ppi 201502ZU4645
Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185Depósito legal pp
197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

Vol.41 *Nº 79*
Octubre
Diciembre
2023

Cuestiones Políticas Vol. 41, Nº 79 (2023), 156-171
IEPDP-Facultad de Ciencias Jurídicas y Políticas - LUZ

Breach of obligations under contracts for the sale of goods and supply of digital content in European Union and Ukrainian law

DOI: https://doi.org/10.46398/cuestpol.4179.11

Liudmyla Savanets *
Anzhelika Baran **
Tetiana Podkovenko ***
Hanna Poperechna ****
Olena Dyka *****

Abstract

The content of the research lies in an analysis of the legal prescriptions of the legislation of the European Union and Ukraine, which determine the liability of the parties for breach or improper performance of obligations under contracts for the sale and purchase of goods and supply of digital content. With the help of general and special philosophical methods, the possibility and legal consequences of applying the liability provisions of the relevant articles of the Civil Code of Ukraine, to the contractual relations of purchase and sale of goods and the supply of digital content (violation of the contract of sale by the seller and the lessee, copyright infringement, etc. are discussed.) It is concluded that in order to harmonize the Ukrainian legislation with the legislation of the European Union, the provisions of individual drafts and Directives of the European Parliament and the Council, which regulate the specific sphere of legal relations, were analyzed. Special attention was paid to the implementation of the draft Law on Digital Content and Services and its

* Candidate of legal sciences, Associate Professor, Associate Professor at the Department of International law and Migration policy at West Ukrainian National University, Ternopil, Ukraine. ORCID ID: https://orcid.org/0000-0002-0051-8905. Email: l.savanets@wunu.edu.ua

** Candidate of legal sciences, Associate Professor, Associate Professor at the Department of International law and Migration policy at West Ukrainian National University, Ternopil, Ukraine. ORCID ID: https://orcid.org/0000-0003-2134-1325. Email: abaran_wunu@ukr.net

*** Candidate of legal sciences, Associate Professor, Associate Professor at the Department of Theory and History of State and Law at West Ukrainian National University, Ternopil, Ukraine. ORCID ID: https://orcid.org/0000-0003-0344-3010. Email: tpodkovenko@gmail.com

**** PhD., in Law, Associate Professor, Associate Professor at the Department of International law and Migration policy at West Ukrainian National University, Ternopil, Ukraine. ORCID ID: https://orcid.org/0000-0001-6978-4892. Email: hn.stahyra@gmail.com

***** PhD., in Economics, Associate Professor of the Department of National Security, Public Administration and Administration at Zhytomyr Polytechnic State University, Zhytomyr, Ukraine. ORCID ID: https://orcid.org/0000-0002-0800-3498. Email: dyolena@ukr.net

Recibido el 07/04/23 Aceptado el 23/07/23

compliance with the basic principles of private law in this area, established on the basis of the values of the European Union.

Keywords: contractual liability; digital content; purchase and sale of digital content; digital content provider; consumer.

Incumplimiento de las obligaciones derivadas de los contratos de compraventa de bienes y suministro de contenidos digitales en la legislación de la Unión Europea y de Ucrania

Resumen

El contenido de la investigación radica en un análisis de las prescripciones legales de la legislación de la Unión Europea y Ucrania, que determinan la responsabilidad de las partes por el incumplimiento o cumplimiento indebido de las obligaciones derivadas de los contratos de compraventa de bienes y suministro de contenido digital. Con la ayuda de métodos filosóficos generales y especiales, se discute la posibilidad y las consecuencias jurídicas de aplicar las disposiciones sobre responsabilidad de los artículos pertinentes del Código Civil de Ucrania, a las relaciones contractuales de compra y venta de bienes y el suministro de contenido digital (violación del contrato de compraventa por parte del vendedor y el arrendatario, violación de los derechos de autor, etc.) Se concluye que, para armonizar la legislación ucraniana con la legislación de la Unión Europea, se analizaron las disposiciones de proyectos individuales y Directivas del Parlamento Europeo y el Consejo, que regulan la esfera específica de las relaciones jurídicas. Se presto especial atención a la implementación del proyecto de Ley de Contenidos y Servicios Digitales y su cumplimiento de los principios básicos del derecho privado en esta materia, establecidos en base a los valores de la Unión Europea.

Palabras clave: responsabilidad contractual; contenido digital; compra y venta de contenidos digitales; proveedor de contenido digital; consumidor.

Introduction

The emergence of the global Internet, new technologies and the latest methods of communication have largely influenced changes in law. The domestic legislator faced an urgent need for both the introduction of legal

norms for the regulation of emerging relations and the adaptation of existing legislative provisions to new realities (Savanets and Stakhira, 2020).

Ukraine's intention to become a member of the European Union (hereinafter – EU) necessitates bringing its legislation into line with the requirements of EU legislation. The relevant obligation is defined in the Association Agreement between Ukraine, on the one hand, and the EU, the European Atomic Energy Community and their member states, on the other hand. Thus, the preamble states that the parties «undertake to ensure the gradual adaptation of Ukrainian legislation to the EU acquis in accordance with the directions specified in this Agreement and to ensure its effective implementation».

One of the directions of cooperation and adaptation of legislation is to ensure the gradual adaptation of Ukrainian legislation to the EU acquis. Therefore, Ukraine has expressed its readiness to implement into national legislation the existing acts of the EU institutions in accordance with the directions defined in the agreement, one of which is the strengthening of economic and trade relations, through the creation of an in-depth and comprehensive free trade zone, including intangible objects, which include digital content.

It should be emphasized that the market of digital content and digital services in Ukraine is not developing as quickly as compared to European countries. One of the defining reasons for the slow development of this sector of the market is the lack of legal regulation of the provision of digital content and (or) digital services to consumers. The presence of the mentioned problems prompted an analysis of the legislation of the European Union and Ukraine in terms of legal regulation of breach of obligations under contracts for the sale of goods and the supply of digital content.

1. Methodology of the study

The basis of the research methodology was: the dialectical method of legal knowledge, the application of which made it possible to single out the contractual construction of the supply of digital content and highlight its features; a comparative-legal method of knowledge, with the help of which the analysis of the provisions of the EU secondary law on contracts for the purchase and sale of goods and the supply of digital content was carried out and their comparison with the relevant norms of the civil legislation of Ukraine, as well as the system-functional method in the interpretation of legal categories, as a result of which deepened and the conceptual and categorical apparatus of civil law regulation of relations of purchase and sale of goods and supply of digital content was clarified.

2. Analysis of recent research

Separate organizational and legal aspects of the regulation of public relations in the sphere of buying and selling goods and supplying digital content have been the subject of research by many scholars of civil contract law. We do not deny that the conducted scientific research has great theoretical and practical significance. At the same time, the modern contractual law of the European Union is undergoing transformations caused by the challenges of the digital revolution, standardization and digitization of private legal relations of a contractual nature, which requires a detailed scientific analysis of the possibilities and legal consequences of applying to contractual relations from the circulation of digital content the general provisions on liability for breach of contractual obligations and special norms of the Civil Code of Ukraine.

In addition, taking into account the desire to harmonize Ukrainian legislation with the legislation of the EU, the research also requires the provisions of the relevant Directives of the European Parliament and the Council, which regulate the contractual relations of the purchase and sale of goods and the supply of digital content, and establish the responsibilities of the parties to the contract.

The purpose of this article is a comprehensive analysis of the regulatory regulation by the European Union and Ukraine of responsibility for breach of obligations arising from contracts for the purchase and sale of goods and the supply of digital content.

3. Results and discussion

3.1. Peculiarities of the legislative regulation of breach of obligations under contracts of sale of goods and supply of digital content in Ukraine

The Civil Code of Ukraine contains a number of provisions establishing general principles of liability for breach of contractual obligations. The legislator defines that a violation of an obligation is its non-fulfillment or fulfillment in violation of the conditions determined by the content of the obligation (improper fulfillment) (Article 610 of the Civil Code of Ukraine) (Civil Code Of Ukraine, 2003).

The doctrine has repeatedly emphasized that improper performance involves an obligation that is fulfilled, but with existing violations of certain terms of the contract, for example, regarding the quality of the transferred goods, their quantity, the deadline for the fulfillment of the obligation, volume, etc.

Instead, it is customary to consider non-performance as the inaction of the debtor. It is quite logical that such a differentiation gives rise to a number of practical problems. In particular, in the case of the application of the provisions of the law regulating liability for non-fulfillment of an obligation, reasonable doubts arise regarding the ability of the creditor to simultaneously demand both the fulfillment of the obligation in kind and compensation for damages (in case of improper performance of the contract).

Considering the fact that the market of digital goods and services, which includes digital content, is rapidly displacing the market of tangible goods that have an identical purpose (for example, e-books, watching videos in online format, as well as in streaming format, etc. instead of the usual paper books, videos and music stored on material media CDs, DVDs), calls for a scientific analysis of the responsibility of the parties for breach of obligations in contracts for the supply of digital content.

First of all, we note that the Central Committee of Ukraine does not define the concept of digital content and does not regulate the legal relationship of its circulation. However, the mixed legal nature of digital content, as well as the nature of the relationships that arise in the process of its circulation, makes it possible to apply the most similar contractual constructions on the basis of legal analogy (Kalaur and Stakhira, 2019).

Liability on the basis of the general provisions of Chapter 51 of the Civil Code of Ukraine is based on the restoration of the equality of the parties in binding legal relations by granting one of the parties the right to: terminate the obligation due to unilateral refusal of the obligation, if this is established by a contract or law, or termination of the contract ; changing the terms of the obligation; penalty payment; compensation for damages and moral damage (Civil Code Of Ukraine, 2003).

At the same time, the application of such responsibility is impossible without the existence of the obligation itself, that is, a legal relationship in which one party (the debtor) is obliged to perform a certain action for the benefit of the other party (the creditor) (transfer property, perform work, provide a service, pay money, etc.) or refrain from committing a certain action (negative obligation), and the creditor has the right to demand from the debtor the fulfillment of his obligation. At the same time, the application of the general rule on the right to terminate the obligation by unilateral refusal may be limited, provided that the digital content is provided to the user free of charge, that is, the debtor in this legal relationship is not obliged to take any actions in favor of the creditor, and therefore, does not enjoy the right to terminate the obligation due to unilateral refusal.

Particular attention needs to be paid to clarifying the responsibility of the parties under the contract for the supply of digital content, applying

by analogy the contractual structure of purchase and sale. In particular, it seems interesting to study the possibility of applying the provisions of Art. 673 of the Civil Code of Ukraine regarding the quality of goods to a special object of civil legal relations - digital content. The obligation of the seller, established in the legislation, is to transfer to the buyer the goods of proper quality, that is, their suitability to achieve the corresponding purpose (Civil Code Of Ukraine, 2003).

In case of violation of quality obligations, the buyer has the right, regardless of the possibility of using the product for its intended purpose, to demand from the seller, at his choice: a proportional price reduction; free elimination of product defects within a reasonable period of time; reimbursement of expenses for the elimination of product defects. In the event that the digital content was purchased according to a sample or description (for example, the buyer was previously provided with a demo version of software or an online game), the application of part 3 of Art. 673 of the Civil Code of Ukraine, which establishes requirements for compliance of the quality of the goods with the previously provided sample or description, will provide an additional opportunity to protect the expected expectations of the buyer.

Consumer contracts require additional analysis regarding liability for breach of contractual obligation to supply digital content. Applying the provisions of the Law of Ukraine «On the Protection of Consumer Rights» to contracts for the supply of digital content, in the event that a deficiency in the digital content is discovered by the consumer, in accordance with part 1 of Art. 8, the right to demand: 1) a proportional price reduction is guaranteed; 2) free of charge elimination of product defects within a reasonable period of time; 3) reimbursement of expenses for elimination of product defects (Consumer Rights Protection, Law Of Ukraine, 1991).

The specified norm gives the consumer the right to terminate the contract and the right to demand the replacement of the product in the event of a significant defect only if the seller (manufacturer) of the product is at fault. In this context, the question of the possibility of protecting one's own rights by the consumer in the event of the existence of a significant defect without the fault of the manufacturer (seller) arises. There is no doubt that the issue of defective goods is a type of improper performance of an obligation.

However, the legal consequences of the transfer of defective goods are based on other grounds than those arising from general principles of liability. First of all, the reason is the defect of the product, not the damage caused. In the event of the existence of a defect, the structure of responsibility acquires the character of the responsibility of the seller regardless of fault, as well as his awareness (knowledge), and therefore this responsibility is based on the principle of «risk». The above gives reason to understand such responsibility as a means of protecting buyers (Savanets, 2017).

Taking into account the specifics of digital content and taking into account the fact that, although it is not a thing (in the interpretation of Article 179 of the Civil Code of Ukraine), as a subject exclusively of the material world, it nevertheless has a combined legal nature, the lack of legislative consolidation of the concept of digital content makes it possible to apply by analogy the provisions of Chapter 58 of the Civil Code of Ukraine on digital content hire (lease) contracts.

As evidenced by the analysis of the content of the Civil Code of Ukraine, the construction of the lessor's responsibility is similar in construction to the seller's responsibility in sales contracts, the subject of which is digital content. Yes, the lessor is responsible for the timely transfer of digital content to the lessee (immediately or within the period specified in the contract). In addition, the legislator especially protects the lessee's rights in case of inconsistency in the quality of the digital content, both as stated in the contract and as guaranteed by the lessor to the lessee during the entire period of use of the digital content.

Such a quality guarantee and liability provided for non-compliance with warranty obligations regarding the quality of digital content is the main way to protect the tenant in case of destruction or damage to his property. In particular, the lessor is responsible for the destruction, damage, distribution on the network without the lessee's consent of his personal files stored on the lessor's server. At the same time, in Art. 768 of the Civil Code of Ukraine defines the right of the tenant to demand from the landlord: 1) replacement of digital content, if possible; 2) a corresponding reduction in the fee for using the content; 3) free of charge elimination of defects in digital content or reimbursement of expenses for their elimination; 4) termination of the contract and compensation for damages caused to him (Civil Code Of Ukraine, 2003).

At the same time, for the use of digital content under the employment contract, it is worth paying attention to the provisions of clause 3 of Art. 767 of the Civil Code of Ukraine, which obliges the lessee to check the condition of the thing (Civil Code Of Ukraine, 2003). At first glance, such a rule should protect the rights of the lessor and the lessee, but given the mixed legal nature of digital content rental contracts, we consider the possibility of conducting such an inspection «in the presence of the lessor» burdensome for the lessee and does not contribute to ensuring the equality of the parties in civil legal relations.

Also, in view of the spread of copyright on digital content, the author may be held liable for the non-compliance of digital content provided for by the Law of Ukraine «On Copyright and Related Rights», but only in the case of concluding an author's contract.

It is certain that at the current stage of the development of the market of digital goods and services there is an urgent need for effective unified regulation of relations related to the circulation of digital content. In the national doctrine, an opinion was expressed regarding taking as a basis the draft Directive of the European Parliament and the Council on certain aspects relating to contracts for the supply of digital content dated December 9, 2015 No. 2015/0287 (Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, 2015), which established the maximum form of harmonization, in particular with regard to provisions relating to liability for non-fulfillment or improper fulfillment of the service provider's obligations.

According to Art. 10 of the draft of this Directive, the provider of digital content services is responsible for: violation of the obligation to supply goods and services that are digital content; any inconsistency of the digital content with the terms of the contract existing at the time the consumer receives such content; in case, according to the terms of the contract, digital content must be provided to the consumer during a certain period - for each non-compliance of the digital content with the terms of the contract during the entire period of its consumption. Limitation of the liability of the supplier of digital content under the contract takes place only at the stage of applying the appropriate means of legal protection of the consumer and is established on the basis of the proportionality of the degree of responsibility with the offense committed (Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, 2015).

At the same time, the final adoption of Directive 2019/770 and Directive 2019/771 (Directive (EU) 2019/770 Of The European Parliament And Of The Council, 2019; Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019) means that the EU member states cannot define either a stricter or a softer form of liability, but only undertake to introduce into their legislation norms that are identical to the provisions of the aforementioned Directives on the liability of the service provider, according to which the circulation of digital content is carried out (Kalaur and Stakhira, 2019).

3.2. Problematic issues of the implementation of the European Union Directives aimed at regulating the circulation of digital content and liability for breach of contractual obligations

It is worth noting that the legislation of the EU member states did not immediately adopt the position of the need to develop a separate regulatory regulation of digital content circulation relations. In order to implement into national legislation the provisions of Directive 2011/83/EU of the

European Parliament and of the Council on consumer rights dated October 25, 2011 (Directive 2011/83/Eu Of The European Parliament And Of The Council, 2011), a number of draft laws were developed.

Many scholars pointed out the impossibility of appropriate application of the sales provisions to the legal relationship of circulation of digital content in the case when the Civil Code itself does not contain its definition. It was also pointed out the ineffectiveness of enshrining the contractual construction of the supply of digital content exclusively in the legislation on consumer rights, which will significantly narrow the application of legal norms exclusively to the regulation of consumer relations in the field of digital content circulation (Targosz and Wyrwiński, 2015). We share this point of view, since the differences between tangible goods, energy and other resources and digital content are so significant that joint legal regulation of the sale of goods and the supply of digital content will be ineffective.

A number of doubts and comments arose when clarifying the need to apply regulatory provisions in the field of purchase and sale of goods to the legal relationship of the supply of digital content (Schmidt-Kessel, 2012; Nowacka, 2017; Wendehorst, 2012, p. 44).

Ambiguity in the positions of both scientists and the European Commission regarding the application of common European regulation of sales contracts contributed to the development of a new approach to the regulation of contractual relations in this area, which ended with the adoption of Directive 2019/771 of the European Parliament and of the Council on some aspects of sales contracts of goods dated May 20, 2019, which determined the extension of legal regulation of purchase and sale to legal relations, the subject of which are goods with digital elements (Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019).

Taking into account the above, we consider it necessary to apply the approach of separate regulatory regulation of the purchase and sale of goods and the supply of digital content in the development of legal regulation of the circulation of digital content. It is expedient to introduce into domestic legislation a separate contractual structure for the supply of digital content, and the extension of the norms of Chapter 54 of the Civil Code of Ukraine to the legal relations of the circulation of digital content is justified in the case of concluding a contract, the subject of which will be goods with digital elements, the separation of which is not possible without such goods losing their properties (Savanets and Stakhira, 2020).

It is important to establish the possibility of applying the provisions of Directive 2019/770 and Directive 2019/771 to legal relationships in which the proper use of the purchased product is prevented by the lack of a digital service provided by a third party, and not by the seller of the

product (Directive (EU) 2019/770 Of The European Parliament And Of The Council, 2019; Directive (Eu) 2019/771 Of The European Parliament And Of The Council, 2019). It is also problematic to define the concept of a shortage of goods, taking into account the characteristics of goods with digital content and artificial intelligence, which require regular updates.

The question of bringing the seller to justice in the event of a lack of software that supports the functioning of goods with digital elements purchased by the consumer (for example, fitness trackers, connected cars with a built-in navigation system), and the proper quality of the main material object is important. In such cases, clarification requires the possibility of covering the lack of digital service (software) that supports the functionality of the smart device with the concept of product non-conformity (Kalamees and Sein, 2019).

This issue is partially resolved in Part 3 of Art. 3 of Directive 2019/771, which applies to goods with digital elements, that is, any tangible movable things that include digital content (digital service) or are related to it (it) in such a way that their absence affects the functionality of the product (point «b» part 5 of article 2 of Directive 2019/771) (Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019).

However, the most difficult of these challenges relate to the purchase of goods with ancillary digital services (eg, smart TVs with Netflix and Youtube apps, smart cars with app-controlled digital navigation systems). The consumer concludes with the seller a contract for the sale of material goods and an additional license contract with the provider of digital content for the use of digital services. This raises the issue of the consumer's right to demand termination of the sales contract or a reduction in the price of a new smart TV in case of problems with Netflix. A similar situation occurs with the improper operation of smartphone programs, the navigation system of a smart car (Sein and Karin, 2020).

In the case of goods with digital elements, it is quite difficult to determine the cause of their non-conformity and establish the moment of occurrence, which is of great importance when the risk of product non-conformity passes. An interesting situation is the impossibility of synchronizing a fitness tracker with a corresponding application or a smart car with navigation maps due to the lack of compatibility of pre-installed software and its update if the application has completely stopped working (Kalamees and Sein, 2019).

The seller, as a rule, is not obliged under the sales contract to provide the consumer with a digital service that supports the functioning of the product, therefore the doctrine proposes to establish at the legal level the warranty obligation of the seller to ensure the provision of relevant services to the consumer even after the transfer of risk to the buyer or conclude an

additional contract for the provision of services between the seller and the buyer (consumer) to the sales contract. We share the point of view of some scientists that in such cases the seller will be liable in case of incompatibility of the product with digital elements with the application, if he is also the manufacturer of this program.

Directive 2019/771 does not contain rules regulating contractual relations involving the assistant (intelligent assistant) of the buyer, for example, Amazon Alexa, Google Assistant or Apple Siri (Busch, 2018). We share the point of view of J. M. Carvalho (Carvalho, 2019) that such a gap will complicate the modern development of contractual relations, because the actions of the buyer's assistant (intelligent assistant) by mutual consent of the parties should be considered as obligations under the sales contract.

Also, one of the problematic issues of both directives is the use of a large number of evaluative concepts (Vanherpe, 2020), such as «normal», «reasonable», «long-lasting», «serious», «functional», «informed». Their interpretation in practice can be controversial and will lead to a significant increase in the number of decisions of the EU Court regarding the observance of justice. This can directly affect the consumer's decision to enter into a contract.

The purpose of the draft Law on Digital Content and Digital Services dated January 31, 2022 No. 6576 (Draft Law No. 6576, 2022) is the objectively determined need to model the legal regulation of civil-law relations between the performer and the consumer regarding the provision of digital content on the basis of a contract and (or) a digital service, as well as the legislative establishment of an effective legal instrument for the protection of the rights of consumers who are provided with digital content and (or) a digital service (Explanatory note to the draft Law No. 6576, 2022).

The draft law defines the sphere of civil legal relations to which its provisions apply, distinguishes subjective and objective criteria for compliance of digital content and (or) digital service with the terms of the concluded contract, establishes the legal consequences of failure to provide digital content and (or) digital service under the contract, and as well as non-compliance of the provided digital content and (or) digital service with the requirements stipulated by this Law, the grounds and legal consequences of the refusal of the contract under which the digital content and (or) digital service is provided are determined (Explanatory note to the draft Law No. 6576, 2022).

As evidenced by the analysis of the said draft law, there is a certain inconsistency in it with other normative legal acts, inaccuracy in the wording of certain terms. In particular, in Art. 3 of the project defines relations that are not covered by this Law. At the same time, the Law of Ukraine «On the

Peculiarities of Providing Public (Electronic Public) Services» defines the principles of providing electronic public services, public services, complex electronic public services, and the automatic mode of providing electronic public services.

In addition, Art. 2 of the said draft offers a definition of terms, in particular the term «digital content». It is worth noting that this term is already contained in the Law of Ukraine «On Payment Services» (On Payment Services. Law Of Ukraine, 2023). The sphere of regulation of relations defined by this law is precisely digital services and digital content, therefore, the developers are invited to provide definitions for «digital content» and «digital services» with further alignment with other regulatory legal acts operating with the specified concepts. Also, in the provisions of Art. 4 of this project, in contrast to the provisions of Art. 6 of Directive 2019/770, there is no reference to the article on the rights of third parties.

In the conclusion of the Committee on Digital Transformation of the Verkhovna Rada of Ukraine, it is noted that in order to distinguish such concepts as digital content and digital service, to ensure the operation of these concepts in regulatory and legal acts, to avoid collisions and the lack of settlement of discrepancies between electronic and digital forms, as well as to establish such elements as objects of civil rights, we recommend that the specified law define what exactly is the «digital form» of this or that object (Conclusion of the Committee on Digital Transformation of the Verkhovna Rada of Ukraine to the draft Law on Digital Content and Digital Services, 2022).

The legislative initiative, in the event of final approval, will regulate such legal relationships in which the performer on the basis of the contract provides or undertakes to provide digital content and (or) a digital service to the consumer, and the consumer provides or undertakes to provide his personal data, except when their transfer is necessary exclusively for the provision of digital content and (or) a digital service, without the intention of their further use to achieve any other goals; relations in which the performer on the basis of the contract provides or undertakes to provide digital content and (or) a digital service developed in accordance with the consumer's specification; relations in which the performer, on the basis of the contract, provides or undertakes to provide digital content on a tangible medium, which is intended exclusively for the storage of such digital content.

In general, we can conclude that Draft Law No. 6576 in its purpose does not contradict Ukraine's international legal obligations in the field of European integration, but needs to be revised in order to bring it into line with Directive 2019/770.

Conclusions

The contract for the supply of goods and digital content is a new type of contractual obligation that needs to be enshrined in current civil legislation. In order to harmonize Ukrainian legislation with the legal requirements of the European Union, it is expedient to bring the draft Law on Digital Content and Digital Services into compliance, as well as to develop and enshrine in the Civil Code of Ukraine provisions that will regulate the legal relationship of the purchase and sale of goods and the supply of digital content, in particular, determine liability for violation of relevant obligations in this area.

One of the key novelties of European contract law was the provisions of Directive 2019/770 and 2019/771, which establish the concept of product conformity, digital content, digital service, subjective and objective criteria for determining product conformity and have a consolidated impact on consumer protection and trade in the EU in general.

Incorporation of these Directives into national legislation will contribute to uniform legal regulation of contractual relations in the field of purchase and sale of goods, related in particular to digital content, and will facilitate cross-border transactions, increasing their number. Despite the fact that the Court of Justice of the EU is competent in solving issues of prosecution for breach of obligations under contracts for the sale of goods and the supply of digital content, more specific instructions from the EU legislator could increase legal certainty in the process of implementing these norms.

Chapter 51 of the Civil Code of Ukraine transfers the responsibility of the parties arising on the basis, and, among other things, gives the right to unilateral waiver of the obligation, can be applied only in the case when the parties concluded a contract for the supply of digital content. The difficulty of fully applying the provisions governing the purchase and sale to the legal relationship of the circulation of digital content is associated with: the transfer of the thing to the ownership of the buyer, which is characteristic of the purchase and sale, which practically does not apply in the case of digital content; specific requirements for the quality of digital content, which in the understanding of the doctrine can be ambiguously interpreted and applied only to physical media on which digital content is placed; as a way to protect the rights of the consumer of digital content in the context of his obligation to prove the fault of the supplier in case of detection of defects or significant defects of digital content during the warranty period.

Liability for contracts for the supply of digital content in Ukraine is not unified, which creates ambiguity in the choice of methods of protection of violated rights. The implementation of the provisions of Directives 2019/770 and 2019/771 into the legislation of Ukraine should be a significant step towards ensuring the protection of the rights of Ukrainian consumers and

providers of digital content services, as well as confirmation of Ukraine's fulfillment of the obligations assumed in the Association Agreement with the EU.

To this end, the project of Law No. 6576, which by its purpose does not contradict Ukraine's international legal obligations in the field of European integration, needs to be finalized as soon as possible in order to bring it into line with EU requirements and adopt it as a basis at the national level for regulating contractual relations of purchase and sale of goods and supply of digital content.

Bibliographic references

BUSCH, Christoph. 2018. "Does the Amazon Dash Button Violate EU Consumer Law? Balancing Consumer Protection and Technological Innovation in the Internet of Things" In: Journal of European Consumer and Market Law. Vol. 2. pp. 79-80.

CARVALHO, Jorge Morais. 2019. "Sale of goods and supply of digital content and digital services — overview of Directives 2019/770 and 2019/771" In: Journal of European Consumer and Market Law. Vol. 8, No. 5, pp. 194–201.

CONCLUSION OF THE COMMITTEE ON DIGITAL TRANSFORMATION OF THE VERKHOVNA RADA OF UKRAINE TO THE DRAFT LAW ON DIGITAL CONTENT AND DIGITAL SERVICES. 2022. Reg. No. 6576. Available online. In: https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=6576&conv=9. Consultation date: 10/04/2023.

DIRECTIVE (EU). 2019. 2019/770 Of The European Parliament And Of The Council Of 20 May 2019 On Certain Aspects Concerning Contracts For The Supply Of Digital Content And Digital Services. Available online. In: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0770. Consultation date: 10/04/2023.

DIRECTIVE (EU). 2019. 2019/771 Of The European Parliament And Of The Council Of 20 May 2019 On Certain Aspects Concerning Contracts For The Sale Of Goods. Available online. In: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32019L0771&from=pl. Consultation date: 10/04/2023.

DIRECTIVE (EU). 2011. 2011/83/Eu Of The European Parliament And Of The Council Of 25 October 2011 On Consumer Rights. Available online. In: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN. Consultation date: 10/04/2023.

DRAFT LAW ON DIGITAL CONTENT AND DIGITAL SERVICES. 2022. Reg. No. 6576. Available online. In: https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=6576&conv=9. Consultation date: 10/04/2023.

EXPLANATORY NOTE TO THE DRAFT LAW ON DIGITAL CONTENT AND DIGITAL SERVICES. 2022. Reg. No. 6576. Available online. In: https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=6576&conv=9. Consultation date: 10/04/2023.

KALAMEES, Piia; SEIN, Karin. 2019. Connected consumer goods: who is liable for defects in the ancillary digital service? In: Journal of European Consumer and Market Law. Vol. 1, pp. 13–22.

KALAUR, Ivan; STAKHIRA, Anna. 2019. Liability of parties for breach of contractual obligations for the supply of digital content. Law of Ukraine. pp. 77-90.

NOWACKA, Izabela. 2017. Umowa o dostarczeniu tresci ditykylch. Jagiellonian University. Poland, Krakow.

ON PAYMENT SERVICES. 2023. No. 1591-IX. Verkhovna Rada. Available online. In: https://zakon.rada.gov.ua/laws/show/1591-20#Text. Consultation date: 10/04/2023.

LAW OF UKRAINE. 1991. On The Protection Of Consumer Rights No. 1023-XII. Available online. In: https://zakon.rada.gov.ua/laws/show/1023-12#Text. Consultation date: 10/04/2023.

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT 2015/0287. 2015. The database of legislation of the European Union. Available online. In: https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-634-EN-F1-1.PDF>. Consultation date: 10/04/2023.

SAVANETS, Lyudmila. 2017. Consumer rights in case of purchase of goods of inadequate quality under the legislation of the European Union and Ukraine. In: Actual problems of jurisprudence. Ukraine.

SAVANETS, Lyudmila; STAKHIRA, Anna. 2020. “New legislative instruments of the European Union concerning the purchase and sale of goods and the supply of digital content” In: Law. Vol. 64, No. 2. pp. 222–244.

SAVANETS, Lyudmila; STAKHIRA, Anna. 2020. “The concept of the contract for the supply of digital content in the context of the adaptation of the contract law of Ukraine to the acquis communitare of the EU” In: Law Forum. Vol. 61, No. 2, pp. 56–64.

SCHMIDT-KESSEL, Martin. 2012. Ausgestaltung der Option und andere Fragen zur Verordnung. Ein einheitliches europaisches Kaufrecht? In: Analyze des Vorschlags der Kommission. Sellier European Law Publishers. Munich, Germany.

SEIN, Karin. 2020 «Goods with digital elements» and the interplay with Directive 2019/771 on the sale of goods. Available online. In: https://ssrn.com/abstract=3600137. Consultation date: 10/04/2023.

TARGOSZ, Tomasz; WYRWIŃSKI, Michał. 2015. "Dostarczanie treści dizyczych a umowa przyszkiej. Uwagi na tle projektu nowelizacji art. 555 of the Civil Code" In: Forum Prawnicze. Vol. 27, No. 1, pp. 18–31.

THE CIVIL CODE OF UKRAINE. 2003. Newsletter Of The Supreme Council Of Ukraine (VVR), Nos. 40-44, Article 356. Available online. In: https://zakon.rada.gov.ua/laws/show/435-15. Consultation date: 10/04/2023.

VANHERPE, Jozefien. 2020. "White smoke, but smoke nonetheless: some (burning) questions regarding the Directives on sale of goods and supply of digital content" In: European Review of Private Law. Vol. 28, No. 2, pp. 251–273.

UNIVERSIDAD DEL ZULIA

CUESTIONES POLÍTICAS

Vol.41 Nº 79

Esta revista fue editada en formato digital y publicada en octubre de 2023, por el ***Fondo Editorial Serbiluz, Universidad del Zulia. Maracaibo-Venezuela***

www.luz.edu.ve
www.serbi.luz.edu.ve
www.produccioncientificaluz.org