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Determining the Parties Obligations in Contracts for the Supply Digital Content: Problems and Prospects of Adapting Ukrainian Legislation to Eu Law

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Abstract After signing the Association Agreement between the European Union and its Member States [1], Ukraine undertook a number of commitments, including the progressive alignment of its legislation with the European Union acquis. This includes the strengthening of economic and trade relations with a view to Ukraine's gradual integration into the European Union internal market through the establishment of a deep and comprehensive free trade area, including intangible goods such as digital content. In May 2019, the European Parliament and the Council adopted a new legislative act in the field of digital content distribution – Directive 2019/770 on contracts for the supply of digital content and digital services, which entered into force for European Union member states on July 1, 2021. The process of implementation of the Directive provisions involves recodification of the member states national civil legislation. This underlines the importance of studying the provisions of this regulatory act in the context of the Ukrainian legislation adaptation. Therefore, the study of the possible implementation of the provisions of this Directive, in particular of the perspective of determining the parties' obligations in contracts for the supply digital content into the national legal system of Ukraine is of great importance. The purpose of this study is to clarify the content of the obligations of the parties in contracts for the supply digital content, to examine the possibility of application current national legislation to regulate relations for the supply digital content and to develop regulatory provisions for the improvement Ukrainian legislation in accordance with the provisions of European Union law.

In the course of this research the following general scientific and special legal methods have been applied: the method of legal analysis, the method of comparative law and modeling, the system-functional method, the method of analysis and synthesis, and the method of generalization.

The article substantiates the need to establish a digital content supply contract in the Civil Code of Ukraine as a separate type of named contract with its own subject matter and other essential conditions. The authors demonstrate the ineffectiveness of applying the rules of sale of goods, service and lease contracts to legal relations with digital content. The authors substantiate the appropriateness of the imposition of additional information obligations on the provider of digital content in contracts with consumers. Within the framework of the conducted research, the author identify the obligations of the supplier of the digital content, including:

- a) to deliver the digital content;
- b) to transfer the ownership of the physical data carrier on which the digital content is stored in favor of the recipient;
- c) to ensure that the digital content complies with the terms of the contract;
- d) to ensure the possibility of using the digital content in accordance with the terms of the contract; e) to transfer the necessary documents to the recipient together with the digital content.

The article proves that the recipient's obligations under a contract for the supply of digital content are as follows:

- a) to pay the contract price (unless the terms of the contract provide for the fulfillment of another counter-obligation, including the provision of personal data usage, or provide for the supply of digital content on a gratuitous basis);
- b) to accept the digital content together with the necessary supporting and authorization documents;
- c) to take the necessary measures to ensure the use of the digital content.

Index Terms contracts, digital content, supply agreements, ukrainian legislation, eu law, parties obligations, contract law, digital rights, intellectual property, legal adaptation, harmonization

I. Introduction

On May 20, 2019, long-awaited legislative act was adopted of the European Union – Directive 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services. The European legislator managed to harmonize a significant part of civil law in the form of a regulatory in the context of the formation of a single digital market. Although the need for the adoption of mentioned Directive was determined by the Digital Single Market Strategy 2015, and later in 2021 in 2030 Digital Compass: the European way for the Digital Decade, in our opinion, they appeared as a result of a long process of Europeanization of contract law, which began in the late 1980s. The characteristic features of Directive 2019/770 are fundamentally new provisions on the sale of goods (including goods with digital elements) and the supply of digital content, based on the maximum level of harmonization. At the same time, some problems related to the practical implementation of these provisions, in our opinion, remain controversial.

The need to develop a new legal regulation for contracts under which digital content is circulated is the subject of debate in national and foreign literature. D. Staudenmaier notes that the adoption of the new Directive 2019/770 is a consequence of significant changes in European contract law, because, firstly, the harmonization of legislation on sales of goods as one of the central areas of control, which began in 1999 with the adoption of Directive 1999/44/EC, is being implemented. Secondly, the Directive opens the process of legislative adaptation of European private law in the transition to the digital economy [2], and thirdly, as J. Vanherpe aptly emphasizes, the maximum level of harmonization of rules on the sales of goods and the supply of digital content is being implemented [3]. Many scientific works have been devoted to the study of legal regulation of digital content circulation in the context of the implementation of new directives. Thus, A. De Franceschi and R. Schulze pay special attention to the impact of the new Directives 2019/770 and 2019/771 on the harmonization of European contract law, the authors pay particular attention to the systematic implications (e.g., the relationship with the law of obligations and contracts, intellectual property law and data protection law) and the impact on the formation of concepts and terms in national law [4]. The work of I. Kull investigates the effectiveness of transposition of directives into the national legislation of the EU Member States, in particular Estonia, and identifies the approach to the most effective transposition of the directive and the existing gaps [5]. F. Ferri focuses on the gaps in the legal regulation of the Directive, emphasizing the freedom of the national legislator to develop effective national legal regulation [6]. In studying the legal regulation of contracts for the supply of intangible objects, scholars focus on the problematic aspects of the impact of digitalization on existing contract law and the possibility of regulating new relations by existing rules of national law. In the work of C. Twigg-Fleschner considers the role of legal conformity requirements

of contracts for the sale of goods and supply of digital content, distinguishing between different levels of conformity based on subjective and objective criteria [7]. J.M. Carvalho focuses on researching a unified legal regime on conformity and lack of conformity of goods and digital content for all consumer contracts [8].

The issues of defining the obligations of the parties under digital content supply contracts in the national legislation of Ukraine and the possibility of effective adaptation of EU legislation in the field of digital content supply to national legislation remain insufficiently developed. These aspects are the subject of the analysis in this article. The relevance of the subject of the article is determined by the need to develop a scientific concept of civil law regulation of the circulation of digital content in Ukraine and to substantiate the expediency of introducing a new type of contractual relations for the supply of digital data into the national legislation, and to determine the scope of the parties' obligations under contracts for the supply of digital content in accordance with the existing applicable legislation and its correlation with the provisions of the legislation of the European Union. The purpose of the research is to address a number of theoretical and practical issues related to the regulation of the distribution of digital content under Ukrainian law and to analyze the EU legislation in this area in order to introduce effective regulation of contractual obligations for the distribution of digital content and to harmonize national legislation with EU law. In order to achieve this goal, the following main tasks were identified: to conduct a comparative analysis of the contractual structures mediating the supply of digital content under Ukrainian and EU law; to characterize the contractual obligations of the parties in the field of digital content supply; to substantiate the scientific conclusions and proposals for the improvement of Ukrainian legislation in the field of digital content supply.

As a result of the research, the authors formulated a number of conclusions and proposals, which are essential for the development of scientific approaches and legislative regulation of the issues under study, namely: provisions on the supplier's obligations under contracts for the supply of digital content, including: a) to deliver digital content; b) to transfer to the recipient the ownership of the physical data carrier containing digital content; c) to ensure that the digital content complies with the terms of the contract; d) to ensure the possibility of the transfer of digital content to a third party.

II. Materials and Methods

The study of determining the parties' obligations in contracts for the supply digital content in the process of adaptation Ukrainian law to EU *acquis* was based on the Ukrainian secondary legislation and the EU law. In particular, the new EU Directives: Directive 2019/771 of the European Parliament and of the Council on certain aspects of contracts for the sale of goods dated 20.05.2019 (hereinafter - Directive 2019/771), Directive 2019/770 of the European Parliament and of the Council on certain aspects of contracts for the supply of digital content and digital services dated 20.05.2019 (hereinafter

referred to as Directive 2019/770), Directive 1999/44/EC on certain aspects of the sale of consumer goods and related guarantees (hereinafter referred to as Directive 1999/44/EC), Draft Regulation (EU) No. 2011/0284 of the European Parliament and of the Council on the common European regulation of contracts for the sale of goods dated 11.10.2011 (hereinafter - the Draft Regulation), Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, the Civil Code of Ukraine (hereinafter - the CC), the Law of Ukraine “On Consumer Protection”, the Law of Ukraine “On Information”, the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, dated 27.06.2014.

The methodology of this article is based on general scientific and special legal methods of scientific cognition. In particular, the use of the legal analysis method made it possible to identify in the Association Agreement the main areas of adaptation of Ukrainian contract law to EU law. The comparative legal method was used to compare the provisions of EU directives and the Civil Code of Ukraine and the Law of Ukraine “On Consumer Protection”. The modeling method was used for scientific argumentation of recommendations for improving Ukrainian contract law. The system-functional method was used to study the concept of conformity of digital content in the new EU legislation on supply of digital content. The analysis and synthesis methods were used to clarify the concept of adaptation of Ukrainian legislation on supply of digital content to the new EU contract law. The dialectical method allowed the authors to highlight the dynamics of harmonization of EU law in the field of supply digital content. The dogmatic legal method allowed the author to analyze the provisions of current legislation, identify gaps in it, and formulate proposals for its improvement. The method of generalization allowed to systematize and interpret the results obtained in the course of the study.

All research methods were used in conjunction and interdependence, which contributed to ensuring the completeness, objectivity and comprehensiveness of the study. The chosen aspect allowed to lay the groundwork for further directions of scientific development of theoretical ideas on the adaptation of Ukrainian civil law to EU law.

III. Results and Discussion

Ukraine’s obligation to gradually approximate its national legislation to *Acquis Communautaire* has forced the national legislator to recodify the Civil Code of Ukraine (further – CC of Ukraine) in accordance with the current requirements of EU law. In the national legal doctrine was a strong discussion about legal nature of digital content, and including it to the list of objects of civil rights in CC of Ukraine. But, in 2023 the national legislator made changes to the article 177 CC of Ukraine, added the new form of things – digital things, and noting that objects of civil rights can exist in the material world and/or the digital environment. The mentioned above allows us extending the legal regime of things to digital content,

to consider the obligations of the parties in the field of supply digital content under the contractual structures available in national civil law. The distinction between the concepts of digital content and digital service excludes the application of a service contract to legal relations mediating the circulation of digital content. Based on the above, the analysis of the parties’ obligations in the field of digital content circulation should be carried out on the basis of contractual structures of sale and lease.

It is appropriate to begin the study of the content of contractual obligations of the parties in the field of digital content supply by clarifying the obligations of the digital content provider, applying by analogy the provisions on the contract of sale.

First of all, it should be analyzed pre-contractual obligations. The legal doctrine supports the position that the seller’s information obligations are included in the list of such obligations that must be fulfilled before the conclusion of the contract [9], [10]. Pursuant to the provisions of Article 700 of the CC of Ukraine, the seller is obliged to provide the buyer with the necessary and accurate information about the goods offered for sale. Providing relevant information about the specifics of the subject matter of a contractual obligation is one of the key prerequisites for concluding a contract mediating the circulation of digital content. It is the wording of “reliable and necessary information” contained in the law that needs to be clarified in detail. National legislation does not interpret it, however, analyzing the doctrinal approaches, we agree with the statement of T. Kostetska, who understands reliable information as determining the degree of objective, accurate reflection of events and facts that have taken place [11]. At the same time, in contractual obligations, we consider it expedient to understand the concept of necessary information as information about the product contained in the Law of Ukraine “On Information” and defined as information and/or data that disclose quantitative, qualitative and other characteristics of the product [12].

We agree with the position of J. Jezioro that in the case of concluding contracts under which digital content is circulated, the seller is obliged to provide the full range of necessary information about such goods in a way that will allow the recipient to receive and understand it [13]. The simplest way of providing information means, first of all, avoiding the use of complex technical terminology, providing easy access to the information provided (placement in a prominent place on the website, in a font of a size that is easily readable by the recipient without the need for any technical manipulations, etc.)

In case of entering into a contract for the supply of digital content placed on a tangible medium, the obligation to provide the necessary and accurate information about the goods will apply to this tangible medium. A different situation arises when the buyer enters into a digital content sale contract, under which the seller undertakes to customize such digital content to the buyer’s needs. In this case, the digital content will be subject to copyright, which will significantly complicate its

further resale. We believe that the provision of information on the distribution of copyrights to digital content is necessary when entering into a digital content supply contract, as it will be of significant importance to the recipient when deciding whether to enter into the contract.

Reflecting on the list of information that the seller is obliged to provide before concluding the contract, scholars are inclined to expand and clarify it by including: data on the special properties of things (or digital content), possible ways of using the components of such things (goods with digital elements) [14].

A similar provision to the one contained in Article 700 of the CC of Ukraine is duplicated in the legislation in the field of consumer protection, through the prism of consolidating the consumer's right to necessary, accessible, reliable and timely information in the state language about products, their quantity, quality, assortment, and their manufacturer (performer, seller) [15].

In connection with the proliferation of copyright in digital content, the need for certain hardware and software that enables its use, in order to maintain the balance of the parties in contractual obligations for the supply of digital content, we consider it appropriate to impose additional information obligations on the digital content provider in contracts concluded with consumers, namely: informing the consumer about the possibility of digital content performing certain functions, compatibility of digital content with operational and This is primarily due to the assumption that the average consumer does not have special knowledge in the field of computer and information technology, and as a result, lack of awareness in the selection of digital content [16].

At the same time, legal relations for the supply of digital content via the Internet should be subject to the provisions of the Law of Ukraine "On consumer protection" on information to be provided at the conclusion of distance contracts, namely:

- 1) the name of the supplier, its location and the procedure for accepting a claim;
- 2) the main characteristics of digital content;
- 3) if the contract for the supply of digital content is of a reimbursable nature, the price, including delivery charges, and the terms of payment;
- 4) warranty obligations and other services related to the maintenance, repair, and updating of digital content;
- 5) other terms of supply or performance of the contract;
- 6) the minimum duration of the contract if it provides for periodic supply of products or digital content;
- 7) the period of acceptance of the offer to conclude the contract. In the case of contracts under which digital content is supplied, such information should be provided immediately before the conclusion of the contract by posting it on the same website where the offer is posted or by sending such information to the recipient's e-mail if registration on the service provider's website is required before the conclusion of the contract.

However, when entering into a contract for the supply of digital content at a distance, we believe that the existing

list of information obligations of the supplier is insufficient. Thus, given the specifics of the subject matter of the contract under study, it seems advisable to enshrine the supplier's obligation to provide the recipient with information on the use of technical means of digital content protection, namely, the methods of collecting information and the possibility of its further use.

Based on the content of Article 655 of the CC of Ukraine, the seller's main obligation under a sale contract is to transfer the goods (property) to the buyer. If this provision is applied by analogy to contractual obligations that mediate the circulation of digital content, the recipient of the digital content acquires ownership of it.

Given the large number of ways of supplying digital content, we believe that the legal consequence of each of them cannot be the transfer of digital content to the recipient. For example, downloading digital content to a personal technical device gives rise to the recipient's ownership of a digital copy of it, the use of which, given the recipient's lack of copyright, is limited to personal use only. In case of placing digital content on a tangible medium created for the purpose of storing digital content of a certain type (for example, a CD or DVD disk), or inextricably linked to the performance of digital content functions (gaming console software that enables the play of games, is aimed at performing the console's functions, and is inextricably linked to it), the recipient of digital content will acquire ownership of the tangible medium. In contrast, when acquiring ownership of a computer under a sale contract, the buyer does not automatically acquire ownership of the software that can be used by this technical device. The use of a specific program that allows watching movies and music, creating visual presentations, recognizing texts, editing videos, etc. requires the conclusion of a separate contract [17].

This problem has led to a scientific discussion. On the one hand, scholars consider digital content as an accessory of the thing on which it is placed [18]. The CC of Ukraine in Article 186 defines an accessory as a thing intended to serve another (main) thing and connected with it by a common purpose. The legal significance of this division is that the belonging follows the main thing, unless the contract or law provides otherwise. We agree with O. Dzera, who emphasizes that the accessory and the main thing are physically independent things, but the main thing has an independent meaning, and its accessory is dependent, auxiliary and serves the best use of the main thing. The affiliation of the main thing is indicated in standards, technical specifications or price lists, and is determined by the contract [19], [20]. Adoption of this approach allows applying the legal consequences of Article 662 of the CC of Ukraine and imposing on the supplier of goods with digital elements the obligation to transfer to the recipient its belonging, namely digital content, along with the main thing. We believe that this position is unjustified, because when entering into a digital content supply contract, the recipient is primarily interested in receiving the digital content itself as the main thing, and not the material medium on which it will be placed. In addition, the issue of regulating the sale of digital content itself remains

unresolved.

Another statement is also common in the doctrine, according to which digital content is an integral part of the material thing on which it is placed [19]. Legislation in Art. 187 of the CC of Ukraine recognizes as an integral part of a thing everything that cannot be separated from it without damaging and significantly depreciating the thing, and when transferring rights to a thing, its integral parts are not subject to separation.

We agree with I. Novatska, who, reflecting on the issue of defining digital content as an integral part of a thing that cannot be separated from it, notes that digital content is an integral part of only goods with digital elements, and in other cases it is an independent object of civil legal relations. At the same time, when a thing containing digital content does not perform any other function than the function of a digital content carrier, is transferred to the buyer on the basis of a digital content supply contract, and its market price is significantly lower than the contract price, such a contract should be qualified as a digital content supply contract, and the material carrier, in this case, performs only an auxiliary function of its component part [21].

Thus, digital content is an independent subject of contractual relations, and its placement on a material medium is only a way to transfer digital content to the recipient.

Another important obligation of the seller under the terms of the sale contract is to transfer the goods to the buyer (Article 662 of the CC of Ukraine). Based on the provisions of Part 2 of Article 334 of the CC of Ukraine, the transfer of goods should be considered as delivery to the buyer or carrier, communication organization, etc. for shipment, forwarding to the buyer of property alienated without the obligation to deliver.

It is worth noting that the Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law 2011/0284 [22] (further – Regulation 2011/0284 on sales contracts) imposes an obligation on the supplier of digital content to transfer control over the digital content to the recipient. Pursuant to Article 91 of Regulation 2011/0284 on sales contracts, the transfer of control over digital content means placing digital content on the supplier's server with the possibility of downloading it to the recipient's digital device, sending such content to the recipient's e-mail, that is ensuring the existence of a model where the service provider does not influence the provided digital content in any way. Thus, the EU legislator has adapted the provisions on the transfer of ownership of goods under a sales contract to the specifics of digital content.

In our view the supplier's obligation to transfer digital content to the recipient does not meet the needs of the digital economy and is justified only if the digital content is placed on a tangible medium. The application of the rules on sale, including the seller's obligation to transfer the goods, to the contract for the supply of digital content by analogy is inefficient, and the national legislator should implement the provision on "transfer of control over digital content" from the Regulation 2011/0284 on sales contracts when defining

the supplier's obligation.

At the same time, it should be noted that the presented model of transfer of control over digital data is applicable only to certain types of digital content. For example, under a cloud storage contract, the supplier undertakes to ensure the safety of data on the server. Under a contract for the supply of software that enables online processing of audio or video files on its server, the supplier's obligation is to provide the recipient with access to use this digital content [23].

In order to protect the rights of the parties in the event of accidental destruction or damage to digital content, it seems necessary to clearly establish the moment when such risk is transferred to the recipient. In our opinion the application of Article 668 of the CC of Ukraine, which establishes the transfer of the risk of accidental destruction or damage to goods from the moment of their transfer, is also ineffective for regulating the supply of digital content. This position is due to the predominant electronic form of such transfer. At the same time, the provision of Article 664 of the CC of Ukraine, which defines the fulfillment of the seller's obligation to transfer the goods at the moment of their placement at the buyer's disposal, if the goods are to be transferred to the buyer at the location of the goods, will be considered applicable. In applying this provision to the legal relationship for the supply of digital content, we consider that if the digital content has been made available on the supplier's server specified in the contract in a form that allows it to be downloaded to the recipient's personal technical device, the supplier's obligation is deemed to have been fulfilled and the risk of accidental loss or damage to the goods is transferred to the recipient.

In this context, it seems appropriate to quote the decision of the Supreme Court of the Republic of Poland, which, when examining the moment of performance of the contractual obligation to deliver digital content, which is directly related to the moment of passing the risk of its accidental destruction or damage, stated that the supplier's obligation is considered fulfilled when the digital content is made available for downloading on the supplier's server. The moment of transfer of the risk of accidental destruction or damage to digital content is considered to be the time when the recipient downloads the data, and not the moment of its transfer by the supplier [24].

Applying, by analogy, to the contractual obligations of the recipient of digital content the provisions of the CC of Ukraine on the obligations of the buyer under a contract of sale, we will try to analyze two main obligations: to accept the property (goods) and to pay a certain amount of money for it.

In the literature, the obligation to accept the goods means that the buyer takes all necessary actions aimed at ensuring the fulfillment of the seller's obligation to transfer the goods, namely: notification of the delivery address of the goods, provision of vehicles for loading and transportation of the goods (if required by the terms of the contract, etc.) [25]. It is emphasized that the buyer's obligation to accept the goods is closely connected with ensuring the seller's fulfillment of its obligation, and therefore its failure to do so may be the basis for the buyer's liability for breach the conditions of fulfillment

obligation [26], [27].

Fulfillment by the digital content recipient of the obligation to accept it will depend on the form of external expression of digital content. In the case of digital content delivery placed on a material medium, it will consist in providing information about the place and time of delivery such a medium. If the digital content is delivered online, it is necessary to specify an e-mail address or other server or cloud storage to which the supplier must upload the digital content.

Since the sale contract is commutative contract, the buyer is obliged to pay a certain amount of money in favor of the seller, as determined by the terms of the contract. The literature notes that the above obligation of the buyer includes additional actions, in particular, opening a letter of credit under the terms of the contract, providing a bank guarantee, etc. Nowadays, the only currency of fulfillment of a monetary obligation in Ukraine, in accordance with the provisions of the CC of Ukraine is the hryvnia. Taking into account the fact that contracts for the supply digital content are most often concluded on the Internet, the buyer's obligation is transformed from the payment of a monetary amount to the transfer of personal data and cryptocurrency. According to the explanation of the National Bank of Ukraine on the legality of using "virtual currency/cryptocurrency" in Ukraine, Bitcoin is currently in the gray zone of the Ukrainian economy [28]. In view of the above, it is time to develop a new model of fulfillment of a monetary obligation by monetizing personal data, legalizing the fulfillment of a monetary obligation on the Internet with bitcoin in the case of payment for digital content.

Thus, if the recipient of digital content fulfills a counter-obligation by providing personal data, filling out marketing questionnaires, and other similar things, it is impossible to apply the provisions on sale of goods to legal relations for the supply digital content.

Contractual relations related to the provision of a part of the supplier's server capacity for the recipient to store digital data have common features with the contractual structure of lease. In the light of the above, it is necessary to clarify the obligations of the parties to such legal relations.

According to Part 1 of Article 759 of the CC of Ukraine, the lessor transfers or undertakes to transfer property to the lessee for use in return for payment for a certain period of time. Projecting this provision to the legal relations for the supply of digital content, the supplier's obligation will be to transfer the digital content to the recipient for use for a certain period of time. Depending on the form of expression of the digital content, such transmission may take place by providing the recipient with access to digital data on the supplier's server.

Another form of providing digital content under a lease contract may be the activation of the recipient's personal account in the supplier's information system. Logging in such an account, after its activation, allows the recipient to use digital content [29]. At the same time, by virtue of the provisions of Art. 765 of the CC of Ukraine, under a lease contract, digital content is transferred to the recipient for use immediately or within the period established by the contract.

In addition, we would like to draw attention to the obligation to transfer property for use of appropriate quality. The provisions of the CC of Ukraine impose on the lessor the obligation to transfer to the lessee the thing in a complete set and in a condition that meets the terms of the lease contract and its purpose. As O. Moroz rightly notes, the thing transferred for hire must be fit for purpose, which means that the thing must be in a condition that allows its normal use. This does not mean that the thing that is leased should be free of any defects at all, but these defects should not prevent the use of the thing for its intended purpose [30], [31]. In addition, the lessor is obliged to warn the lessee about the special properties and defects of the thing that he knows and which may be dangerous to the life, health, property of the lessee or other persons, or, which is essential in the case of a digital content supply contract, may cause damage to the thing itself during its use. Thus, the supplier must ensure the safety of the recipient's digital content created, processed or otherwise placed on its server and notify the recipient of the terms of use of such server in a manner that prevents damage, destruction or any other negative impact on such digital content.

However, some of the terms of the lease, which are designed to regulate the transfer of things for use, do not correspond to the content of the contractual relationship for the supply of digital content. Thus, the obligation of the lessee to check the serviceability of the leased item in the presence of the lessor and the presumption of serviceability of such item (in the event of non-compliance by the lessee with the obligation of verification) are not applicable to contractual obligations for the supply of digital content for a number of reasons, including

- 1) the contract under which digital content is supplied is usually concluded without the simultaneous presence of the supplier and the recipient, online, by means of remote communication;
- 2) it is impossible to check the serviceability of digital content, given its digital form of expression;
- 3) given the purpose of concluding a contract under which the recipient is transferred a part of the capacity of an electronic server, the supplier should be imposed with additional obligations to maintain the functioning of such a server during the term of the contract, by updating the information on the server.

In addition, this presumption significantly changes the vector of the burden of proof in civil proceedings. Appropriate application of Art. 767 of the CC of Ukraine to the legal relations of digital content supply, in the event of a dispute concerning the quality and functionality of the digital content, the recipient of the digital content is obliged to prove that defects existed at the time of contracting that completely prevent the digital content from functioning. Such evidence may be a written opinion as to the characteristics of the digital content that is the subject of the lease contract at the time the contract is concluded [32], [33]. Within the framework of this study, it seems necessary to pay attention to the lessor's obligation arising from Article 768 of the CC of Ukraine

to guarantee the quality of the thing during the entire term of the lease. In case of concluding a digital content supply contract, this obligation should be understood as guaranteeing stable and uninterrupted access to digital content, ensuring its updating by reproduction using the recipient's software and hardware.

It should be noted that the reciprocity of equivalent counter-obligations of the parties to the lease contract regarding the transfer of property for use and its payment indicates its bilateral nature [34], [35]. Under a lease contract, the lessee is charged a fee expressed in cash or in kind. However, for contracts under which digital content is supplied, it will be important for the recipient to fulfill a counter-obligation by transferring personal data as payment and/or performing another action in favor of the creditor. At the same time, in the case of supplying digital content free of charge, such a contract cannot be interpreted as a lease contract.

The next obligation of the lessee, pursuant to Article 773 of the CC of Ukraine, is to use the thing transferred for lease in accordance with its purpose and the terms of the contract. According to I. Kalaur, the details of this provision are found in Part 1 of Article 783 of the CC of Ukraine, which states that the lessor has the right to demand termination of the lease contract, in particular, if:

- 1) the lessee uses the thing contrary to the contract or the purpose of the thing;
- 2) the lessee has transferred the thing to another person without the lessor's permission;
- 3) the lessee creates a threat of damage to the thing by his negligent behavior [36], [37].

Application of these rules to the legal relations of digital content supply is essential in case of copying or distribution of digital content by a person who does not own the copyright to it. Thus, the supply of digital content under the terms of a lease contract would require a detailed description in such a contract of the ways of using digital content, which, given its detailed definition and digital form of expression, is extremely broad [38], [39].

Thus, given the specific legal nature of digital content, the application of the rules on sales and lease contracts to the supply of digital content by analogy is not effective enough.

In order to harmonize Ukrainian legislation in the field of digital content circulation and develop new legal regulation, we consider it necessary to study EU legal acts on contractual obligations of the parties in the field of digital content circulation.

The most detailed list of obligations of the digital content supplier is contained in Article 91 of the Proposal for a Regulation 2011/0284 on sales contracts, in particular: a) to ensure the supply of digital content; b) to transfer ownership of the material medium on which the digital content is placed; c) to verify compliance of the digital content with the terms of the contract; d) to ensure that the recipient has the right to use the digital content in accordance with the terms of the contract; e) to transfer to the recipient the documents that he may require on the basis of the concluded contract.

We believe that such a position of the European legislator is justified only when concluding contracts with consumers, otherwise, the obligation to verify the right to use digital content is excessively burdensome. It should be noted that the Proposal for a Regulation 2011/0284 on sales contracts establishes a different approach to the interpretation of the legal provision on the obligations of the parties than the national legislation. Thus, the Law of Ukraine "On Protection of Consumer Rights" provides a list of supplier's obligations through the prism of the list of consumer rights. Article 4 of the mentioned law enshrines the consumer's right to proper quality of products and services, which accordingly imposes on the service provider the obligation to supply products of proper quality and the legal consequences of failure to fulfill such an obligation [40], [41].

A slightly different approach to the list of supplier obligations is contained in the new Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. According to Art. 5, the supplier is obliged to deliver the digital content or digital service without delay, immediately after the conclusion of the contract. At the same time, the supplier's obligation will be deemed fulfilled at the moment of: a) provision of digital content or any means for its downloading directly by the consumer or by the consumer's designated virtual platform; b) downloading of digital content by the consumer or by the consumer's designated virtual platform.

The European legislator moves away from the concept of supply as the provision of a tangible medium of information previously enshrined in Directive 2011/83/EU on consumer rights, and establishes a new approach to the supply of intangible data as the transfer of control over digital content by giving the consumer or third parties designated by him access to goods in a way that allows the consumer to extend his ownership of such goods with the possibility of resale [42].

In the legal doctrine, the transfer of control over digital content is defined as the supplier's obligation to place digital content in the memory of the end recipient's technical device, including by sending it to an e-mail, in a way that deprives the supplier of the possibility of further use or modification of the specified digital content [43], [44]. Thus, the supplier's obligation to provide digital content will not be considered properly fulfilled if the digital content is available for download on an online platform, since the supplier has the ability to modify or otherwise influence the digital content until the actual download.

In our opinion, the above model, according to which the supplier's obligation to provide digital content will be considered fulfilled only when the possibility of its modification is lost, is unjustified, since the recipient of the digital content may not take any actions to download it to his personal technical device, and the supplier will not be able to demand payment of the contract price. Thus, to implement the definition of fulfillment of the obligation by the supplier, the provisions of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services should be

applied, and the provision of digital content for download by the supplier should be considered the moment of fulfillment of its obligation.

Pursuant to Article 12 of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, the burden of proof of the supply of digital content rests with the supplier. On our opinion this provision is due to the peculiarity of digital content circulation. After all, in the case of providing digital data for downloading on an intermediary online platform, the recipient does not have any technical capabilities to obtain this information.

Important for analysing the supplier's obligations is the provision to provide digital content without delay, immediately after the conclusion of the contract [45]. F. Zoll understands this provision as the supplier's obligation to transfer digital content within a reasonable period of its objective expectation [46], [47]. At the same time, the method of providing digital content will be of key importance: in case of its delivery on a material medium, the term of fulfillment of the obligation by the supplier will be longer than the term of providing digital data online, except for contracts that provide for the supplier's obligation to create or program digital content in accordance with the individual wishes of the recipient [48], [49].

It seems necessary to analyze the feasibility of imposing an obligation on the digital content supplier to verify the compliance of digital content with the terms of the contract [50]. Unlike the provisions of the Proposal for a Regulation 2011/0284 on sales contracts, the adopted Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services does not contain this obligation. Instead, the European legislator has adopted the approach of expanding the concept of conformity of digital content with the terms of the contract, imposing on its supplier the obligation to provide the consumer with digital content that meets the terms of the contract, identifying two main criteria for such conformity: objective and subjective. The subjective criterion of conformity of digital content is determined by the provisions of the contract for its supply. According to paragraph a) Article 7 of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, the description of digital content, its quantity and quality, functionality, interoperability, compatibility, compatibility with hardware and software, and other features must comply with the terms of the contract. A similar provision is enshrined in the Proposal for a Regulation 2011/0284 on sales contracts. The contractual condition on quantity includes the recipient's ability to copy the provided digital content an indefinite number of times [51]. In practice, it is quite common for the supplier to include special software in the digital content to block the recipient's ability to copy the digital content. For this purpose, online platforms use various contractual structures in the field of digital content supply. Thus, analyzing the activities of online platforms for the supply of video resources, we come to the conclusion that their services are realized on the basis of many contractual structures, which in turn requires the inclusion in such con-

tracts of various, often different, information obligations of the supplier [52], [53]. For example, in order to access the movie resources of the Netflix platform, the recipient enters into a standard fixed-term contract for the supply of digital content. One of the terms of such contract is a provision on the use of digital content, including its protection against copying, with the support of special programs. When downloading a specific movie, the supplier's obligations are not additionally prescribed, and the absence of a condition on the impossibility of copying a video file is not a ground for recognizing digital content as not meeting the terms of the contract or the recipient's expectations.

The functioning of the You Tube platform in terms of access to watching full-length movies on the basis of a compensated contract concluded for the supply of each video content is somewhat different. The absence of a provision in the contract on the impossibility of copying video content leads to a violation of the objective expectations of the recipient of such content, and as a result, to the recognition of digital content as not meeting the terms of the contract.

The peculiarity of the existence of digital content determines the inclusion of special features of interoperability, compatibility and functionality of digital content as a subjective criterion of its compliance [54].

Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services defines the interoperability of digital content as its ability to interact with hardware and software other than that typically used to work with digital content of a given type.

The objective criterion for the conformity of digital content is determined by the following features:

- 1) suitability of digital content for use for the purpose for which such digital content is usually used, taking into account the technical requirements contained in the legislation of the country of its circulation;
- 2) quantity and quality, including functionality, compatibility, accessibility, continuity of supply and security of use of digital content, which are typical for digital content and digital services of the same type, and which the consumer can reasonably expect to receive under the terms of the contract or public offer of the supplier placed on advertising banners or labels of the material carrier of digital content, except for - delivery of digital content in the quantity and quality that complies with the terms of the public offer of a particular digital content provider; - delivery of digital content in the quantity and quality that complies with the terms of the amended public offer posted in the same manner as the previous offer, if such changes were made before the conclusion of the contract;
- 3) delivery of digital content together with accessories and instructions for use, which the consumer objectively expects to receive;
- 4) delivery of digital content that corresponds to the demo version previously provided to the recipient for review;

- 5) informing the recipient by the supplier about updates to the software supporting the functioning of the digital content, including updates to the programs providing the system of protection of the supply of digital data, maintaining compliance of the digital content supplied with the terms of the concluded contract, and providing such updates to the recipient of the digital content within the period specified in the contract: - the period specified in the fixed-term contract for the supply of digital content; - the period of one-time or multiple deliveries of digital content, depending on its type and/or purpose, as well as the terms of the contract; Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services presumes that the digital content supplier is released from liability for the non-compliance of digital content with the terms of the contract arising from the lack of software updates, if the recipient of digital content does not install the update provided by the supplier within a reasonable period of time, provided that - informing the recipient of the digital content about the availability of the update and the consequences of its failure to install it; - the recipient's failure to install the software update is due to errors in the instructions provided with the update.
- 6) Compliance with the terms and conditions of the transferred digital content fixed-term contract;
- 7) delivery of digital content in the latest version that exists at the time of the contract conclusion, unless otherwise specified in the terms of the contract [55].

We believe that such an approach of the European legislator to detailing subjective and objective grounds is justified. After all, in the context of the digital economy, it becomes necessary to develop effective legislation aimed at protecting the weakest party to the obligation to supply digital content - the recipient of digital content and digital services, especially when it is a consumer.

EU law also defines a number of obligations of the recipient of digital content, which do not differ significantly from the obligations of the buyer under a sales contract, and consist of the following: a) payment of a certain amount of money and/or provision of data; b) acceptance of digital content, together with the necessary accompanying and authorization documents [56].

The first of these obligations of the recipient of digital content is defined in Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services as the duty to pay a price. Part 7 of Art. 2 defines the concept of price in a broad sense as a monetary or digital reflection of the relevant value provided for the supply of digital content or digital services. It is worth noting that such a formulation of the concept of price is relatively new for the European legislator. For example, the previously drafted Regulation 2011/0284 on sales contracts defined price only as the money due to the seller for the goods provided, digital content delivered, and related services [57].

The inclusion of the corresponding value in the definition

of price is a requirement of the existing digital services market, as a large percentage of reimbursable contracts for the supply of digital content are concluded on the condition that the recipient provides his or her personal data, completes a survey to create a marketing strategy by the supplier, etc. This definition of the price also makes it possible to pay for digital content supply services with new forms of electronic currency, including bitcoins [58].

Pursuant to Article 123(1) of Proposal for a Regulation 2011/0284 on sales contracts, one of the main contractual obligations of the buyer is to accept the digital content together with the relevant documentation. It is worth noting that the obligation to accept the goods in sales contracts is closely related to the costs incurred by the seller in case of storage of the sold item. Excessive costs associated with the storage of digital content occur when digital content occupies a significant part of the disk surface capacity, which burdens the seller with excessive costs for hosting services [59].

IV. Conclusions

After a comprehensive analysis of the legal regulation of the parties' obligations under digital content supply contracts based on EU legislation and legal doctrine of EU member states, we conclude that Ukrainian legislation need to enshrine in the CC of Ukraine the contract for the supply of digital content as a separate type of named contract with a common subject matter and other essential terms. Given the specific legal nature of digital content, it is ineffective to apply provisions on sales of goods or lease contracts to legal relations where digital content is the subject. The rules on the contract for the supply of digital content should be apply to both general and specific subjects - consumers.

Thus, taking into account all the above, we consider the approach of the EU legislator to distinguish objective and subjective criteria for determining the compliance of digital content with the terms of the contract for its supply to be effective and worthy of attention of the national legislator. In light of the harmonization of national legislation with the EU *acquis*, it is advisable to enshrine in the provisions of the Civil Code of Ukraine the obligations of the supplier and recipient of digital content.

To summarize, we propose that the list of the supplier's obligations under a digital content supply contract should include: a) supplying digital content; b) transferring ownership of the material data carrier containing digital content to the recipient; c) ensuring compliance of digital content with the terms of the contract; d) guaranteeing the possibility of using digital content in accordance with the terms of the contract; e) transferring the necessary accessories and documents to the recipient along with the digital content." The Civil Code of Ukraine should be updated with provisions defining the obligations of the recipient of digital content, including: a) to pay a certain amount of money and/or provide data, unless the terms of the contract provide for the supply of digital content on a free-of-charge basis; b) to accept digital content together with the necessary accompanying and permitting documents;

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