UDC 347.440.66:(004.738.5:338.4)-052
DOI https://doi.org/10.32782/chc.v052.2024.10

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TERMS OF SERVICE AS A NEW TYPE OF CONTRACT: APPROACHES TO LEGAL REGULATION AND ISSUES TO BE SOLVED

Formulation of the problem. In the modern society, almost everyone is a user of numerous online accounts - from accounts in social networks to gaming, financial, insurance, medical accounts, etc. To gain access to such accounts and some other online platforms, it is necessary to agree to the Terms of Service (ToS), which are developed by the providers. The practice of recognizing such Terms as a kind of contract binding the parties with mutual rights and obligations is already established. In the US practice, there has been an approach to recognize the occurrence of an obligation even in the case of the simple fact of using a site in the presence of "browse-wrap" or "click-wrap" agreements on such sites, despite the fact that many users do not know their content or even about their existence [1].

However, research shows that, in most cases, user agreements are aimed only at ensuring the interests of providers and actually set significant restrictions for users without giving them any rights other than the right to use the service. On this basis, the question is increasingly being raised of the need to strengthen the protection of users' rights as the weaker side of the contract, by analogy with the protection of consumer rights. In addition, ToS are quite often the subject of litigation, and courts tend to grant protection to users contrary to ToS provisions. Therefore, the question arises about the need to revise approaches to ToS regulation and introduce the basic principles of their creation, aimed at ensuring the protection of users' rights from abuse by providers.

Analysis of recent research and publications. Given the novelty of ToS, there are not many studies devoted to their investigation. Among the researchers of the legal nature and specifics of user agreements, we can mention K. Cornelius, L. Belli and G. Venturini, T. Romm, P. Randolph. The insufficient level of attention to user agreements in terms of growing legal problems arising from them determine the need for research in this area.

The purpose of the article is to study the peculiarities of approaches to the regulation and interpretation of Terms of Service and to identify legal problems that arise during their application, as well as ways to overcome these problems.

Presenting main material. Terms of Service are the rules that a person or organization must follow in order to use the service. Generally, such rules are considered binding on users, provided they do not violate any laws. Such agreements may be changed from time to time by the provider itself, who is responsible for notifying users of any changes. As a general rule, user agreements are not used on sites that only provide information or sell products. Instead, they are mandatory for sites that store personal data of users, such as social networks, online auctions, sites where financial transactions are carried out, etc. [2]. The elements of the Terms of Service agreement can be a privacy policy, rules of use of the service, provisions on data collection and processing, property rights, provisions on liability, etc. [1].

Regarding the legal nature of the Terms of Service agreement, different opinions are expressed. There are positions that it is a contract for the provision of services or an agency contract, an unnamed contract, a license agreement, a mixed contract or a *sui generis* contract [3, 4]. Most of the arguments are in favor of recognizing such an agreement as a contract for the provision of services, which at the same time should be considered a contract of accession. After all, under such a contract, providers actually provide users with access to online platforms, which can be qualified as the provision of an

access to the service. This conclusion is supported by a small amount of judicial practice, and gains weight in the light of the Directive (EU) 2019/770 of the European Parliament and the Council of May 20, 2019 on certain aspects of contracts for the supply of digital content and the provision of digital services, which recognizes the fact of exchanging personal data of users to provide them with services of this kind [5].

In favor of the fact that Terms of Service agreements are license agreements, the wording of the terms of such agreements speaks. For example, the Terms of Service of Facebook and Instagram contain provisions that the user grants a non-exclusive, transferable, free license to use intellectual property objects that he posts or creates on the platforms.

However, it should be taken into account that the number of elements included in the Terms of Service agreement is much wider than the subject of the service agreement or license agreement. Terms of Service agreements include not only provisions on the access to the online platform and legal consequences regarding the intellectual property objects placed on it, but also provisions on the rights to all objects located in the account and on the account itself, privacy policy, regulations on the use of personal data, etc.

Thus, the user agreement can be considered as a mixed contract between software developers and users, defining specific rights and setting restrictions on users. In fact, this is the main criticism of these agreements - they are only aimed at ensuring the interests of developers and actually set significant restrictions for users [6, 7, 8, 9]. In addition, providers create them in such a way as to draw less attention to the fact there is a contract in this relationship. Such agreements are generally placed as a hyperlink at the bottom of the page or created as a step that the user must agree to during registration [1]. That is why the majority of the users do not even read such terms, just automatically giving their consent by ticking the relevant window.

It is fair to draw attention to the fact that hiding the text of the agreement behind a hyperlink with the possibility to change such text at any time hardly allows us to talk about the proper familiarization of users with the terms of such an agreement [10]. According to recent research, standard contracts (including Terms of Service as an example) are rarely read, and if they are, they are considered difficult to understand due to their length, content and legal jargon [4, 11]. The situation is even worse in the online environment, because the time required to simply read the Terms of Service is staggering. Studies have shown that users would spend eight hours a day for 76 days just to read the privacy policies of the 1,500 websites they visit each year [3]. In the end, most users do not read ToS agreements, and the vast majority do not pay attention to potentially dangerous terms [4].

For this reason, some researchers argue that Terms of Service is not a contract at all. And it should be noted that in the US judicial practice, in some cases, "browse-wrap" agreements were not recognized as contracts, since such one-sided standard texts hidden behind hyperlinks do not fully meet the criteria of contracts, and therefore should not be covered by the provisions of contract law [1]. In addition to the fact that such agreements are absolutely not agreed upon by the parties, the problems of consent and user awareness do not allow these documents to be defined as concluded between two parties who: 1) are aware of the agreement that they undertake to adhere to; 2) are aware of the exchange established by the terms of the agreement. In the case of Terms of Service, in fact, using the term “agreement” only reflects the desire of the developer of these rules to oblige the user to comply with them [12]. However, because such templates are not concluded with express consent, are detached from the intuitive understanding of the agreement, and generally deprive individuals of their democratically approved rights, such agreements nullify the basic principles of contracts, which are intended to express the autonomous will of individuals and are subject to private control. For these reasons, some researchers believe that such typical agreements cannot establish the rights and obligations of users at all [1].

As a study of Terms of Service agreements of fifty online platforms showed, their key factor is an attempt by companies to avoid liability. The analysis revealed an imbalance between the powers of companies and the rights of users, demonstrating that the most economically efficient ways of regulating relations are often neglected by the full protection of users' rights. The imbalance in favor of companies is also manifested in the fact that they receive extremely broad powers to moderate user accounts [13, c. 62-68]. For example, 26 of the analyzed ToS agreements provide that in case of deletion of content created by the user, the latter may not even receive any notification about it and may not have the opportunity to renew the deleted content. The other 18 ToS agreements do not contain any guar-

antees of notice or right to appeal in the event of removal of user's content. This shows that there is no proper notification about the removal of user's content on 44 of the analyzed platforms, i.e. in 88 percent of cases. An even more impressive fact is that 44 of the investigated ToS agreements stipulate that providers can delete a user's account without prior notice or the possibility to change this decision [3, c. 1-17].

In addition, users are not always informed about changes in ToS agreements and cannot always access the first version of the contract to which they agreed. Only 15 of the platforms surveyed explicitly state that they will notify users of changes to their contracts, while 28 platforms, or 56 percent, contain conflicting terms about the consequences of such changes. In most cases, the ToS agreements establish the obligation of companies to notify changes only if they are qualified as "significant" by the companies themselves, while six of the investigated platforms generally specify that regardless of the significance of the changes appearing in the ToS agreement, users will be reported about them [3, c. 1-17].

In order to prevent this kind of abuse by companies and to ensure the real operation of the principle of freedom of contracts, it is proposed to establish the obligation to provide users with an original copy of the ToS agreement. This can be done either by requesting a PDF version of the agreement for download, or by automatically downloading such a contract [1]. Also, in order to strengthen the protection of users' rights, it is proposed to develop mechanisms of national legislation, including mechanisms of control and supervision, regarding the protection of consumers and personal data in order to guarantee the principles of protection of human rights. Such mechanisms should include all interested parties, such as users, non-profit organizations of the civil sector, academic institutions, who will monitor and report on potentially infringing contractual structures on the part of the network or platform. National regulators should have the right to review ToS agreements at any time, as well as the technical means of their implementation, in order to check private regulatory acts for compliance with national laws and international standards for the protection of human rights. It should also be the company's responsibility to inform users of any changes to the ToS, especially when such changes affect users' rights and responsibilities. At the same time, mechanisms of access to justice must be ensured. Access to traditional judicial protection can be supplemented by alternative dispute resolution mechanisms [3, c. 1-17].

The judicial practice regarding the protection of users' rights concerning their digital assets with reference to Terms of Service is also ambiguous. One example of a successful protection of user rights is the case of *Li Hongchen v. Beijing Arctic Ice Technology Development Co*, in which a "dweller" in the virtual world filed its claims against the developer, because its virtual property was hijacked by a hacker. The trial court ordered the provider to return the property to its rightful owner, and this decision was upheld by the court of appeal [14]

However, in another case, *Bragg v. Linden Research, Inc.*, the user's attempt to protect his rights did not succeed [15]. A user's avatar in the MMOG Second Life purchased a plot of land at an auction using a loophole in the software. After the developer learned about the violation, he blocked the user's account, which resulted in the actual confiscation of all virtual property belonging to the user. This case demonstrates that developers are drafting user agreements in such a way that they reserve the right to deprive users of their digital assets into which they have invested significant time and money without any opportunity to receive any compensation or challenge the developers' actions.

The disadvantages of user agreements include the fact that users and developers may interpret their terms differently. An example of this would be a situation in EVE Online where the developer refused to sanction a user at the request of another user, because he considered that there were no violations of the user agreement. However, a detailed analysis of the user agreement led to the conclusion that the violation had taken place [16]. In addition, even if the developer decides to sanction the user for violating the agreement, the only available punishment is to block the user's account. If the interests of other users were violated, no compensation is provided for them.

Therefore, while the provisions of the user agreement can be applied to resolve disputes between the user and the developer, they are completely inapplicable to the relationship between users. After all, the user agreement does not bind users with any rights and obligations with regard to each other [6]. Thus, if the rights of one user are violated by another, the only option to protect the violated interest is to contact the developer with a demand to apply sanctions to the violator. However, the developer is under no obligation to resolve dis-

putes between users and to protect their violated interests, so the resolution of the problem in each case is at his own discretion. At the same time, developers quite often refuse to recognize the fact of violations, especially if the violation occurred with the use of software flaws, since the disclosure of such a fact calls into question the safety of other users and may lead to their refusal to use the program, which for the developer will mean the loss of customers.

The imperfections of the Terms of Service prompt researchers to consider the need to prevent the unlimited possibilities of developers, which they establish for themselves in user agreements. Thus, P. Palka points out the need to develop the so-called "user law" by analogy with the rights of consumers, which will allow the intervention of the legislator to ensure balance in the actual inequality in digital relations [17].

The analysis of judicial practice [18, 19] reveals that there is a recent tendency for courts to grant a greater degree of protection to users, despite the Terms of Service, even though the latter are most often understood as contracts that bind the parties and should be applied preferentially to the law. However, courts are limiting the unreasonably wide powers of developers in favor of users. The emerging situation shows the need to establish certain restrictions for developers at the legislative level, in order to protect users as a weaker party. After all, modern platforms have essentially become monopolists in the virtual environment, and clearly abuse their position when establishing rules of conduct. Therefore, by analogy with real-world monopolies, there is an urgent need to interfere in the "rules of the game" established by developers for users, in order to ensure a balance of interests.

The Digital Markets Act and Digital Services Act adopted in 2022 can be considered the first step in this direction. As noted by the European Commission, the Digital Services Act and Digital Markets Act were adopted to create a safer digital space where the fundamental rights of users are protected [20]. The Digital Markets Act defines the concept of the so-called "gatekeeper", which is a very large online platform or a very large online search engine that has more than 45 million users, i.e. 10% of the population in Europe. Significant restrictions are set on such major players in the digital space, aimed at preventing them from abusing their rights and protecting the rights of end and business users. It was decided to apply such restrictions to prevent "serious imbalances in bargaining power and, consequently, unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers" [21]. The main duties of gatekeepers are laid down in Articles 5-8 of the Digital Markets Act.

The Digital Services Act, pursuing the goal of ensuring better protection of consumers and fundamental rights of users, defines some requirements for the content of Terms of Service. Article 14 of the Act mentioned above requires that providers of intermediary services shall include in their terms and conditions information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service. This information should include information about any policies, procedures, measures, and tools used to moderate content, including algorithmic decision-making and staff reviews, as well as the rules of procedure for the internal complaint handling system. It must be set out in clear, simple, understandable, user-friendly and unambiguous language and must be publicly available in an easily accessible and machine-readable format. In addition, providers of intermediary services must notify users of any material changes to the terms. One more extremely important rule is that providers of intermediary services shall act in a diligent, objective and proportionate manner, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service. Those fundamental rights include but are not limited to: for the recipients of the service, the right to freedom of expression and of information, the right to respect for private and family life, the right to protection of personal data, the right to non-discrimination and the right to an effective remedy; for the service providers, the freedom to conduct a business, including the freedom of contract; for parties affected by illegal content, the right to human dignity, the rights of the child, the right to protection of property, including intellectual property, and the right to non-discrimination [22].

Conclusions. Thus, the situation that has developed in the field of the legal regulation of relations regarding digital assets with the application of contractual provisions demonstrates the ineffectiveness of this approach to protecting the rights of users. Instead, in the approaches to the legal regulation of these relations, an imbalance of interests is evident, where providers and developers receive comprehensive protection and guarantees, while users are in a very vulnerable

position. Therefore, there is a need to review the approach to the legal regulation of Terms of Service in order to ensure a balance of the interests of developers and users and to provide effective protection to the interests of the latter. The first step in this direction was taken in the Digital Markets Act and Digital Services Act adopted in 2022, which define some requirements for the content of Terms of Service, aimed at preventing abuse by providers and ensuring users' rights. As a final step in the protection of the users' rights can be implemented the power of the national competent authorities (which also have to be defined) to review ToS agreements as well as the technical means of their implementation, in order to check private regulatory acts for compliance with national laws and international standards for the protection of human rights.

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Некіт Катерина Георгіївна

Користувацька угода (Terms of Service) як новий вид договору: підходи до правового регулювання та проблеми, що потребують вирішення

У сучасному світі практично кожен є активним користувачем різноманітних онлайн-платформ. Велика кількість таких платформ, як-от соціальні мережі, поштові сервіси, онлайн аукціони, сайти для проведення фінансових транзакцій, надають доступ до їх сервісу лише за умови погодження користувача з умовами користувацької угоди. У світі склалася практика розуміти Terms of Service своєрідним контрактом, спрямованим на врегулювання відно-

син між користувачами та провайдерами. Аналіз правової природи таких контрактів дозволяє вважати їх змішаними договорами, які містять у собі елементи політики приватності, правила користування сервісом, положення щодо збору та обробки персональних даних, особливості надання користувачами ліцензій щодо контенту, положення про відповідальність. Однак приватно-правовий підхід до регулювання у цій сфері призвів до того, що дуже часто умови користувацьких угод спрямовані більшою мірою на гарантування інтересів провайдерів, суттєво обмежуючи при цьому права користувачів. Судова практика, що складається у цій сфері, є також неоднозначною. Проте превалює судовий підхід, за якого суди схильні надавати захист користувачам навіть всупереч положень користувацьких угод. Однак вирішення проблеми захисту прав користувачів на підставі користувацьких угод у судовому порядку навряд чи можна назвати ефективним підходом. Тому на сучасному етапі виникає необхідність регулятивного втручання у сферу відносин між провайдерами та користувачами з метою забезпечення прав останніх. Першим кроком на цьому шляху стали нещодавно прийняті європейські акти про цифрові ринки та про цифрові послуги, які, поміж іншого, визначають основні вимоги до діяльності особливо крупних провайдерів та змісту користувацьких угод. У статті аналізуються усі згадані проблеми, що виникають під час застосування Terms of Service, наводиться судова практика, що склалася у цій сфері, та висловлюються пропозиції щодо зміни підходів до регулювання користувацьких угод з метою забезпечення балансу інтересів провайдерів та користувачів.

Ключові слова: Terms of Service, користувацька угода, контракт, провайдер, користувач, захист прав.

Nekit Kateryna

Terms of Service as a new type of contract: approaches to legal regulation and issues to be solved

In the modern world, almost everyone is an active user of various online platforms. A large number of such platforms, such as social networks, e-mail services, online auctions, sites for carrying out financial transactions, provide access to their service only if the user agrees to the terms of the user agreement. It was developed a practice of understanding the Terms of Service as a kind of contract aimed at regulating the relationship between users and providers. An analysis of the legal nature of such contracts allows us to consider them as mixed contracts that contain elements of the privacy policy, rules for using the service, provisions for the collection and processing of personal data, features of the provision of content licenses by users, provisions on liability. However, the private-law approach to regulation in this area has led to the fact that very often the Terms of Service agreements are aimed more at guaranteeing the interests of providers, while significantly limiting the rights of users. Case law in this area is also ambiguous. However, the prevailing judicial approach is that courts tend to grant protection to users even against the provisions of user agreements. However, solving the problem of protecting users' rights on the basis of user agreements in court can hardly be called an effective approach. Therefore, at the current stage, there is a need for regulatory intervention in the sphere of relations between providers and users in order to ensure the rights of the latter. The first step on this path was the recently adopted Digital Markets Act and Digital Services Act, which, among other things, determine the basic requirements for the activities of especially large providers and the content of user agreements. The article analyzes all the mentioned problems that arise during the application of the Terms of Service, cites the judicial practice that has developed in this area, and makes proposals for changing approaches to the regulation of user agreements in order to ensure a balance of the interests of providers and users.

Key words: Terms of Service, user agreement, contract, provider, user, rights protection.