related Fields (Regulatory Laws): Collection of Articles*, 39.

It is possible to classify digital platforms on various grounds, for example, depending on the territory in which they operate, they can be divided into national and international ones (Yandex.Taxi and Uber in Russia, for example).

At the same time, of greater interest is the allocation of different types of platforms depending on their purpose, as well as participation in relationships with other entities - consumers and suppliers. The categories differ in terms of whether there are transactions between users of the platform, whether there is communication between users of the platform, and whether the platform is used by other platforms to reach end users. Depending on the particular revenue model that is applied, these differences determine to a large extent, whether or not network effects can be operationalized.[8]

With regard to the aggregators, it is proposed to single out such categories of e-commerce aggregators as aggregators for the sale of goods; aggregators for the provision of services/performance of work; specialized aggregators of automotive trade; private ad aggregators; aggregators for the provision of transportation services.[9]

There are other classifications of aggregators, for example: commodity aggregator; service aggregator; price aggregator; marketplace; classified; otzovik; aggregator with external content; aggregator with internal content; exchange.[10] As can be seen from the list presented, some authors breed product aggregators and marketplaces, defining them as an aggregator that already becomes a participant in the transaction: it takes payment on the site, for example, or organizes the sale of goods, logistics, or arranges booking.[11]

Special terminology may be used in individual states. For example, in India, when referring to transportation aggregators, the term "cab aggregators" is used, which is not typical for other states that use the concept of "taxi aggregators". It is taxi aggregators that cause discussions in terms of taking on part of the consumer liability.

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[8] Pieter Nooren, Nicolai van Gorp, Nico van Eijk, Ronan Ó Fathaigh, 'Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) 10 (3) Policy & Internet 11.

[9] Lyubov V. Kuznetsova, 'Issues of the Civil Liability of E-commerce Aggregators' (2019), in: Rozhkova M.A., ed. *E-commerce and Related Fields (Regulatory Laws): Collection of Articles*, 40.

[10] Y. Evseev, 'Aggregator sites from A to Z. A Detailed Guide to the World of Aggregators' (2021) <https://vc.ru/life/312963-sayty-agregatory-ot-a-do-ya-detalnyy-spravochnik-v-mir-agregatorov> accessed 20 March 2022.

[11] ibid.

The development of taxi aggregators leads to the fact that aggregators account for a large share of the transportation services market. For example the prominent players operating in the organized taxi market in India are: Ola, Uber, Easy Cabs, Jugnoo, Mega Cabs, Tab Cab, Meru, Taxi Pixi and Savaari.[12]

In Russia, aggregators provide up to 60% of taxi orders, although in some regions the share of such services is at the level of 45%. The market leader is "Yandex.Taxi" with a share of 40% (among aggregators - 67%), "Citymobil", "Maxim" and other players claim the second place. Of the foreign aggregators in Russia, Chinese DiDi is represented. As for Uber, it operates on the Russian market through a joint venture between Uber and Yandex.[13]

At the same time, the specifics of their activity are such that, unlike, for example, commodity aggregators, where the buyer chooses the goods, and after him the seller, the taxi consumer does not choose the driver himself, who will provide him with the service, that is, in many respects the terms of the contract are determined precisely aggregator.

It should be noted that for international companies, such as Uber, the rules by which aggregators operate may differ depending on the country. For example, in the US, according to U.S. Terms of Use Uber "provides a personalized multipurpose digital marketplace platform ("Uber Marketplace Platform") that enables you to conveniently find, request, or receive transportation, logistics and/or delivery services from third-party providers that meet your needs and interests".[14] In other countries where Uber operates, this rule is not provided.

Aggregators for the purchase and sale of goods (or commodity aggregators) have received a special name - marketplaces. Market places facilitate transactions between user groups on the platform. The transactions can include many products and services, and marketplaces can, therefore, have an impact on a wide array of markets.[15]

The essence of trade through aggregators involves providing an opportunity for the consumer to get acquainted with the characteristics of a product

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[12] Aman Chhajed, 'Taxi Aggregators: Meaning, Market Share & Preference of Customers in India' <*Medium*> <https://medium.com/@chhajedaman1112/taxi-aggregators-meaning-preference-of-customers-in-india-47a503381f2e> accessed 20 March 2022.

[13] "Aggregators Account for 60% of Taxi Orders in Russia" (*AdIndex,* 29 September 2019) <https://adindex.ru/news/tendencies/2021/09/29/298437.phtml> accessed 20 March 2022.

[14] U.S. Terms of Use (Uber) <https://www.uber.com/legal/ru/document/?name=general-terms-of-use&country=united-states&lang=en> accessed 20 March 2022.

[15] Pieter Nooren, Nicolai van Gorp, Nico van Eijk, Ronan Ó Fathaigh, 'Should we Regulate Digital Platforms? A New Framework for Evaluating Policy Options' (2018) 10 (3) Policy & Internet 4.

or service that does not belong to the owner of the aggregator, in the form of an offer to sell them, as well as obtaining an expression of will from the consumer to purchase such a product or service.[16]

IV. GENERAL APPROACHES TO LEGAL LIABILITY

In the context of consumer protection in the digital world (digital era), the most acute and debated aspect is the issue of legal liability of digital platforms. This is due to a certain kind of discrepancy in the essence of the relationship that arises between consumers and digital platforms, ideas and the correct and fair resolution of conflicts between them and the currently existing theory of legal liability.

Thus, the modern theory of legal liability proceeds from the need to combine two interrelated factors that affect the possibility of its application: the objective, expressed in the onset of a certain event, the consequences of which led to a violation of the procedure established by law or agreement, and the subjective one, which implies the existence of a relationship between the event that has occurred and a certain mental attitude of the subject of liability to these events. The subjective factor finds its expression in the provisions of the legislation on the individuality (personification) of liability, the need to take into account the fault of the offender when adverse consequences are applied to him. In its most extreme form, the need to take into account the subjective factor is expressed in the prohibition of prosecution without fault and the consolidation of the presumption of innocence,[17] which is characteristic of criminal law. Meanwhile, such a prohibition, being an integral characteristic of liability in the field of public law, has certain indulgences in the field of private law.

So, implying civil liability in some cases can occur even in the absence of the fault of the offender. Such cases include, in particular, the obligation to inflict harm caused by: activities that create an increased danger to others, defects in goods, work or services; compensation for harm by the employer for his employee, etc.

In the case of strict liability under civil law, the subjective basis of liability is not fault, but risk, as an acceptable possibility of unforeseen, but probable

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[16] See E. Suvorov, 'Some Problems of E-commerce: On the Liability of Aggregator Owners to Consumers' (2019) 9 Bulletin of Economic Justice of the Russian Federation 57 - 67.

[17] N. Skrebneva, 'Legal Liability in Public and Private Law (Questions of Theory and Practice)' (2018) 65.

events for which the person is responsible, and, accordingly, assumes the legal consequences of these events that violate the rights other entities.[18]

The very possibility of replacing fault with risk in the case of civil liability is due to the fact that, unlike criminal liability, its main function is not to punish and correct the offender, but to compensate the victim for the consequences of violation of his right. At the same time, the justification for introducing this type of liability lies, among other things, in the fact that an entity whose activities may cause accidental harm will be interested in taking certain precautions in order to minimize the likelihood of it being caused again.[19] Meanwhile, the possibility of strict liability in the field of private legal relations is rightly criticized by a number of scientists.[20] At the same time, a number of scientists note that the arguments against strict liability are largely related to ethical views, while from an economic point of view, such liability may be justified.[21]

Without going into details of the content of the theoretical dispute about the fairness of the existence of strict liability, we note that its inconsistency is usually balanced by the selectivity of the introduction and the requirement, although not in all jurisdictions, to establish a limited list of such cases in the law.

A special case of the gap between the objective and subjective grounds for liability are the cases of secondary liability. It should be noted that this term is not well-established and in different jurisdictions can be understood in different ways,[22] it is also used mainly in the context of exclusive rights protection than consumer protection.

In the framework of this study, this term is proposed to be used as a collective one, implying cases of legal liability for entities that are not the tortfeasor, who did not directly commit the violation (direct infringement) and are only indirectly related to it. As a special case of strict liability, such liability also, as a rule, must be specified in the law, although there are exceptions to this rule.

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[18] G. Prokopovich, 'The Degree of Risk as a Criterion for Determining the Scope of Responsibility' (2005) Actual Problems of Law in Russia and CIS Countries 56-63.

[19] S. Kurylev, 'Sanction as an element of a legal norm' (1964) 8 Soviet state and law 42.

[20] See N. Malein, 'On the Institute of Legal Responsibility' (1989) Works on Jurisprudence 24-29, G. Prokopovich "Theoretical Model of Legal Responsibility in Public and Private Law" (2010) 103.

[21] R. Epstein, 'A Theory of Strict Liability' (1973) 2 (1) The Journal of Legal Studies 151-204.

[22] G. Dinwoodie, 'A Comparative Analysis of the Secondary Liability of Online Service Providers' (2017) Secondary Liability of Internet Service Providers 1-72.

V. APPLYING THE GENERAL THEORY OF LIABILITY TO DIGITAL PLATFORM OPERATORS IN THEIR RELATIONSHIPS WITH CONSUMERS

Speaking about the liability of digital platforms, it should be noted that the nature of their activities and interaction with consumers implies a predominantly secondary liability.

Thus, the digital platform in most cases acts only as an intermediary in communication and the conclusion of a transaction between the consumer and the seller directly, the contractor of works or services. Therefore, when shortcomings in a product, work or service are identified, harm is caused to the consumer as a result of such a shortcoming, the direct cause is not the digital platform, but the seller or the performer, respectively.

Based on the general theory, this implies the non-responsibility of the digital platform for contractual obligations or torts arising from legal relations between users of the platform. Meanwhile, the nature of the interaction of a digital platform with its users has a number of specific features, which, in combination, cast doubt on the fairness of this state of affairs and initiate searches to bring the platform to secondary liability.

Thus, a digital platform, acting as an intermediary in concluding a transaction, unlike a classic intermediary, often defines certain frameworks and standards for offering a product, service or work, forcing sellers and performers to adapt to their own requirements. Thus, taxi aggregators, such as Uber or Yandex, determine the price of a trip, make demands on the car and driver, and set the rules for interaction between the driver and the passenger. These requirements are supported by sanctions for their non-compliance, up to the complete exclusion of the offending performer's access to the platform. Similar mechanisms are used by other aggregators, whether it be hotel services, freelancing exchanges or the selection of domestic staff. A common feature of aggregator platforms is the presence of control over sellers and performers. In relation to their interaction with the consumer, a different pattern is observed. The aggregator platform, as a rule, strives to maximally mediate the communication and agreements of the consumer with the direct executor, locking all their communication to itself, and in some cases minimizing information about the executor himself and the nature of his relationship with the platform. As a result, in the eyes of the consumer, the figures of the aggregator platform and the performer, the seller practically merge together, the latter dissolve into the identity of the platform.

The above strategy of digital platforms is fully justified from the point of view of business and economy. It allows you to bind consumers, sellers and performers to yourself as much as possible, which prevents settlements between them from going into the shadows, and therefore protects the income of the aggregator, which can be formed from the percentage received from the transaction or from the sale of advertising (in this case, the platform does not benefit from the formation of constant, long-term relationships between consumers and contractors of works and services). But the same strategy raises doubts about the fairness of applying the standard approach to liability to them.

At the moment, there are two main approaches to substantiate the secondary liability of a digital platform in case of violation of consumer rights: objective and subjective.[23]

VI. APPLYING OBJECTIVE APPROACH TO LIABILITY OF DIGITAL PLATFORM OPERATORS IN DIFFERENT JURISDICTIONS

As part of an objective approach, the law enforcer focuses on the nature of the legal relationship that arises between the platform and the consumer, and carefully analyzes the role of the platform in the provision of a service, work or sale of goods. If there is a significant influence of the platform on the performer or seller in terms of fulfilling the obligation to the consumer, the platform may be regarded by the court as a direct performer or seller and held liable as a person who has committed direct infringement.

This approach is reflected in the practice of US courts. So in the case *Oberdorf v. Amazon.com Inc*[24] the plaintiff sued Amazon for damages resulting from the use of a low-quality dog collar she purchased through an online platform.

Heather Oberdorf purchased a dog collar with a retractable leash from a platform vendor. During a walk with the dog, the mechanism broke, as a result of which the victim's glasses were damaged by the leash, and she became blind in her left eye. Neither the victim nor the Amazon platform was able to identify the seller, who used a fictitious name and no longer had an active account on the platform.

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[23] N. Filatova-Bilous, 'Once Again Platform Liability: On the Edge of the "Uber" and "Airbnb" Cases' (2021) 10 (2) Internet Policy Review 13-14.

[24] *Oberdorf v Amazon.com Inc* No 18-1041 (3d Cir 2019) (Justia US Law, 3 July 2019) <https://law.justia.com/cases/federal/appellate-courts/ca3/18-1041/18-1041-2019-07-03.html> accessed 20 March 2022.

The court of first instance dismissed the lawsuit, finding that Amazon cannot be considered a seller and therefore cannot be held liable (strict liability) for damage caused by a defective product (product liability).

On the contrary, the appeal sided with the plaintiff. In qualifying Amazon as a seller, the court held that "Although Amazon does not have direct influence over the design and manufacture of third-party products, Amazon exerts substantial control over third-party vendors. Third-party vendors have signed onto Amazon's Agreement, which grants Amazon "the right in [its] sole discretion to suspend, prohibit, or remov[e] any [product] listing," "withhold any payments" to third-party vendors, "impose transaction limits," and "terminate or suspend any Service [to a third-party-vendor] for any reason at any time." Therefore, Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so".[25]

In addition, the court held that Amazon "may be the only member of the marketing chain available to the injured plaintiff for redress.", Amazon was uniquely positioned to receive reports of defective products, which in turn could lead to such products being removed from circulation, and Amazon could adjust the commission-based fees that it charged to third-party vendors based on the risk that the third-party vendor presents.

A similar approach was taken by the Court of Appeal in the case *Angela Bolger v Amazon.com LLC*, in which the plaintiff sued for damages caused by a faulty replacement laptop battery purchased on the platform. The Court emphasized: '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".[26]

Some support for an objective approach can also be found in recent CJEU decisions in case of Uber[27] and Airbnb.[28] In these cases, the CJEU resolved the

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[25] ibid.

[26] *Bolger v Amazon.com, LLC* (2020) Justia US Law <https://law.justia.com/cases/california/court-of-appeal/2020/d075738.html> accessed 20 March 2022.

[27] *Asociación Profesional Elite Taxi v Uber Systems Spain* (2017) <https://curia.europa.eu/juris/liste.jsf?num=C-434/15> accessed 20 March 2022.

[28] C-390/18 - Airbnb Ireland (2019) <https://curia.europa.eu/juris/liste.jsf?num=C-390/18> accessed 20 March 2022.

question of whether an online platform operator could be considered a provider of a material service or should be considered solely as an intermediary providing information society services.

It is noteworthy that in the case of Uber, the court came to the conclusion that it can be considered as a service in the field of transport, while Airbnb was recognized as an exclusively information service.

The main criterion for such a distinction is whether the platform operator influences the economically significant aspects of the provision of the service. In the case of Uber, this influence is somewhat obvious and manifests itself in determining the price and standards of service. At the same time, there is no such influence in the case of Airbnb.

VII. APPLYING SUBJECTIVE APPROACH TO LIABILITY OF DIGITAL PLATFORM OPERATORS IN DIFFERENT JURISDICTIONS

Along with an objective approach, a number of jurisdictions are developing a subjective approach, which involves an analysis by the court not so much of the nature of the activities of the platform itself, but rather the perception of such activities by the consumer.

An example is Danish jurisprudence in the context of two cases concerning the liability of platform operators GoLeif.dk. и Booking.com.[29]

Platform GoLeif.dk. offered its users services for buying air tickets, comparing prices and routes. In a dispute between the operator of this platform and a consumer, the court considered a situation in which the consumer purchased air tickets from Copenhagen to Nice and back through the platform. The consumer was able to fly to Nice, but the return flight did not take place because the airline went bankrupt. The court concluded that the platform was liable to the plaintiff, since the consumer, when purchasing tickets, could assume that he was dealing directly with GoLeif.dk, and not with the airline, since the GoLeif.dk website did not clearly indicate that the performer services is precisely the airline.

At the same time, in the Booking.com case, the court came to the opposite conclusion, considering that the platform cannot be held responsible for the violation on the part of the hotel, since it was sufficiently obvious to the consumer that the applicant should have understood that temporary

[29] K. Ostergaard and S. Sandfeld Jakobsen, 'Platform Intermediaries in the Sharing Economy: Questions of Liability and Remedy' (2019) 1 Nordic Journal of Commercial Law 20-41.

accommodation services were provided to him the hotel, and not Booking.com, which acts only as an intermediary in the transaction.

At present, the subjective approach has formed the basis of the draft EU Online Platforms Directive,[30] article 20 of which states: "If the customer can reasonably rely on the platform operator having a predominant influence over the supplier, the customer can exercise the rights and remedies for the non-performance available against the supplier under the supplier-customer contract also against the platform operator".

The project proposes the following as indicators of such influence:

a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;

b) The platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract;

c) The platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the customer to the supplier;

d)The terms of the supplier-customer contract are essentially determined by the platform operator;

e) The price to be paid by the customer is set by the platform operator;

f) The marketing is focused on the platform operator and not on the suppliers; or

g) The platform operator promises to monitor the conduct of suppliers and to enforce compliance with its standards beyond what is required by law.

VIII. APPLYING SUBJECTIVE APPROACH TO LIABILITY OF DIGITAL PLATFORM OPERATORS IN RUSSIAN FEDERATION

A subjective approach to the liability of the platform operator is also used in the Russian Federation, although at the moment it is limited to disputes with taxi aggregators and the possibility of its application to other operators of online platforms is questionable.

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[30] Model Rules on Online Platforms. Report of the European Law Institute (2019) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platform s.pdf> accessed 20 March 2022.

This is due to some features of Russian law regarding bringing an innocent person to tort liability.

Thus, the provisions of Chapter 59 of the Civil Code of the Russian Federation (Obligations due to infliction of harm) are the right main for bringing to such liability.

In accordance with paragraph 1 of Article 1064 of the Civil Code of Russia, "Damage caused to the person or property of a citizen, as well as damage caused to the property of a legal entity, is subject to compensation in full by the person who caused the harm." Paragraph 2 of this article establishes the presence of fault as a mandatory condition for holding a person liable.

Thus, as a general rule, harm under Russian law is subject to compensation directly by the person who caused it, and only if there is fault. There may be exceptions to this rule, however, by virtue of the same paragraph 1 of Article 1064 of the Civil Code of the Russian Federation, such exceptions must be established at the level of federal law.

At the moment, in Russia, strict liability for digital platform operators has not been established, the only specialized provision on the liability of a digital platform operator is the provisions of Article 12 of the Law of the Russian Federation on the Protection of Consumer Rights, according to which "The owner of the aggregator who provided the consumer with false or incomplete information about the product (service) or the seller (executor), on the basis of which the consumer concluded a sale and purchase agreement (contract for the provision of services) with the seller (executor), is liable for losses caused to the consumer as a result of providing him with such information. However, the law does not establish the liability of the aggregator for the quality of goods, services or work, nor does it guarantee compensation for harm from the aggregator due to their shortcomings. Thus, the possibility of holding them liable on consumer claims is made dependent on resolving the issue of whether they can be considered as a seller of goods or a performer of services and works, for which the corresponding liability is provided in Article 1096 of the Civil Code of the Russian Federation and Article 14 of the Law of the Russian Federation on the Protection of Consumer Rights).

In the case of taxi aggregator platforms, this issue is resolved in accordance with the clarification of the Supreme Court of the Russian Federation adopted in 2018, given in the Decree of the Plenum No. 26 of 06/26/2018.

In accordance with the approach chosen by the Supreme Court, "A person contacted by a client to conclude a contract for the carriage of passengers and

baggage is liable to the passenger for damage caused during the carriage if he entered into a contract of carriage on his own behalf or from the circumstances of the conclusion of the contract (for example, advertising signs, information on the site on the Internet, correspondence of the parties when concluding the contract, etc.) a conscientious citizen-consumer could have the opinion that the contract of carriage is concluded directly with this person, and the actual carrier is his employee or a third party, involved in the performance of transportation obligations".

Note that this clarification is of a retrospective nature and can be applied to legal relations that arose before its adoption. Thus, one of the first cases in which this clarification was applied was the 2018 case of Gashchenkov vs Yandex.Taxi LLC, in which the defendant Yandex provides taxi aggregator services using the Uber model. The dispute related to the events of 2016, when the plaintiff called a car through the defendant's mobile application and got into a traffic accident due to the fault of a taxi driver. As a general rule, damage in such a situation was subject to compensation by a taxi driver or taxi company, if the driver was his employee, while the plaintiff turned his claims to the owner of the mobile application. The court of first instance dismissed the claim, concluding that "Yandex.Taxi LLC provided information services on the demand of passengers for transportation services, as well as providing technical opportunities through a mobile application for passengers (users) to report their desire to travel, and carriers - about your desire to make such a trip. These services were advertised by Yandex.Taxi LLC by placing advertisements on partner vehicles. Thus, no evidence that Yandex.Taxi LLC provided passenger transportation services or was an employer for a taxi driver was presented to the court".[31]

The Court of Appeal overturned the decision, retroactively applying the clarification of the Supreme Court, and concluded that the obligation to transport the passenger arose directly from Yandex.Taxi LLC, which acted as the carrier's agent, while, in accordance with Russian law on transactions, the concluded agent from in his own name and at his own expense, the obligations arise directly from the agent. As the court notes, "By accepting an order from Grashchenkova E.A., Yandex.Taxi LLC actually assumed an obligation to provide transportation services and gave the client information about the services it provided (car brand, arrival time), which allowed the plaintiff to rely

[31] Decision of the Tushinsky District Court of Moscow dated June 15, 2018 <https://mos-gorsud.ru/> accessed 20 March 2022.

on transportation taxi passengers with a technically sound car and a competent driver".[32]

It should also be noted that according to the Federal Tax Service of Russia, which maintains a register of legal entities, the main activity of Yandex.Taxi LLC is the "Development of computer software", which in no way indicates the activity of a taxi. But it is unlikely that consumers of taxi services will go to the website of the Federal Tax Service and examine the official documents of the organization at the moment when they call a taxi through a mobile application.

It is assumed that a conscientious citizen-consumer should study the documents posted in the mobile application or on the aggregator's website, according to which it will be clear who exactly - the aggregator itself or a third party provides services directly. The truth is that"consumers find themselves frequently clicking the 'I agree' button realizing that they are agreeing to something but not taking the time (or having the ability) to understand the terms to which they are agreeing".[33] As rightly pointed out James P. Nehf, "Technological advances allow countless standard terms to be imposed on consumers in even the simplest transactions, and manifestations of assent are questionable in many cases".[34]

And does a citizen have the opportunity to refuse services, for example, a taxi, if he does not agree with the terms of service, if other taxi aggregators do not work in this locality.

It should be noted that the use of a subjective approach carries certain risks of legal uncertainty, conflicting with the principle of legitimate expectations, which implies that legislation should be quite clear and applied in a predictable manner.

As an example of the inconsistency in the application of a subjective approach, one can also cite the case of *Nikeshin v Wheely* recently considered in Russian courts. In 2019, S.N. Nikeshin filed a lawsuit against the owner of the premium-class taxi aggregator "Wheely" to recover moral damages. The reason for the claim was that several of the plaintiff's trips, despite earlier confirmation, were canceled by the drivers. As a result, the plaintiff was late for a number of business meetings within the framework of the St. Petersburg

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[32] Resolution of the Moscow City Court dated 4 April 2019 <https://mos-gorsud.ru/> accessed 20 March 2022.

[33] James P. Nehf, 'The failure of 'notice and consent' as effective consumer policy' (2019) 7 International Journal on Consumer Law and Practice 7.

[34] ibid. 1.

International Economic Forum. The court of first instance dismissed the claim, motivating its decision by indicating that the defendant "is not a carrier, does not provide transport services, and is not a dispatch service, but only provides the user with access to the computer program using credentials (login and password), through which interacts between drivers and users".[35] The decision was upheld by the court of appeal. In the case under consideration, the courts did not find grounds for applying the above clarification of the Supreme Court, despite the fact that the legal relationship between the plaintiff and the defendant was similar to the legal relationship in the case of *Gashchenkov v Yandex. Taxi LLC*.

Despite the fact that the explanations of the Supreme Court of Russia regarding the liability of taxi aggregators as a whole fit into the general subjective approach to the liability of digital platform operators, they are formulated as highly specialized and can be directly applied only in relation to taxi aggregators. For operators of other digital platforms, these clarifications can be applied by way of analogy, however, Russian courts, as a rule, are reluctant to use this legal instrument, preferring the literal application of the provisions of the law to it.

IX. JUSTIFICATION AND EFFECTIVENESS OF THE OBJECTIVE AND SUBJECTIVE APPROACHES TO THE LIABILITY OF DIGITAL PLATFORM

Analyzing the justification and effectiveness of the objective and subjective approaches to the liability of digital platform operators to consumers, it should be noted that both approaches have a common drawback. Within them, the question of the liability of the operator is resolved by actually merging his role with the role of the seller of goods or the performer of the service. The very possibility of holding him liable is made dependent on such a substitution of roles, which, firstly, in our opinion, unreasonably ignores the differences between the activities of the seller and the contractor and the activities of the operator, and, secondly, opens up scope for a fairly wide discretion of the court or other law enforcer, which reduces the guarantee of legal certainty.

As an alternative to the approaches chosen, one could turn to the existing doctrines of secondary liability, widely used, for example, in intellectual property law. Thus, in the United States, there are two main approaches to establish secondary liability - these are the doctrines of contributory infringement and vicarious infringement. Both doctrines are built on the recognition of a person

[35] The decision of the Petrogradsky District Court of the city of St. Petersburg dated October 31, 2019.

associated with a violation, but not directly carrying it out, of an independent status and independent grounds for holding liable.

At the moment, the application of these doctrines in the United States in relation to operators of digital platforms and in legal relations with the consumer is difficult, since the legislation contains protective provisions "Safe harbor", excluding strict liability for owners of online services. However, with some adjustments to such safeguards, these doctrines could form the basis for the development of special provisions on the liability of digital platform aggregators in consumer protection claims.

The doctrine of contributory infringement involves bringing a person to liability if there are three conditions simultaneously: a) direct infringement, b) knowledge (actual or potential) about infringement by defendant, c) (material contribution), this may include the provision of an electronic platform for interaction with the consumer.

Meanwhile, in the case of digital platforms in the consumer market, the fulfillment of the second criterion seems doubtful, since the operator still does not intend to provide low-quality services or low-quality goods through its platform and, with a certain degree of prudence, can and should rely on the good faith of its users.

At the same time, the application of the doctrine of vicarious infringement seems quite promising. Within the framework of it, a person is liable also subject to three factors: a) existence of a direct violation; b) financial interest in the infringement; c) right and ability to supervise the direct infringer. In most cases, in the consumer market, the specified criteria are met by the online platform operator, as we can see in the case of Amazon or Yandex.Taxi.

The operators of both platforms have received a certain commission from the transaction concluded by the person who directly caused the harm, both operators could and did create conditions for the control of persons providing services through their platforms. Thus, in a slightly modified and modified form, the doctrine of vicarious infringement could form the basis for the development of an independent type of liability for operators of digital platforms in the consumer market, provided, of course, that the existing safe harbor provisions are limited.

X. CONCLUSION

Summing up the results of the study, it is worth noting that at present, in many jurisdictions, there are no special provisions on the liability of digital

platform operators to consumers. At the same time, the courts, while bringing the operators to liability, identify it with the direct tortfeasor, which makes it possible to use legal mechanisms of strict liability of the seller of goods or service provider, works for their possible shortcomings.

Such identification, depending on the jurisdiction, occurs on the basis of either an objective approach that involves an analysis of the role of the operator in the process of selling goods or providing services, performing work, or a subjective approach based on establishing the perception of legal relations by the consumer.

A common drawback of these approaches is their uncertainty and the possibility of almost unlimited discretion on the part of the courts, which conflicts with the requirements of legal certainty and violates the legitimate expectations of both platform operators and consumers.

As an alternative to these approaches, it is proposed to develop provisions on a special type of liability for digital platform operators, which can be based on the already existing doctrines of secondary liability, in particular the doctrine of vicarious infringement.