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Pre-contractual relationship in the contract law of Ukraine and the DFCR: the problem of updating legal regulation in view of the reform of the Civil Code of Ukraine

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Secção I

Investigação Científica*

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Pre-contractual relationship in the contract law of Ukraine and the DFCR: the problem of updating legal regulation in view of the reform of the Civil Code of Ukraine

A relação pré-contratual no direito contratual ucraniano e o DFCR: o problema da atualização das normas jurídicas na perspetiva da reforma do Código Civil da Ucrânia

Olena KOKHANOVSKA[1]
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ABSTRACT: The purpose of the article is to study the institutions of pre-contractual relationship and civil liability at the negotiation stage in view of the updating processes of the civil legislation of Ukraine using the normative experience of European countries and the provisions of the Model Rules of European Private Law project. To achieve the set purpose, a number of general and special scientific methods were used during the study, namely: formal and logical, dialectical, dogmatic, systemic and structural, comparative and a number of other methods. The article analyses the general pre-contractual obligations of counterparties under the DCFR connected with the compliance with the good faith principle, non-disclosure of confidential information, legitimate expectations, negotiations consequences in violation of the good faith principle, and other responsibility forms of the negotiating parties. Particular attention is paid to informational rights between counterparties, commercial enterprises and in the processes of marketing activities in relation to consumers. The conclusions emphasise that the Ukrainian concept of pre-contractual relationship should be based on a number of fundamental principles of contract law, as it is accepted in European private law, and take into account flexible rules of their implementation in the practice of business conduct.
KEYWORDS: civil legislation, privacy, information rights, negotiations, pre-contractual liability.

RESUMO: O objetivo do artigo é estudar os institutos da relação pré-contratual e da responsabilidade civil na fase de negociação, tendo em vista os processos de atualização da legislação civil da Ucrânia, utilizando a experiência normativa dos países europeus e as disposições do projeto de Regras Modelo de Direito Privado Europeu. Para atingir o objetivo estabelecido, foram utilizados vários métodos científicos gerais e especiais durante o estudo, nomeadamente: formal e lógico, dialético, dogmático, sistémico e estrutural, comparativo e vários outros métodos. O artigo analisa os deveres gerais pré-contratuais das contrapartes no âmbito do DCFR relacionados com o cumprimento do princípio da boa-fé, a não divulgação de

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informações confidenciais, a confiança legítima, as consequências das negociações em violação do princípio da boa-fé e outras formas de responsabilidade das partes negociadoras. É dada especial atenção aos direitos de informação entre contrapartes, empresas comerciais e nos processos de actividades de marketing em relação aos consumidores. As conclusões sublinham que o conceito ucraniano de relação pré-contratual deve basear-se numa série de princípios fundamentais do direito dos contratos, tal como é aceite no direito privado europeu, e ter em conta as regras flexíveis da sua aplicação na prática da conduta comercial.
PALAVRAS-CHAVE: legislação civil, privacidade, direitos de informação, negociações, responsabilidade pré-contratual.

Introduction

As a result of thorough work in 2019-2020, on January 5, 2021, The Concept of updating the Civil Code of Ukraine[4] project was presented to Ukrainian society that was prepared by members of the Working Group formed by Resolution of the Cabinet of Ministers of Ukraine No. 650 "On the establishment of a working group on the recodification (update) of civil legislation f Ukraine"[5] (hereinafter referred to as Concept). In the Introduction to the Concept of updating the Civil Code of Ukraine[6], it is noted that its authors believe that the implementation of the recodification process comes from the transformational processes of modern society, in particular, such necessary component of the European integration orientation of civil society as an effective market economy development. At the same time, among the factors and prerequisites of a legal nature for starting relevant works, the authors see, in particular, the presence of model norms of international acts, which certainly includes the "Project of collaborative approaches" or, in other translations "Principles, Definitions and Model Rules of European Private Law", better known by the abbreviation DCFR (Draft Common Frame of Reference)[7], which were prepared by two working groups under the authority of the European Commission and constitute an academic work that synthesises and systematises the principles, definitions and model rules of European private law.

[4] Concept of updating the Civil Code of Ukraine. 2021. Available from https://cutt.ly/CNoH1l5.
[5] Resolution of the Cabinet of Ministers of Ukraine No. 650 "*On the establishment of a working group on the recodification (update) of civil legislation of Ukraine*". 2019. Available from https://zakon.rada.gov.ua/laws/show/650-2019-%D0%BF#Text.
[6] Concept of updating the Civil Code of Ukraine. 2021. Available from https://cutt.ly/CNoH1l5.
[7] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.

The relevance of referring to the provisions of the DCFR[8] in the updating process of the current Civil Code of Ukraine[9] is thoroughly followed in the Concept of updating the Civil Code of Ukraine[10], in particular with regard to the institutions of liability and contract law. In the context of this study subject in § 5.31. The Concept is about the need to significantly expand the scope of legal regulation of pre-contractual relationship. The authors of the Concept note that "it is considered expedient to take into account the provisions of the DCFR, which regulate the informational rights and obligations of participants in the pre-contractual process in detail (in particular, Articles II.-3:101, II.-3:103, II.-3:104, II.-3:106, II.-3:107, II.-3:108, II.-3:109); as well as provisions devoted to the negotiation procedure itself: compliance with the good faith principle during negotiations, compliance with the confidentiality principle, as well as establishing responsibility for violation of the negotiations terms". The relevance of the analysis of the pre-contractual relationship problems is also evidenced by the clarification contained in § 5.27, namely, the Concept indicates the need to objectify the institution of pre-contractual liability in view of the need to implement the norms to the Civil Code of Ukraine, which would provide for the liability of an unscrupulous participant at the stage before joining in contractual legal relationship. In addition to the DCFR[11] provisions, the provisions of the French Civil Code[12] are also mentioned here as a successful example of normalising liability for damages caused to other participants by their guilty acts at any stage of negotiations.

Ukrainian scientists devoted their works to the study of the institutions provided in the DCFR[13] and in general, the problems of private law modernisation in modern conditions, taking into account the European experience, in particular, in the context of the latest processes of reforming the civil legislation of Ukraine. An invaluable source of scientific opinion on the

[8] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[9] Civil Code of Ukraine. 2003. Available from https://zakon.rada.gov.ua/laws/show/435-15#Text.
[10] Concept of updating the Civil Code of Ukraine. 2021. Available from https://cutt.ly/CNoH1l5.
[11] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[12] French Civil Code. 1804. Available from https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf.
[13] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.

legislative regulation of contractual relationship, including, with the consideration of the DCFR provisions, are the scientific and practical comments of the Civil Code of Ukraine, among which is the next edition of the commentary edited by O. V. Dzera and N. S. Kuznetsova[14] and always relevant commentary prepared by the developers of the current Civil Code of Ukraine edited by A. S. Dowgert and N. S. Kuznetsova[15]. The authors of this articles repeatedly addressed the problems of contractual relationship, in particular, in the aspect of updating civil legislation in the conditions of the information society[16,17]. A thorough monograph prepared by a team of authors, including A.B. Grinyak et al.[18] is devoted to the issue of updating the contractual regulation of private law relationship in Ukraine. A scientific article by V. Karnaukh[19] is devoted directly to the analysis of the model of pre-contractual relationship under the DCFR, some of the conclusions of which the authors will refer below in this work.

Establishing the prerequisites and prospects for the implementation of the specified DCFR provisions in the regulation of pre-contractual relationship at the level of the Civil Code of Ukraine will be carried out further within the scope of this scientific article. Thus, the purpose of this article is to study approaches to the regulation of pre-contractual relationship in the DCFR with the purpose of analysing them and establishing the prospects of borrowing in view of the systematic provisions updating of the Book of the Fifth of Civil Code of Ukraine, mechanisms modernisation of contract law regulation in the system of civil legislation of Ukraine.

Materials and Methods

During the study, to achieve the set scientific purpose the following general-theoretical and special methods of scientific knowledge were used in

[14] DZERA O. V., and KUZNETSOVA N. S. Scientific-practical commentary on the Civil Code of Ukraine: in 2 volumes. Kyiv: Yurinkom Inter, 2019.
[15] DOWGERT A. S., and KUZNETSOVA N. S. Civil Code of Ukraine. Article-by-article commentary in two parts. Part 2. Kyiv: Justinian, 2006.
[16] KOKHANOVSKAYA, O. V. Information in contractual relations. *Law of Ukraine*, 2012, vol. 9, pp. 85-94.
[17] CURA, V. V. Legal nature of the agreement on the establishment of an easement. *Entrepreneurship, Economy and Law*, 2017, vol. 2, pp. 46-50.
[18] GRINYAK, A. B., KOT, O. O., and PLENYUK, M. D. Renewal of contractual regulation of private relations in Ukraine. Kyiv: The Academician F.H. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of National Academy of Law Sciences of Ukraine, 2020.
[19] KARNAUKH V. Model of pre-contractual relations on the project of common approaches (DCFR). *Journal of National Law: Theory and Practice*, 2016, vol. 2, n. 1, pp. 75-80.

the work: systemic and structural, dialectical, empirical analysis, synthesis, formal and logical, comparative and a number of others.

The dialectical method was used throughout the entire work on the article to find the most rational points of view on issues of pre-contractual relationship in their development, the formal and logical method was used to analyse the norms of the Civil Code of Ukraine[20] and other regulatory legal acts, as well as the DCFR[21] provisions that regulate pre-contractual relationship. During the study, the provisions of prospective legislation were analysed in terms of the Concept of updating the Civil Code of Ukraine[22]. The use of systematic and structural and comparative methods in the work made it possible to analyse the principles of pre-contractual relationship by group and to pay the greatest attention to the principles of informational pre-contractual relationship, as decisive for the agreement of the parties' positions in modern contract law. Such approach contributed to the identification of the essential "hear" of the pre-contractual relationship and negotiations model, namely the DCFR provisions, which confirm the key duties and principles of good faith, conduction of fair business practices, confidential information protection, allowing comparing them with similar aspects in Ukrainian civil legislation. Empirical method was used to study the practical aspects of the certain principle applications in accordance with the provisions of the DCFR and Civil Code of Ukraine, as well as an analysis of current doctrinal developments in the field of pre-contractual relationship in Ukraine.

Thus, in the preparation process a scientific article, using formal and logical, systemic and structural methods and the empirical analysis method, a detailed analysis of the provisions of the DCFR and the civil legislation of Ukraine, which regulates pre-contractual relationship, was carried out. In the course of the study, own conclusions were made regarding the regulation of pre-contractual relationship in the contract law of Ukraine and in the DCFR, the ways for solving the problems of updating normative regulation in view of the Civil Code of Ukraine reform.

[20] Civil Code of Ukraine. 2003. Available from https://zakon.rada.gov.ua/laws/show/435-15#Text.
[21] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[22] Concept of updating the Civil Code of Ukraine. 2021. Available from https://cutt.ly/CNoH1l5.

Thus, this study was conducted in several stages. The first stage of the work consisted in revealing the theoretical aspect, namely the determination of the legal nature and essence of pre-contractual relationship and pre-contractual liability that helps to analyse the study subject in more detail and specify its content. The implementation of the second stage was focused on the study of the Civil Code of Ukraine and the DCFR provisions, which act as a regulator of pre-contractual relationship. No less important during this stage is the analysis of the prospective legislation provisions on updating the Civil Code of Ukraine. Due to the implementation of this stage of work, the key provisions of the DCFR were defined, which are the good faith principle, confidential data protection, conduction of fair business practices in comparison with Ukrainian civil legislation. The third stage was based on the development of own conclusions regarding the current state of pre-contractual relationship in the civil law of Ukraine; the main problems and ways to overcome them were identified in connection with the determined necessity of reforming the Civil Code of Ukraine.

Results

Structurally, the institutions of pre-contractual relationship and pre-contractual liability in the DCFR[23] are enshrined in sufficient detail at the level of Chapter 3 “Marketing and pre-contractual obligations” of Book II “Contracts and other legal acts” of this document. The specificity of the study of the relevant provisions is the need to take into account and clarify the content of the concepts and principles used in the specified chapter that reveal the content of the rights and obligations of the parties in pre-contractual relationship in accordance with the DCFR. Thus, first of all, it should be stated that the non-identity term “legal relationship” established in the Ukrainian legal doctrine when applied to the concept of pre-contractual relationship in the DCFR and, accordingly, in view of the onset of liability for obligations non-fulfillment in legal relationship, which is emphasised by V. Karnaukh[24]: in the comment to Article

[23] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[24] KARNAUKH V. Model of pre-contractual relations on the project of common approaches (DCFR). *Journal of National Law: Theory and Practice*, 2016, vol. 2, n. 1, pp. 75-80.

II.-3:301 DCFR absence the legal relationship formulation, however DCFR in Chapter 3 of Book II widely uses the "duty" concept.

Among such obligations enshrined in the DCFR[25], the researchers distinguish four key ones, three of which are defined as common or general pre-contractual duties, good faith, legitimate expectations and conducting negotiations contrary to the good faith principle, and, in a separate block, information obligations[26]. The most important, for the needs of the provisions updating of Civil Code of Ukraine[27] in terms of the introduction of pre-contractual relationship institution, is the establishment of the main pre-contractual obligations, but it is also important to focus on the information obligations of the participants in the negotiations, which are only partially reflected in the current legislation of Ukraine in the aspect of consumer rights protection. The first section of Chapter 3 is entirely devoted to the parties' information obligations in pre-contractual relationship, and the second section is devoted to the obligation to prevent digital input errors when concluding a contract by electronic means and to accept the fact of the order (confirmation of the contract conclusion) from the other party. Analysis of Articles II.-3:101-II.-3:202 of the DCFR[28], devoted to the abovementioned obligations of the parties to pre-contractual relationship, allow making the following conclusions:

1. Their observance should ensure full awareness of the parties with the goods state, other assets and services that will be sold, transferred or provided under the future contract. Thus, in accordance with Article II.-3:101 (1) DCFR before concluding a contract for the goods supply, other assets or services by a commercial enterprise to another person, such enterprise has an obligation to disclose to the relevant person information about the goods, assets or services that can be reasonably expected by the other party, taking into account quality and performance standards that can be considered reasonable under the circumstances. At the same time, Article II.-3:101 (2) DCFR when determining

[25] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[26] TWIGG-FLESNER, C. Pre-contractual duties – from the Acquis to the Common Frame of Reference. Common Frame of Reference and Existing EU Contract Law. Munich: Sellier ELP, 2008.
[27] Civil Code of Ukraine. 2003. Available from https://zakon.rada.gov.ua/laws/show/435-15#Text.
[28] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.

the amount of information that should be disclosed to another party operates with the concept of “good commercial practice”, provided that such party is also a commercial enterprise.

2. Separately, a number of provisions of the analysed sections of Chapter 3 of Book II of the DCFR establish special obligations for a commercial enterprise when carrying out marketing activities (in fact, when developing and promoting a commercial offer) in relationship with consumers, and consumers who are in a particularly vulnerable situation. Such obligations include the obligation not to provide information that may mislead (this is defined as information that distorts or omits important facts that an average consumer could expect to make an informed decision about whether to take steps to conclude a contract, and when assessing what the average consumer can expect, it is necessary to take into account all the circumstances and the limitations of the communication mean used), provide all the necessary information for the consumer to make a decision (including establishing in the DCFR a basic list of relevant data), the obligation to provide information clearly and intelligibly, in plain and understandable language, provide sufficient information about the price and additional payments, about the address and all contact and identification details of the enterprise, etc.

3. Sufficient attention is paid to the commercial enterprise obligations, in pre-contractual relationship and the implementation of marketing activities, in relation to guaranteeing proper notification of potential counterparties and consumers using electronic communication means in terms of notification of all necessary technical steps for concluding a contract, preventing or timely eliminating errors introduction before acceptance by the other party of the offer, provision of the counterparty’s right to information, including regarding their exercise of the option to refuse the conclusion of the contract, etc.

4. In terms of non-compliance with any of these obligations, the DCFR does not communicate directly about the party responsibility that should have provided information using Article II.-3:109 the concept of “remedies”, which is closest to the Ukrainian civil tradition, can be considered in view of legal remedies. Such means are also based on a number of principles, in particular, establishing the obligation of the responsible party after the conclusion of the contract to take actions that can reasonably be expected from it due to the

absence or incorrectness of the information provided by it before the signing of the contract. However, Article II.-3:109 (3) DCFR does contain a general rule that a party who has failed to fulfill any of the specified information obligations is liable to the other party for the damages caused thereby.

In general, a significant amount of the given information obligations has already been implemented in Ukrainian legislation, primarily in Law of Ukraine No. 1023-XII "On consumer rights protection"[29] (in particular, in Part 2 of Article 12, Part 2-4 of Article 13, Article 15 of the specified Law). At the same time, authors believe that when the institutions of pre-contractual relationship and pre-contractual responsibility are enshrined in the norms of the updated Civil Code of Ukraine, those of information obligations, including those related to negotiations and the documents exchange in electronic form, which concern counterparties with equal legal status, should be reflected. This will contribute to achieving greater predictability of economic turnover, transparency of business conduct and, in pre-contractual relationship, will create an additional preventive mechanism against conduction of dishonest business activities, establishing specific information obligations of the participants in the negotiations and the consequences of their non-compliance. The essential "heart" of the model of pre-contractual relationship and negotiations established in the DCFR[30] is the provisions of Articles II.-3:301-II.-3:302 DCFR, which establish key duties and principles of good faith, fair business practices, and confidential information protection. These and a number of other principles of contractual relationship were considered in the works of modern Ukrainian authors dedicated to various institutions of contractual law[31,32], which serves as confirmation of the possibility of using doctrinal developments in separate contractual structures in various areas of social relationship.

[29] Law of Ukraine No. 1023-XII "On consumer rights protection". 1991. Available from https://zakon.rada.gov.ua/laws/show/1023-12#Text.
[30] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[31] LUKASEVICH-KRUTNIK, I. S. Theoretical principles of legal regulation of contractual relations for the provision of transport services in civil law of Ukraine. Ternopil: FOP Palyanytsya, 2019.
[32] MILOVSKAYA, N. V. Contractual obligations on insurance in the civil law of Ukraine: problems of theory and practice. Kyiv: The Academician F.H. Burchak Scientific-Research Institute of Private Law and Entrepreneurship of National Academy of Law Sciences of Ukraine, 2019.

In accordance with Article II.-3:301 DCFR[33] a person is free to negotiate and is not liable for failure to reach an agreement. The person who entered into the negotiations has an obligation, which cannot be limited or excluded under the contract, to conduct them in accordance with the principles of good faith and fair business practices and not to terminate them contrary to these principles. At the same time, the person who violated this obligation is responsible for any damages caused to the other party (in the literature, such damages include negative interest, which represents certain work performed, damage caused, financial losses incurred by the party that intended to conclude a contract, as well as compensation for lost profit, while the affected party does not have the right to claim compensation for these claims based on a positive interest[34]). In particular, it is contrary to good faith and fair business practices for a person to enter into negotiations or continue them in the absence of real intentions to reach an agreement with the other party.

In Article I.-1:103 (1) DCFR[35] in the general provisions enshrines that the principles of good faith and conduction of fair business practices constitute conduct standards, which is characterised by openness, honesty and consideration of other party's interests to the legal relationship or the relevant transaction. An important position is the understanding of the objective nature established in Article II.-3:301 DCFR of the conduct standard reflected in the combination of the concepts of good faith and fair business practices. Considering this and taking into account the possibility of the guilty party being liable only for negative interest, that is, only in relation to the actually made expenses or objectively proven lost benefit, the consequences of non-compliance with the principles of good faith and conducting fair business practices at the stage of negotiations within the pre-contractual relationship cannot be considered a deterrent or excessively burdensome mechanism for the parties of a potential contract. On the contrary, the institution of responsibility in this case has a clear instrumental purpose equal to the costs

[33] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[34] DZERA O. V., and KUZNETSOVA N. S. Scientific-practical commentary on the Civil Code of Ukraine: in 2 volumes. Kyiv: Yurinkom Inter, 2019.
[35] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.

amount and the stage of pre-contractual relationship, in case of the conducting negotiations principles violation within which such responsibility may arise[36].

Here it should be agreed with the authors who at one time considered the principles of proper performance of contractual obligations in civil law[37], the content and meaning of liability under contracts in business activity[38], and now quite rightly consider violations at the pre-contractual stage as a classic example of abuse of right, as a result of which in the presence of specific negative consequences, the delict obligation itself should arise (bad faith of a person who purposely delayed negotiations and then refused to conclude a contract; it should be noted that it should provide an assessment of its actions as illegal, and a reasonably justified conclusion regarding the occurrence of this act due to such abuse of the freedom of contract of non-property losses to the affected party will indicate the existence of appropriate conditions that serve as the basis for the emergence of an obligation of a delict nature regarding the compensation of moral damage)[39], although the DCFR itself does not directly attribute such responsibility to delict one. In this regard, it will be necessary to find the necessary balance between the introduction of the pre-contractual liability institution and the established mechanisms of civil legal liability, enshrined at the level of the Civil Code of Ukraine and comprehended by the civil doctrine. A possible option is to attribute such liability to quasi-delict as an additional special type. In favour of the necessity for implementing a balanced approach to the harmonisation of the civil legislation of Ukraine with the provisions of the DCFR, taking into account the national state characteristics, the opinions of other representatives of the Ukrainian science of civil law are heard[40].

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[36] TWIGG-FLESNER, C. Pre-contractual duties – from the Acquis to the Common Frame of Reference. Common Frame of Reference and Existing EU Contract Law. Munich: Sellier ELP, 2008.

[37] KALAUR, I. R. The principle of proper fulfillment of contractual obligations through the prism of fulfillment of obligations to transfer property. *Scientific Bulletin of Kherson State University*, 2013, vol. 3, pp. 84-86.

[38] LUC, V. V. Contracts in business. Kyiv: Jurinkom Inter, 2001.

[39] PRIMAK, V. D. Ways to adapt the institution of compensation for moral damage to European and world standards. In: *Problems of modernization of private law in terms of European integration: a collection of scientific papers* (pp. 106-113). Khmelnytsky: FOP Melnyk A.A., 2015.

[40] BLAZHIVSKA, O. Features of harmonization of civil legislation of Ukraine with the principles and model rules of European private law. *Scientific Journal of the National Academy of the Prosecutor's Office of Ukraine*, 2015, vol. 30, pp. 10-16.

Another aspect of proper negotiation under paragraph 3 of Chapter 3 of Book II of the DCFR[41] is maintaining the information confidentiality exchanged between the parties. In accordance with Article II.-3:302 DCFR, if confidential information has been given to another party in the course of negotiations, the other party has an obligation not to disclose or use such information for its own purposes, regardless of whether a contract was concluded. In the same article DCFR defines confidential information as information that it itself or by the circumstances in which it was obtained, is information that the disclosing party knows or could reasonably expect to be confidential to the disclosing party. Among the means of legal response to the potential disclosure of confidential information and its actual disclosure, Article II.-3:302 DCFR provides the possibility of obtaining a judicial decision against disclosure and for the party who disclosed the confidential information to be liable for any damages caused to the other party as a result of the violation, and such party may be obliged to pay the other party any benefit received as a result of the violation. The commentary to these provisions notes that although this remedy is not provided for by the laws of all European Union (EU) member states, it seems appropriate by analogy with the remedies available for violation of other intellectual property rights.

Discussion

In modern civil studies, the issue of defining pre-contractual relationship is considered in terms of the pre-contractual liability institution based on the doctrine of culpa in contrahendo (guilt in negotiations). In accordance with R. Mu et al.[42], the essence of this doctrine is that the negotiations parties have an obligation to behave in good faith; this involves providing the necessary true information for decision-making and taking into account the interests of the counterparty. In the event that one of the parties behaves in bad faith, it should compensate the other for the damages. It should be noted that the regulatory institution of pre-contractual relationship is the principle of good faith, as it

[41] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). 2009. Available from https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf.
[42] MU, R., WU, P., and HAERSHAN, M. Pre-contractual relational governance for public-private partnerships: how can ex-ante relational governance help formal contracting in smart city outsourcing projects? 2021. Available from https://cutt.ly/kNo8EYU.

determines the freedom of the concluded contract and the limits of the autonomy of the will of the subjects of civil-law relationship. In case of this principal violation, the party undertakes to bear responsibility. In general, the institution of pre-contractual liability is traditionally applied to the type of legal relationship that arises in the business activity area. As noted by I. Methatham[43], this is due to the fact that it is the subjects of business activity that can bear significant losses in the event of not concluding a contract or bear significant costs in the negotiating process of its conclusion.

For a long time, the question of the procedure certainty for concluding a contract through negotiations was not regulated by doctrine and legislative acts, and there was also a refrain from interfering in the segment of pre-contractual relationship, which was due to the absence of regulation of the negotiation procedure and the obligations imposition on the contracting parties. In accordance with P.J. Kalondo[44], pre-contractual liability should be defined as an institution of civil law, which is a type of civil liability for damage that was caused in the process of negotiations and concluding a contract in connection with the improper performance by the counterparty of the affected party of the given obligations, as, for example, positive information about the quality and ownership of the agreement subject or the absence of a valid intention to conclude a contract.

As S. Stici[45] notes, the nature of pre-contractual liability serves as an advantage over delict liability, because before the contract conclusion, its probable participants are not bound by mutual obligations due to the existence of a undermined agreement and the application of liability norms of a contractual nature will be deprived of formal and legal grounds. In accordance with M. Bakes[46], pre-contractual liability has a delictual nature. However, as D.

[43] METHATHAM, I. The Role of Good Faith in Pre-Contractual Liability. *Thammasat Business Law Journal*, 2020, vol. 10, pp. 107-118.
[44] KALONDO, P.J. Duress, Undue Influence and the Ethics of Pre-contractual Negotiation. 2020. Available from https://ssrn.com/abstract=3533966.
[45] STICI, S. Pre-contractual information in contracts concluded with energy consumers. In: *The 2nd International Scientific Conference: Online Conference for Researchers* (pp. 80-89). Chișinău: ASEM, 2021.
[46] BAKES, M. Pre-Contractual Information Duties and the Law Commissions' Review. In: *B. Soyer (Ed.), Reforming Marine and Commercial Insurance Law* (pp. 25-63). London: Routledge, 2008.

Bertolini[47] distinguishes, pre-contractual liability cannot have either a delictual or contractual nature; they classify it as quasi-contractual. Based on the opinion of J.P. De Giorgio[48], it should be noted that the problem of the basis for the emergence of an obligatory relationship, the content of which derives from the good faith behaviour of the parties during negotiations on the contract conclusion, can be solved only in a non-contractual way.

Referring to the opinion of L. Frazer et al.[49], pre-contractual relationships have a peculiar transitional nature, and they are also characterised by the role of an "intermediate link" between the relationship stages, agreement provisions and unregulated legal norms; their key purpose is the preparatory process for the emergence of such type of legal relationship as a civil law contract. It should be noted that pre-contractual relationships are characterised by a close connection with the future contract object, and also have a pecuniary along with the main contract. In this case, it should also be noted that the obligation to conclude a contract can be based on the law, such as a public contract, or on the contract itself, such as an option or preliminary contract. At the same time, in the first case, such an obligation acquires the character of absolute, while in the second case, it has the character of a binding legal relationship. The determination of the nature of the contract conclusion should be based on the pre-contractual liability qualification. Considering the majority of cases, it should be noted that it should be defined as liability for violation of obligation, which consists of quasi-contractual or contractual liability, and in a number of cases it can be defined as a delict; for example, liability for non-performance of an obligation to conducting an agreement based on law.

A peculiarity of this type of legal relationship is the combination of non-contractual and contractual forms of interaction between counterparties at the same time. They are usually of an organisational and informational nature, but in a number of cases they are mandatory; for example, in virtue of a previously concluded agreement between the parties, there is an obligation to conclude

[47] BERTOLINI, D. Contracting out liability for negligent pre-contractual misrepresentation. *Dalhousie Law Journal*, 2021, vol. 44, article number: 2.
[48] DE GIORGIO, J. P. Pre-contractual duties of information and the impact on the notary in relation to the sale of immovable. Msida: University of Malta, 2019.
[49] FRAZER, L., BUCHAN, J., WEAVEN, S., TRAN-NAM, B., and GRACE, A. Pre-contractual Due Diligence by Franchisees and Independent Small Business Buyers. *Australian Business Law Review*, 2018, vol. 3, pp. 157-177.

the main one. However, in the opinion of M. Kovac[50], the absence of a contract does not make it possible to unambiguously classify this type of relationship as non-contractual, because the party, by its own free will due to actions of a lawful nature, enters into pre-contractual relationship, which is not inherent in non-contractual ones. By applying a differentiated approach in this regard, depending on the negotiations stage, the scope of responsibility is determined; in those cases when the negotiation process is in the final stage and the basic terms of the agreement are determined, it is possible to compensate pre-contractual losses in full. It is also should be noted that distinguishing the stages of the negotiation process, in particular, the last one, at which the terms of the future contract are obvious, and the negotiation process parties confidently rely on its conclusion, raises the issue of the objectivity of assessing the contract terms in order to determine the lost benefit.

Based on the abovementioned, the issue of the legal nature certainty of pre-contractual relationship and pre-contractual liability is resolved depending on the legal foundations of the state structure. Also, the law enforcement practice of courts has a significant influence on this institute composition; it contains a wide range of legal consequences regarding the determination of illegal actions during the contract conclusion, which may consist in the possibility exclusion of a certain objection, compensation for damages or the issuance of objects of unjustified enrichment. Considering the case where the subject enters into negotiations without the intention of concluding an agreement, the liability for the caused damage always occurs; also, under certain circumstances, it may arise when a person implements the negotiation process for concluding a contract alongside with two subjects. As D. Singeorzan[51] states, pre-contractual liability can also arise in the event of a violation of the obligation to inform, when one of the parties does not provide the other with the necessary information, although it knows that the other party is not sufficiently informed and in the event that it was aware of these circumstances, it would not conclude a contract. Based on this, the contracting party is limited in providing the opportunity at its own discretion to terminate the

[50] KOVAC, M. Culpa in Contrahendo, Promissory Estoppel, Pre-Contractual Good Faith and Irredeemable Acts. *Asian Journal of Law and Economics*, 2019, vol. 10, n. 1, pp. 1-19.
[51] SINGEORZAN, D. Pre-contractual Information of the Patient. *Acta Universitatis Lucian Blaga*, 2018, vol. 1, pp. 180-222.

process of the contract conclusion. It should be referred to cases of pre-contractual liability the damage of misuse of information that one of the parties received during the negotiation process on the contract conclusion, but under the condition that this contract was actually concluded.

This theory, which has a generalised nature, regarding the certainty of pre-contractual liability was accepted by most of the countries of continental Europe, but the legal system of Ukraine remained an exception regarding this doctrine development process. The absence of confidence and the probability of any financial losses without compensation influence the fact that business entities quite often refuse from promising agreements, which results in a decrease in the Ukrainian economy level. Based on this, the absence of a single doctrinal approach regarding the certainty of the legal nature of pre-contractual relationship and pre-contractual liability, as well as the low level of theoretical development, leaves this issue unsolved. Therefore, the issue of enshrining at the legislative level the good faith principle in pre-contractual relationship and responsibility for the violation of this principle at the pre-contractual stage is particularly relevant. It should be noted the need for further reform of the civil legislation of Ukraine, which should be based on enshrining in the Civil Code of Ukraine[52] the concept of negotiations in bad faith, the obligation to conduct negotiations in good faith, the obligation to compensate for the caused damages, and to determine the compensation mechanism that was caused by violating the requirements of good faith under the negotiation process regarding the contract conclusion regardless of their results.

Conclusions

Thus, the concept of pre-contractual relationship is enshrined in the DCFR follows the general modern approaches of European private law, which is based on a number of fundamental principles of contract law and flexible rules of their implementation in the practice of business conduct. The basis of this institution is the observance of good faith principles and fair business practices by the negotiations participants, which is expressed in the establishment of an objective standard of reasonable behaviour of each party, taking into account

[52] Civil Code of Ukraine. 2003. Available from https://zakon.rada.gov.ua/laws/show/435-15#Text.

the legitimate interests and expectations of the other counterparty, and imposing obligations on the parties to provide full and reliable information about goods, assets and services, with special attention to conducting business activities using electronic technologies and establishing additional guarantees for the protection of consumer rights.

Since information obligations constitute a separate block in this list, which is currently extremely important when preparing the updated civil legislation, it should be focused in detail precisely on the information obligations of the negotiations participants, which are only partially reflected in the current legislation of Ukraine in the aspect of consumer rights protection. Authors suggest providing separate structural units in the Civil Code of Ukraine dedicated to the information obligations of the parties in pre-contractual relationship, obligations in the area of digital input errors prevention when concluding a contract using electronic means and acceptance of the fact of an order by the other party. Even at the stage of pre-contractual relationship, the parties should be fully aware of information about the condition of goods or other assets and services that will be sold, transferred or provided under the future contract.

Based on the analysis of the relevant provisions of the DCFR, it is possible to state that the general suitability of the model integration of pre-contractual relationship and the institution of pre-contractual liability into the updated Civil Code of Ukraine. At the same time, the national civil tradition should be taken into account, in particular, when introducing responsibility for disruption or purposeful delay of negotiations, failure to conclude a contract, which caused the other party actual losses and factually proven lost profit. Possible options in view of this may be the inclusion of the specified institution in the mechanisms of delict liability or the creation of a new quasi-delict structure. These and other issues of the adaptation of the civil legislation of Ukraine to the acquis of the European Union and the implementation of the DCFR developments in the area of contract law may be the subject of further scientific works.

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