A Theoretical Perspective on the Civil Liability of Online Platform Operators

Comment on Karaiskos

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I. INTRODUCTION

In his contribution, Professor Antonios Karaiskos has illustrated the current situation regarding the civil liability of online platform operators in Japan. Professor Karaiskos' article has clearly described the related legal rules in Japan as well.[1]

Therefore, in my brief comment, I aim to offer a more general perspective on the issue: I will first discuss the legal schemes under which online platform operators are held liable. This may be considered as the *legal form* (or *legal nature*) of the civil liability of operators. Secondly, I will make reference to how these rules are formed in our society (*formation* of the rules). My comment will be theoretical and will not go into the details of the rules (*content* of the rules), although this last aspect is crucial when the lawyers actually try to resolve the disputes in which online platform operators are involved. In this sense, while I will refer to some legal rules in Japan, I do not intend to confine the scope of my analysis to Japanese law.

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1 See A. KARAISKOS, Liability of Online Platforms in Japan: An Overview, on pp. 57–69 of this issue.

II. Legal Schemes to Pursue the Civil Liability of Online Platform Operators

When we consider legal schemes under which affected parties may pursue the civil liability of online platform operators, we can think of (at least) three possibilities.

1. Contractual Liability

First, online platform operators may assume contractual liability for the reason that they are in breach of a duty they have accepted under a contract.[2] For those operators of online platforms who have actually concluded contracts with an operators, this is presumably the most straightforward way of pursuing civil liability.

As a typical example, when a malfunction has occurred in a platform's online system, the operators may be held liable for the losses incurred by the users under contract law because the operators have breached its duty to offer online services in accordance with the contracts concluded with the users. The operators may be under a contractual duty not only to offer online services themselves, but also to protect the interests of the users of their online platforms from infringement by other participants. The latter duty of operators was disputed in the *Yahoo!-auction* case, which is discussed in Professor Karaiskos' article. In that case, the plaintiff, a user of *Yahoo!-auction,* had argued that operators of an online auction assume a contractual duty to take appropriate measures to prevent the perpetration of fraud on their auction sites.

As a matter of course, under this scheme of contractual liability, the duty of online platform operators is determined by means of contractual interpretation. Although it is often necessary to fill in the gaps left in a contract and to acknowledge implied obligations of operators, the agreement between the operator and the user is decisive in this context. At the same time, the legal rules that control the content of the relevant contracts will intervene. Under Japanese law, the legislation aiming to protect the interests of consumers, such as the Consumer Contract Act[3] and the Act on Specified Commercial Transactions,[4] play an important role.

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2 For an analysis of the contractual liability of internet auction sites under Japanese law, see T. Isomura, *Intānetto ōkushon torihiki o meguru keiyaku-hō-jō no shomondai* [Internet Auction Transactions and Issues in Contract Law], Minshō-hō Zasshi 133 (2006) 684, 696–701.

3 *Shōhi-sha keiyaku-hō,* Act No. 61 of 12 May 2000. The Consumer Contract Act is applied to all contracts concluded between a consumer and a business operator. The Act provides rules that serve to control unfair contract terms (Artt. 8–10).

2. Tort Liability

Second, online platform operators may be held liable under tort law. This is the case when online platform operators have unlawfully violated their duty to take adequate measures to protect the users of the platform, and when the violation results in infringements of the rights and interests of the users. For example, in the *Yahoo!-auction* case, if we assume a general duty of online-auction operators to take necessary measures to prevent fraud on their auction sites, the operators are held liable under tort law when their failure to meet the requirements has resulted in a loss being suffered by victims of fraud.

It must be kept in mind, however, that in modern private law, which is based on the principle of freedom and self-responsibility, no one is in principle under a general duty to protect the rights and interests of others; thus, in order to hold the operators liable for not acting, namely for their omissions, a special "duty to protect the interest of others" needs to be established and justified.

This is all the more the case with regard to telecommunications. In Japan, the Act on the Limitation of Liability for Damages of Telecommunications Service Providers[5] (hereinafter "Limitation of Liability of Providers Act") provides that Telecommunications Service Providers are held liable for damages only when they actually knew that the infringement of the rights of others was caused by information distribution via a telecommunications service they provide (Art. 3 (1)(i)), or when they had knowledge of the information distribution via a telecommunications service they provide and when there is a reasonable ground to believe that they could have been aware of the infringement of the rights of others (Art. 3 (1)(ii)). The German Act on Telemedia *(Telemediengesetz)*[6] also provides rules (see Artt. 7–10) that are at least to some extent similar to the Japanese Limitation of Liability of Providers Act. The limitation on the liability of service providers is based on the idea that it is inappropriate to impose upon service providers a general duty to monitor information distribution. Although this idea does not necessarily hold true for all the online platform services, it must nevertheless be carefully examined whether it is justifiable to impose a duty on operators to protect the rights and interests of users under tort law.

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4 *Tokutei shō-torihiki ni kansuru hōritsu*, Act No. 57 of 4 June 1976. The Act on Specified Commercial Transactions, which was enacted as the Door-to-door Sales Act in 1976, regulates seven specified types of transaction. As far as contracts between online platform operators and users are concerned, the regulations on "Mail Order Sales" (Artt. 11–15-3) are applied.

5 *Tokutei denki tsūshin ekimu teikyō-sha no songai baishō sekinin no seigen oyobi hasshin-sha jōhō no kaiji ni kansuru hōritsu*, Act No. 137 of 30 November 2001.

6 *Telemediengesetz* of 26 February 2007 (BGBl. I S. 179).

3. Systemic Liability

We can think of another approach based on tort law, namely to ask whether there is a systemic or structural defect in the online platforms. Whereas the previous approach, which is based on the classical fault principle, asks whether operators had unlawfully violated their duties to protect the users of the platform, under this systemic approach, it is inquired whether there is a defect in the design or operation of the online platforms as a whole.

This third approach is, needless to say, modeled on the rules on product liability.[7] In most jurisdictions, including EU Member States[8] and Japan,[9] product liability is a form of strict liability under which the producers are held liable for the damages caused by a defect in their products. If the operators may be likened to "producers" of the online platforms, it is possible to hold the operators liable for the damages even when it is difficult to find them at fault under the classical view of tort law.

4. A Brief Theoretical Observation

I have theoretically systematized the three legal schemes for pursuing the civil responsibility of online platform operators. Although these three schemes are not incompatible as such, and it may even be necessary to allow the concurrence of two or three schemes in some cases, it is theoretically interesting to consider which scheme is most persuasive.

The answer to this question depends upon our perception of the online platforms: First, if we perceive online platforms as being the *"nexus of contracts"*, comprising contracts entered into between operators and users, the conditions under which the operators are held liable should be determined by contract law. If the online platforms are, on the other hand, regarded as *"spaces"* in which all individuals participate based on the principle of self-responsibility, the rules of classical tort law ought to apply. Lastly, if we were to consider online platforms as *"systems"* which are designed and managed by the operators, the rules on product liability could be a foundation stone on which the rules on the liability of online platform operators are built.

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7 Based on a similar idea, Naoki Kanayama argues that liability of platform operators should be regarded as a modern version of the liability scheme for a possessor/owner of physical structures *(Haftung des Grundstückbesitzers)* (N. KANAYAMA, *Gendai ni okeru keiyaku to kyūfu* [Contract and Performance in Modern Times] (Tōkyō 2013) 176–182). Under the Japanese Civil Code (*Minpō*, Act No. 89/1896 and No. 91/1898), whereas the liability of a possessor of a physical structure found on land is fault liability with a presumption of fault, the liability of an owner is considered to be strict liability (see Art. 717 (1)).

8 See Directive 85/374/EEC on Liability for Defective Products.

9 See Product Liability Act (*Seizō-butsu sekinin-hō)* Act No. 85 of 1 July 1994.

III. The Formation of Rules on the Civil Liability of Online Platform Operators

Regardless of which legal scheme is adopted, the question of how the specific rules are formed is of critical importance. The liability of online platform operators is an interesting research agenda in this aspect as well.

1. The Privatization of Rulemaking

As far as telecommunications are concerned, it should be mentioned that private entities play a large role in the rulemaking process. As a prominent example, in Japan, a private committee titled the "Provider Liability Limitation Act Guidelines Review Council" (hereinafter "the Council") establishes the "Guidelines" so as to specify a code of conduct for telecommunications service providers.[10] The Guidelines provide for adequate measures that must be taken by service providers, and it is assumed that when the service providers follow the Guidelines, they will not be held liable under tort law. Indeed, the Guidelines are of private nature and are not legally binding, but it is nevertheless expected that the courts will take them into account when deciding whether there was "a reasonable ground"[11] on the part of the service providers.

Such a privatization *(Privatisierung)* of rulemaking must be well-conceived so as to surmount the difficulty in formulating rules that effectively regulate online platforms. Legislatures often lack the capability to provide for the rules in detail, and the abstract rules of general tort law may have a chilling effect on the activities of online platform operators. The Council, comprised of many stakeholders having expertise, may be in a better position to establish the specified rules.

At the same time, however, we should not overlook the downside of private rulemaking. Not only do private entities lack democratic legitimacy, there is also a danger that the rules may be made by an interest group which does not represent the interests of all the stakeholders. To avoid such danger, the Council is populated not only by members of the industry association of the telecommunications service providers, but also by potential victims, namely members drawn from organizations constituted by copyright and trademark holders.

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10 Available at *http://www.telesa.or.jp/consortium/provider/pconsortiumproviderindex_e-html*. There are Guidelines relating to copyright, defamation and privacy, trademark rights, and sender information disclosure.

11 Art. 3 (1) (ii) of Limitation of Liability of Providers Act. See II.2. above.

2. Competition Among Online Platforms

Whereas the Guidelines presuppose the tort liability of service providers, privatization of rulemaking could be effective also in respect of the contractual liability of online platform operators. For instance, one can imagine establishing a committee in charge of drafting standard contract terms which are used in contracts between operators and users. The committee could be comprised of both platform operators and members representing the interests of users. Such private rulemaking could be very beneficial considering the fact that a large number of contracts concluded between online platforms and their users are consumer contracts, and considering that the parties are not always able to negotiate over the contract terms in detail. Moreover, the general rules of contract law may not always be suitable for online platform contracts.

However, by emphasizing the benefits of private rulemaking, we should not be blinded to the other side of the issue. Online platforms are not just passive entities assuming civil liabilities; rather, they are active competitors striving to offer better services to their users. If that is the case, we should not impede competition among the online platforms by encouraging them to use uniform contract terms. Instead of trying to establish uniform rules which are applied to all platforms, it may be better to leave the matter to the market.

The answer, again, depends upon how we perceive online platforms – namely, whether we consider them as *given markets* in which we participate or as *markets we may choose from* in the market of platforms, existing as it were in "the market of markets".

SUMMARY

The contribution is a brief comment on the contribution by Antonios Karaiskos and outlines the civil liability of online platform operators. The legal framework of this liability is considered under the aspects of contractual, tortious and "systemic" liability. Rather than the content of specific provisions, general mechanisms are discussed, namely the duties of online platform operators owed to users of their platforms as arising from their contractual relationship, as well as the tortious duty to protect the interests of those users as they may arise under certain circumstances. "Systemic liability" refers to the issue whether platform operators ought to be vicariously liable for damage suffered by the users – analogous to the rules on product liability – on the basis of an intrinsic defect in the operation or design of online platforms. The contribution also considers how regulatory frameworks are formed in society. One way is through private rulemaking, such as by a council formed of the stakeholders in

a certain matter, though this approach harbours the risk of some interests not being reflected in the rules. Another approach would be to develop a common set of standard terms to protect the users, though it might be better to let the market regulate itself.

(The Editors)

ZUSAMMENFASSUNG

Der Beitrag stellt einen Kommentar zum Beitrag von Antonios Karaiskos dar und skizziert die privatrechtliche Haftung von Betreibern von Online-Plattformen im Allgemeinen. Der rechtliche Rahmen wird unter den Aspekten der vertraglichen, der deliktischen und der „systemischen" Haftung umschrieben. Nicht bestimmte gesetzliche Regelungen, sondern allgemeine Mechanismen werden angesprochen, nämlich die Pflichten eines Plattformbetreibers gegenüber den Nutzern seiner Plattform aufgrund des Vertragsverhältnisses und die deliktische Pflicht die Interessen der Nutzer zu schützen, welche unter gewissen Umständen entstehen kann. „Systematische Haftung" meint das Problem, ob Plattformbetreiber aufgrund eines grundlegenden, inhärenten Mangels im Betrieb der der Gestaltung von Plattformen verschuldensunabhängig haftbar gemacht werden sollten. Der Beitrag betrachtet auch die gesellschaftliche Entstehung der Regelungen. Die private Regelsetzung, z.B. durch Stakeholder gebildete Komitees, ist ein Weg, wobei diese das Risiko birgt, dass bestimmte Interessen nicht in den entstehenden Regeln zum Ausdruck kommen. Ein anderer Ansatz wäre die Erarbeitung von allgemeinen Vertragsbedingungen. Allerdings ist es vielleicht am besten, die Regulierung dem Markt selbst zu überlassen.

(Die Redaktion)