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## **LIABILITY FOR FAILURE TO FULFIL CONTRACTUAL OBLIGATIONS IN THE FIELD OF SUPPLY DIGITAL CONTENT IN EU LAW<sup>1</sup>**

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## ВІДПОВІДАЛЬНІСТЬ ЗА НЕВИКОНАННЯ ДОГОВІРНИХ ЗОБОВ'ЯЗАНЬ ПОСТАЧАВАННЯ ЦИФРОВОГО КОНТЕНТУ В АКТАХ ЄС

**Summary.** *Introduction. The signing of the Association Agreement between Ukraine and the European Union has given impetus to the gradual strengthening of economic ties and the development of a single common market. The existence of such a market requires the national legislator to develop and implement effective legal instruments to regulate the circulation of goods and services, including digital ones.*

*Purpose. The purpose of the study is to analyse the provisions of the EU regulations governing the supplier's liability in case of failure to fulfil its obligations under a digital content supply agreement.*

*Materials and methods. The research materials are: 1) EU regulations on the sale and supply of digital content, namely: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 2011/0284, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Directive 2019/771 on certain aspects concerning contracts for the sale of goods; 2) provisions of national and foreign doctrine in the field of liability for breach of contractual obligations in general and contractual obligations in the field of digital content supply in particular.*

*In the course of the study, the author used general scientific and special legal methods of scientific knowledge. In particular, the use of the legal analysis method made it possible to identify the main areas of adaptation of Ukrainian contract law to the law of the European Union in the Association Agreement. The comparative legal method was used to compare the provisions of the EU directives with the Civil Code of Ukraine and the Law of Ukraine "On Consumer*

*Protection". The modelling 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 goods in the new EU legislation on the supply of digital content. The method of generalisation allowed to systematise and interpret the results obtained in the course of the study.*

*Results. The article reveals the limits of the supplier's liability for breach of contractual obligations for the supply of digital content contained in the acts of the European Union. The author analyses the evolution of the provisions of EU law in the area under study, and makes a comparative analysis of the provisions of draft Directive 2015/0287 on digital content supply contracts, draft Regulation (EU) No. 2011/0284 on sales contracts, Directive 2019/770 on contracts for the supply of digital content and digital services, and Directive 2019/771 on sales contracts. The author proves that the implementation of the provisions of these EU regulations into Ukrainian legislation will be a significant step towards ensuring the protection of the rights of Ukrainian consumers and digital content service providers, as well as confirmation of Ukraine's fulfilment of its obligations under the Association Agreement with the European Union.*

*Discussion. In further research, it is proposed to focus on cases of improper performance by the supplier of the terms of the digital content supply agreement, the effectiveness of Ukraine's national legislation in this area, and the development of effective provisions for recodifying Ukraine's civil legislation in the spirit of EU law.*

**Key words:** *digital content, adaptation of private law, contract for the supply digital content, supplier, liability.*

**Анотація.** *Вступ. Підписання Угоди про асоціацію між Україною та Європейським Союзом стало поштовхом для поступового зміцнення економічних зв'язків та розбудови єдиного спільного ринку. Існування такого ринку вимагає від національного законодавця розробки та*

запровадження ефективних правових інструментів для регулювання обігу товарів і послуг, в тому числі цифрових.

*Мета.* Метою дослідження є здійснення аналізу положень нормативних актів Європейського Союзу, що регулюють відповідальність постачальника у випадку невиконання своїх зобов'язань за договором постачання цифрового контенту.

*Матеріали і методи.* Матеріалами дослідження є: 1) нормативно-правові акти Європейського Союзу у сфері купівлі-продажу та обігу цифрового контенту, а саме: проект Директиви 2015/0287 про договори постачання цифрового контенту, проект Регламенту 2011/0284 про договори купівлі-продажу, Директива 2019/770 про договори постачання цифрового контенту та цифрових послуг, Директива 2019/771 про договори купівлі-продажу; 2) положення національної та зарубіжної доктрини у сфері відповідальності за порушення договірних зобов'язань загалом, та договірних зобов'язань у сфері постачання цифрового контенту зокрема.

В процесі здійснення дослідження було використано загальнонаукові та спеціально-юридичні методи наукового пізнання. Зокрема, використання методу правового аналізу дозволило визначити в Угоді про асоціацію основні напрями адаптації українського договірного права до права Європейського Союзу. Порівняльно-правовий метод використовувався для порівняння положень директив Європейського Союзу та Цивільного кодексу України, Закону України «Про захист прав споживачів». Для наукової аргументації рекомендацій щодо вдосконалення українського договірного права використовувався метод моделювання. Системно-функціональний метод використовувався для дослідження концепції відповідності товарів у новому законодавстві ЄС про постачання цифрового контенту. Метод узагальнення дозволив систематизувати та інтерпретувати отримані в ході дослідження результати.

*Результати. У науковій статті розкрито межі відповідальності постачальника за порушення договірних зобов'язань із постачання цифрового контенту, що містяться в актах Європейського Союзу. Проаналізовано еволюцію положень права Європейського Союзу у досліджуваній сфері, здійснено порівняльний аналіз положень проекту Директиви 2015/0287 про договори постачання цифрового контенту, проекту Регламенту 2011/0284 про договори купівлі-продажу, Директиви 2019/770 про договори постачання цифрового контенту та цифрових послуг, Директиви 2019/771 про договори купівлі-продажу. Доведено, що впровадження положень зазначених нормативно-правових актів Європейського Союзу до законодавства України стане вагомим кроком до забезпечення захисту прав українських споживачів та постачальників послуг цифрового контенту, а також підтвердженням виконання Україною зобов'язань, взятих на себе в Угоді про Асоціацію з Європейським Союзом.*

*Перспективи. В подальших наукових дослідженнях пропонується зосередити увагу на випадках неналежного виконання постачальником умов договору постачання цифрового контенту, ефективності національного законодавства України у даній сфері та напрацювання дієвих положень для рекодифікації цивільного законодавства України у дусі права Європейського Союзу.*

**Ключові слова:** *цифровий контент, адаптація приватного права, договір постачання цифрового контенту, постачальник, відповідальність.*

**Problem statement.** By signing the Association Agreement, Ukraine recognised the importance of aligning its current legislation with EU law and committed itself to ensuring the gradual alignment of its legislation with the EU acquis.

In view of this, the national legislator is faced with the challenging task of developing and implementing effective unified regulatory norms for the digital

market, where intangible goods and services are traded. One of the key steps in bringing Ukrainian legislation into line with the EU acquis in the area of digital content distribution is a thorough analysis of the rules governing the liability of parties in the event of non-performance or improper performance of their contractual obligations. These provisions are contained in the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content, Proposal for the Regulation (EU) 2011/0284 on a Common European Sales Law, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 2019/771 on certain aspects concerning contracts for the sale of goods.

**Analysis of the latest research and publications.** *Studies of the issues of supplier's liability under digital content supply contracts are presented in the works of Schulze R., Schlechtriem P., Butler P., Mańko R. and others.*

**Purpose.** The purpose of the study is to analyse the provisions of the EU regulations governing the supplier's liability in case of failure to fulfil its obligations under a digital content supply agreement.

**Materials and methods.** The research materials are: 1) EU regulations on the sale and supply of digital content, namely: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law 2011/0284, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Directive 2019/771 on certain aspects concerning contracts for the sale of goods; 2) provisions of national and foreign doctrine in the field of liability for breach of contractual obligations in general and contractual obligations in the field of digital content supply in particular.

**Presentation of the main material.** Adopted on 20 May 2019 Directive 2019/770 on certain aspects concerning contracts for the supply of digital content

and digital services and Directive 2019/771 on certain aspects concerning contracts for the sale of goods are acts that establish the maximum level of harmonisation, including with regard to the provisions on liability for non-performance of obligations by the parties. This means that in the course of their implementation, EU Member States will not be able to enshrine either a stricter or a softer form of liability in their national legislation at their own discretion, but will only be obliged to introduce into the legislative body provisions identical to the provisions of the directives in terms of the liability of the parties to contracts under which digital content is supplied [1;2].

The legal description of the liability of the parties under the contracts for the supply of digital content should start with an analysis of the liability of the supplier. Thus, according to Article 10 of the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content, the supplier is liable for

- Failure to fulfil the obligation to supply the goods and services constituting the digital content;
- any non-compliance of the digital content with the terms of the contract existing at the time of its receipt;
- if, under the terms of the contract, the digital content must be delivered to the recipient within a certain period of time, for any non-compliance of the digital content with the terms of the contract throughout the entire period of its delivery.

When analysing the above, it is worth noting that the scope of the supplier's liability is quite broad. For example, the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content enshrines the principle of the inadmissibility of limiting the supplier's liability, similar to that contained in Article 36 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, according to which the seller is liable for any non-conformity of the goods that exists at the time the risk passes to the buyer, including cases where such non-conformity is discovered much later.

This article also establishes the seller's liability for any lack of conformity of the goods arising after the risk has passed to the buyer and resulting from a breach of the seller's obligations, including a breach of a guarantee that the goods will be fit for a particular purpose or will retain their specified qualities or characteristics for a specified period [3;4, c.121].

The provisions of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services also establish a broad approach to determining the liability of the supplier. Thus, in accordance with the provisions of Article 11, taking into account Article 5, the supplier of digital content is liable for failure to fulfil its obligation in the event that the recipient or the platform designated by the recipient in the terms of the contract does not receive the digital content on a personal technical device.

It is worth noting that it is the provisions of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services that most fully enshrine the concept of supplier liability, compared to previous legislation. Thus, while Article 10 of the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content contained a provision providing for the liability of the supplier for failure to fulfil the obligation to supply digital content, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services expands this concept by setting out a detailed list of obligations and liability for their non-performance, distinguishing between non-performance and improper performance of the supplier's obligation.

Failure to fulfil the supplier's obligation under a digital content supply contract means that the supplier fails to carry out any of the actions provided for, while improper fulfilment of obligations means non-delivery, late delivery or delivery of digital content of inadequate quality.

In explaining the content of the failure to fulfil the obligation to supply digital content, it should be noted that the European legislator uses the term

"failure to supply" to describe this institution, which means a complete failure by the supplier to fulfil its obligations under the terms of the contract, resulting in the recipient not receiving digital content, or the supply of digital content to another person who is not a party to the contract and who has not been designated by the recipient as a third party authorised to receive digital content.

In the context of analysing the breach of contractual obligations by a digital content provider, it is necessary to determine the legal consequences of the transfer of digital data other than that provided for in the contract. For example, instead of providing the recipient with software version 2024, the recipient is provided with version 2020, or when downloading a video file on a platform allowing access to films, the recipient is provided with an audiovisual work other than the one specified by the recipient. Pursuant to Article 6 of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, the supplier is obliged to transfer to the recipient the digital content specified in the terms of the contract. It is worth noting that, unlike the previous proposal, the Directive contains an extended catalogue of digital content conformity signs. Thus, the transferred digital content is of good quality if it meets the objective and subjective conformity criteria set out in Articles 7 and 8 of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. In addition, the Directive contains a criterion for the conformity of digital content - the integrity criterion, which establishes the supplier's liability for the incompatibility of digital content with the recipient's hardware or software, making it impossible to incorporate digital data into such software and use it in accordance with the terms of the contract. At the same time, the supplier is liable for violation of the integrity criterion, which led to the non-compliance of the digital content with the terms of the contract, if: a) the compatibility of the recipient's software and hardware and the digital content supplied on the basis of the contract is ensured by the supplier or under his responsibility; b) if the digital content was installed by the recipient in accordance

with the instructions provided by the supplier, and the incompatibility of the digital content with hardware or software is caused by errors in the instructions. Given that in the above example the supplier did deliver the digital data to the recipient, the European law considers such delivery to be an improper performance of the obligation, given the inconsistency of the digital content with the objective requirements of the contract.

The supply of digital content that does not fully comply with the terms of the contract should be characterised as a failure on the part of the supplier, since the digital content received has a significant defect that makes it impossible to use it in accordance with the recipient's purposes. In this case, we believe that it would be appropriate to give the recipient the right to demand the delivery of digital content of proper quality within a certain period of time or to withdraw from the contract.

The provisions of the new Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services clearly define the legal consequences of the supplier's failure to fulfil its contractual obligations. Thus, pursuant to Art. 13, the recipient of digital content has the right to request the supplier to provide the digital content if this has not immediately occurred after the conclusion of the contract. If the supplier refuses to provide the digital content immediately after the request or within a period of time agreed upon by the parties, the recipient has the right to terminate the agreement. The recipient shall exercise this right without the need to take any additional preliminary actions if the supplier notifies the recipient of the impossibility of fulfilling his/her obligation or if it arises from additional circumstances.

Another prerequisite for the recipient to terminate the contract without prior notice to the supplier is the agreement of the parties on the term of delivery of the digital content or any other indication by the supplier before or at the time of the conclusion of the contract that the receipt of the digital content within a certain period of time is essential for the recipient. In order to terminate the contract, the

recipient must send a notice of termination to the supplier in accordance with the provisions of Article 15 of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. Upon receipt, the supplier is obliged to refund the price paid under the contract. It should be noted that in the case of a fixed-term contract under which digital content has been supplied for a certain period, the supplier is obliged to refund to the recipient an amount of money proportional to the amount of digital content not received.

In addition, in accordance with Article 15(2) of the Directive, the supplier undertakes to cease any use of the recipient's personal data supplied under the contract, unless such data: cannot be separated and used separately from the digital content supplied to the recipient; contains only information about the recipient's use of the digital content (including the time of use of such content, method of connection to the network, etc.); or is used in a way that is unlawful, harmful or misleading to the recipient.

We believe it is necessary to pay particular attention to the legal consequences of the supplier's failure to fulfil its obligation to deliver digital content contained in a tangible medium.

By including in Art. 3 the appropriate application of the provisions of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services to digital content supplied on a tangible medium, the European legislator excludes the right of the recipient to terminate the contract in the event of the supplier's failure to fulfil its obligations. Thus, in accordance with point 20 of the preamble to the Directive, the legal consequences of the supplier's failure to fulfil its obligation to provide the recipient with digital content on a tangible medium are governed by the provisions of Directive 2011/83/EU on consumer rights as regards the supplier's liability for failure to perform the obligation to supply goods. In addition, the obligations to supply digital content contained in a tangible medium are also subject to the provisions

of the Directive, in particular as regards the grounds and legal consequences of termination of the contract under which such content is to be supplied.

In this context, it is worth noting the overlap between the provisions of the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content and the Proposal for the Regulation (EU) 2011/0284 on a Common European Sales Law. Thus, in Art. 110 of the latter, the European legislator provides for the right of the recipient of digital content to require the supplier to fulfil its obligations. The doctrine emphasises that such an approach is justified in the light of the harmonisation of the different legal traditions of the EU Member States, which enshrine different approaches to determining the legal consequences of non-fulfilment of an obligation [5, p.504]. However, these rules are not reflected in the new directives. For example, the adopted Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 2019/771 on certain aspects concerning contracts for the sale of goods contain provisions that exclude their application to legal relations for the supply of digital content on a tangible medium, except where they serve solely to store digital content.

National legislation on the distribution of intangible data is still in its infancy. Therefore, the main task of the national doctrine is to develop effective rules of regulation of the digital market. It is worth noting that the European integration course of Ukraine has a direct impact on the vector of development of national legislation, its formation in the light of adaptation to the current provisions of both primary and secondary EU law.

In view of the above, and based on the justification of the need to develop legal regulation of digital content delivery relations, we consider it expedient to amend the Civil Code of Ukraine by supplementing it with provisions establishing the supplier's obligations to provide digital content and defining the legal consequences of the supplier's failure to fulfil its obligation to provide digital content, as follows: "The supplier undertakes to provide the recipient with digital

content or ensure immediate access to it after the conclusion of the contract, unless otherwise provided for in the contract or by law. The supplier's obligation shall be deemed to have been fulfilled when the recipient or a virtual server or a physical device not controlled by the supplier has been given access to the digital content. Legal consequences of failure to comply with the supplier's obligation to provide digital content. If the supplier fails to fulfil the obligation to provide digital content, the recipient has the right to request the supplier to provide immediate access to the content and, if it is not provided within a certain period, to withdraw from the contract and demand a refund of the amount paid and to terminate any use of personal data.

Thus, the analysis of the peculiarities of the liability of the parties to a digital content supply contract shows that the existing legal regulation of the EU digital services market is effective and based on the principle of proportionality of the degree of civil liability to the offence committed.

The implementation of the provisions of the Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content, Proposal for the Regulation (EU) 2011/0284 on a Common European Sales Law, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 2019/771 on certain aspects concerning contracts for the sale of goods into Ukrainian legislation will be a significant step towards ensuring the protection of the rights of Ukrainian consumers and digital content service providers, as well as a confirmation of Ukraine's fulfilment of its obligations under the Association Agreement with the European Union.

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