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PROVIDING OF DATA AS A COUNTER PERFORMANCE IN CONTRACT FOR SUPPLY DIGITAL CONTENT

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SUMMURY

The article is devoted to a theoretical research problem of providing personal and other data as a form of counter performance of an obligation in a contract for the supply of digital content. The analysis of the position of legal doctrine and provisions of the Ukraine and the Member States of the European Union legislation on issues related to the provision of data is being carried out. The necessity of modernization of the domestic legislation, by its addition to the provisions on data protection at the conclusion contract for supply digital content is substantiated.

Key words: digital content, supply contract, personal data, data, non-gratuitous contract.

ПРЕДОСТАВЛЕНИЕ ДАННЫХ КАК ФОРМА ВЫПОЛНЕНИЯ ОБЯЗАТЕЛЬСТВ В ДОГОВОРЕ ПОСТАВКИ ЦИФРОВОГО КОНТЕНТА

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АННОТАЦИЯ

В статье проводится теоретическое исследование проблемы предоставления персональных и других данных как формы выполнения обязательства в договоре поставки цифрового контента. Осуществляется анализ позиций правовой доктрины, положений законодательства Украины и стран-членов Европейского союза относительно вопросов, связанных с предоставлени м данных по договору поставки цифрового контента. Обоснована необходимость новелизации отечественного законодательства путем его дополнения положениями о защите данных при заключении договора о поставке цифрового контента.

Ключевые слова: цифровой контент, договор поставки, персональные данные, данные, возмездный договор.

Introduction. Development of the Ukraine economy lead to creation new information society, digitization goods and services, rising level of person rights protection. With the framework of Association Agreement of the Ukraine and European Union (further – EU) it should harmonized legislation, and build wide common digital single market. Significant progress in the development of information technology, their widespread introduction, associated with the increase in volumes and areas of information use has led to the possibility of collecting, storing and processing information about the individual who is the subject of private law relations. In turn, due to the widespread use of automated systems and related technologies, information about any person may become one way or another open and lead to a violation of its lawful interests, material or non-pecuniary damage. But technology progress gives an opportunity to use personal data as a counter performance for getting goods and services in digital form. The emergence of such legal relations need development and adoption some legislative regulation, which create maximum level of consumer rights protection.

The goal of article is to analyze existing theoretical and legal provisions, which create the opportunity using personal data as a counter performance in contracts for the supply digital content, and propose to add such special provision into Ukrainian legislation.

Analysis of recent research and publications. On actual level of development native science, there is a gap in the legal regulations of using personal data as a counter performance in the contract for supply digital content. Instead, this issue is devoted to the research of European scholars, among whom N. Helberger, M. Loos, A. Metzger, K. Pormeister, T. Targosz, M. Wyrwiński and others.

Presentation of the main material. Digital content become an integral part of every persons live. Watching movies or listening music in the Internet, downloading and reading e-books, cloud storage of our personal materials – all of this are the subjects of the contract for the supply of digital content. The most detailed definition of contract for the supply digital content provided in the Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content 2015/0287 dated 9.12.2015 (futher – Proposal for Directive for the supply of digital content). Under which the contract for the supply of digital content is any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data [1].

Digitization has enabled the emergence of a plethora of new business models for the delivery of digital content. Consumers can choose between "on-demand" offerings, "near-on-demand" content, on-demand downloading, streaming, webcasting, IP-based TV, subscription to purchase e-books, e-journals, and e-newspapers, social broadcasting, cloud computing, apps, in-app purchases, and many, many more. Similarly varied are the forms of payment, ranging from monetary prices to services in kind, attention (in particular to advertising), or personal data [2, p. 39].

It should be noted that the term "digital contract" is defined more narrowly. According to the opinion of Kärt Pormeister term "digital contract" will be used as referring to a contract, which is concluded based on automated processing of data. Hence there is no individual negotiation process, and the conclusion of the digital contract is carried out via automated means with one or both/all parties providing certain data in order for the contract to be automatically produced based on this data (e.g. the service provider establishes their terms of service, and creates a web platform in which the consumer is asked to provide certain information and give confirmation regarding acceptance of the terms and services, after which the contract is automatically concluded). Such contracts can also be referred to as "wrap contracts", more specifically "click wraps" or "browse wraps" – the former presume a click of typically an "I agree" box, whilst the latter do not presume any activity on part of the consumer other than browsing a certain website (e.g. whilst browsing the website of an online newsletter, the user agrees to the website's terms of service by merely browsing it) [3, p. 17].

In a "click-wrap" license, the standard contract terms are presented to the user electronically, and the user agrees to these terms by clicking on a button or ticking a box labeled "I agree" or by some other electronic action. For instance, depending how the click-wrap license is technically set up, the consumer's consent may be required either at the download or at the installation of the software, or sometimes at both stages. The most recent way to present standard terms to the consumer is the "browse-wrap" license, where the terms of the agreement are simply accessible via a hyperlink on the website of the trader. Contrary to the click-wrap method, the consumer does not get, by the browse-wrap license, the possibility to "agree" to the terms by actively clicking on a button or ticking a box. Instead, the user is presumed to assent to the terms by merely using the website. Paradoxically, the website must be used in order to read the contract, or even become aware of its existence [2, p. 39].

Thus, in the context of comparing contract and consent, most importantly a digital contract is, first, as all contracts, binding in its nature, with the exception of the consumer's right to withdraw if certain preconditions are met. Second, a digital consumer contract for services is defined as one that has been pre-programmed by the service provider, requiring merely certain data and/or "click or browse acceptance" by the consumer for the conclusion of the contract. But in most cases this form of concluding contract does not give information about the payment, and using data [3, p. 17].

Under the provisions of Proposal for Directive for the supply of digital content, contract for the supply digital content has non-gratuitous character. It means that each party has the obligation to make some action in favor of other party.

Civil Code of Ukraine in the art. 636 (5) contains the presumptions of non-gratuitous for all contracts, except that ones, the gratuitous of which is expressly provided for by law or contract.

In case of the contract for the supply of digital content we have special type of goods which have the nonmaterial expression. In most cases where we bought some digital content which located on a physical medium, such as a CD or DVD, paying of the price also occurs in the material form (money). But the problem is where we carry out activities in the Internet. In most cases digital content is supplying to the consumer without material storage device. This situation takes place both when we conclude such contract as a one-time (e. g. watching movie online) and as a long-time one (e. g. cloud storage). In the most of that cases, the consumer don't pay the price by money, but it pays by providing of the data [4, p. 24].

It is important to analyze what the EU legislator understands under the data concept. First harmonized document, which regulated the legal relationship of personal data protection, was Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data 95/46/EC dated 24.10.1995. According to the art. 2 (a), the above Directive, personal data is any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity [5]. Later, in 2016 the EU improved legislation on the protection of personal data and adopted Regulation of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which repealing Directive 95/46/EC. However, the adoption of a new legislative act did not change the definition of the concept of personal data.

The European legislator, besides personal data, also allocates other ones which are also under legal protection. Directive of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) 2002/58/EC dated 12.07.2002 distinguishes three main categories of data generated in the course of a communication:

– the data constituting the content of the messages sent during communication; these data are strictly confidential;

– the data necessary for establishing and maintaining the communication, so-called traffic data, such as information about the communication partners, time and duration of the communication;

– within the traffic data, there are data specifically relating to the location of the communication device, so-called location data; these data are at the same time data about the location of the users of the communication devices and particularly relevant concerning users of mobile communication devices [6].

Traffic data may be used by the service provider only for billing and for technically providing the service. With the consent of the data subject, however, these data may be disclosed to other controllers offering added value services, such as giving information in relation to the user's location on the next metro station or pharmacy or the weather forecast for this location [7].

However, consumers during process of digital content using, began to come across the need to provide their personal data instead of access the desired files. In some cases it was impossible to consumer start (or continue) work with digital content, until it have clicked the button "I agree" in the dialogue window. That consumer action in most cases means, that it has gave his consent to the collection and processing by the supplier of such content it personal and other types of data.

When consumers don't obligated to pay money for getting an access to some digital content, the impression of "free services" is creationed. But legal construction of "free services" doesn't such simple. Service providers like social media services, search engines, communication services, and hosting platforms, presented their business model as purely ad-funded services based on a two-sided market, in which the advertisers pay for the service and the users only have the advantages of attractive and cost-free services [8].

Spreading practice to get digital content in exchange for providing personal data and getting annoying advertisinghas led newcomers to legislation on the protection of personal data. In 2009 there was anamend to the Directive on privacy and electronic communications introduced the following:

– the restrictions on sending emails for direct marketing purposes were extended to short message services, multimedia messaging services and other kinds of similar applications; marketing emails are prohibited unless prior consent was obtained. Without such consent, only previous customers may be approached with marketing emails, if they have made their email address available and do not object;

– an obligation was placed on Member States to provide judicial remedies against violations of the ban on unsolicited communications;

– setting of cookies, software which monitors and records a computer user's actions, is no longer allowed without the computer user's consent. National law should regulate in more detail how consent should be expressed and obtained in order to offer sufficient protection [7].

Howsoever, this situation gives EU legislator revealed position that personal data have an economic value to individuals. Furthermore, such data can be "monetized" by businesses providing digital content and digital services [9]. Some scholars, including R. Manko and N. Putowa have also considered the "propertisation" of personal data, i. e. the creation of property rights (in rem) over one's personal data. The proposed directive seems roughly to go in this direction by allowing consumers to use their personal data (or other data) as counter performance for digital content or services [9; 10].

The introduction of this innovation follows the Parliament's resolution on CESL from February 2014, where for the first time was concluded that the data can be a form of counter performance, but with restriction about the minimum set of data provision of which is necessary to perform the electronic transaction [11].

The same position contains Proposal for Directive for the supply of digital content. Article 3(1) states that the directive shall apply to contracts under which "a price is to be paid or the consumer actively provides counter performance other than money in the form of personal data or any other data". Article 3 (4) of the proposed directive excludes from its scope contracts in which consumers provide only the bare minimum of personal data strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in any way incompatible for this purpose. Such limited communication of personal data is not treated by the proposed directive as a counter performance. Hence, a contract in which a consumer communicates only data which are strictly necessary to conclude the contract is a gratuitous contract and falls outside the directive's scope [1].

The Commission justifies the inclusion of digital content contracts in which consumers "pay" with data by pointing out that covering only digital content paid for with money would discriminate between different business models and would provide an unjustified incentive for businesses to move towards offering digital content against data. However, the same economic argument could be used against excluding from the directive's scope entirely gratuitous contracts, especially considering that – as the Commission points out – a significant share of consumers face problems with "free" digital content [10].

Analyzing the provisions of Ukrainian legislation in the field of data protection, we may say that it is on the stage of active development. Significant value of this process is given by its legislative consolidation. In particular, the Civil Code of Ukraine defines, that information (including personal information) is any information and / or data that can be stored on tangible media or displayed electronically. The Law of Ukraine "On Information" in art. 11 stipulate that information about an individual (personal data) is a statement or a set of information about an individual that is identified or may be definitely identified [12].This definition of personal data actually coincides with the definition of personal data, which is fixed in Law of Ukraine "On personal data protection".

Domestic law in field of data protection doesn't contain provisions, which in a straight way prohibited the use of consumer data as a peculiar form of fulfill its obligations to pay for the use of digital content. Law acts contain only a reservation about the necessity of obtaining from the owner of personal data the consent for their processing and use. According to the Law "On personal data protection": in the field of electronic commerce, the consent of the subject of personal data may be provided during registration in the information and telecommunication system of the subject of e-commerce by placing a mark on granting permission to process his personal data in accordance with the stated purpose of processing them, provided that such system does not create opportunities for the processing of personal data until the consumer put the mark in a appropriate place [13].

Considering on the peculiarities of the digital market, get personal or other data of users as a counter performance in a contract for the supply of digital content for supplier is sufficiently easy. Such approach can significantly reduce the real level of consumer data protection when it is operating on the Internet.

In order to protect the rights of consumers at the time of conclusion contracts for the supply digital content in Internet, and to provide non-gratuitous character of them, the Ukrainian legislator should make changes in the Law "On personal data protection". And Civil Code of Ukraine in a way of adding to them provisions, which determine proprietary character of the data.

Herewith, to enhance the effectiveness of such legal regulation, it should use the experience of European legislation and note, that providing where are giving by consumers only the bare minimum of data, strictly necessary for the performance of the contract, or for meeting legal requirements will not be considered as a counter (non-gratuitous) performance, and the supplier does not further process them in any way incompatible for this purpose.

Conclusions. On the basis of the analysis of legislative acts of Ukraine and the EU, positions of scholars in the field of supply digital content and protection of data, next conclusions have made. Domestic legislation is at the stage of formation legal massive, which aimed at regulation of provisions related to the contract for the supply digital content, including using of data as counter performance in such agreements.

The search of the scholars for a common approach for regulation of counter performance in the supply digital content contracts in the type of data provision have found their reflection in the Proposal for Directive for the supply of digital content. This document contained provisions, which make possible to pay for the supply of digital content by data, except for those cases when consumers provide only the bare minimum of personal data strictly necessary for the performance of the contract.

On the basis of generalizations of existing approaches to the question of understanding providing personal data as a form of counter performance, the introduction of amendments to the legislation of Ukraine is proposed. The Civil Code of Ukraine and the Law of Ukraine "On personal data protection" should complement by provisions which in a strictly indicate that in a contract for the supply of digital content, consumer can use his personal or other data as a counter performance, except such cases when it provide only the bare of minimum data, necessary for the performance.

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