MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
PRIVATE LAW INSTITUTE

TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV
FACULTY OF LAW

MYKOLA OTENIYA

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FREEDOM OF CONTRACT IN EUROPE AND IN UKRAINE : COMPARATIVE ANALYSIS

Master thesis

Supervisor
Lecturers, Institute of Private Law
Dr. Viktorija Budreckienė

Supervisor
Vice-dean for Research and International Relations
Professor of Civil law department
Dr. Habil. Olesia Otradnova

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CONTENT

INTRODUCTION

Problem of research. Due to the integration processes in Ukraine, happening in connection with the signing of the Association Agreement with the European Union, one of the tasks facing Ukraine is to bring its legislation into EU law. The central principle of contractual law, and even the completely private plea of Europe, especially in European Union, is the freedom of contract. In view of this, it is necessary to bring the civil law of Ukraine in the field of regulating freedom of contract closer to the provisions of the law of the European Union.

Relevance of the final thesis. The European Union plays a key role on the arena of global politics. An important aspect in this is its system of law. The European model of legal regulation of social processes is a standard for states not only of the European continent, but also of other countries of the world.

When analyzing the law of Europe, we will primarily characterize the primary and secondary law of the European Union, because Ukraine, which geographically belongs to Europe, differs from the European system of law. These differences are associated with its Soviet past. Particular importance, in our opinion, must be given to the soft law of Europe, in particular, such acts as PECL, DCFR and UNIDROIT principles. Despite the last named act has an international, intergovernmental character, UNIDROIT principles play a significant role in regulating private relations in the European Union. The aforementioned documents show a generalized understanding of the principles of private law of the European Union. Although they are not always implemented, since the national legislation is in force, in the vast majority of cases, the national legislation of the EU members' states clarify and details the provisions of these acts and do not contradict them.

When Ukraine has chosen the path towards European integration, it has thus determined the direction of convergence of its legislation with the law of Europe. Further transformation of the economic system of Ukraine in accordance with the market model of economy and international economic order is accompanied by the emergence of new and identifying drawbacks of known contractual structures, increasing the value of the contract as a regulatory mechanism of civil relations. Under these conditions, there is a need for the modernization and further improvement of civil law, in particular at the level of general provisions on the contract. This requires from the civil law doctrine to conduct a research of not only certain types of contracts, but also a detailed consideration of the freedom of contract. Contractual freedom is an indicator of a law-governed state with a market economy, therefore, its proper implementation plays a key role for Ukraine as a state of Europe.

In Ukraine, the problematic issue of freedom of contract in civil matters often get attention in the legal literature. At the monographic level the latter was investigated by Lutz A.V. in the thesis "Freedom of contract in the civil law" (2001). Some of its aspects are also considered in the monograph of Berveno S. M. "Problems of Contract Law of Ukraine" (2006) and the monograph of Bodnar T. V. "Contractual obligations in civil law" (2005). A thorough analysis of the freedom of the contract and its elements was made by Gorev V.O. in the Ph.D. thesis on "Freedom of contract as general principles of civil law of Ukraine" (2007).

However, as we can observe, for nearly ten years the freedom of the contract has not been the subject of a dissertation study. This convinces that the study of the problem remained at the post-Soviet level, and the law of Europe as a basis for reforming the civil law of Ukraine was not considered.

Therefore, in view of the necessity of the process of adapting the Ukrainian legislation, including civil law, to the provisions of EU law, the study of the principle of freedom of contract becomes actual.

Scientific novelty and overview of the research on the selected topic. The scientific novelty of the study is that it is the first comprehensive study of the principle of freedom of contract in Ukraine through the prism of the law of Europe. The study of freedom of contract in Ukraine, carried out in Ukraine, is a theoretical and philosophical reflection on this principle and a comparison of the regulation of freedom of contract in Ukraine and post-Soviet countries. Codification processes in Europe has not been successful. Nevertheless, it reflects the precise understanding of the principles of the EU law. Moreover, the development of the principles of European contract law has not been the object of research of Ukrainian scientists.

Those scientists, who have addressed the problems of contractual freedom in civil law of Ukraine, either call it the principle of civil law (Lutz A.V.), or unconditionally recognize it as a principle of contractual law with reference to Article 627 of the Civil Code of Ukraine (hereinafter - the CCU) (Berveno S.M.). However, it appears as the basis of civil law. Therefore, it is necessary to examine the understanding of freedom of contract as a basis or principle, to reconcile approaches to the definition of freedom of contract in Europe and Ukraine.

The legal nature of the restrictions on freedom of contract and the general theoretical issues of their establishment remain virtually undeveloped. In the above-mentioned domestic works, specific restrictions and sources of their fixation are considered. In the dissertation of Gorey M.O. there are identified a philosophical basis for the restrictions of contractual freedom, however, the system of restrictions on freedom of contract in civil law has not been developed.

Significance of research. The work can serve as the basis for further research into the relationship of freedom of contract with the norms of civil law, the peculiarities of its application

in the analogy of law, the restrictions of contractual freedom, as well as to improve the concepts of civil law existing in civil law (for instance, civil-law contract, etc.).

In the process of legal implementation, the results of the study can be used in the practice of legal advisers and lawyers when concluding, modifying and terminating the contracts. At the same time the work can be of use for courts for the resolution of contractual disputes. In addition, the results of the study can also be utilized in the law-making process to amend the CCU in order to bring the legislation of Ukraine into conformity with the EU law.

Moreover, the results of the research can be used in the educational process: they can be included in the content of lectures on civil law, used in conducting practical lessons and seminars on such subjects as “Civil law of Ukraine”, “International private law”, “The EU law”, as well when teaching a special course “Contract Law”, etc.

The aim of research is to improve the concept of freedom of contract, enshrined in the civil law of Ukraine, taking into account the priority of the task of adapting Ukrainian legislation to the legislation of the European Union (hereinafter - the EU) and Ukraine's integration into the international economic order.

The objectives of research. To achieve the goal, the following objectives were set:

- To explore approaches to understanding the freedom of contract in Europe and Ukraine and to make the comparisons;

- Identify the main elements of the principle of freedom of contract in Europe and Ukraine, characterize their content and conduct comparisons;

- To present the state of restriction of freedom of contract in Europe and Ukraine, to provide their comparative analysis;

- To propose changes to the legal regulation of freedom of contract in Ukraine with a view to bringing it in conformity with the EU law.

Methods of research. During the research there were used both general scientific and special legal methods of cognition. The general scientific dialectic method was used to substantiate the position that the freedom of contract should be considered through the prism of the methods of legal regulation of civil relations, through which it is implemented in civil law. The system-structural method was used to streamline the manifestations of freedom of contract by the stages of the contract process and the degree of concretization. The method of interpretation (literal, logical, systematic) was used in the process of analysis of the content of acts of civil legislation and practices of its application. The comparative legal method was used to analyze the provisions of national legislation, which implemented the freedom of contract, in comparison with the EU legislation. The dogmatic-legal method has been widely used to identify

shortcomings in legal regulations that impose restrictions on freedom of contract in Ukraine and to develop concrete proposals for their improvement.

Structure of research. The first Chapter "Freedom of contract as the principle of civil law" explores the understanding of freedom of contract. Section 1.1. describes the provisions of primary and secondary EU law on freedom of contract, defines the consolidation of the principle of freedom of contract in the Principles of UNIDROIT and the Principles of European Contract Law. The understanding of freedom of contract in the legislation of the EU member states is analyzed. Subsection 1.2. "General characteristics of the approach to the definition of the principle of freedom of contract in Ukraine" reflects the understanding of freedom of contract in the legislation and legal doctrine of Ukraine; the definition of freedom of contract as a principle of law, and not the foundation of civil law; the basic elements of the freedom of the contract are defined. In subsection 1.3 "Comparison of general characteristics of the approach to the definition of the principle of freedom of contract in Europe and in Ukraine" there are determined the philosophical basis for understanding the principle of freedom of contract, which underlies its legal understanding; on the basis of comparison of approaches to the understanding of freedom of contract in Europe and Ukraine, it is proposed to amend the legislation of Ukraine (would consolidate the freedom of contract as a principle of civil law).

The second Chapter "Elements of the principle of freedom of contract in Europe and in Ukraine" is devoted to characteristics of elements of freedom of contract. Subsection 2.1. "Freedom to conclude the contract as an element of the principle of freedom in civil law in Europe and in Ukraine. Comparative Analysis" is devoted to the study of the freedom to conclude an agreement and the process of negotiations in Europe and Ukraine, and proposes to resolve the gaps in Ukrainian legislation in this area. In subsection 2.2. "Freedom to choose with whom to enter into the contract as an element of the principle of freedom in civil law in Europe and in Ukraine. Comparative Analysis" there is researched the essence of freedom of choice of the counterparty, the exceptions to the freedom to choose the counterparty under the law of Ukraine and Europe are characterized, their comparison is made. The final subsection of the Chapter, "Freedom to choose the content of the contract as an element of the principle of freedom in Europe and in Ukraine. Comparative Analysis" investigates the freedom to determine the terms of the contract, describes the freedom of the contract form in detail, defines the notion of substantive conditions of the agreement on the rights of Ukraine. On the basis of comparative analysis, there are proposed amendments to the legislation of Ukraine regarding the definition of the terms of the contract.

The final Chapter of the paper "Limitation of freedom of contract" is devoted to restrictions of the freedom of contract. Subsection 3.1. "Limitation of freedom of contract in

Europe" investigates the established restrictions on the principle of freedom of contract in the primary and secondary law of the EU. The provisions of the main codification acts of the EU law concerning restrictions on the principle of freedom of contract are studied; cases of restriction of freedom of contract in the legislation of the EU member states have been investigated. In subsection 3.2. "Limitation of freedom of contract in Ukraine" there are characterized cases of restriction of freedom of contract in Ukraine. They are structured and classified. In subsection 3.3. "Comparison of limitations of freedom of contract in Europe and in Ukraine" on the basis of a comparative analysis of the general restrictions on freedom of contract in Europe and Ukraine, a conclusion was made on the extent of freedom of contract in Ukraine. It is proposed to mitigate the limited freedom of contract in Ukraine.

Defense statement. The following provisions are put to the defense:

1. The content of freedom of contract principle differs in Ukraine and other parts of Europe and such differences negatively influence proper implementation of this notion in Ukraine.

1. FREEDOM OF CONTRACT AS THE PRINCIPLE OF CIVIL LAW

1.1. General characteristics of the approach to the definition of the principle of freedom of contract in Europe

One of the central institutes of private (civil) law is a contract. In its turn, the contract appears as one of the most long-standing legal constructions. Contract law in general is based on the time-tested principles (by doctrine and practice) that occupy a special place in the hierarchy of a system its norms. These norms are interconnected with each other and due to this fact it is possible to state that Contract law acquires such characteristic as stable and steady norms. These norms reflect the very essence and nature of Contract law.

The principle of freedom of contract can be treated as one of the central principles in the system of principles of Contract law, since, like any other deed, the contract is a volitional act. However, this volitional act is endowed with specific peculiarities. The contract is not an isolated voluntary action of two or more persons, but instead it is a joint (single, agreed) expression of will. In order to formulate and consolidate it in the contract, the expression of will must be free from external influences. As the generally recognized mean of achieving this goal it appears a freedom of contract.

Principle of freedom of contract can be already found in classical Roman law. The first rule formulated on the basis of the idea of this principle refers to the law of XII tables of 451-450 BC. That rule was formulated as follows "cum nexum faciet mancipium, uti lingua nucupassit, ita ius esto" (VI, 1) ("When one makes a bond and a conveyance of property, as he has made formal declaration so let it be binding"[1]). The active development of relations in the Roman state guaranteed the influence of Roman law on the legal systems of many states of Europe.

Only with the further development of cities and the establishment of trade relations between them in the XI-XII centuries there emerged a necessity to give more freedom, at least for the economic movement.[2] Such idea was in line with the spirit of the Roman formalized contractual law. Under the influence of the canonists, the general law was permeated by the principle of consent, and the doctrine concerning the possibility of challenging in non-court those contracts that have no form developed.[3] As a result, the condition of freedom of contract appeared.[4]

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[1] Hattenhauer H. Europaeische Rechtsgeschichte. Heidelberg: Müller, 1999. – C. 56.

[2] Kaiser A. Zum Verhältnis von Vertragsfreiheit und Gesellschaftsordnung während des 19. Jahrhunderts: insbesondere in den Auseinandersetzungen über den Arbeitsvertrag. Berlin, 1973. – C. 9.

[3] Busche J. Privatautonomie und Kontrahierungzwang. Tübingen: Mohr, 1999. – C. 46.

[4] Kaiser A. Zum Verhältnis von Vertragsfreiheit und Gesellschaftsordnung während des 19. Jahrhunderts:

During mercantilism period in the middle of XVII the development had changed its direction. The idea of freedom of contract was lost. It was only in XIX century, when it has reborn, despite the reluctance of representatives of this course.

In 1804 the Code of Napoleon came into force, which consolidated the ideals of personal freedom and equality. Such postulates are specifically expressed in the protection of personal property, freedom of economy and freedom of contract.[5] This code continues to be applied in France and nowadays.

Historically, the freedom of contract as a special expression of the autonomy of the individual is connected with the so-called "theory of autonomy of the will". According to this theory, the recognition and execution of contractual obligations is based on the proposition that the parties to the agreement have themselves "voluntarily wanted" to be associated with their obligations.[6]

Today, the principle of freedom of contract is a fundamental and prevalent principle of European Contract law.[7] We agree with the opinion of Professor Ulrich G. Schuter that the principle of freedom of contract is also fundamental for international treaty law as a whole.[8]

We will proceed with considering the principle of freedom of contract through the prism of the primary law of the European Union. Directly the principle of freedom of contract is not mentioned in the Treaty on European Union. However, the content of numerous provisions of the Treaty of Rome can be understood only with the assumption that freedom of contract is guaranteed. For example, according to Point 2 of Article 81 of the Treaty on European Union (now Article 101 (2) of the Treaty on the Functioning of the European Union), those assignments that that restrict competition are considered insignificant.[9]

Another document of primary law of the European Union is the Charter of Fundamental Rights of the European Union. The Lisbon Treaty proclaimed the Charter as an obligatory element of EU law.[10] As a result, the Charter acquires the status of founding treaties and shall be treated as a part of the primary law of the EU. However, this document also does not specifically

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insbesondere in den Auseinandersetzungen über den Arbeitsvertrag. Berlin, 1973. – C. 27.

[5] Kaiser A. Zum Verhältnis von Vertragsfreiheit und Gesellschaftsordnung während des 19. Jahrhunderts: insbesondere in den Auseinandersetzungen über den Arbeitsvertrag. Berlin, 1973. – C. 20.

[6] Цвайгерт К., Кетц Х. Введение в сравнительное правоведение в сфере частого права: В 2-х тт.- Том 2.- Пер. с нем.- М.: Междунар. отношения, 1998. – С. 8.

[7] Drobnig U. General Principles of European Contract Law [Electronic resource]. – Access mode:www.cisg.law.pace.edu/cisg/biblio/drobnig.html

[8] Schroeter, Ulrich G. Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law [Electronic resource]. – Access mode: http://www.cisg.law.pace.edu/cisg/biblio/schroeter2.html

[9] Див.: Договір про функціонування Європейського Союзу [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/994_b06

[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/ALL

mention the freedom of contracts. The general right to freedom, according to Article 6 of the Charter, refers to the principle of freedom of the individual, that is to the freedom of physical movement, but not to the freedom in the sense of commercial activity.[11] However, the evidence that the Charter protects the certain aspects of the freedom of contracts can be found in the following provisions of the document. This applies to the right to marry in accordance with Article 9, to the right to assembly in accordance with Article 12 and the right to employment in accordance with Article 15.[12] The right to engage in trade and economic activity, which has long been recognized as a general principle of EU law, includes the right to freely choose a business partner in operations.[13] Article 16 of the Charter is of a special value for freedom to entrepreneurship as it recognizes «[…] the freedom to conduct a business in accordance with Community law and national laws and practices».[14] Finally, right to ownership, which is enshrined in Article 17, guarantees everyone the right to use, dispose and bequeath their property. Accordingly, whenever the subject of the contract relates to the interests of the owner protected by law, this agreement may regulate the use or disposal of property in the sense of Article 17.

In result of research of the primary EU law it is possible to conclude that although it does not explicitly mention freedom of contract, this principle nevertheless is largely guaranteed. Indeed, no treaty can be concluded in such a way that it was completely deprived of the guarantees provided for by the primary law of the EU.

Now we will turn to the characteristics of freedom of contract in the EU`s secondary law. The permission of the parties to regulate in a contract a specific issue is foreseen, for example, in the Regulations on the introduction of the euro[15] and in separate provisions of the Directive of the European Economic Community on the coordination of the laws of the Member States relating to self-employed commercial agents.[16] In addition, Article 4 of Directive on the

[11] Див.: Bernsdorf N. Kommentar zur Charta der Grundrechte der Europaeischen Union. Baden-Baden, 2003. Art. 6. № 11.

[12] Charter of Fundamental Rights of the European Union 2012/C 326/02 [Electronic resource]. – Access mode: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[13] Judgment of the Court (Third Chamber) of 10 July 1991. Joined Cases C-90 and 90/91 [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0090

[14] Charter of Fundamental Rights of the European Union 2012/C 326/02 [Electronic resource]. – Access mode: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[15] Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro [Electronic resource]. – Access mode: https://publications.europa.eu/en/publication-detail/-/publication/209eb935-db04-40e9-a782-52bbbb654c8e/language-en

[16] Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro [Electronic resource]. – Access mode: https://publications.europa.eu/en/publication-detail/-/publication/209eb935-db04-40e9-a782-52bbbb654c8e/language-en.

sale of consumer goods does not consider the right of final sellers to claim damages (losses) from suppliers as mandatory one.[17]

Also, some of the doctrines of international private law relating to freedom of contract are recognized when it comes to the autonomy of the will of the parties,[18] the prohibition of agreements and other types of contractual jurisdiction.[19] However, most mandatory legal instruments do not provide any reference directly to freedom of contract. Only in the preamble can one find inconsistent remarks that one or another legal instrument is an exception to the principle of freedom,[20] or that the purpose of its application is the prohibition to abuse the freedom of contracts.[21]

Thus, the recourse to the freedom of contract in the EU law has an incidental character. However, the referring has become more frequent and compels us to agree with Rainer Schulz`s assessment that "we oppose one of the general principles of European law to the principle that applies only to an individually defined aspect or specific areas of EU law."[22]

In this regard we share the opinion of U. Basedov, who argues that one can only regret that the "Principles of the Contractual Law of the EU" (*Acquis Principles*) under the existing contract law of the EU, developed by a group of scholars of law in the last few years, do not include the principle of freedom of contract.[23] Only freedom of form has found its embodiment in Article 1:303.[24] Given the discrepancy in references to the freedom of contract, such silence by the Principal Group aggravates a clear uncertainty in the application of the law.

Let us now proceed with the characteristics of the principle of freedom of contract in terms of European law as the law of the whole of Europe, and not just the EU.

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[17] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN.

[18] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [Electronic resource]. – Access mode: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=en

[19] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN.

[20] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [Electronic resource]. – Access mode: http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF

[21] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0035.

[22] Schulze R. Grundsaetze des VCertragsschlusses im Acquis communautaire // Zeitschrift fuer Gemeinschaftsrecht. 2005. № 56.

[23] Basedow J. Die Europäische Union zwischen Marktfreiheit und Überregulierung – Das Schicksaal von Vertragsfreiheit. In Bitburger Gespräche (pp. 85-104). München: C.H. Beck. [Electronic resource]. – Access mode: http://hdl.handle.net/11858/00-001M-0000-0019-C978-3

[24] Див.: Research Group on the Existing EC Private Law (Acquis Group). Principles of the Existing EC Contract Law (Acquis Principles) — Contract I. Munich, 2007.

An important place in the system of legal acts regulating private law in Europe belongs to the Principles of European Contract Law. For instance, Article 1:102 of this Act establishes the following: "[...] Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles. The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles."[25]

Although the freedom to choose a counterparty is not explicitly stated in Article 1:102 of the European principles of contract law, but the authors of this act in the first part of this article, under the phrase "parties are free to enter into an agreement" also meant the freedom to choose the counterparty.[26]

The content of the principle of freedom of contract, which is enshrined in Article 1: 102, reflects the historical progress of the development of this institute of Contract law (its evolutionary process, both doctrinal and practical) and a coherent position between the various legal approaches of the EU member states.

The principle of freedom of contract is fundamental in private legal relations and is understandable to all legal systems. That is why, when developing the European Principles of Contractual Law, there was no doubt about the need to consolidate such a principle in this Act.

It is also worth drawing attention to the provisions of the European Code of Contract Preliminary Draft, which provide the understanding of the principle of freedom of contract. Although this act has no practical application, since the codification process has not been implemented, the work, that had been done, was aimed at integration of the doctrine of European contract law. The European Code of Contract Preliminary Draft provides a direct recourse to the principle of freedom of contract in its "preliminary provisions". Article 2 Clause 1, which deals with the issue of "contractual autonomy" states that "the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy […]".[27]

At the universal level, the UNIDROIT Principles of International Commercial Contract (UNIDROIT) are of particular importance. This document, published in 1994 and translated in more than 20 languages, has high authority in international trade[28] and is recognized as a

[25] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[26] Drobnig U. General Principles of European Contract Law [Electronic resource]. – Access mode:www.cisg.law.pace.edu/cisg/biblio/drobnig.html

[27] European Contract Code [Electronic resource]. – Access mode: http://www.eurcontrats.eu/site2/docs/EuropeanContr.pdf

[28] Bonell M. J. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes? / Michael Joachim Bonell. // Uniform Law Review. — 1996. — Vol. 14. — P. 34.

"symbol of a new phase of private legal unification."[29] Principles of international commercial agreements (the principles of UNIDROIT) establish the principle of freedom of contract in the field of contractual relations already at the very first place in clause 1.1. Clause 1.2 continues to extent the abovementioned principle through the consolidation of the principle of freedom of form. There are no requirements that the contract should be concluded or confirmed in writing. An existence of an assignment can be proved by various means, including witnesses` testimonies.[30]

To be able to get a complete picture of the understanding of the principle of freedom of contract in Europe, it is also worth referring to the Model Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (hereinafter – DCFR).[31] The value of any model acts is that they represent the existing level of development of legal doctrine. The independence of this document from the law of a particular country and an attempt to generalize in it the experience of states of both continental and Anglo-American systems of law allow us to accept the trends reflected by it as universal and inherent in one or another degree of most modern legal orders.[32]

Model rules of European private law consider freedom of contract as an element of the autonomy of the will of the parties. From provisions of Article II-1:102 DCFR, it follows that according to general rules, the parties are free to conclude an agreement or to implement another legal act and determine its content, may exclude, in whole or in part, the application of any rule relating to agreements or rights and obligations that they arise, and also exclude or change its effect, and if the possibility to exclude the use of rules is absent, then the parties may waive the already existing right.[33]

Model rules of European private law are not limited to the formal proclamation of this principle. Instead, they also establish a number of provisions aimed at its practical implementation. In particular, they may include the rules relating to the freedom to form of a contract (Article II-1: 106 DCFR) and mixed contracts (Article II-1: 107 DCFR).

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[29] Basedow J. Die UNJDROIT-Prinzipien der Internationalen Handelsverträge und die Übereinkommen des einheitlichen Privatrechts / Jürgen Basedow // Basedow J., Hort K. J., Kötz H. Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag. — Tübengen: Mohr Siebeck, 1998. — S. 20.

[30] Принципы международных коммерческих договоров.- М: Международный центр финансово-экономического развития, 1996.- 169 с.

[31] Див.: Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) [Electronic resource]. – Access mode: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf

[32] Богустов А.А. Проблемы реализации принципа свободы договора в Модельных правилах европейского частного права // Сборник статей «Свобода договора» / Отв. ред. М.А. Рожкова. – М.: Статут, 2006. – С. 4-9.

[33] Див.: Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) [Electronic resource]. – Access mode: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf

We should also consider the legislation of the local European level. The consolidation of the principle of freedom of contract is characteristic of the legal systems of the EU Member States.

The principle of freedom of contract is directly defined in the civil law of Italy and Spain. Article 1322, paragraph 1 of the Italian Civil Code sets out the principle of freedom of contract within the limits set by the law. It flows from this that all illicit, illegal, immoral and non-binding contracts are prohibited.[34]

Equally, Spanish law affirms the freedom of the parties to contract according to terms of their choice in Article 1255 of the Spanish Civil Code[35]. However, despite the value of this freedom, it has certain limits: the above mentioned provision also affirm that contracts cannot be contrary to norms of the statute, to morality or to public policy or Article 6 of the Civil Code[36].

We should pay a special attention to the provisions of the Lithuanian Civil Code, which includes the principle of freedom of contract in Article 6.156. This Article states that the parties shall be free to conclude any contracts and define their mutual rights and duties at their own discretion; the parties may also enter in other contracts that are not established by this Code unless this contradicts laws. The parties can develop the conditions of a contract at their own discretion, except from the cases where certain conditions of a contract are prescribed by the obligatory rules of law.[37]

Indirectly explored principle is enshrined in French civil law. In the system of rules of the French Civil Code (hereinafter – FCC) freedom of contract is given a special role. To ensure this the lawmakers have used rather unique methods of legal technique. Thus, Article 1134 of the FCC, which enshrines the principle of freedom of contract, does not seem to be quite common in terms of the purposes which it would seem to be aimed at. The first part of this article reads as follows: "The legally concluded agreements take the place of the law for the persons who have concluded them." [38] The literal sense of what is said is something that is just the opposite of freedom: the binding with the contract is entirely in accordance with the requirements of "pacta sunt servanda". In this connection, we should note that in the continental codes it is widely accepted to formulate separately the principle of freedom of contract and the

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[34] Italian Civil Code, approved by Royal Decree No. 262 of March 16, 1942 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/details.jsp?id=2508

[35] Spanish Civil Code, approved by Royal Decree of July 24, 1889 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319

[36] Spanish Civil Code, approved by Royal Decree of July 24, 1889 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319

[37] Civil Code of the Republic of Lithuania [Electronic resource]. – Access mode: http://www.wipo.int/edocs/lexdocs/laws/en/lt/lt073en.pdf

[38] Гражданский кодекс Франции (Кодекс Наполеона) / пер. с франц. В. Захватаев; предисловие: А. Довгерт, В. Захватаев; приложения 1-4 / отв. ред. А. Довгерт. - М., 2012. - С. 21-708

principle of conscientious fulfillment of the treaty. In developing this position, the second part of article 1134 states that the said agreements can only be abolished by mutual agreement of the parties or in cases permitted by law.

The legally concluded contract is, in the understanding of the French Civil Code, the emanation of the law itself, the manifestation of its action and its force. It is not the individual will of the subject that prevails, but the "law", which binds the subject with his own will.

There exists quite a similar in Germany. Despite there is no a specific provision of the Bürgerliches Gesetzbuch (hereinafter – BGB), which indicates the principle of freedom of contract, this principle is nevertheless attached to a written provision, that of Article 2 of the German Constitution. Thus, although the principle of freedom of contract (Vertragsfreiheit), itself a concretisation of the principle of private autonomy (Privatautonomie) is not explicitly formulated by Article 311 I BGB[39] , the principle has, according to the Federal Constitutional Court, constitutional value, as it is 'included at least implicitly in Article 2[1] of the Fundamental Law which guarantees to each person the right to free development of his personality'[40].

Although the German civil code does not contain a separate article on freedom of contract, it has been repeatedly stated that it has a prior meaning in various documents, even in the preparatory works to the German Civil Code itself. As an example we can consider such statements as "the basic principle that prevails in the law of obligations is the freedom of contract […]" or "by virtue of the principle of freedom of contract that prevails over the law of obligations the parties may determine, by mutual voluntary agreement, their mutual legal and commercial relations."[41]

Finally, in English law the principle of freedom of contract finds its roots in the economic theory of laissez-faire[42], the self-regulation of the market by the principle of supply and demand and the idea that each contracting party, as the best judge and best defender of their own interests, should not be hindered in their contractual efforts.

Having examined the normative consolidation of the principle of freedom of contract in Europe, both at the pan-European level and at the level of individual states, we have enough instruments to turn to the clarification of the content of this principle.

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[39] Budesministerium der Justiz [Electronic resource]. – Access mode: http://bundesrecht.juris.de/englisch_bgb/index.html.

[40] Zimmermann R., The New German Law of Obligations (Historical and Comparative Perspectives): Oxford University Press Inc., New York, 2005, p.160, 205, 207.

[41] Савельев В. А. Гражданский кодекс Германии.- М.: Юрист, 1994. – С. 29.

[42] Див.: Treitel G. H., An outline of the Law of Contract, Oxford University Press, 6th edition 2004, pp. 3-5.

As it follows from the Principles of European Contract law, the principle of freedom of contract includes the following provisions in its content:

- freedom to agree or refuse to conclude a contract;
- freedom to choose a counterparty under the contract;
- freedom to determine content of the contract.

Researchers of European law, along with the already mentioned provision, also distinguish other elements. For example, Y. Bazedov also refers to the freedom of form and the freedom to modify the contract.[43] The first freedom means that the contract does not depend on the choice of one or another form. In its turn, the freedom of modification means that during the period of the existence of contractual obligations the parties are free to enter into it at their own will. At any time, they can rewrite the contract or introduce changes to it.

Moreover, in the majority of the studied legal systems freedom of contract also encompasses the freedom to break off contractual negotiations. This leads to the fact that all the Member States of the European Union uphold that the breaking off of contractual negotiations is free.[44] Such freedom is most frequently subject to a requirement of good faith.[45]

The different projects all provide that freedom of contract necessitates that the parties are free to negotiate the contract and to break off negotiations, subject to good faith.

Within the UNIDROIT Principles this principle manifests itself in relatively different elements. It includes freedom to negotiate and the absence of liability in the case of failure to reach an agreement.[46]

The freedom to break off pre-contractual negotiations is expressly stated in the Proposals for Reform of the Law of Obligations and the Law of Prescription.[47] The first paragraph of Article 1104 declares that "the parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith."[48]

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[43] Basedow J. Die Europäische Union zwischen Marktfreiheit und Überregulierung – Das Schicksaal von Vertragsfreiheit. In Bitburger Gespräche (pp. 85-104). München: C.H. Beck [Electronic resource]. – Access mode: http://hdl.handle.net/11858/00-001M-0000-0019-C978-3

[44] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[45] However, English law, for its part, does not impose on the parties any duty to enter into or continue negotiations in good faith. See Walford v. Miles [1992] A. C. 128, H. L. cited in: Principles of European Contract Law, Part I and II, op. cit. p. 192.

[46] Принципы международных коммерческих договоров.- М: Международный центр финансово-экономического развития, 1996.- 169 с. [Електронний ресурс]. – Режим доступу: https://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-russian.pdf

[47] Принципы международных коммерческих договоров.- М: Международный центр финансово-экономического развития, 1996.- 169 с. [Електронний ресурс]. – Режим доступу: https://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-russian.pdf

[48] Cartwright J., Whittaker S. Proposals for Reform of the Law of Obligations and the Law of Prescription [Electronic resource]. – Access mode: http://denning.law.ox.ac.uk/iecl/research.shtml

Finally, the freedom to break off negotiations is implicitly found in the European Code of Contract Preliminary Draft where it excludes, as a matter of principle, the liability of the parties if the negotiations do not succeed.[49]

Hence, we should conclude that freedom to break off negotiations should be also considered as an inevitable part of freedom of contract.

The elements of principle of freedom of contract will be characterized in details in the following Chapter.

Thus, it should be noted that the principle of freedom of contract in European law is endowed with the following content: the parties have the right to freely enter into the contractual process (the freedom to conclude an agreement); a person is free to choose the counterparty with whom it will enter into the contract process (the freedom to choose the counterparty); the parties, at their discretion, determine the terms and type of contract (freedom of contract terms). The last element should also include the definition of the type of contract.

Consequently, the principle of freedom of contract is one of the central principles in the system of principles of Contract law and is universally recognized in the European Union and in Europe as a whole. The fact that it is determined at the legislative level of many states and in the law of Europe indicates the obligation for its implementation and places it under the protection of the law. Freedom of contract does not lose its value due to its legally determined restrictions, it is still considered as a guiding principle of Contract law. In many countries, contractual freedom is seen as a fundamental right that strengthens its position and protects against excessive legislative intrusions. At the same time, the constitutionality of private law and the possibility of horizontal application of human rights imply the need to impose far-reaching restrictions on freedom of contract.

1.2. General characteristics of the approach to the definition of the principle of freedom of contract in Ukraine

Constitution of Ukraine proclaims that Ukraine is a democratic, law-governed state.[50] This means that the main driver of social processes is the law. In its turn, the law has its root in a system of fundamental ideas – principles.

After proclaiming of independence, Ukraine took a course on the construction of a new model of economic development, strengthening of the market economy, pluralism of ownership

[49] European Contract Code [Electronic resource]. – Access mode: http://www.eurcontrats.eu/site2/docs/EuropeanContr.pdf

[50] Конституція України: Закон України від 28 червня 1996 року № 254к/96-ВР [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/ rada/show/254к/96-вр

of the respective subjects, their equality and competition. Equality of subjects of civil law as the main element of the principle of dispositivity became the expression of economic equality of participants in commodity-money relations. The principle of dispositivity of Civil law gives participants the opportunity to freely choose their own behavior model, to determine the content of civil rights and responsibilities, and to dispose them. One of the embodiments of dispositivity in Civil law is the principle of freedom of contract.

Analyzing the history of consolidation of this principle in the Ukrainian legislation, we note that the Civil Code of Ukrainian Soviet Socialist Republic did not provide for freedom of contract and proceeded from the dispositiveness of those norms of civil law, which directly gave the parties the right to depart from the requirements of civil law acts.[51]

However, the idea of the possibility to freely choose a counterparty and the free definition of the content of the contract existed in the provisions of special laws even before the adoption of the Civil Code of Ukraine in 2003. For instance, Part 1 of Article 21 of the Law of Ukraine "On Enterprises in Ukraine" dated March 27, 1991 gave enterprises the right to freely choose the subject of the contract, to determine the obligations, any other conditions of economic relations that do not contradict the legislation of Ukraine.

Currently, freedom of contract as a principle of civil law of Ukraine is enshrined in the Civil Code of Ukraine (hereinafter – CCU). Thus, clause 3 of Part 1 of Article 3 of the Civil Code of Ukraine states that freedom of contract is the general basis of civil law. This principle is elaborated in Articles 6 and 627 of the aforementioned normative legal act.

Researchers of this principle often express fundamentally opposing points of view when assessing its expediency.

For example, Beliaieva A. P. is an advocate of the position of the legislator and notes that "the consolidation of the principle of freedom of the contract in the CCU has become an important factor and a significant guarantee of the liberalization of public life, the withdrawal of civilian traffic from the brutal control of public power and the provision of its regulation means of private law. It testifies the further democratization of the legal system of Ukraine, the withdrawal from the total publication of all social relations, the recognition of the priority of private-law interest in public-law."[52]

A categorical supporter of the opposite point of view is Podtserkovnyi O. P., who notes that with the adoption of the new CCU, it became the general rule that the legislative provisions are not binding on the parties to the agreement. Simultaneously the mandatory acts of Civil law

[51] Басай О.В. Принцип свободи договору за цивільним законодавством України [Електронний ресурс] / О.В. Басай. – Режим доступу: www.pjv.nuoua.od.ua/v1_2013/11.pdf

[52] Бєляєва А. П. Принцип свободи договору в правовому регулюванні зовнішньоекономічного контракту: автореф. дис. ... канд. юрид. наук: 12.00.03 / А. П. Бєляєва. - Х., 2005. – С. 5.

must be confirmed primarily by special regulatory clauses on restriction of contractual freedom. In his opinion, part 3 of Article 6, the CCU ignores the postulate that the provisions of acts of civil legislation, ranging from the Constitution of Ukraine to subordinate acts, are naturally binding. He interprets that such provisions provide for search of an element of compulsory content in all norms of civil legislation. However, in his point of view, such provisions are devoid of practical justification and not adapted to practical implementation. Podtserkovnyi O. P. believes that such privately-held ideas of modern reformers jeopardize the existing rule of law as the classic rule of Roman private law is forgotten: "Not everything that is allowed is worthy of respect." [53]

It should be noted that recently, individual scientists from different countries began to wonder whether it was time to replace the principle of "freedom" with the principle of "fairness" of contracts. The reason for this is the frequent "inequality of pre-contracting opportunities", even if it is a contract concluded between the two entrepreneurs. It is generally acknowledged that the free game of economic forces does not automatically lead to equilibrium and harmony at the present time, but, on the contrary, gives rise to an economic advantage over others. Consequently, the principle of justice is to a certain extent assigned the function of equalization of "inequalities of pre-contract opportunities".[54]

Thus, the principle of freedom of contract does not have a universal support, although, in our opinion, this is, of course, a positive legal phenomenon, which, at the same time, requires very careful elaboration of the texts of civil law acts. But it is difficult to overestimate importance of the principle for the development of a market economy. It provides the participants of civil circulation with the opportunity to coordinate their actions independently, which becomes of a particular importance in the modern conditions of technological progress.

The issue of the essence of freedom of contract in legal literature still remains controversial. Some authors who have addressed the problems of contractual freedom in civil law of Ukraine, call it the principle of civil law (for example, Lutz A. V. [55]). Others refer to Article 627 of the Civil Code of Ukraine and unconditionally recognize the freedom of contract as the principle of Contract law (for example, Berveno S. M.[56]). There also exists a third group of scientists, who generally do not distinguish this legal phenomenon as a separate principle, but instead include it in the content of the principle of dispositivity and initiative of the participants

[53] Подцерковний О. П. Недоліки норм про свободу договору в новому Цивільному кодексі України / О. П. Подцерковний // Вісник Академії правових наук України. - 2004. - № 3 (38). - С. 80-82.

[54] Мілаш В. Принцип свободи договору: необхідні межі при укладенні та реалізації підприємницького комерційного договору / В. Мілаш // Право України. - 2005. - № 6. – С. 50.

[55] Луць А. В. Свобода договору в цивільному праві України: дис. … канд. юрид. наук: 12.00.03 / А. В. Луць. – Л., 2001. – 166 с

[56] Бервено С. М. Проблеми договірного права України: монографія / С. М. Бервено. – К.: Юрінком Інтер, 2006. – 392 с

in civil legal relations. It is unlikely that the last approach can be recognized as possible one. In our opinion, under such conditions it is worth looking at the textual meaning of the precise norm – Article 3 of the CCU. In this regard, it is necessary to agree with the first group of authors, which indicates that Article 3 of the Civil Code of Ukraine encompasses the freedom of contract as the general basis of the Civil law. And this norm, in relation to Article 627 of the Civil Code of Ukraine, has a general character. It finds its further clarification in the contractual sphere.

For a correct understanding of the analyzed concept, we will determine the meaning of the notion of "principle" in Ukrainian law.

When defining the concept of the principles of law in the legal doctrine, scholars use such categories as baseline theoretical positions, basic, guiding principles (ideas), general normative-guiding provisions, guiding principles, regularity, essence, coordinate system, etc. Many categories are homogeneous. Therefore, principles are general, managerial (main, primary, starting, initial theoretical, general regulatory, guidance, steering) provisions.[57]

Legal philosophy distinguishes between two approaches in understanding the concept of principles of law. According to the first concept, which is based on the theory of positivism, the principles of law are the ideas, the theoretical, normative and guiding provisions of one or another type of human activity, which are specified in the context of legal norms and objectively conditioned by the material conditions of the existence of society. Proponents of such idea are Iavych L. S., Vasiliev A. M., Ronzhyn V. M. and others.[58]

In accordance with the second concept, which originates from the idea of natural law, the principles of law are understood as guiding ideas, starting principles objectively inherent in the law, the indisputable demands (positive commitments) that put to the participants of social relations to harmonize the combination of individual, group and public interests and determine the content and direction of legal regulation, reflect the most important patterns of socio-economic formation. Such an understanding of the principles of law is observed by Skakun O. F., Rabinovich P. M., Kozlov V. A., Levantsev K. E., Vedernikov U. A., Grekul V. S. and others.[59]

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[57] Старчук О. Бібліографічний опис для цитування: Старчук О. В.Щодо поняття принципів права / О. В. Старчук // Часопис Київського університету права. - 2012. - № 2. – С. 40

[58] Явич Л. С. О принципе научности в работе советского государственного аппарата / Л. С. Явич // Правоведение. - 1967. - № 2. - С. 64; Теория государства и права: учебник [для вузов] / [А. М. Айзенберг, А. М. Васильев, Г. С. Котляревский и др.]; под ред. А. М. Васильева. - [2-е изд. испр. и доп.]. - М.: Юрид. лит., 1983. - С. 236; Ронжин В. Н. О понятии и системе принципов социалистического права / В. Н. Ронжин // Вестник МГУ. - Сер. 11. Право. - 1977. - № 2. - С. 34.

[59] Скакун О. Ф. Теорія держави і права: підручник / О. Ф. Скакун; пер. з рос. - Х.: Консул, 2009. - С. 221; Рабінович П. МОснови загальної теорії права і держави: навчальний посібник / П. М. Рабінович. - [3-є вид. зі змін. і доповн.]. - К.: ІСДО, 1995. - С. 93; Теория государства и права: учебник [для вузов] / [Козлов В. А., Ливанцев К. Е., Денисов Ю. А. и др.]; отв. ред. А. И. Королев, Л. С. Явич. - Ленинград: Из-во Ленинград. у-та, 1982. - С. 212; Ведєрніков Ю. А. Теорія держави і права: навч. посіб. / Ю. А. Ведєрніков, В.

In our opinion, taking into consideration the natural legal paradigm of the emergence of law, the understanding of the principles of law is identified with the norms of law. Therefore, in support of the first approach to the definition of the principles of law, we believe that the best definition is the understanding of the concept of the principles of law, which is proposed by Starchuk V. O. The scientist defines the principles through their features: the principles of law are the fundamental ideas of law, which determine the content and orientation of the norms and are systematic, interdependent, generally binding, universal, stable, substantively certain, generic and regulatory. [60]

It is a commonly accepted approach to divide the principles of law into general legal and special legal (branch).[61] If to follow Article 3 of the Civil Code of Ukraine, we can note that the general principles of civil law are special legal principles of law. It should be noted that the norms of Article 3 of the Civil Code of Ukraine are not simple regulatory legal norms and not just norms-principles, these provisions serve as the constituent norms. Particular authors refer to these norms as to declarative norms, which proclaim the principles of the construction and functioning of state-legal reality, the tasks faced by legal institutions in one or another sphere of activity. Such norms also fall into the category of "all-assertive" norms, which "in a generalized form consolidate certain states of social relations, for example, the basis social, economic, political system".[62] These norms occupy a higher level in the legislation, dominate the hierarchy of law, are characterized by the most general, abstract nature. In the mechanism of legal regulation, they play a special role. They establish, fix and formulate goals, tasks, principles, boundaries, directions, methods of legal regulation.[63]

The principles of civil law fulfill at least two basic functions. The first of them is the expression of the main ideas of the given legal branch, directions of its development, formulation of the basic requirements both to the adopted normative acts, and to the law enforcement activities of state bodies. At the same time this function covers the behavior of individual participants in civil legal relations. It is worth to agree with the statement that the principles express the real state of social positions, and are by their very nature objective.[64]

С. Грекул. - [4-е вид., доповн. і переробл.]. - К.: Центр навч. л-ри, 2005. - С. 79

[60] Старчук О. Бібліографічний опис для цитування: Старчук О. В.Щодо поняття принципів права / О. В. Старчук // Часопис Київського університету права. - 2012. - № 2. – С. 42

[61] Юхимюк О. Особливості застосування принципів права // Проблеми державотворення і захисту прав людини в Україні: Матеріали XVIII регіональної науково-практичної конференції. 26-27 січня 2012. – Львів: Юридичний факультет Львівського національного університету ім.. І. Франка, 2012. – С. 55.

[62] Лазарев, В. В. Теория государства и права : учебник для бакалавров / В. В. Лазарев, С. В.Липень. — 4-е изд., перераб. и доп. — М. : Издательство Юрайт;. ИД Юрайт, 2015. — С. 205.

[63] Общая теория права. Курс лекций / Под общ. ред.: Бабаев В.К. - Нижний Новгород: Изд-во Нижегор. ВШ МВД РФ, 1993. – С. 289.

[64] Теория государства и права / Под ред. Корельского В.М., Перевалова В.Д. – 2-е изд., изм. и доп. - М.: 2002. – С. 237.

The second function of the principles of civil law is the direct regulation of social relations. Article 6 of the Civil Code of Ukraine states that in case of impossibility to use the analogy of the law for the regulation of civil relations, they are regulated in accordance with the general principles of civil law (analogy of law). [65]

One can also claim that, in addition to the above, the principles of civil law also fulfill the ideological function, that is, they are in some way shaping the worldview, since being proclaimed and named, they are actively involved in the formation of legal consciousness, establish certain values.

However, for the implementation of the principles of civil law it is not enough to solely proclaim them. Such principles are reflected and detailed in certain civil norms.

For instance, the researched principle of freedom of contract is not limited to the proclamation of it as the basis of civil law. The action of this principle is based on the fact that it is taken into account when creating the civil law rules, is their "leitmotif", since it is initial and more general for any specific legal requirements (even those relating to the exclusion from the principle, since for the formulation of the exception there should be a particular rule).

Thus, the considered legal principle is implemented indirectly, in the form of an abstract idea, which is specified in more specific rules and regulations. For the direct implementation of the principle of freedom of contract in real relations between subjects, there is a need for legal instruments that would allow this to be done not only as the main idea, but also as a real fact of legal life.

To implement such aim the legislator has formulated Article 627 of the Civil Code of Ukraine with reference to Article 6 of this act. According to Article 627 of the CCU, the parties are free in the conclusion of the contract, the choice of the counterparty and the definition of the terms of the contract.[66]

Article 6 of the Code somewhat details the elements of the principle of freedom of contract. Namely it stipulates that the parties have the right to conclude an agreement not provided for by civil law acts, but conforms the general principles of civil law. Also the parties have the right to regulate their relations which go beyond the regulation of acts of civil legislation in the contract. Finally, the parties to the contract may deviate from the provisions of acts of civil law and settle their relations at their own discretion.[67]

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[65] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[66] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[67] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

Analysis of the aforementioned norm indicates that in this issue it is nothing more than a subjective civil right – the right of subjects of civil law to freely enter into contracts. Subjective right is traditionally defined as a measure of a possible (authorized by law) conduct of an authorized person.[68] If we compare this definition with what follows from the rules on freedom of contract, then it turns out that the freedom to conclude a contract is also a measure of conduct. This indeed refers to the behavior allowed to the subjects of the law. Thus, the norm of Article 6 of the Civil Code of Ukraine legally establishes the subjective civil right of participants in civil legal relations to freely enter into contracts. In this way happens the implementation of the principle of freedom of contract, proclaimed in Article 3 of the CCU. By itself, the principle, or, according to the text of Article 3 of the Civil Code of Ukraine, the general principle of civil law, does not yet provide any specific subjective civil rights and does not confer subjective responsibilities. It appears only as an idea from which the legislator pushes in the formation of civil law.

As derives from the analyzed provisions of Article 6 and 627 of the CCU, there exist the following elements of the principle of freedom of contract in Ukraine:

- freedom to conclude a contract;
- freedom to choose the contract to conclude;
- freedom to determine the terms of the contract;
- freedom to choose a counteragent.

In scientific community there is a possibility to find a position where the authors distinguish only three elements of the principle of freedom of contract, while not allocating the freedom of choice of the counterparty Golubeva N. U. differentiates the freedom selects the contractor in the context of freedom to conclude an agreement.[69] Some authors separate from the freedom to choose the type of contract, the possibility of concluding a mixed contract, and therefore they call four elements of the considered principle.[70] There are also more elements of this principle.[71]

We believe that it is worthwhile to support such an approach that the legislator has covered in Article 6 of the Civil Code of Ukraine. The approach provides three elements, without giving consideration to the free choice of the counterparty. It is also worth mentioning the statement Golubeva N. U.: “An important element of the freedom of contract is the will and

[68] Див.: Москальчук К. М. Зміст суб'єктивного права особистості / К. М. Москальчук // Науковий вісник Ужгородського національного університету. Серія : Право. - 2015. - Вип. 30(1). - С. 88-91.

[69] Голубєва Н. Ю. Свобода договору як принцип цивільного права / Н. Ю. Голубєва // Актуальні проблеми держави і права. - 2009. - Вип. 51. - С. 66

[70] Белов В.А. Пределы профессиональной ответственности юриста (юридическое страхование) // Законодательство,- 1998,- №1- С.87; Шевченко Л., Гредин Г. Роль договора поставки в процессе формирования предпринимательских отношений // ХиП,- 1999,- № 8,- С.77.

[71] Див.: Завидов Б.Д. Договор: подготовка, заключение, изменение. - М., 1997. – С ,6

its external manifestation – expression. The existence of a contract indicates that both parties wanted to conclude an agreement and that their external expression of will corresponds to the internal will." [72]

The author in its statement claims that the expression of will serves as a sign of freedom of contract, and not one of the components or elements as we have been specified above.

As it is possible to mention, all elements of the principle of freedom of contract are related precisely to the conclusion of the contract. If we consider freedom of contract in the stages of its implementation, amending or termination, then in the first case there are strict principles of proper and real fulfillment. When changing or terminating a contract, it possible to refer to the freedom to conclude the contract by the parties. Therefore, there is a widespread view of understanding the freedom to conclude the contract in two aspects:[73]

- in a broad sense, it fully expresses the essence of the principle of freedom of contract. In this case, the freedom to choose a contract to enter into and the freedom to determine its terms may be regarded as elements of the freedom to conclude a contract;

- in the narrow sense, the freedom to conclude a contract, along with the freedom to choose a type of contract, and the freedom to determine its terms, is only one of the elements of the principle of freedom of contract. But even in this case the considered element occupies a prominent place.

We consider that the above findings allow us to proceed with defining the notion of the principle of freedom of contract.

There exist various definitions of the principle of freedom of contract in the scientific literature.

Tanaga A.N. argues that the principle of freedom of contract is a fundamental principle of civil law directly enshrined in the law, which establishes for the subjects of contractual relations the freedom to conclude an agreement, the freedom to choose the type of contract to be concluded, the freedom to determine its terms.[74] The same definition is provided by Klimova A. N.[75]

As we see, approaches to the definition of the principle of freedom of contract are based on its elements (content). In our opinion, to define the concept of this legal phenomenon it is necessary to define its traits.

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[72] Голубєва Н. Ю. Свобода договору як принцип цивільного права / Н. Ю. Голубєва // Актуальні проблеми держави і права. - 2009. - Вип. 51. - С. 67

[73] Танага А.Н. Принцип свободы договора в гражданском праве России: Дис. ... канд. юрид. наук: 12.00.03 / Танага Андрей Николаевич. – Краснодар, 2001 – С. 37

[74] Танага А.Н. Принцип свободы договора в гражданском праве России : Дис. ... канд. юрид. наук : 12.00.03 / Танага Андрей Николаевич. – Краснодар, 2001 – С. 37

[75] Климова А. Н. Принципы гражданского права: дисс. … канд. юрид. наук: 12.00.03 / А. Н. Климова. – М., 2005. – С. 100.

Relying on the conducted research of the legislative consolidation of the principle of freedom of the contract, the understanding of its essence and place in civil law and the law as a whole, in defining its content, we can state that the freedom of contract in the law of Ukraine possesses the following essential characteristics:

1. This is a purely branch civil law principle.

2. This is a principle-norm. This means it is a basic foundation directly enshrined in the law (Articles 3, 6 and 627 of the Civil Code).

3. The principle of freedom of contract establishes the possibility of a free decision of the issue of the conclusion of a contract, the choice of the type of contract, which is concluded and the content of the contract.

Taking into account the determined characteristics we can come up with the following definition of the principle of freedom of contract in Ukraine: this is a branch civil law principle enshrined in the Civil Code of Ukraine, which provides for the parties to the contract during the all stages of the process the freedom to conclude the contract, the freedom to choose the contract, the freedom to determine terms of the contract.

Summarizing, we note that the principle of freedom of the contract is the basic principle of civil law, which proclaims contractual freedom as one of the founding ideas of the development of economic relations and their legal regulation. Therefore, the objective freedom of the participants in the legal relationship in the contractual sphere asserts in the society. But for the existence of freedom in the objective sense as the property of relations between people, freedom must be inherent to any of the individuals involved in such relationships, that is, there should also be the subjective freedom of everyone. Hence to implement this principle for its practical utilization the Ukrainian legislator has clarified it in the subjective civil rights of the participants of the civil relations as enshrined in Article 6 and 627 of the CCU.

Reflection of the principle in Ukrainian legislation has a significant value for development of a law-governed state and civil society, affirmation of principle of dispositivity as a basic Civil law principle and functioning of contractual relations on the European level.

1.3. Comparison of general characteristics of the approach to the definition of the principle of freedom of contract in Europe and in Ukraine

It is generally known that Ukraine has taken a political course towards the EU integration. Among other things, it requires Ukraine to take steps towards harmonization and unification of national legislation with the EU law. At the International Scientific and Practical Conference “Evolution of Civil Legislation: Problems of Theory and Practice”, which took place

from 29 to 30 April 2004 at the Academy of Legal Sciences of Ukraine (Kharkiv), Professor Dovgert A.S. expressed rather an interesting idea, which, unfortunately, was not reflected in the collection of scientific works, published on the results of the conference.[76] In particular, he noted that harmonization and unification of Civil law of Ukraine with the EU legislation should begin with the harmonization of legal awareness. In our opinion, this is true. It is possible to develop a legislative act using the same terms. But the same law will be different understood and applied in Ukraine and the EU. Equally, this also applies to a legal category such as the principles of civil law. The latter are based on the concept of law, not the law.

When analyzing approaches to understanding the principle of freedom of contract in Europe and Ukraine, it should be emphasized that in both cases such an understanding is based on the philosophical category of "freedom".

The concept of "freedom" is multifaceted. It includes personal and political, social, economic, and legal aspects. In the explanatory dictionary of contemporary Ukrainian language freedom is defined as: 1) the absence of political and political oppression, intimidation and constraints; will; 2) staying not under arrest, not in custody, not in captivity; 3) life, existence without dependence on anyone, the ability to behave at own discretion; 4) the ability to operate without barriers and prohibitions in any industry; 5) the possibility of manifestation by the subject of his will in the conditions of awareness of the laws of the development of nature and society; 6) lightness, no difficulty in anything; 7) simplicity, relaxation in behavior; 8) time free from labor.[77]

From the above concepts we infer that a person is an integral part of society, and therefore it is impossible to speak exclusively about his/her personal freedom outside of interaction with society. After all, as it is known, the personal freedom of a particular individual is limited to the rights of another. The regulator of social relations, in particular the regulator of the limits of social freedom, is the law. Freedom cannot be real if it has no legal form and is not implemented through the mechanisms of legal regulation (subjective rights and legal obligations, permissions, prohibitions, obligations, legal incentives, legal restrictions). In other words, the right, known through freedom, becomes its measure as a result of a combination of legal constraints and legal incentives.[78]

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[76] Див.: Еволюція цивільного законодавства: Проблеми теорії і практики: Матеріали міжнарод. науково-практ. конф. 29–30 квітня 2004 року. – Харків-Київ: Академія правових наук України, НДІ приватного права і підприємництва, НДІ інтелектуальної власності, Національна юридична академія ім. Ярослава Мудрого, 2004. – 908 с.

[77] Великий тлумачний словник сучасної української мови (з дод. і допов.) / уклад. і голов. ред. В. Т. Бусел. – К.; Ірпінь: ВТФ "Перун", 2005. – С. 1300.

[78] Донченко О. П. Свобода як категорія права: автореф. дис. … канд. юрид. наук: 12.00.12 "Філософія права" / О. П. Донченко. – Одес. нац. юрид. академія. – О., 2010. — С. 10-11.

Characteristics of freedom, proposed by Benedict Spinoza, served as the foundation for further development of this issue. Spinoza came to the conclusion that human freedom is the unity of sense and will. Therefore, the dimensions of real freedom are determined by the degree of intelligent knowledge. Freedom and necessity are not opposite concepts. On the contrary, they are mutually exclusive. The opposite of necessity, according to Spinoza, is not freedom, but arbitrariness.[79]

Ideas about freedom, developed by Spinoza, have found continuation in the works of Immanuel Kant. The fundamental development of the latter in the study of the category of freedom, in particular, is that freedom is very closely linked with morality. Moral serves as a means of admission to freedom, and freedom is impossible without morality. These are mutually determined categories. According to Kant, freedom is independence from empirical causes. And this, again, is not arbitrariness.[80] We are free while we observe moral duty. Thus, was created one more important criterion of what is meant by freedom: morality.

Finally, one of the key points in determining the essence of freedom belongs to the Kant's categorical imperative: "do only according to such maxims, guided by which at the same time you can wish that it became an act of general legislation."[81]

Freedom forms the basis of the theory of natural law. According to this concept, the state of freedom of the individual is not provided by any public authority, but belongs to it from birth. The theory of natural law is characterized by the division into subordinate (natural) and state (civil) condition of society. Thomas Hobbes believed that in any of these conditions there exist fundamental natural laws. One of these laws states that "[…] if consent is given to other people […] to be satisfied with such a degree of freedom in relation to other people, which it allows other people in relation to himself/herself."[82] In this aspect, human freedom as a free disposal of its property, the freedom "to sell his work to the one who will give him the greatest pay", freedom of conscience, – said Voltaire.[83]

One of the ideological problems of political liberalism during the Great French Revolution was the restriction of individual freedom from arbitrariness by the state. This question is central in the study of the French political figure B. Konstan. The latter proposes the following definition of freedom: "[…] freedom is only that individuals have the right to do, and

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[79] Див.: Спиноза Б. Собрание сочинений / Б. Спиноза. - СПб.: Наука, 1999. — С. 171, 192, 283, 293, 462, 802.

[80] Див.: Малинова И.П. Философия права (от метафизики к герменевтике) / И.П. Малинова. – Екатеринбург: Изд-во Уральской государственной юридической академии, 1995. – С. 28

[81] Кант І. Твори: в 6 т.: Т. 4. – Ч. 1 / І. Кант. – М: Мысль, 1965. – С. 260.

[82] Гоббс Т. Левіафан, або Суть, будова і повноваження держави церковної та цивільної / Т. Гоббс; пер. з англ. Ростислава Димерця [та ін.]. – К.: Дух і літера, 2000. – С. 117.

[83] Вольтер. Кандід: філософські повісті // пер. з франц. / Вольтер; Інститут літератури ім. Т. Г. Шевченка Національної академії наук України. – Х.: Фоліо, 2011. – С. 368.

what society cannot interfere with." Konstan highlighted the following aspects of freedom: everyone's right to be bound only by laws, not to be subjected to any ill-treatment, arrest, or execution as a result of someone else's tyranny; the right of everyone to express their views, to choose their occupations, to dispose of their property, to move freely, not to report on the motives of their actions, to unite with other individuals or to discuss their interests and to send the worship, or to spend time, and to influence the implementation of the authority directly or through representations, petitions, requests that the authorities must take into account.[84]

The importance of freedom in every citizen's life is evidenced by the events in Ukraine in recent years. The Verkhovna Rada of Ukraine, acting on behalf of the Ukrainian people of all nationalities, adopted the Constitution – the Fundamental Law of Ukraine. It among other issues cares about ensuring the rights and freedoms of individual and decent living conditions. "With the aim of establishing in Ukraine the ideals of freedom and democracy, preserving and communicating objective and future generations of objective information about fateful events in Ukraine at the beginning of the XXI century, as well as paying due attention to the patriotism and courage of citizens who in autumn 2004 and in November, 2013 – February, 2014, became the defense of democratic values, rights and freedoms of individual and citizen, national interests of our state and its European choice",[85] there was established the Day of Prosperity and Freedom.

Further we shell follow the utilization of philosophical category of "freedom" in the theory of law. As the German lawyer Poohta writes, "The basic notion of law is freedom. The abstract notion of freedom is an opportunity to define yourself in any respect ... The human being is therefore the subject of law, that he has an opportunity of self-determination, that he has the will."[86]

One of the most significant works in the field of social philosophy and political economy, devoted to the problem of free will, which had a serious impact on legal science, became the work of Mill J.S "Freedom", 1859. Being concerned with the basic question of finding a principle that justifies state interference with a private initiative of the individual, the author saw justification only "if necessary to prevent from his side such actions that are harmful to other people." In his desire to reiterate the principle of inviolability of the private sphere, the author did not recognize any grounds for public interference for the sake of the interests of the person who is subject to the restriction, because "no one has the right to force the individual to

[84] Марченко М. Н. Теория государства и права: учеб. – 2-е изд., перераб. и доп. – М.: ТК Велби, Изд-во Проспект, 2004. – С. 272-275.

[85] Про День Гідності та Свободи: Указ Президента України № 872/2014 від 13 листопада 2014 року // Офіційний вісник України. – 2014. – № 43. – Ст. 1962

[86] Puchta G. Kursus der Institutionen. 5. Aufl. Leipzig, 1856, Bd. I, S. 4—9. Цит по: Пашуканис Е.Б. Общая теория права и марксизм. Издательство коммунистической академии, 1928. – С. 63.

do anything, or do not do anything, on that on the grounds that he would have been better on this or that he would have become happier, or finally, on the grounds that, in the opinion of other people, it would have been somewhat more noble and even commendable to act in a certain way."[87]

Thus, the concept of the free will of the person lies at the heart of the principle of freedom of contract. The philosophical understanding of freedom makes it possible to reveal in essence the principle of freedom of contract, because without the free will of each person, such a principle would be deprived of meaning.

Comparing the understanding of freedom of contract in Europe and Ukraine, let us draw attention to the recognition of the principle of freedom of contract in the first case, and in Ukraine as the basis of civil law. On the one hand, between these concepts one can put the sign of equality, however, in scientific circles there exists a discussion on this subject.

In the Academic textbook on Civil law of Ukraine under the general edition of Shevchenko Y. M. and in the textbook on Civil Law of Ukraine under the general edition of Borisova V.I, Spasybo-Fateieva I.V. and Iaritskiy V.L., the general foundations of Civil law are, without any reservations, identified with the principles of Civil law.[88] In this regard, it should be noted that one of the generally accepted meanings of the term "foundations" is the word "principle".[89] Although, there have been made recent attempts to differentiate these terms in the doctrine of Civil law. For example, Balandin V.P. points to the inappropriateness of the definition of the principle through the notion of foundation, since foundation is to a greater extent a "rule", whereas the principle is closer to the notion of "idea".[90] More clearly this idea is expressed by Aslanian N.P. The term foundation, in her opinion, is used to refer to the provisions of theory, doctrine, science, and certain phenomena of legal reality, and the term "principle" refers only to the terms of theory, doctrine, science.[91]

In our opinion, the given point of view does not correspond to reality. The actual facts indicate that in the field of jurisprudence, the term "principle" applies, in the sense of a certain

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[87] Див.: О свободе. Антология мировой либеральной мысли (I половины XX века) / М.А. Абрамов, М.М. Федорова. - М.: Прогресс-Традиция, 2000. - 696 с.

[88] Цивільне96 с. XX веїни: Академічнийем с. XXідручникс. XX века) / М.А. . ред. Я.М. Шевченко. – Т. 1: Загальна частина. – К.: Видавничий дім "Ін Юре", 2003. – С. 15.; Цивільне.; вничий дїн и: Підручниквничий дім "Ін Юре". редч В.І. Борисової, І.В, Спасибооничєвої, асибооничий ді. – К.: Юрінком Інтер. – 2004. – Т 1. – С1 21.

[89] Великий тлумачний словник сучасної української мови / Уклад. і голов. ред. В.Т. Бусел. – К.: Перун, 2002. – С. 325; Ожегов С.И., Шведова Н.Ю. Толковый словарь русского языка. – М.: Русский язык, 1992. – С. 409.;

[90] Баландин В.П. Принципы юридического процесса: Дисс. … канд. юрид. наук. – Самара, 1998. – С. 8.

[91] Асланян Н.П. Основные начала российского частного права: Дисс. … д-ра. юрид. наук: 12.00.03. – М., 2001. – С. 77.

phenomenon of legal reality. For instance, Article 5 of the Land Code of Ukraine[92] is called "Principles of Land Legislation". The term "principle" is used in the name of such documents as the Principles of International Commercial Agreements [93] and the Principles of European Contract Law[94], which, without doubts, are part of legal reality. It is no coincidence that in the vast majority of scientific and practical comments of the Civil Code of Ukraine, [95] in the scientific and practical comments of the Civil Procedural Code of Ukraine[96] and many other scientific works,[97] the general foundations of civil law are called the general principles of civil law. Perhaps from the point of view of linguistics, the terms "foundation" and "principle" should be distinguished. However, from the point of view of jurisprudence, the need for their differentiation to date seems questionable.

In our opinion, such a concept of understanding the essence of the basic (in Ukraine - the general) principles of civil law is unacceptable. It does not correspond to the current trends in the development of Civil law as a science, as a field of law and as a field of legislation. It does not take into account that:

- the notion of civil law is wider than the concept of civil legislation. To date, in Ukraine (Article 7 of the Civil Code of Ukraine), among the sources of civil law there is not only legislation, but also customs, in particular the customs of business turnover. It is most likely that within the customary law which there will also develop own principles in the future. In this case, it is not necessary to completely reduce the principles of civil law to the principles of civil legislation, which are directly formulated in the text of the codified normative legal act. In

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[92] Земельний кодекс України: Закон України, Кодекс від 25.10.2001 № 2768-III [Електронний ресурс]. — Режим доступу: http://zakon3.rada.gov.ua/laws/show/2768-14

[93] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

[94] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[95] Див.: Цивільний кодекс України: Науково-практичний коментар / За ред. розробників проекту Цивільного кодексу України. – К.: Істина, 2004. – 928 с.; Науково-практичний коментар Цивільного кодексу України: У 2-х т. / За ред. О.В. Дзери, Н.С. Кузнєцової, В.В. Луця. – К.: Юрінком Інтер, 2005. – Т. 1. – 832 с.; Науково-практичний коментар Цивільного кодексу України / За ред. В.М. Коссака. – К.: Істина, 2004. – 976 с. та ін.

[96] Цивільний процесуальний кодекс України: Науково-практичний коментар: У 2-х т. / За заг. ред. С.Я. Фурси. – К.: Видавець Фурса С.Я.: КНТ, 2006. – Т. 1. – С. 17.

[97] Беляневич no/lm/eu.cont договірногоевичno/lm/eu.co Цивільнимевич no/lm/eu.contract.princiУкраїни. – Режим доступу: http://www.ceo.kiev.ua/bel2.html.; lRLINKno/lm/ійногоLINKno/lm/eu.contract.princiУкра.parts.1.to.3.2ії щодо приведення o/lm/eu.contільногоенняо/lm/eu.cїни у відповідністьвгоенняо/lm/и завданнями кодифікації законодавства, що регулює відносиниавстваm/иіці. – Режимниавстваm/http://www.commerciallaw.com.ua/ukr/archive/files/167/.

Ukraine, this would directly contradict the provisions of Article 8 of the Constitution of Ukraine,[98] which prescribe the existence and functioning of the principle of the rule of law;

- the principles of civil legislation are heterogeneous in the form of external expression. In other words, they are not exhausted by those principles, which are formulated in the form of a list in the article of the codified normative legal act. Otherwise, it would be necessary to admit that all civil legislation is based on just eight principles;

- the principles of civil law are heterogeneous in scope of their application. Sverdlick G.O., in his specifically devoted to the principles of civil law study, draws attention to the fact that they can be branch, sub-branch, interinstitutional and institutional[99];

- the laws, as it is rightly notes by Koretsky A.D., can be assessed as lawful (those, which corresponding to the law) and unlawful (those which do not comply with the law, that is, they violate the generally accepted rights and freedoms, appear as undemocratic, unfair). The same can be said about the basic (general) principles of civil legislation. Unfortunately, the approach of Shchenkikova L.V. to the understanding of the essence of the basic principles of civil legislation, does not take this into consideration. According to her position, any fundamental ideas about the legal regulation of civil relations, which the legislator will lay in the basis for civil legislation, even the most unfair and inhumane, will be considered the principles of civil law. At the same time, they challenged and in result accepted as unlawful.[100]

It should also be noted that the EU Member States, to whom Ukraine seeks to approach, recognizes the existence of the principles of civil law not only at the legislative level, but also at the pre-legislative level. As an example, we can analyze the principle of good faith of the parties in relations when concluding an agreement in the civil law of Germany. Initially, this principle existed at the level of customary law and the jurisprudence developed by the courts. It has received the normative consolidation much later in the course of the reform of the Lawof obligations in Germany.[101]

It should also be emphasized that the European doctrine has recently developed a wider approach to understanding the law. As Bazedov U. notes, currently, when determining the very concept of law-making, anyone no longer comes from the fact that it must strictly comply with constitutional requirements. On the contrary, an actual or functional approach is increasingly

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[98] Конституція України із змінами, внесеними згідно з Законом від 08.12.2004 р. № 2222-IV // Відомості Верховної Ради України. – 2005. – № 2. – Ст. 44

[99] Свердлык Г.А. Принципы советского гражданского права. – Красноярск: Изд-во Красноярского университета, 1985. – С. 59.

[100] Щенникова Л.В. Принципы гражданского права: Достижения цивилистики и законодательный эффект // Цивилистические записки: Межвузовский сборник научных трудов: Вып. 2. – М.: Статут, 2002. – С. 41–59

[101] Кучер А.Н. Теория и практика преддоговорного этапа: юридический аспект. – М.: Статут, 2005. – С. 224.

being approved. This means that all norms and principles that, although not of their own nature, are recognized as legal, they are adhered to and applied as *de facto* obligatory.[102] Although today such an approach to understanding the law is premature for us, in the future we will have at least to take it into consideration and reckon with it.

Thus, since in Ukraine, the principle of the rule of law (Article 8 of the Constitution of Ukraine) was recognized at the constitutional level and Article 1 of the Constitution of Ukraine enshrines that Ukraine is a law-governed state; as the custom and moral principles of society were recognized as a source of Civil law (Article 7 and Part 1 of Article 203 of the Civil Code of Ukraine); since the desire to integrate into the EU was formulated and the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand, was concluded we must reconsider the traditional concept for the Ukrainian domestic civil law doctrine that the principles of civil law cannot exist at the pre-legislative level.

Consequently, summarizing the research on understanding the freedom of contract in Europe and Ukraine, we note that this principle has the same substantive philosophical basis. We believe that in Ukraine, following the example of the European Union, freedom of contract will be interpreted not as a basis of legislation, but as a principle of civil law that would extend its effect to the pre-legislative level.

[102] Баседов Ю. Возрождение процесса унификации права: Европейское договорное право и его элементы // Государство и право. – 2000. – № 2. – С. 69.

2. ELEMENTS OF THE PRINCIPLE OF FREEDOM OF CONTRACT IN EUROPE AND IN UKRAINE

2.1 Freedom to conclude the contract as an element of the principle of freedom in civil law in Europe and in Ukraine. Comparative Analysis

The conclusion of the contract is a process of reaching by the parties of the agreement, aimed at obtaining a certain legal result. Such an agreement is reached by proposing one side to conclude a contract (offer) and accepting such a proposal (acceptance) by the other party.

An offer institute according to PECL has certain peculiarities. Firstly, under clause (a) of item 1 of Article 2: 201 of Landau Principles it does not necessarily mean that the offer expresses the intention of the offer to conclude an agreement. It is enough that such an intention was meant. Secondly, items 2 and 3 of Article 2: 201 consider as an individual case when an offer is addressed to an uncertain stake of individuals. Thirdly, item 1 of Article 2: 202 regulates a special case of withdrawal of an offer (if an offer that provides for the possibility of its acceptance by concluding actions or silence) (see items 2 and 3 of Article 2: 205): such is considered withdrawn if the notice of recall falls to the addressee of the offer prior to the conclusion of the contract. This is either the receipt of a notification by the performer of the relevant action, or (if this follows from the practice of business relations between the parties to the agreement or the custom) – the beginning of the commission of this act. [103]

Concerning acceptance, then, firstly, the Landau Principles proceed from the assumption of the inadmissibility of the withdrawal (cancellation) of the sent acceptance. And, secondly, it is established that acceptance with changes or additions of non-essential character is nevertheless an acceptance (item 2 of Article 2: 208) .[104]

The aforementioned position is also followed by other acts, for instance, Principles of UNIDROIT and Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Item 4 of Article 11-4: 202 offer some clarification of the statement: the article reminds us of the priority of special rules (in particular, Book II-IV DCFR) over the general on the question of withdrawal of the offer. The general rules on irrevocable offer in item 3 of Article 11-4: 202 do not apply to contracts, of which - even already concluded

[103] Див.: The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[104] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

- the tenderer would have the right to refuse. The proposal to conclude such contracts, therefore, is always reciprocal and cannot be different.[105]

Let us now turn to the legislation of Ukraine. Part 2 of Article 638 of the CCU establishes that the contract is concluded by proposing one side to conclude an agreement (offer) and accept the offer (acceptance) by the other party. [106]

Article 2.1.1 of the Landau Principles reminds us of the possibility of concluding an agreement not only through the exchange of offer and acceptance, but also "... as a result of the behavior of the parties, which testifies the existence of the agreement." [107] Obviously, this does not mean concessional actions as they are considered acceptance of the offer (item 3 of Article 2.1.6 of the Principles). As such behavior we can view negotiations.

In contrast to the Principles of UNIDROIT, Landau Principles do not contain articles contradicting the methods of contracting each other in terms of their appearance (exchange of offer and acceptance, on the one hand, and negotiations -on the other). The most important issue of this act is the result of the application of any of these methods – a contract concluded. Accordingly, in order to conclude an agreement, any general manner that allows us to establish (a) the fact of concluding the agreement and (b) the intention to be bound by a certain obligation. The fact of the proper conclusion of a contract shall be applied to the agreements, the conditions of which "[…] (a) were determined by the parties sufficiently in order to allow the contract to be executed, or (b) may be determined in accordance with these Principles" (Clauses 1 and 2 of Article 2: 103 of the Principles of Landau). With regard to the intention to be bound by a certain obligation, then it is determined (pursuant to Article 2: 102 Principles) "[…] according to the statements or behavior of a particular party, based on their reasonable understanding by the other party." [108]

The CCU is silent on the negotiation during the process of concluding the contract. Such a legislative decision is both correct and wrong at the same time. This is due to the fact that negotiations can be considered in at least three aspects.

Firstly, negotiations are viewed as a process of exchange of information, during which the participants in civil relations determine only the general moments of a possible conclusion of

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[105] Белов, В. А. Международное торговое право и право вто в 2 т. Том 2. Акты международной частноправной унификации. Право ЕС. Право ВТО: учебник для бакалавриата и магистратуры / В.А. Белов. – М.: Издательство. Юрайт, 2015. – С. 632.

[106] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[107] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

[108] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

a contract in the future. In this sense, the position of Apoliy I. V. is fully justified by referring them to the stage of establishing contacts, which precedes the conclusion of the contract.[109]

Secondly, under the negotiation is understood the exchange of the offer and acceptance at the conclusion of the contract (that is, the classical procedure for the conclusion of the contract). So, Lidovets R.A. notes that the conclusion of a contract is always carried out in the course of negotiations, which in any case usually take place, at least in two stages – the offer and acceptance.[110]

Third, the negotiation is understood as a separate (different from the classical) procedure for concluding a contract.[111] It takes place in cases where the classical procedure for reaching the "offer-acceptance" agreement does not work. Mostly this applies to complex, especially multilateral, treaties.

Practice shows that the conclusion of contracts in the negotiation process as an independent contracting procedure mainly takes place when it comes to multilateral treaties, long-term contracts and contracts for significant amounts. As an example, negotiations can be made between representatives of NJSC Naftogaz Ukraine, Lviv Oblast State Administration and four private investors - Stake CJSC, Agrolit Ltd., and Bortex Enterprises Inc., Commonwealth Occidental Company LLC (ComOxy). These negotiations in their essence mediate the process of concluding an agreement on the construction of an oil refinery in Ukraine worth $ 1.5 billion. Such negotiations are accompanied by significant costs (development of investment projects, business trips, audits, etc.). It is not difficult to guess that the unfair behavior of one of the negotiators will inevitably lead to significant losses to other participants. At least, money and effort will be spent in vain.

In our opinion, this raises the issue of the need to establish restrictions on freedom of negotiation at the time of the conclusion of the agreement, which would be applicable not only in the case of unfair negotiations as an individual contracting procedure (when the offer and acceptance become fictitious), but also in the case of unfair negotiations as a classical procedures for concluding a contract.

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[109] Апопій І.В. Цивільно-правові аспекти договорів купівлі-продажу в оптовій торгівлі: Автореф. дис. … канд. юрид. наук: 12.00.03. – К., 2004. – С. 11.

[110] Лідовець Р.А. Змішані договори в цивільному праві України: Дис. … канд. юрид. наук: 12.00.03. – Острог, 2004. – С. 73.

[111] Кучер А.Н. Теория и практика преддоговорного этапа: юридический аспект. – М.: Статут, 2005. – С. 198-210.; Аномалії в цивільному праві України: Навч.-практ. посібник / Відп. ред. Р.А. Майданик. – К.: Юстініан, 2007. – С. 762-764.

Incidentally, the practice of the EU and the world practice of international trade has tuned to this way a long time ago. Articles 2.1.15 Principles of UNIDROIT[112] and Article 2: 301 of PECL[113] provide for restrictions on freedom of negotiating the form of a general legal obligation to maintain fairness in the negotiation process and responsibility for its failure to comply. Due to this, the legitimate interests of a bona fide person in the event of their violation in the process of negotiations during the conclusion of the contract receive appropriate legal protection.

Instead, in the positive civil law of Ukraine, the possibility of legal protection of the legitimate interests of a fair participant in negotiations at the time of the conclusion of the contract depends on whether the agreement was concluded as a result of unscrupulous negotiations or not. So, if the unfair behavior of the person during the negotiations led to the conclusion of the contract, then, depending on the nature of unfair behavior (contributing to a mistake, deception, use of violence, malicious agreement of the representative of one side with the second, the use of a hard circumstance), there should be applied, respectively, Articles 229-233 of the Civil Code of Ukraine. In such a case, the victim has the right to demand recognition of the concluded agreement as an invalid contract, as well as compensation for losses inflicted on him (Article 229), losses in double amount and moral damage (Articles 230 and 231), losses and moral harm (Articles 232 and 233) in court.[114]

At the same time, it must be taken into account that the unfair behavior of a person in the negotiation process may not lead to the conclusion of a contract. This is possible in the following cases:

- when the unfair behavior of the person in the negotiation process was aimed at concluding the contract, but for one or another reason, it failed to do so;

- when a person enters and negotiates without the intention to conclude an agreement or enter into negotiations with the intention to conclude it, and then loses interest in concluding the contract and, without notifying other participants of the negotiations, for one reason or another, continues the negotiations without a real intention to conclude the contract. This approach is often used to mislead competitors for the true intention of negotiating, especially when it comes to large investment projects.

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[112] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

[113] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002.

[114] Див.: Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

If in a result of negotiations the contract is not concluded, the loss incurred by the honest participant in the negotiations in the form of expenses related to participation in the negotiations is not subject to compensation by the unfair participant. This is due to the fact that the civil law of Ukraine does not provide for a general legal obligation of fair conduct in the negotiation process (general legal prohibition of unfair behavior in the negotiation process) and civil liability for its non-fulfillment (non-compliance).

It should be noted that the refusal to negotiate can be considered unfair conduct in the negotiation process only if the person not only interrupted the negotiations without sufficient grounds but interrupted them, despite the fact that another negotiator reasonably counted on the conclusion of the contract (especially, if such assurance of the conclusion of the contract was caused by actions of the person who subsequently refused the negotiations). [115] The fact that one participant in the negotiations developed another party's confidence in entering into an agreement can be testified by the statements made by the party during the negotiation process. As correctly noted by Schmittgoff K.M., statements made during the negotiations are not an offer or acceptance, unless these statements are incorporated into the contract. But we cannot say that they have no legal significance.[116] Primarily, their legal significance is that they can be taken into consideration by the court as evidence in resolving a dispute.

A typical example of unfair behavior in the negotiation process that does not lead to a contract is also the simultaneous negotiation of concluding the same contract with several potential counterparties. As rightly notes Kucher O.M., parallel negotiations at an early stage are permissible (in order to decide whom to negotiate with). But at a certain stage, when another negotiator has the impression that the contract will be concluded with him, parallel negotiations become unfair behavior. At this stage of the negotiations, the person must already choose a potential counterparty and concentrate on the development of the terms of the contract with him or to warn all potential counterparties so that they know that the negotiations are conducted simultaneously with several participants in civil relations (of course, the receipt of such a notice will affect the behavior of potential counteragents, as they will know that costs incurred by them during the negotiation process can be in vain).[117] This stage is the transition from negotiations on a possible conclusion of a contract to the conclusion of a contract through negotiations.

The lacuna of Ukrainian civil law in regulating unfair negotiations can be resolved in the following ways. The essence of the first option is to establish, at the level of positive civil

[115] Кучер А.Н. Теория и практика преддоговорного этапа: юридический аспект. – М.: Статут, 2005. – С. 242

[116] Шмиттгофф К.М. Экспорт: право и практика международной торговли: Пер. с англ. – М.: Юрид. лит., 1993. – С. 56.

[117] Кучер А.Н. Теория и практика преддоговорного этапа: юридический аспект. – М.: Статут, 2005. – С. 247.

law of Ukraine, legal prohibitions on certain manifestations of unfairness in the negotiation process (groundless refusal to negotiate, concurrent negotiation of concluding the same contract with several potential contractors, etc.) and civil liability for non-compliance with such duties. However, as pointed out by Gorieva V. O., such an approach to the establishment of restrictions on freedom of negotiation in the conclusion of the contract and civil liability for failure to do so will not provide comprehensive legal protection of the legitimate interests of fair negotiators from unfairness. If the legislator did not try, he will still not be able to describe in the law all possible manifestations of unfairness in the negotiation process when entering into an agreement.[118]

The essence of the second variant for solving this issue is to set at the level of positive civil law of Ukraine the general legal obligation of fair conduct in the negotiation process and civil liability for its non-fulfillment. Compared to the first, this approach to establishing a restriction of freedom of negotiation in concluding an agreement has several advantages: a) it allows covering all possible unfairness in the negotiation process. This ensures the most complete legal protection of the legitimate interests of bona fide negotiators from the manifestations of unscrupulousness; b) it corresponds to the Principles of UNIDROIT[119] and the PECL.[120]

In view of this, we believe that this approach to establishing restrictions on freedom of negotiation at the stage of conclusion of a contract is more appropriate. We are deeply convinced that such a civil law norm in the presence of a highly skilled judiciary will only have a positive social effect. A bright example is Germany. The civil law of this country for a long time has a legal norm, which provides a general legal obligation of fair behavior of the parties during the negotiations at the conclusion of the contract. [121] We consider that such experience could be borrowed.

Taking into account the fact that Ukraine has a National Program for the Adaptation of Ukrainian Legislation to the EU Legislation, approved by the Law of Ukraine of 18.03.2004,[122] when drafting the norms of national contract law, it is expedient to consider the relevant provisions of the PECL. According to Danish professor Ole Landau, one of the PECL

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[118] Горєв В.О. Свобода договору як загальна засада цивільного законодавства України : дис... канд. юрид. наук: 12.00.03 / Харківський національний ун-т внутрішніх справ. — Х., 2007. – С. 75

[119] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

[120] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[121] Комаров А.С. Ответственность в коммерческом обороте. – М.: Юрид. лит., 1991. – С. 47-49

[122] Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу: Закон України від 18.03.2004 р. № 1629-IV [Електронний ресурс]. — Режим доступу: http://zakon3.rada.gov.ua/laws/show/1629-15

developers, the main purpose of European principles is to serve as the first draft of the future European Civil Code.[123]

We consider that taking into account the provisions of the PECL in the design of the norms of national Contract law will gradually harmonize the national Contract law with the Contract law of the vast majority of EU member states.

In the light of the above, when drafting the norms of national contract law aimed at establishing a general legal obligation of fair conduct during the negotiations and responsibility for its failure, it is expedient to take Article 2: 301 "Unfair Negotiations" of the PECL. The article provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.

(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party."[124]

When analyzing the scope of Article 2:301 of PECL, we should pay attention to two significant details. Firstly, the provisions of Article 2: 301 of PECL are formulated in view of the fact that they provide for two separate procedures for the conclusion of a treaty – the classical procedure, where the conclusion of a contract occurs through the exchange of offer and acceptance., and the procedure for concluding a contract in the negotiation process, when the offer and acceptance may not even be available at all or they can be isolated from all the mass of messages exchanged between the negotiators. The main thing is that an agreement has been reached. Secondly, in part 2 of Article 2: 301 of the PECL it is referred to the responsibility not for damages in the traditional sense of domestic civil law (real losses and lost profits), but for losses caused to the other side by unfair negotiations.

According to Merezhko O.O., in Part 2 of Article 2: 301, under the losses caused to the other side by unfair negotiations, it is necessary to understand the costs incurred by it during the negotiations, as well as the lost opportunity to conclude this particular contract with a third party. At the same time, the concept of "loss" does not cover the income that would have been received by a person who was subjected to unfair negotiations if he had entered into an agreement with an unfair negotiating party. [125]

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[123] Lando O. Contract law in the EU: The Commission action plan and the Principles of European Contract Law. [Electronic resource]. – Access mode: http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/Lando/Response%2016%20May%2003.doc

[124] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[125] Мережко А.А. Договор в частном праве: Монография. – К.: ЮСТИНИАН, 2003. – С. 128-129

Such an approach to understanding the losses incurred by a person in result of unfair negotiations seems to us to be quite pragmatic. Indeed, as once rightly noted Godem E., the person making the claim for damages cannot claim the equivalent of execution, because the unspent contract does not give him the right to perform. All that may be required according to the right to compensation is that the attempt to conclude a contract was not a source of damages for him.[126]

Taking into account all that was said above, we deem it possible to propose the following version of the legal norm aimed at establishing a general legal obligation of fair conduct in the negotiation process when entering into an agreement and responsibility for its non-fulfillment:

Unfair negotiations at the conclusion of the contract

1. The parties are free to negotiate at the time of conclusion of the contract and shall not be liable for failure to reach an agreement.

2. The parties are obligated to conduct negotiations in good faith.

3. The party which conducts or interrupts the negotiations abusively is liable for losses incurred by the other party.

4. It is unfair, in particular, the entry of the parties into the negotiations or their continuation in the absence of the intention to conclude an agreement with the other party.

Note: under the notion of losses used in part 3 of this article, it is necessary to understand the costs incurred by the party during the negotiations, as well as the lost opportunity to conclude a similar contract with a third person. The concept of loss does not cover the income that a person could have received from an unsuccessful negotiator if he had entered into an agreement with an unscrupulous negotiating party.

The text of this legal norm should be placed in Chapter 53 of the Civil Code of Ukraine before Article 638 of the Civil Code of Ukraine. This legal norm, subject to its inclusion in the CCU, may be applied not only in the case of unfair negotiations as a classical procedure for concluding an agreement “offer-acceptance”, but also in the case of unfair negotiations used as an independent procedure for the conclusion of an agreement. At the same time, it should be noted that it should apply to the legal protection of the legitimate interests of fair negotiators only in cases where unfair negotiations did not lead to the conclusion of the contract. If, however, unfair negotiations led to the conclusion of a contract, in order to protect the legitimate interests of fair parties, negotiations should be applied, respectively, Articles 229-233 of the Civil Code of Ukraine.

[126] Годэмэ Е. Общая теория обязательств: Пер. с франц. И.Б. Новицкого. – М.: Юридическое издательство Министерства юстиции СССР, 1948. – С. 205-206.

2.2 Freedom to choose with whom to enter into the contract as an element of the principle of freedom in civil law in Europe and in Ukraine. Comparative Analysis

Under the conditions market economy, the value of the freedom to choose a counterparty under a contract cannot be overestimated. When selecting a specific contractor under the contract, the participant in civil relations actually chooses the advantages that it has in comparison with other possible contractors. Such advantages can be reliable business reputation, many years of experience in the relevant field of activity, more favorable terms of the contract, convenient geographical location, etc. This ensures the most complete satisfaction of the private interests of participants in civil relations.

As well as free expression of the will of a person for the conclusion of the contract, the freedom of choice of the contractor under the contract is a clarifying manifestation of the freedom to conclude an agreement.

Investigating the principle of freedom of contract in previous Chapter, we have indicated that in European law, the freedom to choose a counteragent is not directly allocated as an element of the principle of freedom of contract. But it follows from the freedom to conclude an agreement.

However, certain provisions of EU law characterize one way or another freedom to choose the counterparty. For instance, Directive 2004/113/EC 13 December 2004 *implementing the principle of equal treatment between men and women in the access to and supply of goods and services*[127] takes the precaution of stating in its Article 3 Clause 2 that only a discriminatory choice, based on the sex of the other party, can threaten the rule according to which "*all individuals enjoy the* freedom to choose a contractual partner for a transaction" *even where it is for* "subjective reasons".

The main aspect in describing the freedom to choose counterparty in European law is the restrictions imposed by the effect of anti-discrimination provisions. For example, Article 141 of the Treaty on European Union (currently Article 157 TFEU) prohibits gender discrimination and ensures that men and women receive are paid equally pay for equal or equivalent work.[128]

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[127] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [Electronic resource]. – Access mode: http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF

[128] Договір про функціонування Європейського Союзу [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/994_b06

Also, Article 21 (1) of the EU Charter of Fundamental Rights provides: "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." [129] More details on the restriction of the freedom of contract principle will be investigated in the next section.

It is worth noting that where in a market economy, individuals are restricted in one way or another in access to goods or services, fair competition must play a central role by restoring equality and punishing those responsible for discrimination. This is mainly done by giving consumers more choice, as the competition mechanisms create favorable conditions for a wider range of suppliers to serve discriminatory customers. Experience shows that these are not empty words. Although it may take some time for this, the winner will be the society as a whole. But this will not happen if state regulation binds everyone to equal opportunities.[130]

Direct application of Article 21 of Charter of Fundamental Rights to private relations, on the contrary, will have the consequence that many public and corporate organizations will find that they are obliged to provide legal justification that is incompatible with the principles of a free and liberal society. Interference with the freedom to choose a contractual partner has already reached a critical level as a result of the norms of EU law in force.[131]

Now we turn to considering the freedom to choose a counteragent in the sense of it as a right in Ukraine. In part 1 of Article 627 of the Civil Code of Ukraine it is states that the parties are free to choose the counterparty taking into account the requirements of the CCU, other acts of civil law, customs of business, the requirements of reasonableness and justice.[132] As we see, at the level of positive civil law of Ukraine regarding freedom of choice of a counteragent under the contract, a general legal permission has been established. This means that according to the general rule a participant in civil relations at the conclusion of a civil contract is allowed to choose the contractor at his own discretion. The specified general legal authority corresponds *both to specific legal obligations and specific legal prohibitions. They represent a restriction on the freedom of choice of the contractor under the contract.*

Iershov U. L. rightly notes that the freedom to choose a contractor under the contract is closely linked with the freedom to enter into contractual relations and the inadmissibility of

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[129] Charter of Fundamental Rights of the European Union 2012/C 326/02 [Electronic resource]. – Access mode: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[130] Див.: StormeM.E. Freedom of contract: Mandatory and not Mandatory Rules in European Contract Law // Tydskrif vir die Suid-Afrikaanse Reg, Journal of South -African Law. 2008. – P. 179

[131] Див.: Basedow J. Die Europäische Union zwischen Marktfreiheit und Überregulierung – Das Schicksaal von Vertragsfreiheit. In Bitburger Gespräche (pp. 85-104). München: C.H. Beck [Electronic resource]. – Access mode: http://hdl.handle.net/11858/00-001M-0000-0019-C978-3

[132] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

coercion to conclude an agreement, since coercion is not only in the decision outside the will of the subject of the conclusion of the contract, but also the question of with whom should such a contract be concluded. It is definitely impossible to compel to conclude a contract with an abstract subject.[133] Therefore, it is quite logical that the overwhelming majority of restrictions on the free expression of the person to conclude an agreement are also restrictions on the freedom of choice of the contractor under the contract.

First and foremost, they include the obligation stipulated in Article 633 of the Civil Code of Ukraine. As the legal analysis of the content of Article 633 of the Civil Code of Ukraine evidences, that the norms of civil law on a public contract of an entrepreneur, who undertakes the obligation to sell goods, perform work or render services to anyone who applies to him, is limited not only to the free expression of the will to enter into a contract, but also to the choice of the counterparty under the contract. Part 3 of Article 633 of the Civil Code of Ukraine expressly states that an entrepreneur does not have the right to favor one consumer to another with a view to concluding a public contract, unless otherwise provided by law. In essence, this means that the entrepreneur is obliged to enter into a public contract with each consumer.

To date, the general definition of concept of consumer is contained in the Law of Ukraine "On Amendments to the Law of Ukraine "On Protection of Consumer Rights."[134] In accordance with paragraph 17 of Part 1 of Article 1 of this Law, the consumer is an individual who buys, orders, uses or intends to purchase or order products for personal needs that are not directly related to the entrepreneurial activity or the performance of the duties of a hired employee.

However, this definition is not an appropriate one to apply for the interpretation of the provisions of Article 633 of the CCU. Otherwise, a consumer in a public contract will be considered to be solely an individual who buys, orders, uses or intends to purchase or order products for personal needs that are not directly related to the entrepreneurial activity or the performance of the duties of the employee. Meanwhile, this is not in line with a number of provisions of the civil legislation of Ukraine. First of all, we are talking about the provisions of the CCU on those contracts, which are directly named "public" (part 1 of Article 698, part 1 of Article 787, part 1 of Article 915, part 1 of Article 936, part 1 of Article 957, part 1 of Article 977 of the Civil Code of Ukraine). Legal analysis of these provisions gives grounds to assert that

[133] Ершов Ю.Л. Принцип свободы договора и его реализация в гражданском праве Российской Федерации: Дисс. … канд. юрид. наук: 12.00.03. – Екатеринбург, 2001. – С. 91.

[134] Про внесення змін до деяких законів України щодо усунення адміністративних бар'єрів для експорту послуг: Закон України від 03.11.2016 р. № 1724-VIII [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/1724-19

the consumer in a public contract may be not only physical, but also a legal entity, including the subjects of entrepreneurship.

It is also important to understand that the approach by which exclusively an individual is recognized as a consumer in a public contract is logical in terms of modern civil law doctrine. Recently, in literature, it is often stated that the purpose of norms of civil law on public contract is to protect the consumer as an economically weaker party in a contract with the participation of a professional entrepreneur.[135] Obviously, it is not necessary to prove that an economically weaker party in a contract with the participation of a professional entrepreneur can be not only an individual.

In general, in the civil law doctrine, there were mixed points of view about the range of participants in civil relations covered by the notion of the consumer as a party to a public contract. For example, Oliukha V.G. believes that the consumer in a public contract is any natural or legal person who applies for the purchase of goods, works, services for any purpose and is not a professional in this field of activity.[136] Kalashnikova G.O. argues that the legal structure of a public contract is mainly intended for the end consumer, i.e. a natural or legal person, including a business entity that buys, uses or intends to purchase goods, works or services for purposes not connected with the exercise of entrepreneurial activity. This scholar points out that as an exception to the general rule (when the commercial organization holding the monopoly (dominant) position) consumer in a public contract may be entrepreneur who buys, uses or intends to purchase goods, works or services for use in business.[137] Kucher O. M. is generally convinced that a consumer in a public contract can be considered only a natural or legal person who intends to order or purchase or orders, buys or uses goods (works, services) solely for personal, family, domestic or other needs, no how connected with the implementation of entrepreneurial activity.[138]

It is hardly possible to accept the given definitions of the concept of a consumer as a party to a public contract, because they do not quite adequately reflect the essence of the civil law of Ukraine. Thus, the legal analysis of the legislative provisions on the parties to the contracts directly named in the law (part 1, Article 698, part 1 of Article 787, part 1 of Article 865, part 1 of Article 915, part 1 of Article 936 , part 1 of Article 957, part 1 of Article 977, part

[135] Ларина Т.В. Особенности правового регулирования публичного договора в России // Юрист. – 2004. – № 4. – С. 18–19.; Мищенко Е.А. Соотношение публичного договора и публичной оферты // Юрист. – 2002. – № 3. – С. 15–16.

[136] Олюха В.Г. Суб'єкти публічного договору // Підприємництво, господарство і право. – 2004. – № 8. – С. 90.

[137] Калашникова Г.А. Публичный договор: Дисс. … канд. юрид. наук: 12.00.03. – Краснодар, 2002. – С. 57.

[138] Кучер А.Н. Теория и практика преддоговорного этапа: юридический аспект. – М.: Статут, 2005.– С. 306.

2 of Article 1058 of the Civil Code of Ukraine) shows that in the civil law of Ukraine, the circle of participants in civil relations, which is covered by the notion of the consumer as a party to a public contract, varies. It depends on the type of public contract and the type of business that it mediates.

Thus, a consumer in a public contract may not always be, for example, a natural or legal person. In some public contracts, the consumer can be solely a legal entity, in others only an individual.

Taking into account the above, the circle of participants in civil relations, which according to the law are considered by the consumer in a concrete public contract, can be established in one of the following ways:

- if the contract is directly named in the law as the public one, it is necessary to analyze the provisions of the legislation on this agreement and find out its subjective composition;

- if the contract is not explicitly named in the law as the public one, then it is necessary to analyze the provisions of the legislation on business activities that it is mediated and to find out which members of civil relations are recognized as the consumers in the field of such entrepreneurial activity.[139]

From the abovementioned provisions it also follows that a participant in civil relations is recognized as a consumer for the purpose of Article 633 of the Civil Code of Ukraine from the moment when he turns to the entrepreneur for goods, works or services. At this moment, there emerges a relative legal relationship between him and the entrepreneur regarding the conclusion of a public contract. It is at this moment that he personifies himself as a consumer, with whom an entrepreneur is obliged to conclude a public contract. Therefore, we agree with Potapova O.O. that the legal structure of a public contract is modeled on the type of absolute legal relationship: in a public contract, the obligated party is always clearly represented. Form this obliged party an undefined circle of persons are entitled to demand the implementation of the foreseen actions.[140]

Taking into account all the above it is expedient to supplement Article 633 of the Civil Code of Ukraine with the following definition of the term “consumer”: Consumer is any participant in civil relations, who applies or intends to apply to the entrepreneur for goods, works or services, except from cases established by law.

In the civil law of Ukraine, the freedom to choose a counteragent under the contract is also limited in the case of establishing a preferential right to enter into a contract. This is rightly

[139] Горєв В.О. Свобода договору як загальна засада цивільного законодавства України : дис... канд. юрид. наук: 12.00.03 / Харківський національний ун-т внутрішніх справ. — Х., 2007. – С. 109.

[140] Потапова О.А. Принципы гражданского права: Дисс. … канд. юрид. наук: 12.00.03. – Ульяновск, 2002. – С. 132.

pointed out in many scientific works, which are devoted to the study of freedom of contract in civil law.[141]

When the law gives one person (persons) an advantage in concluding a particular contract, then there must necessarily be a person (persons) whose interests are infringed in order to ensure the possibility of realizing such an advantage. Indeed, in this regard we will adhere to Chegovadze L.O., that the legal possibilities received by the subject as a set of behavioral options established by the rules of objective law, can only be realized if the implementation of one of the options chosen at the discretion of the authorized person is ensured by an indication of the appropriate required behavior of the obligated person (persons).[142] Therefore, the prevailing right to conclude a contract of one person always corresponds to the legal obligation of another person. For the authorized person, it acts as a legal mean to ensure the possibility of implementing its prerogative right to conclude an agreement, and for the obligated person – as a restriction of the freedom in the choice of the contractor under the contract.

The current Ukrainian legislation provides for a wide range of prevailing rights to conclude an agreement: the prevailing right of members of a limited liability company to acquire a share (its part) in the authorized capital of a company in case of its alienation by another participant (item 2, part 2, Article 147 of the Civil Code of Ukraine); the pre-emptive right of members of a production cooperative to acquire a share (its part) in case of its alienation by another member of the cooperative (clause 2 of Part 3 of Article 166 of the Civil Code of Ukraine); the prevailing right of the co-owner to acquire a share in the right of joint partial ownership in case of its alienation (Article 362 of the Civil Code of Ukraine); the pre-emptive right of the owner of the land plot to acquire the right to use it (chapters. 2, 3, Article 411 of the Civil Code of Ukraine); the prevailing right of the employer, who properly performs his duties under the contract of employment, for the conclusion of a contract of employment for a new term (item 1 Part 1 of Article 777 of the Civil Code of Ukraine); pre-emptive right of the employer to purchase the subject of the contract of employment (part 2 of Article 777 of the Civil Code of Ukraine); the prevailing right of the tenant to acquire the subject of the contract of renting housing in case of its alienation (Part 2 of Article 822 of the Civil Code of Ukraine); the prevailing right of the founder of the competition to conclude a contract with the winner on the use of the subject of the competition (part 3 of Article 1156 of the Civil Code of Ukraine).[143]

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[141] Ершов Ю.Л. Принцип свободы договора и его реализация в гражданском праве Российской Федерации: Дисс. … канд. юрид. наук: 12.00.03. – Екатеринбург, 2001. – С. 92; Танага А.Н. Принцип свободы договора в гражданском праве России: Дисс. … канд. юрид. наук: 12.00.03. – Краснодар, 2001. – С. 81.

[142] Чеговадзе Л.А. Структура и состояние гражданского правоотношения. – М.: Статут, 2004. – С. 111.

[143] Див.: Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс].

Formal analysis of the provisions of paragraph 2 of Part 2 of Article 147, part 2 of Article 362, part 3 of Article 411 of the Civil Code of Ukraine makes it possible to conclude that the preemptive right to conclude an agreement and its corresponding legal obligation arise when a participant in civil relations has expressed an intention to conclude an agreement on which the preferential right of another participant has been established for his conclusion. However, the deadline for the implementation of the prerogative right to conclude an agreement begins to emerge not from the moment of its occurrence, but from the moment when the participant of civil relations granted by such right received from the obligated subject the notice of intention to conclude the relevant contract.

If the person fails to realize the prevailing right to conclude an agreement within the established time period, this right expires. Accordingly, the legal obligation that corresponds to it (i.e., the restriction of the freedom of choice of the counterparty under the contract) is also terminated. After that, the person has the right to choose the contractor on the contract at his own discretion. That is why it is very important to precisely establish the preliminaries of realization of the prevailing rights to conclude an agreement.

In civil law doctrine it is often noted that prevailing rights can only be established by law.[144] However, in our opinion, this point of view regarding the civil law of Ukraine is not fulfilled.

As it is known, the civil law of Ukraine has a general regime of legal regulation of civil relations: "All that is not directly prohibited by law is allowed." At the same time, any of the acts of civil legislation of Ukraine contains a legal prohibition on the establishment of overriding rights in general and overriding rights to conclude an agreement, in particular, at the contract level. According to items 4.1 and 4.2 of the decision of the Constitutional Court of Ukraine in the case concerning the rights of shareholders of a closed joint-stock company dated 11.05.2005 № 4-rp / 2005[145] it was concluded that before the adoption of the Civil Code of Ukraine, part 3 of Article 81 of which defined the pre-emptive right of the shareholders of the joint-stock company to purchase shares sold by other shareholders of the company, such shareholders could establish the right of shareholders in the constituent documents. According to the judges of the Constitutional Court of Ukraine, this did not contradict the legislation, because the establishment of the right was carried out by concluding a constituent agreement, which is a kind of civil law contract.

– Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[144] Белов В.А. Основные учения о преимущественных правах // Вестник МГУ. Серия 11. Право. – 2001. – № 6. – С. 54.; Гражданское право: Учебник: В 2-х т. / Отв. ред. проф. Е.А. Суханов. – Т. 1. – Изд. 2-е, перераб. и доп. – М.: Изд-во БЕК, 1998. – С. 103-104

[145] Рішення Конституційного суду України (справа про права акціонерів ЗАТ) від 11.05.2005 р. № 4-рп/2005 // Офіційний вісник України. – 2005. – № 21. – Ст. 1135.

Confirmation that the preemptive right to conclude an agreement may be established not only by law but also by contract is also found in the Land Code of Ukraine of 25.10.2001[146]. In particular, in part 1 of Article 111 of this Code it is directly indicated that the pre-emptive right to purchase a land plot in case of sale thereof may be established by agreement.

Thus, it can be argued that the restriction of the freedom of choice of a counteragent under an agreement, which occurs in the case of establishing a preferential right to enter into an agreement, may follow both from the law and from the contract. In other words, it can be normative or contractual.

In general, the above provisions of the current legislation of Ukraine and the doctrine of civil law allow us to conclude that the provisions of the acts of civil legislation of Ukraine on preferential rights to conclude an agreement are far from perfect. In view of this, we propose to supplement Chapter 53 of the Civil Code of Ukraine with the general provisions on preferential rights to enter into an agreement. It is expedient determine the time of the emergence of prevailing rights to conclude an agreement, the general preliminaries of their implementation depending on the type of objects of civil rights, the general grounds for termination of such rights, the procedure for notifying the authorized person about the possibility of exercising its prerogative right to conclude an agreement, indicating the possibility of establishing such rights by contract.

Considering the restrictions of the freedom of choice of the contractor under the contract, it should be noted that the freedom of choice of the contractor under the contract could exist only in conditions of fair competition. Unfair competition leads to the unlawful "narrowing" of the freedom of choice of the contractor under the contract. What is more, the lack of competition in general makes the choice of the contractor under the contract objectively impossible.

From the above, it follows that in a market economy in order to provide participants of civil relations a real opportunity to choose a counteragent under the contract, effective antimonopoly-competitive legislation and the organization of control over its compliance is of great importance. Therefore, the wording of Article 627 of the Civil Code of Ukraine is not entirely correct. The restriction of freedom of contract in general and the freedom to choose the counterparty in particular are established by indicating the need to take into account only the requirements of acts of civil law. It is correctly pointed by Berveno S. M. that in this case it is not taken into account that contractual relations can be regulated as acts of civil law, as well as other acts of the legislation (family, land, etc.). We should agree with the scholars that Article

[146] Земельний кодекс України: Закон України, Кодекс від 25.10.2001 № 2768-III [Електронний ресурс]. — Режим доступу: http://zakon3.rada.gov.ua/laws/show/2768-14

627 of the Civil Code of Ukraine needs to be amended accordingly. Namely, it is necessary to replace the phrase "other acts of civil law" with the phrase "other acts of legislation,"[147] which will also cover the provisions of European law on discrimination.

2.3 Freedom to choose the form and content of the contract as an element of the principle of freedom in Europe and in Ukraine. Comparative Analysis

Referring to the freedom to define the terms of the contract, it should be noted that it, as an element of the principle of freedom of contract, is established by all the main acts of the EU's Contractual law. For instance, in Article 1.1 of UNIDROIT Principles it is indicated that the parties are free to determine the content of the contract. The same provision also includes the EUPP. In Article 1.202 "Freedom of Contract" states that "[…] Parties are free […] to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles."[148]

Article 2 Clause 1 of the European Code of Contract Preliminary Draft, called "Contractual autonomy", states that "[…] the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy, as established in this Code, Community law or the national laws of the Member States of the European Union." If the agreement is contrary to public policy, morals, a mandatory law etc. it is sanctioned by holding the contract is void. It is also specifically envisaged that "the content of the contract must be [...] lawful [...]" It is lawful "when it is not contrary to mandatory rules of this Code, to Community law or national law, or to public policy or morals."[149]

We believe that it is first necessary to characterize the requirements regarding the form of the contract as its condition. For the conclusion of a contract in European law, no written or any other form is required. The fact of signing a contract can be confirmed by any means, including testimony.[150] Item 1.2 of the UNIDROIT Principles includes a similar approach.

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[147] Бервено С.М. Проблеми договірного права України: Монографія. – К.: Юрінком Інтер, 2006. – С. 121-122.

[148] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

[149] Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) [Electronic resource]. – Access mode: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf

[150] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Електронний ресурс]. - Режим доступу : http://www. jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

Thus, the freedom of the parties to choose a form of contract, as a general rule, is not limited by imperative norms of European law, while the Ukrainian legislation sets such limits, in particular, in Articles 208-210 of the Civil Code of Ukraine.[151] Article 208 of the Civil Code of Ukraine establishes cases when it is mandatory to comply with the written form of the transaction, and part 1 of Article 218 provides for negative legal consequences for parties to the contract in case of non-compliance with such form, if it is directly established by law: "The denial by one of the parties of the fact of commission or of contesting certain parts of it may be proved by written evidence, means of audio, video recording and other evidence. A court decision cannot be based on testimony of witnesses."[152] Moreover, this norm, based on the jurisprudence of the courts, is interpreted as follows: "It is not possible to restore to the evidence of witnesses to deny the fact of committing an action or to contest certain parts of it, but also the fact of its commission, as well as the fulfillment of obligations arising from the agreement." (paragraph 12 of the Resolution of the Plenum of the Supreme Court of Ukraine "On the judicial practice of reviewing civil cases for the recognition of contracts invalid", dated November 6, 2009, No. 9).[153] Article 209 of the Civil Code of Ukraine provides for the duty of notarization on a contract in cases established by law. At the same time Article 210 still maintains the current provisions on state registration of contracts.[154]

A vivid example of freedom in choosing a form of contract in the EU law and generally in international treaty law is the UN Convention on Contracts for the International Sale of Goods of April 11, 1980. Article 11 of the Convention contains a provision that is analogous to the above-mentioned norm of the Principles on the form of the contract: "It is not required that the contract of sale be concluded or confirmed in writing or subject to another form requirement. It may be proved by any means, including testimony."[155] The revenue may be proved by any means, including testimony." Ukraine, having ratified this Convention, has issued a reservation on this provision. Thus, in the Regulations on the Form of Foreign Economic Agreements (Contracts) dated 06.09.2001 No. 201, approved by the Order of the Ministry of Economy and European Integration, enshrines that such agreement (contract) is concluded in writing (paragraph 4). Moreover, the contract itself is defined as a materially executed agreement

[151] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[152] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[153] Про судову практику розгляду цивільних справ про визнання правочинів недійсними: Постанова Пленуму Верховного суду України від 06.11.2009 р. N° 9 [Електронний ресурс]. - Режим доступу : http://zakon5.rada.gov.ua/laws/show/

[154] Цивільний кодекс України від 16.01.2003 р. №435-IV// Відомості Верховної Ради України (ВВР). -2003. - №40-44. - Ст. 356

[155] Конвенція ООН про договори міжнародної купівлі-продажутоварів від 11.04.1980 р. [Електронний ресурс]. - Режим доступу: http://zakon2.rada.gov.ua/laws/show/995_003.

(paragraph 2).[156] Until recently, such an approach was also enshrined in the Law of Ukraine "On Foreign Economic Activity." [157] However, the Law of Ukraine of 03.11.2016 "On the introduction of amendments to some laws of Ukraine regarding the elimination of administrative barriers to the export of services"[158] has amended its provisions. Thus, in part 2 of Article 6 of the Law, along with the written form of a foreign-economic agreement, it is now provided an electronic form, which, however, is equated by the Civil Code of Ukraine to the written one (Article 205[159]). In addition, in the case of the export of services (other than transport), a foreign economic agreement (contract) may be concluded either by accepting a public offer for an agreement (offer) or by exchange of electronic communications, or in another way, in particular by invoicing, also in an electronic form, for the services rendered.[160] Such a legislative tendency definitely appears to be positive in the process of harmonizing Ukrainian legislation with EU law. However, although these changes are an attempt to somewhat mitigate the requirements regarding the form of foreign economic agreements, the remaining imperative nature of the relevant legal norms and the priority of the written form of the contract remain.

The principle of freedom of a form of the contract in the EU law can be observed in the case of a change or termination of the contract. So, proceeding from the contents of Article 2: 106 of the Principles, the provisions of a written agreement, which requires that any changes or termination of the agreement by agreement of the parties be made in writing, is a pretext that such a change or termination of a contract is not legal force, unless they are done in writing.[161] It follows from this a reverse connection: if the written agreement lacks such a provision, the parties to the agreement can change or terminate it orally. Unlike the European law, Article 654 of the Civil Code of Ukraine establishes the general rule that the amendment or termination of an agreement is performed in the same form as a contract, which is changed or terminated.[162]

Now we will proceed with considering the other contractual terms. The freedom to determine the content of the contract implies for example the freedom to determine the

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[156] Про затвердження Положення про форму зовнішньоекономічних договорів (контрактів): Наказ Міністерства економіки та з питань європейської інтеграції від 06.09.2001 р. № 201 [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/z0833-01

[157] Про зовнішньоекономічну діяльність: Закон України від 16.04.1991 р. № 959-XII [Електронний ресурс]. — Режим доступу: http://zakon.rada.gov.ua/go/959-12

[158] Про внесення змін до деяких законів України щодо усунення адміністративних бар'єрів для експорту послуг: Закон України від 03.11.2016 р. № 1724-VIII [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/1724-19

[159] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[160] Про зовнішньоекономічну діяльність: Закон України від 16.04.1991 р. № 959-XII [Електронний ресурс]. — Режим доступу: http://zakon.rada.gov.ua/go/959-12

[161] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Електронний ресурс]. - Режим доступу : http://www. jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/

[162] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

obligations' place of execution (Article 7:101 (1) PECL), the contract's date of execution (Article 7:102 PECL) or the currency of payment (Article 7:108 PECL). Equally, freedom of contract implies that of simulation (Article 6:103 PECL).[163] Article 627 of the Civil Code of Ukraine states that the parties are free to determine the terms of the contract, that is, according to the general rule, they determine at their own discretion the terms of the contract and its content.[164] However, at the same time, they should take into account the requirements of the CCU, other acts of civil legislation, customs of business turnover, reasonableness and justice. In other words, the freedom to determine the terms of the contract also has certain limitations established by law.

In accordance with item 1 of part 1 of Article 638 of the Civil Code of Ukraine, the contract is concluded if the parties have in the proper form reached the agreement concerning all the essential conditions. If the parties have not attained at least one essential condition of the contract, such agreement is considered not concluded.[165] It follows from the above stated that the emergence of a contractual obligation directly depends on the parties agreeing on all essential terms of the contract. On the basis of this, it can be argued that the requirement established by law for compulsory harmonization of the essential conditions when concluding an agreement is a restriction on the freedom to determine the terms of the contract. Moreover, since the application of part 1 of Article 638 of the Civil Code of Ukraine extends to any civil law contracts, regardless of the subject structure, the way of conclusion, etc., there is every reason to consider such a duty the most extensive limitation of the freedom to determine the terms of the contract from those currently prescribed by acts of civil law.[166]

Based on the analysis of the content of part 1 of Article 638 of the Civil Code of Ukraine,[167] it can be distinguished four groups of substantive terms of the contract.

The first group of substantive terms of the contract covers the terms related to the subject of the contract. This condition is mandatory for each civil law contract. Without the agreement on the terms of the subject, the contract cannot exist in principle. At the same an achievement of the agreement only regarding this condition is in some cases considered sufficient for the conclusion of the contract and the obtaining of the intended legal result.

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[163] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Електронний ресурс]. - Режим доступу : http://www. jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[164] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[165] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[166] Горєв В.О. Свобода договору як загальна засада цивільного законодавства України : дис... канд. юрид. наук: 12.00.03 / Харківський національний ун-т внутрішніх справ. — Х., 2007. – С. 142.

[167] Див.: Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

The second group of essential terms of the contract includes the conditions defined by the law as essential. This group of essential conditions applies only to the so-called "nominal contracts". As for non-nominal contracts, one should agree with Brahinsky M.I. that such agreements do not have special legislative regulation, and consequently do not have a list of mandatory conditions that reflect their specifications.[168] Some of them generally have rather an uncertain subject of their regulation, for example, an agreement for cooperation.

Nowadays the CCU contains a list of essential conditions for such types of civil law contracts as the insurance contract (Article 982), the commission contract (Part 3 of Article 1012), the agreement for property management (Article 1035) and am agreement for bank deposit in favor of a third person (clause 3 [art 1 of Article 1063). Essential conditions for certain types of civil contracts are also formulated in the Laws of Ukraine "On Financial Leasing",[169] "On Mortgage",[170] etc.

The third group of essential terms of the contract includes those conditions, that are necessary for the contracts of exactly this type. These conditions are not explicitly formulated in the laws, therefore in practice it is problematic to define them. According to Lutsia V.V., the circle of essential conditions on the basis of the need for contracts of this type depends on the legal nature (essence) of the contract, its subject, the fundamental rights and obligations of the parties, etc.[171] Currently this view is upheld by the overwhelming majority of civil law scholars. Since the current civil law does not provide the mechanism for determining the conditions necessary for the contracts of this type, Vitriansky V.V. proposes to define a range of such conditions, based on the legal definitions of the corresponding types of contracts.[172]

As an example of such a condition, we can give a price clause in the contract of sale. To date, in the civil law doctrine there prevails the point of view, according to which the price in a sales contract is considered an obligatory condition for contracts of this type. This is due to the fact that the contract of sale is payable by its very legal nature. Therefore, according to clause 2, part 1, Article 638 CCU, the price in paid contracts should be considered an essential condition, as it is necessary for contracts of this type. At the same time, the analysis of the contents of part 4 of Article 632 CCU shows that the legislator has foreseen the possibility of determining the price in the contract by a dispositive norm. It follows that the price is not an essential condition

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[168] Брагинский М.И., Витрянский В.В. Договорное право. Общие положения. – М.: Статут, 1998. – С. 246.

[169] Про фінансовий лізинг: Закон України від 16.12.1997 № 723/97-ВР [Електронний ресурс]. — Режим доступу: http://zakon3.rada.gov.ua/laws/show/723/97-%D0%B2%D1%80

[170] Про іпотеку: Закон України від 05.06.2003 р. № 898-IV [Електронний ресурс]. — Режим доступу: http://zakon2.rada.gov.ua/laws/show/898-15

[171] Цивільний кодекс України: Науково-практичний коментар / За ред. розробників проекту Цивільного кодексу України. – К.: Істина, 2004. – С. 447.

[172] Витрянский В.В. Существенные условия договора // Хозяйство и право. – 1998. – № 7. – С. 6

for a payment contract, because the essential terms of the contract cannot be determined by dispositive norms.

To avoid this inaccuracy, we consider it expedient to exclude from Part 1 of Article 638 of the Civil Code of Ukraine the criterion for determining the essential terms of the contract "necessary for contracts of this type". This criterion does not allow to unambiguously clarify the range of substantive conditions of both nominated and non-nominated contracts. It causes internal conflicts in the CCU, as a result of which the clear distinction between permitted and obligatory in the process of negotiating the terms of the contract is lost.

The last group of essential terms and conditions of the agreement includes the conditions, in respect of which the consent has to be achieved at the request of at least one of the parties. The range of such essential conditions and their content is determined at own discretion by the contracting party. This group of essential conditions is closely adjacent to random conditions, so in practice quite often there are difficulties associated with their delineation.

In the mechanism of legal regulation of freedom to determine the terms of the contract, an important role is played by civil law norms, which establishes the ratio of acts of civil law and the contract (Article 6 of the Civil Code). Having analyzed the content of these norms, Sibilov M.M. came to the conclusion that in the civil law of Ukraine there exist two basic models of legal regulation of contractual relations. The essence of the first, he writes, lies in the fact that the parties can take advantage of the opportunity provided by them to self-regulation and limit the scope of the terms of the contract only to the initiative conditions. This may be the case when the acts of civil law regarding the type (form) of the contract entered into by the parties do not at all provide for a circle of mandatory conditions. The same situation is possible even if they provide for them, but do not contain a direct warning that it is impossible to depart from these requirements, and this impossibility does not directly follow from the content of these acts.

The essence of the second model is that the parties can refuse from the possibility of self-regulation provided to them and agree to the regulation of contractual relations on the basis of imperative requirements contained in the acts of civil law regarding the type (kind) of the contract concluded by them, although they do not contain a direct warning about impossibility to deviate from their requirements. Certainly, according to Sibilov M.M., the second model covers the situation in which the acts of civil law in relation to the type (kind) of the contract, concluded by the parties, not only provide for a range of mandatory terms of the contract, but also contain a warning about the impossibility of derogating from their requirements.[173]

[173] Сібільов М.М. Акти цивільного законодавства і договір // Методологія приватного права: Зб. наук. праць (за матеріалами наук.-теорет. конф., м. Київ, 30 травня 2003 р.) / Редкол.: О.Д. Крупчан (голова) та ін. – К.: Юрінком Інтер, 2003. – С. 158–163.

In our opinion, the conclusion of Sibylov M.M. that the parties can limit the terms of the contract merely to the initiative conditions needs to be clarified. The author ignored the essential terms of the contract, which, as noted above, are mandatory conditions of each civil law contract. The parties cannot depart from the provisions of acts of the civil legislation on the essential terms of the contract, since without the agreement of such terms the contract is impossible in principle. Therefore, the conclusions of the scientist on the essence of the first model of legal regulation of contractual relations can only be agreed with the clarification concerning the essential terms of the contract.

Regarding the second model, it should be mentioned that we also disagree with the statement of the scientist that the legal requirements from which parties to the contract may derogate on the basis of Article 6 of the CCU, are imperative. In our view, such orders formally resemble imperative norms, but in essence they are dispositive. The dispositivity of these prescriptions is provided by the imperative norms contained in Article 6 of the CCU. Accordingly, the conditions contained in such orders cannot be considered obligatory. After all, the parties to the contract may at their own discretion depart from them (to change them or to exclude them at all), which, in fact, is a typical feature of the usual terms of the contract.

The Principles of European Contract Law include the provision, which differs from that developed in the civil law of Ukraine. Thus, according to part 1 of Article 2.104, if some of the terms of the contract were not separately discussed and one of the parties was not aware of them, the other party may refer to them only if it has taken sufficient measures to bring them to the attention of the other party by the time or at the time of conclusion of the contract. Significantly, in accordance with Part 2 of Article 2.104, it is not considered that the terms were properly communicated to the party if this was done by a simple reference to them in a written contract, even if that party signed this agreement.[174]

In the Civil Code of Ukraine there is no analogical provision. Part 1 of Article 628 of the CCU provides a rule, under which the content of the contract includes the conditions (items), determined at the discretion of the parties and agreed upon by them, and the conditions that are binding, in accordance with acts of civil legislation.[175] Thus, the civil law of Ukraine does not allow a situation in which part of the contract may include the conditions not agreed with the other party to the contract, even if all the necessary steps have been taken to bring them to its notice.

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[174] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Електронний ресурс]. - Режим доступу : http://www. jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/

[175] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

The consolidation of the stated position of the PECL in the CCU seems particularly relevant for the adherence to the contract with a view to avoiding abuses by the party, which has acceded to the treaty and, not wishing to comply with certain conditions, argues that they were not explained to her, although the other party took all necessary measures to bring them to the attention of this party.

On the other hand, as a rule, the signature of a person in a written contract is to be interpreted as proof that all the conditions are agreed, and therefore brought to her notice. However, in the case where, for example, a draft contract is made by an entity for which the activity constituting the subject of the contract is professional and requires special knowledge, the party joining may not have the sufficient knowledge, which will give an ability to understand correctly all the terms of the contract. In such a case, the obligation of the party who made the draft is to clarify the content of the contract to the other party. Therefore, it would be preferable to apply the provisions of part 2 of Article 2.104 PECL, according to which it is not considered that the conditions have been properly communicated to the party if this was done by a simple reference to them in a written contract, even if that party has signed this agreement. We propose to consolidate a similar position in the CCU.

To summarize the above, we should conclude that the freedom of contract in the EU law is wider than in the civil law of Ukraine. In the conditions of harmonization of the legislation of Ukraine with the law of the European Union it is expedient to review the provisions of the CCU regarding the form and procedure of the conclusion of the agreement. Further it would be necessary to safeguard the harmonization of municipal norms with the general principles of the EU Treaty law, in particular by extending the scope of the freedom of contract. For this purpose it is offered:

• to mitigate the requirements of the Central Committee of Ukraine regarding the form of the contract (agreement);

• to supplement the Civil Code of Ukraine Article 628-1 with the following sentence: “1. If separate terms and conditions of the contract were not discussed by the parties and one of the parties was unaware of them, the other party may demand execution only if it has taken adequate measures to bring such terms and to the attention of the other party until the time of conclusion of the contract.

2. It is not considered that the terms have been properly communicated to the party if this was done by simply referring to them in a written agreement, even if this party has signed this agreement.”

3. LIMITATION OF FREEDOM OF CONTRACT

3.1 Limitation of freedom of contract in Europe

Understanding the limitation of freedom of contract in European law has a philosophical basis. The limitation of this principle is based on the issue of paternalistic intervention as a form of public intervention in protecting the interests of the person subject to restriction.

Regarding the concept of paternalistic intervention, there is a general view that such interference is being carried out for the purpose of protecting the interests of persons whose will is subject to restrictions in order "to limit their ability to conclude valid agreements of various kinds." [176]

The explanation for and the nature of the paternalistic intervention has numerous different forms. According to one point of view, the intervention may be called paternalistic, when it is based on the assumption that the subject acts on the basis of false judgments about his "true interests."[177] In result it causes harm to this very subject. Accepting this approach it is possible to qualify as paternalistic intervention, for example, restrictions on freedom of the will, which prohibit a potential debtor to assume certain obligations to avoid harmful consequences for him.

According to another approach, the notion of paternalism in the law should be considered more broadly and to include in this category also restrictions that may be imposed on third parties, who will enter into legal relationships with the person in need of protection in the future (so-called passive paternalism[178]).

In certain cases, there may be objective preconditions for public interference. They can be in the form of possible damage that may be caused to third parties from the execution of a particular contract. In other situations, the state is guided by the special nature of the relations between the participants of the turnover, and shell seeks to reduce the risks caused by natural imperfections in human abilities. It can be argued that regardless of the motives for interference

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[176] Kronman A.T. Paternalism and the Law of Contracts // The Yale Law Journal, Vol. 92, Num. 5, April 1983 P. 779; Cserne P. Freedom of Choice and Paternalism in Contract Law: a Law and Economics Prospective // SIDE Working Papers, First Annual Conference, 2005. P. 7; Enderlein W. Rechtspaternalismus und Vertragsrecht. Koln. - Munchen: Verlag C. H. Beck, 1996; Sack R., Fischinger P.S. J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 1. Sellier - de Gruyter, Berlin, 2011. § 138. S. 311.

[177] Kennedy D. Distributive and Paternalist Motives in Contract and Tort Law / The Foundations of the Economic Approach to Law. Edited by A.W. Katz. New York, 1998. P. 354.

[178] Dworkin G. "Paternalism" in "Morality and the Law" (R.A. Wassenstrom, ed., 1971). Цит по: Trebilcock M.J. The limits of Freedom of Contract. Oxford, 1993. P. 150.

with the sphere of personal freedom in contractual relations, the essence of such an intervention is that in one or another degree the will of the parties to the contract to be entered into the contract is ignored and the parties are invited to apply a different legal regime than they themselves have planned and had in mind. In this case, the state exercises its own decision, based on the fact that in certain circumstances, imperative norms can better or more effectively regulate relations between the parties than the contractual norms developed by them. In those cases, when state interference in the private sphere is not based on the prevention of harm to third parties and, most importantly, is carried out in the interests of the persons whose will is ignored, it is about paternalism.[179]

Thus, first of all, the provisions of the law, positive law should be considered as a restriction of the principle of freedom of contract. As it was correctly noted by Bazedov U., basically only binding norms are considered appropriate for regulatory purposes at the level of the EU. These norms can be interpreted and criticized as an attack on various manifestations of freedom of contracts.[180]

In the mid-1980s, the Community began to introduce contractual law instruments into legislative acts. In part, these legal instruments relate to particular issues in specific areas (for example, an obligation to provide information on life insurance,[181] liability to third parties for motor insurance[182] or the rights of passengers on air or rail transport[183]). Many of them can be applied to contracts in the field of consumption as a whole.[184] Only some relate to commercial contracts.[185]

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[179] Feinberg J. Legal Paternalism // Canadian Journal of Philosophy, Vol. 1, No. 1 (Sep., 1971). P. 106. Cserne P. Freedom of Choice and Paternalism in Contract Law: Prospects and Limits of Economic Approach. Hamburg, 2008. P. 31.

[180] Basedow J. Die Europäische Union zwischen Marktfreiheit und Überregulierung – Das Schicksaal von Vertragsfreiheit. In Bitburger Gespräche (pp. 85-104). München: C.H. Beck [Electronic resource]. – Access mode: http://hdl.handle.net/11858/00-001M-0000-0019-C978-3

[181] Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0083&from=EN

[182] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31972L0166&from=EN

[183] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R1371.

[184] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [Electronic resource]. – Access mode: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0027&from=RO

[185] Див.: Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31986L0653&from=EN; Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0035; Directive 2002/47/EC of the European Parliament and of the

In the EU law, it is possible to detect an interference with the freedom to conclude an agreement, in particular freedom of the offer. According to Article 82 of the Treaty on European Union (currently Article 102 of the TFEU) it has been recognized the "doctrine of major infrastructure systems", which requires dominant companies to not impede competitors in accessing the main infrastructure systems.[186] In addition, one can also encounter interference with freedom of demand. Primarily this relates to an existence of obligation to insure responsibility. This interference, however, is quite adequate and does not go beyond the scope that has been previously recognized by numerous member states. However, at the same time we will not observe the examples of interference with the freedom to change treaties in the EU's secondary legislation. In fact, this freedom is specifically stipulated in Article 3 (2) of the Regulation on the law applicable to contractual obligations (also referred as Rome I). It enshrines that it is possible to reconcile the choice of law at any time.[187]

Also, rarely, the secondary law of the EU intrudes into the area of freedom of form of the contract. Although the written form of the contract is often offered by Labor law and Consumer protection law,[188] this usually applies only to the transmission of certain information and only in exceptional cases relates to the offer and its acceptance by the parties to the contract. It relates to the inclusion of the provisions on the authenticity of information and unimpeded access to it in the contract, which is an integral part of both the contract itself and its implementation.

Certificate the authorities of the contracting parties or their notification concerning the content of the contract rarely becomes a major point; it only takes place in consumer loan agreements[189] or timeshare contracts that cover real estate issues. Here, the written form of the contract corresponds to the specific needs of the parties who have decided to conclude a contract.

Council of 6 June 2002 on financial collateral arrangements [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0047&from=EN

[186] Договір про функціонування Європейського Союзу [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/994_b06

[187] Див.: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008R0593

[188] Див.: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1985:372:FULL&from=EN; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [Electronic resource]. – Access mode: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31990L0314&from=en; Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [Electronic resource]. – Access mode:https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991L0533&from=EN

[189] [189] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [Electronic resource]. – Access mode: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31987L0102

Conversely, the principle of freedom of form is specifically protected against additional agreements between banks.[190]

The main task set before the regulation many times was to provide reliable information to the consumer and to guarantee him the right to cancel or revise the contract. In result of such actions the mandatory force of such agreement may in some cases be postponed for a significant period of time. The obligation to provide information prior to the conclusion of the contract is aimed at stimulating the consumer's rational behavior when concluding the contract and protecting it from unjustified expectations and disappointments. Granting the right to break and revise a contract has different purposes. Mainly this action is aimed at minimizing the consequences of such situations when the contract is concluded under the influence of the moment and in the absence of all the necessary information. Consequently, the norms of European Consumer protection law are intended at providing more reliable information at the time of concluding a contract and thus increase the security and effectiveness of the contracting process.

Thus, as we can conclude from the foregoing, the interference of the EU law in the development of contractual rights and obligations is not extensive and concerns only a small part of the contracts, in particular treaties on real estate and the sale of consumer goods.

Restrictions on the choice of a partner under those contact included in the anti-discrimination directives appear as quite controversial in terms of legal policy. Article 141 of the Treaty on European Union (now Article 157 of the Treaty on the Functioning of the European Union) prohibits discrimination on grounds of sex and "ensures compliance with the principle of equal pay for men and women for equal or equivalent work."[191] Member States with a large number of working women were thus deprived of the competitive advantage that could arise at a lower level of wages for working women. From this limitation the Court of the EU had developed an individual right, which has direct effect not only in relation to a Member State (direct vertical action) but also a contractual partner (direct horizontal action).[192] Since then, the EU has implemented the principle of the prohibition of discrimination on the grounds of sex with regard to most labor law standards.[193]

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[190] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [Electronic resource]. – Access mode: https://publications.europa.eu/en/publication-detail/-/publication/f0b65b16-d91b-45ad-947b-8747617a73d9/language-en.

[191] Договір про функціонування Європейського Союзу [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/994_b06

[192] Judgment of the Court of 8 April 1976. Case 43-75. The principle that men and women should receive equal pay for equal work. [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61975CJ0043

[193] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

The provisions on the prohibition of discrimination are also contained in the Charter of Fundamental Rights of the EU. The scope of its provisions prohibiting discrimination was significantly expanded after the entry into force of the Lisbon Treaty. They can be directly applied by the courts in accordance with Article 21 (1) of the Charter: "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."[194]

The practice of the EU Court of Justice on discrimination, given the nature of the Charter, provides for the possibility of such direct application of Article 21. In particular, it should be remembered that in the *Menghold case*, the EU Court relied on the provisions of Framework Directive No. 2000/78. However, it relied on the direct effect of the prohibition of discrimination on the basis of age in relations between employers and employees as on the general principle of EU law, which is as primary law.[195] The directive itself was not applied in this case. Summarizing the doctrine on this subject,[196] one can confidently state that the direct effect of such a broadly formulated principle of prohibition of discrimination takes place primarily in the public domain, but not in private law.

The analysis of the rules of primary and secondary law of the EU allows us to conclude that the provisions on freedom of contract and its restrictions are scattered and chaotic. This problem has necessitated the development of the Principles of European Contract Law (also referred as Landau Principles).[197] On the basis of the Communiqué of 2004, the European Commission united and coordinated the efforts of already existing groups of legal scholars.[198] The first results of their activities were presented to the Commission at the end of 2007. The goal was to develop a "Common Frame of Reference for European Contract Law" that would provide the EU courts with solid reasons for further implementation of the EU's contractual legislation.[199]

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employment and occupation (recast) [Electronic resource]. – Access mode: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF.

[194] Charter of Fundamental Rights of the European Union 2012/C 326/02 [Electronic resource]. – Access mode: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[195] Див.: Case C-144/04. Directive 1999/70/EC - Clauses 2, 5 and 8 of the Framework Agreement on fixed-term work - Directive 2000/78/EC - Article 6 - Equal treatment as regards employment and occupation - Age discrimination. [Electronic resource]. – Access mode: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-144/04

[196] Див.: Basedow J. Der Grundsatz der Nichtdiskriminierung im europäischen Privatrecht / J. Basedow // Zeitschrift für Europäisches Privatrecht. – 2008. – № 230. – S. 13-36.

[197] Див.: The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[198] Joint Network on European Private Law (CoPECL) [Electronic resource]. – Access mode: www.copecl.org

[199] О Единой рамочной системе ссылок на европейское договорное право, див: ZEuP —Symposium 2006 // ZEuP. 2007. P. 109-223.

At the same time, the Commission began work aimed at consolidating Directives in the sphere of Consumer contractual law.[200] Accordingly, the course was taken not only to review the law in this area, but also in support of future lawmaking through the development of general contractual terms and principles.

Further we shell turn to the research of the limitations of the principles of freedom of contract in the provisions of the Principles of European Contract Law.

Provisions of item 1 Article 1:102 of Landau Principles enshrines: "[…] Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles."[201] Mentioning the need to respect the principle of good face and honest business practice is, of course, a tautology, because this principle is universal. This means it applies to any actions of individuals, including the conclusion of an agreement (see Article 1: 201 of Landau Principles).

The question of the inadmissibility of ignoring the imperative norms of the Principles by private individuals is not new. The UNIDROIT Principles are also include the provisions that do not allow retreating from imperative norms. But coupled together in the definition of freedom of contract, these two parameters mean the definition of a new legal quality: freedom – it is only then freedom, when it is implemented in certain regulatory boundaries. These limits are set by national law. It does not matter, whether it is an act of private unification or a norm-principle - it does not matter. It is possible to say that generally purely philosophical characteristic freedom of contact got also a legal value thanks to the Landau Principles.[202]

When describing this provision of the Principles, it should be noted that contracts that contravene the fundamental principles of morality or contradict public policy, in principle, cannot create legal consequences. This principle is known to all European legal systems with different levels of direct or implicit recognition. Particular legal systems use concepts of state policy and morals to determine what is considered to be a legitimate contract.[203] Typically, the

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[200] Tamm M. Das Gruenbuch der Kommission zum Verbrauch- er-Acquis und das Modell der Vollharmonisierung — eine kritische Analyse // Europaeische Zeitschrift fuer Wirtschaftsrecht. 2007. P. 756; Micklitz H.-W, Reich N. Europaeisches Verbraucherrecht — Quo Vadis? // Verbraucher und Recht. 2007. P. 121; Proposal for the Directive on Consumer rights, COM (2008), 614 of 08.02.2008.

[201] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002l

[202] Белов, В. А. Международное торговое право и право вто в 2 т. Том 2. Акты международной частноправной унификации. Право ЕС. Право ВТО: учебник для бакалавриата и магистратуры / В.А. Белов. – М.: Издательство. Юрайт, 2015. – С. 658.

[203] Див.: Гражданский кодекс Франции (Кодекс Наполеона) / пер. с франц. В. Захватаев; предисловие: А. Довгерт, В. Захватаев; приложения 1-4 / отв. ред. А. Довгерт. - М., 2012.. – С. 688; Italian Civil Code, approved by Royal Decree No. 262 of March 16, 1942 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/details.jsp?id=2508; Portuguese Civil Code, approved by Decree-Law No. 47344 of November 25, 1966 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/details.jsp?id=7991; Spanish Civil Code, approved by Royal Decree of July 24, 1889 [Electronic resource]. – Access mode: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319

illegal contracts are considered invalid. In English, Irish and Scottish law, contracts that contravene the public policy or those that are considered immoral are often regarded as unencumbered in court. The parties can claim neither damages nor results in kind.

According to Article 6 of the Civil Code of France, statutes relating to public policy and morals may not be derogated from by private agreements. Prerequisites of Article 1108 of the Civil Code of France establish that the validity of the agreement is determined by four essential conditions: the consent of the obliged party, the ability to enter into an agreement, the presence of the subject of the obligation and the legal basis of the obligation. According to Article 1133 Civil Code of France, the basis of the obligation is deemed unlawful when it is prohibited by law and when it conflicts with good intentions or public order.[204]

So, Articles 1108 and 1133 of the Civil Code of France establish the invalidity of an contract that violates the law, good intentions or public order.

Under public order the French civil law understands the imperative rules aimed at defending state independence, social security, economic foundations, as well as human rights and freedoms.[205] In other words, it is a set of rules and legal principles that govern the social and public order.

Good intentions are understood as the state-sanctioned imperative norms of social morality that every member of a society must adhere to, regardless of his/her religious, philosophical, political and personal moral convictions. The French civil law does not contain a definition of good intentions. The content of the latter is inferred from the legal principles and jurisprudence.[206]

Thus, while the rules of public order are a legitimate legal imperative, the rules of good intentions, although they are authorized by the state, are a moral and legal imperative of social origin.

The peculiarity of French civil law is a rather broad interpretation of public order, which is inherent in the civil law of other continental countries. For example, according to Article 16-9 of the Civil Code of France, all the provisions of Chapter II (Articles 16 – 16-9 enshrine the primacy of personality and physical integrity) are imperative, that is, they relate to public order authorized by the state. The legal analysis of the provisions of this chapter allows us to assume

[204] Див.: Гражданский кодекс Франции (Кодекс Наполеона) / пер. с франц. В. Захватаев; предисловие: А. Довгерт, В. Захватаев; приложения 1-4 / отв. ред. А. Довгерт. - М., 2012. - С. 21-708.

[205] Гражданский кодекс Франции (Кодекс Наполеона) / пер. с франц. В. Захватаев; предисловие: А. Довгерт, В. Захватаев; приложения 1-4 / отв. ред. А. Довгерт. - М., 2012. – С. 21.

[206] Гражданский кодекс Франции (Кодекс Наполеона) / пер. с франц. В. Захватаев; предисловие: А. Довгерт, В. Захватаев; приложения 1-4 / отв. ред. А. Довгерт. - М., 2012. – С. 688.

that the actual adoption of the category of "good intentions" by the category of "public order" occurs.[207]

The German Civil Code includes Article 134, which regulates the cases when public law laws, especially criminal laws, condemning one or another agreement, are restricted by imposing a public-law or criminal-law sanction without giving an assessment of the issues of civil-legal insignificance of such an agreement. Thus, according to Article 134, a contract that violates the prohibition established by law is null and void, unless otherwise provided by law.[208]

The developers of the German Civil Codes proceeded from the fact that in the situation when the law expresses disagreement with the concluded contract, this mere disagreement itself should give rise to civil-law nullity, unless the law provides otherwise.[209]

Consequently, the public order in Germany is regulated outside the frameworks of civil law by means of appropriate public-law rules. Therefore, civil law does not contain any special rules on public policy. In addition, the Civil Code of Germany establishes civil-law consequences (in the form of recognizing the contract as null and void) for violation of public-law rules (public order). It is possible to assume that such a legislative approach is logical and justified, since it does not "overload" the civil law with non-inherent public-law norms.

The limitation of contractual freedom with good intentions in German civil law takes place on the basis of Article 138 of the Civil Code. The paragraph notes that a contract that violates good intentions is null and void. In fact, any agreement, in which one person, using a difficult state, inexperience, insufficient reasonableness or weak will of another, in exchange for any execution makes him/her to promise or to provide such person or a third person with property benefits, obviously not dimensional executed from their side (usury) is treated as null and void.[210]

It must be borne in mind that in the interpretation of Article 138 the agreement violates good intentions if it is subject to the violation of the minimum requirements of social morality. The term "social morality" is understood as the dominant moral views of the society. However the legal term "violation of good intentions" for the purpose of Article 138 does not imply the violation of any requirement of a social morale, but only its minimum standards. They form the scale for checking transactions. That is, the fact of a violation of good intentions is available

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[207] Див.: Василенко М. Є. Свобода договору, об-межена публічним порядком та моральними засадами суспільства, у континентальному цивільному законодавстві / М. Є. Василенко // Порівняльно-аналітичне право. - 2014. - №8. - С. 64

[208] Bürgerliches Gesetzbuch (BGB) [Electronic resource]. – Access mode: https://www.gesetze-im-internet.de/bgb/BGB.pdf

[209] Шапп Ян. Система германского гражданского права: учебник / Шапп Ян / пер. с нем. С.В. Королева. - М.: Междунар. отношения, 2006. - С. 280-283.

[210] Bürgerliches Gesetzbuch (BGB) [Electronic resource]. – Access mode: https://www.gesetze-im-internet.de/bgb/BGB.pdf

only in the case where the "ethical minimum" is infringed. It is incorrect to understand the concept of "good intentions" morality itself, because in this situation there will occur a transition to the philosophical doctrines of morality. It will entail the establishment of other requirements than those that can be achieved through the use of law. The notion of "social morality", in contrast to terms such as "morality" and "ethics", indicates that the scale taken by it actually has a social character and prevails in society. This means that this scale is usually observed.

The decisive for the taxonomy of control in accordance with the content of the agreements Article 138 is the negative formulation of the said norm, namely, the agreement is not checked for the purpose of its compliance with good intentions, but for the purpose of its contradiction with these intentions.[211]

The content of the violation of good intentions is established by the court on case-by-case. This occurs despite the facts that the German judicial practice has developed and the most typical approach on this issue. According to this approach the violation of good intentions is, in particular, usury, the guarantee of close relatives, remuneration without implementation.[212]

The following provision, which establishes restrictions on contractual freedom of the parties, is Article 1:103 of the Principles of European Contract Law. This article clarifies the cases of limitations of freedom of contract with mandatory rules.

This provision allows parties, when the applicable law, determined by the choice of law rules of the forum before which the dispute is brought, so allows, to *"choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable,"*[213] with the exception of those rules which apply regardless of the governing law.[214]

Article 15:102 enshrines that, although the Principles constitute a self-contained system of rules applicable to the contracts governed by them, it is still not possible to ignore altogether the provisions of municipal law or the other rules of positive law applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annullable or unenforceable in certain circumstances. In this regard, we should return to the distinction between mandatory rules laid down in Article 1:103 of the Principles.

It can be concluded that the Principles establish general limitations of contractual freedom, whereas special rules are set primarily at the level of national legal systems.

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[211] Шапп Ян. Система германского гражданского права: учебник / Шапп Ян / пер. с нем. С.В. Королева. - М.: Междунар. отношения, 2006. - С. 280-283.

[212] Василенко М. Є. Свобода договору, об-межена публічним порядком та моральними засадами суспільства, у континентальному цивільному законодавстві / М. Є. Василенко // Порівняльно-аналітичне право. - 2014. - №8. - С. 64

[213] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[214] Guiding principles of European contract law [Electronic resource]. – Access mode: https://iuccommonsproject.wikispaces.com/file/view/Guiding+principles+of+European+Contract+law.pdf

It is also worth examining the provisions of other European-level regulations such as the Code of Contract and the UNIDROIT Principles.

Sub-clause 1 of Article 2 of the European Code of Contract Preliminary Draft, which is called "Contractual *autonomy*", provides that "[…] the parties can freely determine the content of the contract, within the limits imposed by mandatory rules, morality and public policy, as established in this Code, Community law or the national laws of the Member States of the European Union..."[215] If the agreement is contrary to public policy, morals, a mandatory law etc. it is sanctioned by holding the contract void. It is also specifically provided that "the content of the contract must be […] lawful […]" It should be considered lawful "when it is not contrary to mandatory rules of this Code, to Community law or national law, or to public policy or morals."[216]

Also, Article 1.4 ("Mandatory rules") of the UNIDROIT Principles states that "[…] nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."[217]

Consequently, like freedom in general, freedom of contract immanently includes certain restrictions. They are imposed due to the need to protect private and public interests. On the one hand, the restrictions on the freedom of contract are the limits of the exercise of subjective rights in contractual relations. On the other hand, the limits of the implementation of the interests are protected by the law of the parties to contractual relations. The limits are established through positive commitments and legal prohibitions, and sometimes even through specific legal permissions.

Having examined the provisions of the main European normative acts that directly or indirectly regulate contractual relations, we can infer that the restrictions on the principle of freedom of contract, which are established by them, are based on the practice that has developed from customs and traditions, from the needs of business. And therefore on the first plan there is the requirement to adhere to the principles of good faith and honesty, and only then the imperative norms of normative acts.

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[215] European Contract Code [Electronic resource]. – Access mode: http://www.eurcontrats.eu/site2/docs/EuropeanContr.pdf

[216] Див.: Guiding principles of European contract law [Electronic resource]. – Access mode: https://iuccommonsproject.wikispaces.com/file/view/Guiding+principles+of+European+Contract+law.pdf

[217] The Principles of International Commercial Contracts (PICC) (The UNIDROIT Principles) of 2010 [Electronic resource]. – Access mode: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

3.2 Limitation of freedom of contract in Ukraine

One of the first contemporary monographs on freedom of contract in Ukraine (PhD thesis of Luts A. V. "Freedom of contract in civil law of Ukraine") notes that freedom of contract is not limitless, that it exists within the limits normative acts in force, customs of business turnover. There is also stated that the actions of the parties to the contract must be based on the principles of reasonableness, conscientiousness and justice.[218] However, it does not specifically derive from a work, what constitutes a restriction on freedom of contract and what exactly is its essence.

When considering the principle of freedom of contract within the framework of legal regulation of a foreign economic contract, Beliaieva A. P. proceeds from the fact that restrictions on freedom of contract are its measures. However, she does not provide a due reasoning in favor of such identification. Also she does not reveal the meaning of the notion of the measures of freedom of contract, so it remains unclear what is actually the essence of the measures of contractual freedom.[219]

The civil doctrine has a point of view according to which the limitations and restrictions of freedom of contract are treated as different legal categories. For example, Iershov U. E. under the freedom of the contract understands the limits of the implementation of subjective civil rights in contractual relationships. Simultaneously, under the restrictions of freedom of contract he means the restriction of legal capacity of individuals, as well as the restriction of the possibility of realization of certain rights.[220]

The contemporary civil law science neither has any certainty on the issue, what constitutes a limitation of freedom of contract, nor is the mechanism of their establishment sufficiently cleared up. The overwhelming majority of civilians deal with general assertions that freedom of contract is limited to legislative acts, as well as out-of-law criteria. Thereafter, as a rule, there follows a description of the relevant legislative and out-of-law criteria.[221] At the same time, there is not much attention paid to the issues of connections between limitations of freedom of contract with the ways of legal regulation of civil relations.

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[218] Луць А.В. Свобода договору в цивільному праві України: Дис. … канд. юрид. наук: 12.00.03. – Львів, 2001. – С. 54.

[219] Бєляєва А.П. Принцип свободи договору у правовому регулюванні зовнішньоекономічного контракту: Дис. … канд. юрид. наук: 12.00.03. – Харків, 2005. – С. 45-52.

[220] Ершов Ю.Л. Принцип свободы договора и его реализация в гражданском праве Российской Федерации: Дисс. … канд. юрид. наук: 12.00.03. – Екатеринбург, 2001. – С. 111-112.

[221] Бервено С.М. Проблеми договірного права України: Монографія. – К.: Юрінком Інтер, 2006. – С. 126-134; Бєляєва А.П. Принцип свободи договору у правовому регулюванні зовнішньоекономічного контракту: Дис. … канд. юрид. наук: 12.00.03. – Харків, 2005. – С. 48-51; Мережко А.А. Договор в частном праве: Монография. – К.: ЮСТИНИАН, 2003. – С. 87-93 та ін.

In civil doctrine there generally exists a sensible idea that the essence of the limitation of freedom of contract is in establishing a framework of its legal content.[222] But it did not receive proper theoretical substantiation and hence development.

The vast majority of civil scientists rightly note that freedom of contract has certain measures or limitations. However, they do not observe the fact that the freedom of contract as a principle in its essence is a certain idea, which, with the assistance of the appropriate legal "toolkit", is implemented in civil law. The idea, as it is known, cannot be limited. Therefore, it is not entirely clear what it is, in fact, limited when it comes to limitations on the exercise of freedom of contract.

If we pay attention to Article 3 of the Civil Code of Ukraine, it can be noted that the general principles of civil law of Ukraine are formulated in such a way as to indicate the ways of legal regulation of civil relations, through which they are implemented in the "civil-law matter."

The textual formulation of the freedom of contract (item 3 of Article 3, Article 627 of the Civil Code of Ukraine) indicates that it is implemented in civil law with the help of a general legal permission, the essence of which is to provide the participants of civil relations with the opportunity to enter into contracts at their own discretion, and also decide the legal fate of their contracts.

The general legal permission, which is established in relation to freedom of contract, is expressed in the system of specific legal permissions (subjective civil rights). They are envisaged by acts of civil law of different levels.

Taking into account the aforementioned, limitation of freedom of the contract should be understood in the sense that it is not the principle itself that is limited, but the general legal permission, which is dialectically connected with it, by means of which this principle is implemented in civil law. At the same time, it should be emphasized that in civil law the specified legal permission from the very beginning is limited. For example, when describing the constraints of constitutional rights and freedoms, Kruss V. I. correctly points that when something is not manifested, it cannot be limited. On the other hand, the manifested (substantiated concretely) is already somewhat limited.[223]

The restriction of freedom of contract in civil law can be divided into general and special.

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[222] Мілаш В.С. Теоретичні аспекти співвідношення свободи підприємницького комерційного договору та обмежувальних чинників // Українське комерційне право. – 2005. – № 6. – С. 54.; Розгон О.В. Значення встановлення меж договірної свободи для меж права власності // Вісник Запорізького національного університету. – 2006. – № 2. – С. 70.

[223] Принципы, пределы, основания ограничения прав и свобод человека по Российскому законодательству и международному праву // Государство и право. – 1998. – № 8. – С. 62.

General limitations on contractual freedom are the general limits of the implementation of civil rights and legally protected interests of parties to contractual relationships. In the most general form they are defined in Article 627 of the Civil Code of Ukraine. By virtue of this imperative prescription, the members of civil relations, while exercising freedom of contract, must comply with the requirements of acts of civil law, the customs of business turnover, as well as the requirements of reasonableness and justice.

The general limits of the implementation of civil rights in contractual relations are specified in a number of provisions of the CCU (Article 13, part 1 of Article 6, part 1 of Article 205, etc.). Naturally, the central place in determining such boundaries has Article 13 of the Civil Code of Ukraine. It contains provisions on the limits of the exercise of any civil rights.

The provisions of part 3 of Article 13 of the Civil Code of Ukraine[224] may also be applied in the case of the utilization of legally acquired interests with the intent to harm another person. In this regard, it is expedient to clarify the title of Article 13 of the Civil Code of Ukraine, which is formulated in a following way: "The limitations of the implementation of civil rights and legally acquired interest". It is of special value, since today part 3 of Article 15 of the CCU, which corresponds to parts 2-5 of Article 13 of the Civil Code of Ukraine, it enshrines that in the case of violation of the provisions of parts 2-5 of Article 13 of the CCU, the court may refuse to protect not only civil law, but also interest.

General limitations on the freedom of the contract (the general limits of the exercise of subjective rights and legitimate interests) without exception, apply to all parties to contractual relationships, regardless of the specific nature of the contract, which it concludes, changes or breaks, regardless of the peculiarities of their economic and legal status, etc. They outline the legal framework of what is generally permissible in the conclusion and implementation of any civil society participant in any civil contract. Actually, therefore, this dissertation designates them as "general." [225]

Such restrictions are established exclusively at the level of legislative acts by means of legal prohibitions and positive obligations. They cannot be established by the contract. This is explained by the fact that the contract, unlike the regulatory act, does not have such trait as normativity.[226] As it is rightly emphasized by Koretsky A.D., the contract is an act of individual subnormal regulation of social relations. The contracts cannot establish the obligatory typical

[224] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[225] Горєв В.О. Свобода договору як загальна засада цивільного законодавства України : дис... канд. юрид. наук: 12.00.03 / Харківський національний ун-т внутрішніх справ. — Х., 2007. – С. 51.

[226] Корецкий А.Д. Теоретико-правовые основы учения о договоре / Отв. ред. д-р юрид. наук, проф., акад. РАЕН П.П. Баранов. – СПб.: Юридический центр Пресс, 2001. – С. 120.

rules of conduct for all participants in civil relations. This contradicts the very essence of the contract.

The special limitations on freedom of contract are established within the frameworks of the allowed. The legal framework of the allowed is outlined by the general limitations on freedom of the contract. They represent the special limits of the implementation of subjective rights and legally acquired interests of the parties to the contractual relations. There are set the following categories of limits:

- depending on types and subtypes of contracts;
- depending on subjects, who enter into the contract (for example, in the case of a public contract);
- depending on the way of the conclusion of the contract (for example, in the case of an agreement of accession and the main contract, which is concluded on the basis of the preliminary agreement), etc.

The restriction of freedom to conclude a civil-law contract is the obligation of a person to enter into a contract in explicit cases. Among such "obligatory contracts" are: 1) a public contract, 2) an accession contract, 3) contract for public order, 4) a model contract, 5) an agreement with a person who has won public (electronic) bidding, 6) a preliminary contract.[227]

A public contract is that one that is made with a commercial organization, which establishes its responsibilities for the sale of goods, the performance of works or the rendering of services, which such organization, according to the nature of its activities, should provide to anyone who has turned to it (Article 633 of the CCU).[228] When concluding a public contract such a commercial organization is prohibited from giving preferential treatment to particular individuals, setting different prices for its customers (except for certain categories of citizens). In case of unwarranted avoiding the conclusion of a public contract, the consumer may compel an organization to do so or demand reimbursement of losses incurred through the judicial procedure.

Part 1 of Article 634 of the Civil Code of Ukraine also establishes a legal limitation on the contractual freedom of parties to a civil contract. A contract of accession is an agreement, the terms of which are established by one of the parties in a specific standard form. Such contract can be concluded only by joining the other party to the proposed contract as a whole. The other party, which joins such an agreement, cannot introduce any changes to the contract itself, cannot

[227] Мельниченко Р. В. Обмеження договірної свободи сторін у цивільному праві України / Р. В. Мельниченко // Науковий вісник Ужгородського національного університету. Серія : Право. - 2015. - Вип. 30(1). - С. 143

[228] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

qualify for negotiations on “specific” terms of the contract, etc. In this case, the contractual freedom still exists, however it is limited. Thus, the legislator assumes that when the other party joins the contract, it accepts the first-party offer and fully agrees with the proposed terms of the contract.

The next legislative restriction on freedom of contract is enshrined in part 4 of Article 183 of the Economic Code of Ukraine (hereinafter – ECU), according to which evasion from the conclusion of a contract for public order is a violation of economic legislation and entails the responsibility provided for by the Economic Code and other laws of Ukraine. Disputes related to the conclusion of a contract for public order, including those connected with avoidance of the conclusion of a contract by one or both parties are resolved in court. That is, the law directly imposes on the subject the obligatory procedure for the conclusion of the agreement. At the same time, avoiding the conclusion of a contract for public order is considered a violation of economic legislation and shell serve as the basis of economic responsibility and inflicts the application of economic sanctions in accordance with Article 218 of the Economic Code of Ukraine.[229] We believe that this economic contract, which is a type of civil-law contract, is not typical in the sense of civil law. The reason for such statement is that it is not characterized by such principles of the institute of contractual law as dispositivity and contractual freedom of the parties to legal relations. An outlined contractual construction, which exists in the Economic law of Ukraine, is conditioned by a public interest. This, in fact, establishes an exceptional case where a party undertakes to enter into an economic contract without its own will to do it.

As a similar legislative restriction on contractual freedom shell be treated the provision of paragraph 4 part 4 Article 179 of the ECU, which states that when entering into economic contracts, the parties may determine the content of the contract on the basis of a model agreement, approved by the Cabinet of Ministers of Ukraine, or in cases stipulated by law, another government body, when the parties can not retreat from the content of the model contract, but have the right to specify its terms.[230]

A separate restriction of contractual freedom of the parties in civil law of Ukraine is an agreement with the person who won the bidding. The CCU contains only one special provision , namely, Article 650,[231] which is devoted to the peculiarities of concluding contracts at auctions, contests, etc. The specified article does not contain any special rules and is blanket one. Furthermore, all other acts of civil law do not contain a unified procedure for conducting

[229] Господарський кодекс України : науково-практ. комент. - 2-е вид., доп. та перероб. / [О.І Харитонова, Є.О. Харитонов, В.М. Коссак та ін.]; за ред. О.І. Харитонової. - Х. : Одіссей, 2008. – С. 335.

[230] Господарський кодекс України: Закон, Кодекс від 16.01.2003 № 436-IV [Електронний ресурс]. — Режим доступу: http://zakon2.rada.gov.ua/laws/show/436-1

[231] Див.: Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

tenders. Therefore, in our opinion, there is a need to include the general rules on the tenders, their types and peculiarities of their procedure in the CCU.

We completely agree with the position of Polishko N. L.: if a participant is recognized as the winner, he undertakes to sign the protocol on completion of the biddings in co-operation with the organizer of the biddings. The obligation to sign the protocol of the organizer and the winner are mutually exclusive, which makes it possible to secure the commitment of each of them with a deposit. If the participant who has won the bidding refuses to sign the protocol, he loses the deposit. In case the and bidding organizer to sign this protocol, he is obliged to return the deposit in double amount and to compensate the winner the trading losses in excess of the amount of the received deposit (Article 571 of the CCU). Those who did not become the winner, shell get their deposits returned.[232]

There exists a discussion in the doctrine of civil law regarding the issue of restricting the freedom of contract with respect to a preliminary contract. According to Article 635 of the Civil Code of Ukraine the preliminary contract is that one, the parties of which are obliged to enter into a contract in the future (the main contract) within a certain period of time, under the conditions established by this preliminary agreement. However, an agreement on intentions and, specifically, a protocol of intent, which does not reflect a coherent will of the parties to grant the document the power of a pre-contract, are not taken into consideration. Thus, occurs the development of the norm of Article 626 of the CCU on the contract as an agreement and Article 627 of the CCU on the will of the parties as a compulsory component of the freedom of contract.[233]

Deserves a support the scientific position regarding the fact that the legislator, with the help of the designing a preliminary agreement, has made a general exclusion from the principle of freedom of contract. Such an exception is in some cases stronger than in the case of a public contract, since in the case of a preliminary agreement the conclusion of the main contract is binding on both parties by virtue of the accepted obligation, while necessarily on the already agreed terms. It is precisely the preliminary agreement that should be placed on the positive grounds of restricting the principle of freedom of contract. Since the parties jointly establish the content (general terms) of the treaty, it is appropriate to refer to the free mutual self-restraint of freedom. The participant of the contract offers its terms to the second participant and it accepts counter conditions.[234]

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[232] Полішко Н.Л. Особливості укладання договорів на торгах, аукціонах, конкурсах // Юридична наука. - 2011. -№ 4-5. – С. 28.

[233] Басай О.В. Принципи цивільного права України: теорія і практика: монографія. - Івано-Франківськ. - 2013. – С. 268.

[234] Клименко О.М. Вираження принципу свободи договору в конструкції попереднього договору /

The next group of restrictions on freedom of contract includes the restriction of freedom regarding the type, form and content of the contract. They are stipulated by the structure of the subjects of legal relations, the subject-matter of the certain contract, the objectives of concluding such a contract.

For instance, the parties cannot conclude civil agreements at their own discretion, even though this does not directly conflict with the law.

Firstly, the conclusion of a civil law contract must be carried out by the appropriate subjects. Secondly, it should be remembered that the limits of contractual freedom are very closely in line with the institute of sham (Article 234 of the CCU) and the deceptive (Article 235 of the CCU) contracts.

Basay O.V. has fully reasonably noted that restrictions on the freedom of the parties to choose the type of contract, as a rule, derive from the nature of relations regulated by the relevant contract and also by their subject structure. In particular, the guarantor, as a participant in a bank guarantee contract, may be a bank or other financial organization (Article 560 of the CCU); a creditor under a loan agreement may be only a bank or other financial institution (Article 1054 of the CCU); a financial agent for contract of factoring can be only a specialized organization (article 1079 of the CCU); only banks may enter into a bank deposit agreement (Article 1066 of the CCU), only specialized insurance organizations may be insured under insurance contracts (Article 984 of the CCU).[235] Hence, it is the nature of the contractual civil legal relationship that determines the proper contractual structure. Otherwise, one can speak of the sham, deceptive or the invalid nature of such an act. At the same time, following the conclusion of such civil-law contracts, the insignificance of the transaction may be null and void, when its invalidity is established directly by law (Part 2 of Article 215 of the Civil Code of Ukraine).

The contractual freedom of the parties to civil legal proceedings is also limited by the way of conclusion of an agreement (form), namely, that it is limited by the mandatory written form of the contract, as well as its notarization and state registration in cases expressly provided for by law. Conclusion by silence is only admissible in cases directly stipulated by law or by agreement of the parties (Articles 205, 208, 209, 210 of the Civil Code of Ukraine).

O.A. Belyanevich notes that among significant constraints on contractual freedom should also be considered: 1) in accordance with Article 627 of the CCU CC – requirements of reasonableness and justice, which must be observed by the parties to contractual relations; 2) in

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О.М. Клименко // Юриспруденція: теорія і практика. - 2007. - № 2. – С. 33.

[235] Басай О.В. Принципи цивільного права України: теорія і практика: монографія. - Івано-Франківськ. - 2013. – С. 265-266.

accordance with part 1 of Article 203 CCU – the moral foundations of society. In addition, in certain current acts of the legislation, certain restrictive measures are called “social order”, “public order”, “public interests”", “principles of humanity and morals”. Application of such restrictions to freedom in judicial practice appears as the most complex aspect because of their abstract formulation and evaluation nature.[236] Luts A.B. also believes that the freedom of contract is not limitless, since it exists within the framework of current normative acts, customs of business, and the actions of the parties to the contract must be based on the principles of reasonableness, good faith and justice.[237]

Unlike general restrictions on freedom of contract, special restrictions are set at the level of legislative acts not only through legal prohibitions and positive obligations, but also through specific legal permissions. In such manner part 3 of Article 720 of the Civil Code of Ukraine expressly states that business associations may enter into a gift contract between themselves, if the right to make donations is directly established by the constituent document of the donor.[238] In essence, by establishing such a specific legal permission, the legislature somewhat reduces for business associations the possibility to enter into a gift contract between themselves in comparison with the opportunities provided to the other participants in civil relations regarding the conclusion of such an agreement. In particular, this is manifested in the fact that other legal entities can enter into a gift contract between themselves, even if the right to make donations is not provided for by the constituent documents of the donor.

The significant difference between the special restrictions on freedom of contract and the general one is that they can be established at both the normative and the contractual level. This, of course, concerns exclusively the limits of the exercise of subjective rights in contractual relationships and does not concern the implementation of the interests protected by law. The latter, in principle, cannot be established by an agreement. This follows from the essence of the contract as an agreement between two or more parties aimed at establishing, changing or terminating their civil rights and obligations (part 1 of Article 626 of the Civil Code of Ukraine). To be more specific, the civil law relations (in particular, contractual obligation) are modeled on the contract. The content of such relations is always the mutual rights and obligations of the parties to the contract. Legally acquired interests, based on their specific legal nature, have no place in such a legal structure as a civil law relations.

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[236] Беляневич О.А. Принцип свободи договору за Цивільним та Господарським кодексами України // Вісник Київського нац. ун-ту імені Тараса Шевченка. - 2004. - №60/52. – С. 66.

[237] Луць А.В. Свобода договору в цивільному праві України: дис. ... канд. юрид. наук : спец. 12.00.03. - Львів, 2001. – С. 54.

[238] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

The special limits of the implementation of subjective rights in contractual relationships are established by the contract to ensure the interests of a particular participant or participants in civil relations. They are always personalized. Establishment of such boundaries leads to the expansion of the right (rights) of one party (parties) of the contract and to the reduction of the volume of the corresponding right (rights) of the other party to the contract, in comparison with a way in which such rights are enshrined in the legislation. If the rights of one participant expand, then another participant will inevitably narrow the measure of the appropriate possible behavior, and there will emerge a legal obligation. On this occasion, Stefanchuk M. O. rightly notes that the right of one person ends where the right of another begins.[239]

Expansion and narrowing of the scope of rights based on the contract is temporal in its character. As a rule, after the expiration of the term established by the contract or with the termination of the contract itself, the extended or narrowed rights of the parties to the contract are restored within the limits provided for them by the relevant provisions of the legislation. In our opinion, it is the manifestation of the so-called "elasticity of contractual freedom".

Establishment of the special limitations of the exercise of subjective rights in contractual relations, in essence, means the change (shift) of the limits of the exercise of such rights compared with those established by law. Given this, when establishing limits on the exercise of rights at the contractual level, participant of civil relations should have a clear understanding of how far they are free to depart from the provisions of civil law acts.

Legal analysis of part 3 of Article 6 CCU allows to suggest that the national legislator ignored the traditional (classical) legal and technique approach at realization of dispositivity in civil law (where the discretionary provisions of civil law specifically contain an indication of the possibility of establishing other rules of conduct in the contract) and added to the Civil Code of Ukraine a presumption of dispositivity of provisions of civil law acts that govern contractual relations. However, at the same time, they did not propose effective criteria for distinguishing between dispositive provisions of acts of civil law from imperative ones.

Proceeding from the contents of part 3 of Article 6 of the Civil Code of Ukraine, there are three criteria for determining the imperativeness of the provisions of acts of civil law.[240]

The first criterion is that the provisions of the act of civil law should be considered imperative if they contain a direct prohibition to retreat in the contract from such a provision. Among others, this criterion appears as the most definite. Despite this, it cannot be called effective. As was rightly noted by O. P. Podtserkovnyi, the norms of the current legislation of

[239] Стефанчук М.О. Межі здійснення суб'єктивних цивільних прав: Дис. … канд. юрид. наук: 12.00.03. – К., 2006. – С. 112.

[240] Див.: Горєв В.О. Свобода договору як загальна засада цивільного законодавства України : дис... канд. юрид. наук: 12.00.03 / Харківський національний ун-т внутрішніх справ. — Х., 2007. — 203 с.

Ukraine do not have the full application of direct prohibitions to change the provisions of the law in the contract. It should also be agreed with the scholars that in those cases where such regulatory prohibitions still occur, they have a non-regulatory, but largely declarative meaning, emphasizing the inviolability of the most important rights of the individual.[241]

The second criterion is that the provisions of the act of civil legislation should be considered imperative, if the binding character of such a provision for the parties to the agreement from its content. It turns out that when entering into an agreement, participants of civil relations will have to "search" for evidence of possible imperativeness of the provisions in the content of the provisions of civil law acts. At the same time, the parties will always have a dilemma about the fact that the contents of any legislative provision can testify its binding nature, especially when it comes to the provisions that contain the definitions of civil-law concepts.

The third criterion is that the provisions of the act of civil legislation should be considered imperative, if the obligatory character of such a provision for the parties to the agreement follows from the essence of relations between them. Compared to the rest, this criterion is the least defined. Currently it remains unclear what should be understood under the category "the essence of relations between the parties" and how it should be ascertained. The answers to this question can be found neither in the legislation nor in law enforcement practice.

Part 3 of Article 6 of the Civil Code of Ukraine presumes that "The contract allows all that is not expressly prohibited by acts of civil legislation, is not prohibited, based on the content of legislative provisions or the essence of relations between the parties to the contract." Introduction of provision on the legislative level led to the fact that, to date, it became a significant problem to make a distinction between dispositive and imperative provisions of acts of civil law. Even among judges there is no a single position as to how part 3 of the Article 6 of the Civil Code of Ukraine should be applied in cases of delimitation of dispositive and imperative provisions of acts of civil law. In the book of judges of the Supreme Court of Ukraine, which serves as a kind of methodological guidance on the application of the Civil and Economic Codes of Ukraine in the course of the administration of justice, it is noted that in practice there were court decisions that recognised the terms of the penalties for violating the non-monetary obligation invalid only because part 3 of Article 549 of the CCU defines a fine as a penalty, calculated as a percentage of the amount of late executed monetary obligation for each day of delay of execution. The book also states that such decisions are illegal, since they do not take into account that the parties to the contract have the right to establish a penalty for delay in

[241] Подцерковний О.П. Недоліки норм про свободу договору в новому Цивільному кодексі України // Вісник Академії правових наук України. – 2004. – № 3. – С. 79-80.

performing not only monetary, but also any other obligation on the basis of part 3 of Article 6 of the CCU.[242]

From the above stated it follows that, proceeding from the content of part 3 of Article 6 of the Civil Code of Ukraine judges of the Supreme Court of Ukraine consider the provisions of part 3 of Article 549 of the Civil Code of Ukraine as dispositive, while the lower courts consider them imperative.

If we follow the position of the judges of the Supreme Court of Ukraine, then it turns out that on the basis of part 3 of Article 6 of the Civil Code of Ukraine it is possible to withdraw from the provisions of acts of civil law, which contain the definition of fundamental civil-law concepts. Under such conditions, there disappears the need for many civil law categories. However, their existence justifies itself for more than one decade. For example, in the above extract, it makes no sense to divide the penalty into types – a penalty and a fine, since on the basis of part 3 of Article 6 of the Civil Code of Ukraine it is allowed to deviate from the legal definition of the fine in a convenient way.

Summarizing, an approach to legal regulation of the contract, which is enshrined in part 3 of Article 6 of the Civil Code of Ukraine, generates only ambiguity and uncertainty in contractual relations, creates preconditions for the loss of significant civil-law categories. Therefore, it is expedient to refuse from it. To this end, we propose to implement at the level of part 3 of Article 6 of the CCU another mechanism of legal regulation of the contract, namely: "The contract allows all what does not contradict the acts of legislation and the general principles of civil law." Among other things, it will give the subjects of law enforcement a clear idea of when they have the right to change the limits of the implementation of subjective civil rights in contractual relations established by the acts of civil law (to set special limits for the implementation of such rights at the contractual level), and when there is no such possibility.

3.3 Comparison of limitations of freedom of contract in Europe and in Ukraine

The limits and the degree of legislative restrictions on the principle of contractual freedom by state bodies is always fluctuated and directly depended on the economic (socio-political) situation in the state. From the history of the development of any state, it can be seen that wares, large-scale ecological disasters, economic crises in most cases entail a certain collectivization of society. This is explained by the person's desire to receive collective protection and reduce risks. The more real the threat is, the sooner a person abandons individual

[242] Проблемні питання у застосуванні Цивільного і Господарського кодексів України / Під ред. А.Г. Яреми, В.Г. Ротаня. – К.: Реферат, 2005. – С. 11.

values in favor of the collective. The opposite situation is observed during the onset of peace and economic growth, since there is no need to be associated with the team and, accordingly, a person increasingly seeks for individualism and personal freedom.

The above socio-economic factors directly affect the degree of restriction of contractual freedom. Thus, during the course of economic crises, the state is pursuing a tougher legislative policy to limit the freedom of expression. This is caused by the urgent need to eliminate the preconditions or consequences of such crises. That is, in this case the primacy of collective interests prevails over individual ones. Conversely, in the absence of negative factors and in economic stability, the ideology of personal freedom and individualism comes to the fore, which entails a reduction of legislative restrictions on constitutional freedom.[243]

It should be noted the facts of non-recognition of the principle of freedom of contract in states with oppressive forms of a political regime, where full centralization of power, as a rule, leads to its usurpation and the restriction of individual freedoms, which necessarily entails a proportional restriction of compulsory freedom up to its actually a total ban.

Thus, primarily, it should be borne in mind that the scope of contractual freedom depends on the priority of collective or individual values in a certain social area. It should be understood that the struggle of these values is endless, and historical evidence does not allow to assume a complete and definitive victory of one or another social value. It is obvious that the nature of the struggle and the change of priority over the above-mentioned values will always depend on the economic development curve of the state. Depending on the political and economic situation in the state, one or the other approach will receive priority, respectively, the restriction of contractual freedom will be strengthened or weakened.

As an example, state restrictions on the principle of contractual freedom include the adoption of laws to limit the monopolization of the market (the Laws of Ukraine "On the Antimonopoly Committee of Ukraine"[244], "On Protection of Economic Competition",[245] "On Protection against Unfair Competition"[246]) or from aimed at reducing the negative consequences of economic crises (Law of Ukraine "On Measures to Ensure the Sustainable Operation of Fuel and Energy Complex Enterprises"[247]).

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[243] Василенко М. Є. Свобода договору, об-межена публічним порядком та моральними засадами суспільства, у континентальному цивільному законодавстві / М. Є. Василенко // Порівняльно-аналітичне право. - 2014. - №8. - С. 65

[244] Про Антимонопольний комітет України: Закон від 26.11.1993 № 3659-XII [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/3659-12

[245] Про захист економічної конкуренції: Закон від 11.01.2001 № 2210-III [Електронний ресурс]. — Режим доступу: http://zakon.rada.gov.ua/go/2210-14

[246] Про захист від недобросовісної конкуренції: Закон від 07.06.1996 № 236/96-ВР [Електронний ресурс]. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80

[247] Про заходи, спрямовані на забезпечення сталого функціонування підприємств паливно-енергетичного комплексу: Закон від 23.06.2005 № 2711-IV [Електронний ресурс]. — Режим доступу:

To the restrictions on the principle of contractual freedom can also include the legislative protection of the "weak side" of knowingly unlawful (bonded) conditions of transactions. Such restrictions are fixed in legal norms concerning the need for the approval of contracts by parents, guardianship and guardianship authorities, the invalidation of transactions conducted under the influence of grave circumstances. The protection of the weakness of the transaction can be attributed to the right of the court to reduce the amount of damages and a contractual penalty.

In the light of the foregoing, we should note that the basis of the state restriction of contractual freedom is, firstly, economic factors, and secondly, the need to protect the weakness of the transaction. In the first case, the restriction is introduced in order to prevent (eliminate) negative economic consequences, in the second – in order to protect those subjects of civil law, who, due to objective circumstances, cannot do it themselves.

As mechanisms for restricting contractual freedom, the state uses certain legal constructions (imperative norms) that introduce such categories of restrictions as "good faith", "justice", "public order" and "moral principles of society".

Referring to the UNIDROIT Principles, Article 1.7, "Good faith and Fair Business Practices", states that each party is required to act in accordance with accepted practices of international trade of good faith and honest business practices.[248]

PECL also restrict freedom of contract with "... requirements of good faith and fair dealing."

The specified restrictions on freedom of contract can be compared with the restrictions, which are enshrined in the CCU. First of all, Article 627 obliges parties, entering into contracts, to take into account the requirements of reasonableness and fairness. In addition, Article 6 CCU refers to the principles of civil law, while item 6 of Part 1 establishes the principles of justice, integrity and reasonableness.[249]

According to Maidanik R. A., the principle of justice, conscientiousness and reasonableness enshrined by the domestic legislator should be recognized not as the combination of the three principles, but as the single principle that manifests itself in the unity of three interrelated components that is traditional for the European private law (German Treu und Glauben, French Bona Fideas, etc.).[250] A similar opinion is maintained by Tobot U. A., who

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http://zakon.rada.gov.ua/go/2711-15

[248] The Principles Of European Contract Law 2002 (Parts I, II, and III) [Electronic resource]. – Access mode: http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002

[249] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15.

[250] Майданик Р. А. Науково-практичний коментар до ст. 3 Цивільного кодексу України [Електронний ресурс]. – Режим доступу: http://jurists.org.ua/civil-law/2574-naukovo-praktichniy-komentar-do-

concludes that the categories of fairness, conscientiousness, reasonableness, despite their differences, have common features and are interrelated, since they identify the individual sides (facets) behavior of participants in civil relations. All this conditions the need to combine these categories in one principle.[251] In their turn, such scholars as Deriugina T. V., Berveno S. M., Pohribny S. O., Memelyko O. O. and others consider the principles of fairness, justice, reasonableness separately.[252]

In our view, the combination of good faith, justice and reasonableness in one principle or their separation is not very practical. Good faith, justice, reasonableness are, of course, interconnected categories and affect one another. However, the implementation of these principles in the conclusion and execution of civil contracts can vary.

National researchers, when defining the principle of good faith, mostly focus on its application in contractual relations. For instance, Maidanik R. A. notes that the principle of good faith is one of the means of limiting the principle of freedom of contract of the parties, a method of keeping the parties from abuse of their rights in the performance of the contract. The main purpose of this principle, which was firstly regulated by the national legislator, is to "give the judges more opportunities to find out the factual circumstances of the case and, finally, to establish objective truth."[253] Pogrebny S. O. analyzes good faith through the prism of regulating civil legal relations and notes that, in order to be fair, the legal regulation of civil relations should be carried out in such a way that it provokes a favorable assessment from the part of public morality, in particular, in the aspect of the conformity of the legal means regulation to the goals that are put before them.[254] In the opinion of Kuznetsova N.S., within the frameworks of the obligation, the grounds of good faith are specified as a general obligation, which implies the need: a) of each party to do everything that facilitates the fulfillment of the obligation mutually, and to avoid that can complicate them or make them impossible to perform; b) to eliminate violations of the rights of the other party; c) really do all that is necessary to achieve the purpose of the contract; d) provide the necessary information on the implementation of the initial actions for the implementation of the obligation.[255]

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st-3-civlnogo-kodeksu-ukrayini.html

[251] Тобота Ю. А. Принцип справедливості, добросовісності і розумності у цивільному праві : автореф. дис. на здобуття наук. ступеня канд. юрид. наук / Ю. А. Тобота. — Х., 2011. — С. 13.

[252] Див.: Алексашина Ю. Реалізація принципів добросовісності, справедливості, розумності при договірному регулюванні цивільних відносин / Ю. Алексашина // Юридична Україна. - 2012. - № 11. - С. 89.

[253] Майданик Р. А. Науково-практичний коментар до ст. 3 Цивільного кодексу України [Електронний ресурс]. – Режим доступу: http://jurists.org.ua/civil-law/2574-naukovo-praktichniy-komentar-do-st-3-civlnogo-kodeksu-ukrayini.html..

[254] Погрібний С. О. Механізм та принципи регулювання договірних відносин у цивільному праві України / С. О. Погрібний. — К. : Правова єдність, 2009. — С. 272.

[255] Кузнецова Н. Принципи сучасного зобов'язального права України / Н. Кузнецова // Українське комерційне право. — 2003. — № 4. — С. 13.

The concept of "justice" is more moral rather than a legal category. It relates to the understanding of humanity, of what is good and what is bad. From a legal point of view, the Constitutional Court of Ukraine provided an interpretation of justice. In its decision No. 15-rp / 2004 dated November 2, 2004, it noted the following: "Justice is one of the fundamental principles of the law, which is crucial in determining it as the regulator of social relations, one of the universal human dimensions of law. Generally, justice is seen as the property of law, expressed in particular, in the equal legal sense of conduct and in proportion to the legal responsibility of the offender."[256]

In the contractual regulation of relations, the principle of equity is primarily implemented at the stage of concluding a contract, namely, when the parties agree its terms. Here, it is possible to view as fair those conditions, which assume the equivalence of the parties, such as the effects of unified behavior. Thus, for example, it will be an unfair condition, which will impose sanctions for undue performance on the other party and will not provide the samne conditions for themselves.

Also, understanding of the unfair and, accordingly, fair conditions of the contract can be taken from the EU Directive 93/13 / EU dated 05.04.1993 "On unfair terms in consumer contracts." According to Article 3 of this Directive, the clause of the contract that is not discussed individually and in violation of the requirement of good faith will result in a significant inconsistency in the rights and obligations of the parties arising from the contract to the detriment of the consumer. And in accordance with Article 6, if the clause of the contract is void, it does not create rights or obligations for the consumer, that is, it is invalid, and the contract is valid without an unfair term.[257]

The principle of reasonableness is one of the most important in contractual law. Merezhko O. O. correctly noted that sense is the source of the contract, and the criterion of reasonableness determines its content and implementation.[258]

In the Ukrainian civil law, such a characteristic as reasonableness can be meet quite often. Thus, in the CCU there are references to the "reasonable term" (Articles 564, 619, 666, 684, 700, 846, 938, 1004, etc.), "reasonable fee" (Articles 903, 916, 931), "reasonable expenses" (Article 1232) and on "reasonableness" as such (Articles 3, 509, etc.). However, despite such frequent application, there is no legal definition of the category "reasonableness" in the

[256] Рішення Конституційного Суду України № 15-рп/2004 від 02.11.2004 р. у справі за конституційним поданням Верховного Суду України щодо відповідності Конституції України (конституційності) положень статті 69 Кримінального кодексу України (справа про призначення судом більш м'якого покарання) // Офіційний вісник України. — 2004. — № 45. — Ст. 2975.

[257] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [Electronic resource]. – Access mode: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013..

[258] Мережко А. А. Договор в частном праве / А. А. Мережко. — К. : Юстиниан, 2003. — С. 64

legislation. This is understandable, since it is unequivocally possible to predict which actions will be reasonable and which are not, because of the diversity of situations in which such an assessment should be made.

In civil law literature, the authors often refer to the category of “average person”, “ordinary person” to determine the criterion of reasonableness. V. I. Emelianov wrote that under the reasonable it should be understood the actions that would have been performed by a person who has a normal, average level of intelligence, knowledge and life experience. An abstract man who possesses such qualities can be called a smart person.[259]

In contractual relations, reasonableness manifests itself most at the stage of fulfilling a contractual obligation. The criterion of reasonableness applies when the parties to the contract have not established certain rules of conduct in the contract and when they cannot be determined based on the provisions of the law. Also reasonable are the claims of the creditor in the event of failure or improper performance of the contractual obligation.

Article 228 of the Civil Code of Ukraine introduces such categories of restrictions as “public order" and “moral principles of society”. These orders are aimed at protecting the foundations of public order, although this is not explicitly mentioned in the text of the article itself. It should proceed from the fact that the category of public order covers a much wider range of social relations than those listed in Article 228 of the CCU.[260] It is not limited to the constitutional rights and freedoms of a person and a citizen and the protection of the property of a natural or legal person, the State, the Autonomous Republic of Crimea, a territorial community from the destruction, damage, and illegal capture. The above cases are the foundation of public order, that is, special cases, since they are directly related not to the public order, but to the principles of public order. Accordingly, Article 228 of the Civil Code of Ukraine should be interpreted as a special case of invalid agreements that do not comply with the requirements of the law. A qualifying sign is the violation of the very foundations of public order, with the general rule aimed at protecting public order, is part 1 of Article 203 of the Civil Code of Ukraine, according to which the law cannot suppress the acts of civil law (imperative norms).[261]

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[259] Емельянов В. И. Разумность, добросовестность, незлоупотребление гражданскими правами / В. И. Емельянов. — М. : Лекс-Книга, 2002. — С. 15.

[260] Див.: Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[261] Василенко М. Є. Свобода договору, об-межена публічним порядком та моральними засадами суспільства, у континентальному цивільному законодавстві / М. Є. Василенко // Порівняльно-аналітичне право. - 2014. - №8. - С. 66.

Part 1 of Article 203 of the Civil Code of Ukraine establishes that the content of an agreement cannot contradict the moral principles of society; non-compliance with such a requirement entails its invalidity (Part 3 of Article 228 of the Civil Code of Ukraine).[262]

It is obvious that the aforementioned norms are not about social morality (in general), as it is seen from the literal interpretation of their text, but about the foundations of social morality. At the very least, in the above-mentioned analogs of the civil law of France and Germany, which we considered in previous subdivisions, we are talking about the fundamental principles of social morality (the foundations of social morality). This legal approach is of practical importance, since the foundations of social morality are more easily identified than morality in general. Morality has a subjective character, the excessive sensitivity of a positive right to a violation of morals will entail destabilization of contractual treatment. That is why, in order to refute the presumption of freedom of contract in such cases, it is required to violate such ethical standards, which, unquestionably, are recognized by the majority of society as fundamental.

It should be noted that the category of "fundamentals of morality" has its own specificity, because even with the help of the above-mentioned approach, it is not always possible to clearly identify those facts that violate the principles of social morality. Morality, even in the case of measuring it with a socio-ethical minimum, is still an appraisal category in which each participant in civil legal relations will put his own content. Even the civil law of France, which was the first that introduced the category of "good intentions" and first appeared to be the need to fill it with a clear legal content, could not do it for two centuries. Listed in the above-mentioned continental Civil Codes formulations are vague and do not contain any specifics. Therefore, participants in civil legal relations will subjectively perceive them. They are denied the possibility of objective use by the judiciary in the course of consideration of the relevant disputes. It must be borne in mind that the absence of a clear legal definition of the principle of morality actually transfers the powers of the legislative branch to the court and puts contractual freedom in dependence on judicial subjectivity.[263]

Taking into account the fact that up to this time the legislators of the above-mentioned countries have not dared to fill the category of "fundamentals of morality" with a clear normative content, it is possible assume that this is the case, when it is easier to refuse from such a legal category than to seek criteria, which can help to uniquely identify it.

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[262] Цивільний кодекс: Закон України від 16 січня 2003 року № 435-IV [Електронний ресурс]. – Режим доступу:http://zakon4.rada.gov.ua/laws/show/435-15

[263] Василенко М. Є. Свобода договору, обмежена публічним порядком та моральними засадами суспільства, у континентальному цивільному законодавстві / М. Є. Василенко // Порівняльно-аналітичне право. - 2014. - №8. - С. 66.

There also emerges a question of the appropriateness of legislating the consolidation of the "foundations of morality" in the form as it was done in the CCU. One can admit that it would be advisable to avoid such general wording as "the fundamentals of social morality" and, in case of necessity to protect the latter, to consolidate in the legislation the corresponding specified norm. As an example of "concrete" consolidation of morality in the law, one can refer to the norms of the Law of Ukraine "On the Protection of Public Morality" when relative, undefined, uncertain moral norms acquire totally opposing features through their specific legislative consolidation. In fact, there occurs the natural process of transformation of generally accepted by the society moral norms into the corresponding legislative acts. What is practically valuable in this situation is that the content of the contract will contradict not the abstract principles of public morality, but fully specified norms of the law (acts of civil law, part 1 of Article 203 of the Civil Code of Ukraine), which will bring appropriate transparency in the legal relationship, with the restriction of contractual freedom.

Thus, to protect the moral principles of society, it is enough to prohibit the implementation of concrete actions aimed at violating moral principles at the legislative level.

Research of the restrictions on freedom of contract in Ukraine and Europe gives rise to the conclusion that Ukraine, as an example of European countries, has established, as a criterion for limiting freedom of contract, the principles of good faith and justice. In addition, in Ukrainian legislation there exist the requirements of reasonableness, which is not explicitly mentioned in European legislation. However, it is also a limiting factor, despite it follows from other principles.

CONCLUSIONS

In result of analyzing the normative legal acts of Europe, the EU member states, Ukraine, having researched numerous scientific works of European and Ukrainian scholars on the study of the principle of freedom of contract, defining the basic approaches to understanding this principle, its elements and the established restrictions, we can indicate that defense statements are confirmed. Therefore, summarizing the research, it is possible to give the following conclusions:

1. The essence of freedom of contract in Europe is to consolidate it as a principle of civil law. The Ukrainian legislation contains a somewhat different approach that restricts the freedom of contract.

2. As a legal fiction, freedom of contract is based on the freedom of negotiation, free manifestation of will of the person to conclude an agreement, the freedom to choose an agreement, the freedom to choose the contractor under the contract, the freedom to choose the form of the contract and the freedom to determine the terms of the contract (the right to determine the means of securing contractual obligations, the right to establish forms (measures) for breach of contractual obligations, autonomy of will, etc.). Taking into consideration the fact that contractual obligations may not arise unless the persons obtained the consent of all essential terms of the contract as an act in the proper form (as it follows from Article 11 of the CCU), in the "pure" form, without legal fictions, the essence of the freedom of contract is the ability of the parties to change or break the contract concluded by them. In this form, it acts at the stage of implementation of the contract.

3. Civil law of Ukraine lacks a single approach to the definition and prohibition of the use of unfair terms in treaties. Nowadays under such conditions, the acceptor in an agreement concluded based on a legal act of the state authority actually remains unprotected from unfair terms. He can protect himself from unfair terms only if he proves that the provision by the offeror in a legal act of such conditions has the purpose of harming him or represent another form of abuse of subjective civil right. On the practical side, it is almost impossible to do this, as the current civil law does not contain criteria for assessing the actions of participants in civil relations as abusive subjective civil law in other forms.

4. Freedom of form in Europe is wider in nature than in Ukraine. This follows from the fact that the Ukrainian legislation, first of all, establishes a wide range of obligatory contracts, such as an accession agreement, a public contract, a preliminary agreement, etc. In addition, the CCU determines the essential conditions that are necessary for the contract to be concluded, as

well as requirements for the form, especially writing one (and the lack of regulation of the electronic form as a written form) and the required notarization certification.

5. A provision, enshrined in Article 6 of the Civil Code of Ukraine, can be characterized by ambiguity and the possibility of collisions during application in the part of the reference to the limitation of freedom of contract in case of indication by the acts of civil law. The restriction of freedom of contract in this provision covers not only acts of civil law, but also acts of other branches of law.

6. Having examined the provisions of the main European normative acts that directly or indirectly regulate contractual relations, we can conclude that the restrictions on the principle of freedom of contract established by them derive from the practice that has developed from customs and traditions for business needs. Therefore, the requirement to adhere to the principles of good faith and honesty is put to the fore, and only then go the imperative norms of normative acts.

RECOMMENDATIONS

Based on the abovementioned conclusions, we can propose the following recommendations for the improvement of civil law in Ukraine:

1. It is necessary to define the freedom of contract in the CCU as a principle, not as a foundation. The definition of freedom of contract in the Civil Code of Ukraine as the principle of civil law, and not the foundation of civil law, first of all, ensures that the principle is of not only civil law relations regulated by law, but also to the pre-legislative level.

2. Following the example of the analyzed Europe law, in the Ukrainian legislation it is necessary to regulate negotiations as one of the ways of concluding a contract, along with the offer-acceptor method. An important aspect of this should be the conscientiousness of the negotiations. Therefore, in order to ensure fairness, the legislator in Ukraine also needs to establish civil liability for non-fulfillment as an obligation of an unscrupulous participant in negotiations to compensate a *bona fide* participant for costs incurred during negotiations, as well as the opportunity he lost to conclude a similar contract with a third person. Such a restriction on freedom of negotiation at the time of the conclusion of the contract is proposed not only in the case of unfair negotiations as a classical procedure for the conclusion of an "offer-acceptance" agreement, but also in the case of unfair negotiations as an independent contracting procedure, when the offer and acceptance acquire the character of legal fiction.

3. It is proposed to mitigate the requirements of the CCU regarding the form of the contract, in particular, the requirements for mandatory notarization of the contract. It is also necessary to regulate the consequences of non-compliance with the requirements for the form of the transaction, especially in the form of null and void of such an agreement.

4. It is proposed to consolidate in the Chapter 53 of the Civil Code the right of the party to the contract to demand the change or invalidation of the individually non-agreed terms of the contract, if, contrary to the requirements of good faith, it causes a significant inconsistency of rights and obligations of the parties arising from the contract, with the task of such a party damages.

5. Following the example of the EU law, we propose to establish the following provision at the level of part 3 of Article 6 of the Civil Code of Ukraine: "The agreement allows all that does not contradict the general principles of civil law and legislation", where the principles of good faith, honesty and reasonableness are to be understood first.

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ABSTRACT

Oteniya Mykola Rostyslavovych. Freedom of contract in Europe and Ukraine. Comparative analysis

In the thesis there are researched the approaches to understanding the freedom of contract in Europe and Ukraine, made the comparison and collating between these approaches, characterized the concept and content of the freedom of contract. There are determined the major elements of the principle of the freedom of contract in Europe and Ukraine, characterized their legal regulation and made the collating. There are analyzed the state of restriction of freedom of contract in Europe and Ukraine, prepared their comparative analysis. On the basis of the research there are proposed the amendments to the legal regulation of the freedom of contract in Ukraine for its approaching to the law of the European Union.

Keywords: freedom of the contract; principles of civil law; law of the EU; restriction of the freedom of the contract; Ukraine.

SUMMARY

Oteniya Mykola Rostyslavovych. Freedom of contract in Europe and Ukraine. Comparative analysis

The final thesis «Freedom of contract in Europe and Ukraine. Comparative analysis» has the main task to determine the directions of improvement of the concept of freedom of contract enshrined in the civil law of Ukraine taking into account the priority of adapting the Ukrainian legislation to the legislation of the European Union and integrating Ukraine into the international economic order based on the research of the legal regulation of freedom of contract in Europe and Ukraine.

In Chapter 1«Freedom of contract - the principle of civil law» there are researched the understanding of freedom of contract. The research of the provisions of primary and secondary EU law on freedom of contract has been provided, the consolidation of the principle of freedom of contract in the Principles of UNIDROIT and the Principles of European Contract Law has been determined. There is also explored the understanding of freedom of contract in the legislation and legal doctrine of Ukraine, the definition of freedom of contract as a principle of law, and not the basis of civil law is substantiated; the basic elements of the freedom of the contract are defined. This Chapter also defines a philosophical basis for understanding the principle of freedom of contract. Based on a comparison of approaches to understanding the freedom of contract in Europe and Ukraine, it is proposed to amend the Ukrainian legislation, which would consolidate the freedom of contract as a principle of civil law.

Chapter 2, «Elements of the principle of freedom of contract in Europe and in Ukraine», describes the elements of the freedom of contract. The study of the freedom to conclude an agreement, negotiating in Europe and Ukraine was conducted. On these grounds there were proposed to regulate the gaps in Ukrainian legislation regarding the consolidation and settlement of negotiations as one of the ways of concluding a contract. In subchapter 2.2 «Freedom to choose with whom to enter into the contract as an element of the principle of freedom in civil law in Europe and in Ukraine. Comparative Analysis» there is defined the essence of the freedom of choice of the counteragent to the contract, the exceptions to the freedom of choice of the counteragent under the law of Ukraine and Europe are described, their comparison is made. Also in this chapter the freedom to determine the terms of the contract is researched, the freedom of the form of the contract is described in details, the notion of the essential terms of the contract according to the laws of Ukraine is defined. On the basis of comparative analysis, there are proposed the amendments to the legislation of Ukraine regarding the determining the terms of the contract.

The final Chapter «Limitation of freedom of contract» is dedicated to the restriction of the freedom of contract. There are researched the restrictions on the principle of freedom of contract in the primary and secondary law of the EU, the provisions of the main codification acts of EU law concerning restrictions on the principle of freedom of contract are studied, the cases of restriction of freedom of contract in the legislation of the EU member states and Ukraine are analyzed, their structuring and classification is made. On the basis of the comparative analysis of general restrictions of the freedom of contract it is concluded the degree of freedom of contract in Ukraine, and it is proposed to mitigate the limitation freedom of contract in Ukraine.

HONESTY DECLARATION

07/05/2018

Vilnius/Kyiv

I, Mykola Oteniya, student of Mykolas Romeris University and Taras Shevchenko National University of Kyiv, faculty of Law, Institute of Private Law, Master double degree programme «Ukrainian - European Legal Studies» confirm that the Master thesis titled "Freedom of contract in Europe and Ukraine : comparative analysis":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

_____ Mykola Oteniya