

ГОСПОДАРСЬКЕ ПРАВО

UDC 346.1:346.9(045)

Ya. Horbatiuk,
Associate professor

THE PECULIAR NATURE OF APPLICATION OF BUSINESS AND LEGAL LIABILITY UNDER EFFECTIVE LEGISLATION OF UKRAINE

National Aviation University
Kosmonavta Komarova Avenue, 1, 03058, Kyiv, Ukraine
E-mail: yana_gorbatyuk@ukr.net

Purpose: the paper provides an overview of the approaches, existing in scientific world of Business Law, toward construction of the business and legal liability notion and identifies the lack of such definition in the Commercial Code of Ukraine. **Methods:** phenomenological; hermeneutic; comparative-legal; sociological; logical; dialectical. **Results:** in the course of the study, there have been defined the principles, limits and subjects of application of business and legal liability, there has been set out the possibility to exercise application of the pre-trial procedure for business and legal liability, envisaged by the legislation. The author also establishes factual and legal basis for application of business and legal liability. **Discussion:** the paper examines the rules of the Constitution of Ukraine with regard to impossibility to hold a person legally liable through the prism of the rules of the Commercial Code of Ukraine and states the fact of existence of a certain collision in this situation.

Keywords: business and legal liability, economy management, penalties, indemnity of losses, operative business penalties, administrative business penalties.

Introduction. The question of business and legal liability in Business Law has a special place as it is designed to facilitate identification, bringing to an end, and prevention of offences in such areas as economy management, protection of rights and legal interests of business entities and other participants of the economy management relations. Business and legal liability has an important role in the mechanism of the legal governing of business relations. Notwithstanding the sufficient number of scientific studies focused on the abovementioned question, there emerge certain problems in terms of exercising of this type of liability.

Analysis of the research and publications. So far, certain aspects of application of business and legal liability have been highlighted in the scientific works of S.M. Bratus, Yu.A. Vedernikova, V.V. Kopechikova, V.K. Mamutova, V.S. Martemianova, R.B. Shyshka, V.S. Scherbyna, S.Yu. Yushyna, etc.

Research tasks. The objective of the paper is to define, based on the effective legislation of Ukraine, the peculiar nature and grounds for application of business and legal liability.

Research results. Following the Commercial Code of Ukraine (hereinafter referred to as CC of Ukraine), which is an essential regulatory legal act in the field of economy management, the term of business and legal liability is used but the definition is not provided. Proceeding from the provisions thereof it is necessary to distinguish the notion of business and legal liability and the notion of responsibility in the economy management sector, with the latter having a broader meaning insofar as the civil, administrative, and criminal liability may apply in the economy management sector.

O.O. Melnyk defines business and legal liability as enforceable by the State measures that are set out by law or an agreement and affect an offender [1, p. 63].

M.S. Maleiini considers that business and legal liability is a legal relation arising on infringement of obligation set forth by law or an agreement that manifests in a unfavourable for an offender form through condemnation of the guilty behaviour, property consequences, which occurrence may be subject to public enforcement [2, p. 19].

In O.A. Zayarnyi's opinion, business and legal liability is an obligation envisaged by the rules of law or terms of an agreement, which a non-breaching party or a competent public authority may impose on the participant of economy management relations who has committed an offence, the fulfilment of which would result in influence of its economic interests and gives rise to negative property and organisational consequences [3, p. 112].

Following the analysis of definitions of business and legal liability, it may be concluded that it implies taking measures of negative nature towards an offender.

The business and legal liability arises upon infringement of the rules of carrying out business activities or upon failure to perform or undue performance of the business obligation, i.e. for commitment of an offence related to economy management.

Considering specific aspects of application of business and legal liability, it is necessary to establish a correlation of the terms «business and legal liability» and «business penalties». Thus, following V.S. Scherbyna's view, the legal means of business and legal liability (both the form of exercising liability and at the same time the scope of liability) are penalties, indemnity of losses and operative business penalties applied to participants of business relations for failure to perform or undue performance of organizational and business obligations, and administrative business penalties applied to economic operators for their having infringed the rules of carrying out business activities, and have public and legal nature [4, p. 10].

The business and legal liability is characterized by possibility of application thereof both upon the initiative of a non-breaching party or other participant of business relations, and upon the initiative of the designated public authority or local authority (administrative business penalties).

The business and legal liability shall be exercised in the course of the law-enforcement activity with adherence to certain procedural arrangements and forms [5, p. 432]. Consequently, the procedure for penalties to be applied depends on the type and form of business and legal liability:

- pre-court legal procedure or court procedure;
- directly by creditor in a prompt manner;
- specific – by designated local authorities [6, p. 147].

Another peculiar feature of application of business and legal liability shall be an option to apply a pre-trial procedure for exercising business and legal liability. Therefore, pursuant to Article 222 of CC of Ukraine, the business relations participants that have infringed property rights or legal interests of other subjects shall be obliged to restore them not waiting for a claim to be made or an action to be taken against them. If it is necessary to indemnify losses or apply other penalties, an economic operator or other legal entity – a participant of business relations, whose rights or legal interests have been breached, in order to directly settle a dispute with an offender thereof, may submit a claim unless otherwise is provided by the law [7].

However, this rule is non-mandatory and does not require a pre-trial procedure of exercising of business and legal liability.

Pursuant to Part 3 of Article 216 of the Commercial Code of Ukraine, the principles of application of business and legal liability shall be:

1) a non-breaching party shall be entitled to indemnity of losses irrespective of whether there is a relevant clause in the agreement; the producer's (seller's) liability for substandard quality of products, set forth by the law, shall also apply irrespective of whether the agreement contains the specific clause about this;

2) the fact of payment of the penalties for infringement of obligation and indemnification of losses shall not relieve the offender, without other party's consent, and shall be subject to specific enforcement;

3) it shall be inadmissible for a business agreement to contain clauses about exclusion or limitation of the producers' (seller's) liability for a product [7].

Following V.S. Scherbyna view, the main causes of the problems of application of business and legal liability comprise: 1) multi-faceted functional designation of business and legal liability in the mechanism of legal regulation of business relations; 2) lack of the uniform legislative and doctrinal approach in terms of establishment of the legal content of this type of liability; 3) diversity of forms of exercising of business and legal liability and manifestation of economic consequences thereof; 4) broad spectrum of the subjects of business and legal liability and grounds for the application thereof; 5) lack of clearly defined legislative limits of business and legal liability; 6) insufficient level of legal regulation of peculiarities of business and legal liability in specific types of business relations, including organizational and business ones; 7) diversity of viewpoints on the ways of imposition business and legal liability [8, p. 411-412].

The factual grounds for application of business and legal liability shall be the committed offence: contractual (arises in the event of failure to perform the conditions of an agreement), non-contractual (infringement of the legislation on protection of economic competition).

According to the general rule, the basis for application of business and legal liability shall be the provision of law. It means that in order to make application of business and legal liability enforceable there shall be certain regulatory legal acts that will capture the category of «business and legal liability» and the terms, basis, and forms of application thereof. Within the scope of Business Law, such regulatory legal acts are the Commercial Code of Ukraine and sectoral laws (for example, the Law of Ukraine «On Protection of Economic Competition»).

Meanwhile, in the Business Law not only may the law be the basis for application of business and legal liability but also a commercial agreement. In some cases, the law only defines the type and the size of business penalties (for example, Part 1 of Article 231 of CC of Ukraine: with regard to certain types of obligations the law may provide for the size of business penalties which may not be changed under the agreement by parties (if at least one party is an economic operator belonging to the

public sector of economy, the infringement related to performance of public contract shall be financed at the expense of the State Budget of Ukraine or at the expense of the public credit; Part 2 Article 238 of CC of Ukraine: administrative business penalties may be established solely by the laws) [7]. In other instances, it is envisaged that if the size of the penalties is not set out, the penalties shall apply according to the size as set forth in the agreement. At the same time, the agreement may set out the size of the penalties as percent of the amount of the non-performed part of obligation or as a certain monetary sum, or as percent of the sum of obligation irrespective of the extent of performance thereof, or as a many-fold size of the value of the goods (works, services) (Part 4 Article 231 of CC of Ukraine). The Commercial Code of Ukraine provides that only those operative business penalties may apply to the breaching subject of the business obligation, the application of which is stipulated by agreement (Part 2 of Article 235 of CC of Ukraine) [7]. Also, a court decision may serve as a basis for determining of the size of business penalties (in the event of failure for the parties to achieve consensus as to the business penalties to be set out and the size thereof, the dispute may be settled according to the court procedure upon the claim of any interested party in line with the requirements of the Commercial Code of Ukraine (Part 5 Article 231 of CC of Ukraine) [7].

Based on the analysis of the stated provisions of the Code it may be concluded that the grounds for application of business and legal liability may be either a law or an agreement exclusively, or both law and agreement jointly.

In the process of application of business and legal liability, the question of determining of the limits of business and legal liability plays an important role. Therefore, pursuant to Article 219 of CC of Ukraine, an offender shall be liable to the full extent of its assets based on the right of ownership, economic management assigned to the offender, or operative management of property, for the failure to perform or undue performance of business obligations or for the breach of the rules of carrying out business activities, unless otherwise is established by this Code or other laws. The found-

ers of an economic operator shall not be liable for the obligations of this operator save for the cases stipulated by the law or statutory documents on setting up of this entity. If unlawful actions (inaction) of other party to an obligation have facilitated commitment of an offence, the court may reduce the size of the liability or relieve the defendant from the liability [7].

If this is the case, it is important to determine the limit of the responsibility of a public authority or a local authority that have become founders of public company or public utility company, or the founders of an additional liability company, unlimited partnership or limited partnership, which provide for subsidiary liability of the founders thereof.

Another important question when business and legal liability applies is the analysis of Article 61 of the Constitution of Ukraine under which no one may be brought twice to legal liability of one type for the same offence. The legal liability of a person shall have an individual nature [9].

Proceeding from this rule of the law, business and legal liability is also a variety of legal liability insofar as it is captured at the legislative level in the Commercial Code of Ukraine.

However, there are certain provisions in CC of Ukraine which do not comply with Article 61 of the Constitution of Ukraine, in particular:

1) if the penalties are established for the failure to perform or undue performance of an obligation, the losses shall be indemnified in the scope not covered by the penalties (Article 232 of CC of Ukraine);

2) the operative business penalties may apply simultaneously with indemnification of losses and recovery of penalties (Article 237 of CC of Ukraine);

3) the administrative business penalty may apply in the cases envisaged by law simultaneously with other administrative business penalties set forth by Article 239 of the Commercial Code of Ukraine (Article 241 of CC of Ukraine) [7].

Therefore, the question arises as to whether it is lawful to apply several types of business penalties for the same type of an offence. According to the author's opinion, it is possible to apply the penalties when one of them is deemed additional. Either, it is possible if the subject imposing the recovery is

taken into account (creditor, public authority, court, etc.), i.e. one subject may impose one type of penalties.

Conclusion. Thus, application of business and legal liability in the scope of Business Law has certain peculiar features that depend on the subject imposing certain type of business penalty, on the type of a business penalty, and on the type of an offence in the field of economy management (contractual or non-contractual one). Notwithstanding that the category of business and legal liability, grounds for application thereof, limits and types of business penalties have been captured in the Commercial Code of Ukraine, there arise certain problems when business and legal liability applies.

Література

1. *Melnyk O.O.* Business Law: Study Guide for Independent Learning of the Discipline / O.O. Melnyk. – K.: KNEU, 2005. – 208 p.

2. *Maleiin N.S.* The Property Liability in Business Relations / N.S. Maleiin. – M.: Nauka, 1968. – 207 p.

3. *Zayarnyi O.A.* Business and Legal Liability in the Mechanism of Legal Regulation of Business Relations / O.A. Zayarnyi. – The Taras Shevchenko Kyiv National University Bulletin. – 2011. – № 86. – P. 110-114.

4. *Scherbyna V.S.* Business and Legal Liability: Sectoral Approach, Peculiarities of Application, and Further Scientific Studies Directions / V.S. Scherbyna // The Taras Shevchenko Kyiv National University Bulletin. – 2013. – № 3(97). – P. 10-16.

5. *Scherbyna V.S.* Business Law: Textbook. – 2nd ed., revisited and amended / V.S. Scherbyna. – K.: Yurinkom Inter. – 2005. – 592 p.

6. *Milimko L.V.* Business and Legal Liability: characteristics, procedure for application / L.V. Milimko // Legal Bulletin. – 2016. – № 1 (38). – P. 145-149.

7. *Commercial Code of Ukraine* dated 16.01.2003. № 436-IV // The Bulletin of the Verkhovna Rada of Ukraine. – 2003. – № 18. – Article 144.

8. *The Actual Issues of Business Law: Study Guide* / ed. by V.S. Scherbyna. – K.: Yurinkom Inter, 2012. – 528 p.

9. *The Constitution of Ukraine* dated 28.06.1996 № 254к/96-ВР // *The Bulletin of the Verkhovna Rada of Ukraine*. – 1996. – № 30. – Article 141.

References

1. *Melnyk O.O.* Hospodarske pravo: navch.-metod. posib. dlia samost. vyvch. dysts. / O.O. Melnyk. – K.: KNEU, 2005. – 208 s.

2. *Maleiin N.S.* Imushchestvennaia otvetstvennost v khoziaistvennykh otnosheniakh / N.S. Maleyn. – M.: Nauka, 1968. – 207 s.

3. *Zaiarnyi O.A.* Hospodarsko-pravova vidpovidalnist v mekhanizmi pravovoho rehuliuвання hospodarskykh vidnosyn / O.A. Zaiarnyi. – Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka. – 2011. – № 86. – S. 110-114.

4. *Shcherbyna V.S.* Hospodarsko-pravova vidpovidalnist: haluzevyi pidkhid, osoblyvosti zastosuvannia ta napriamky podalshykh naukovykh doslidzhen / V.S. Shcherbyna // *Visnyk Kyivskoho*

natsionalnoho universytetu imeni Tarasa Shevchenka. – 2013. – № 3(97). – S. 10-16.

5. *Shcherbyna V.S.* Hospodarske pravo: pidruchnyk. – 2-he vyd., pererob. i dop. / V.S. Shcherbyna. – K.: Yurinkom Inter. – 2005. – 592 s.

6. *Milimko L.V.* Hospodarsko-pravova vidpovidalnist: oznaky, protsedura zastosuvannia / L.V. Milimko // *Yurydychnyi visnyk*. – 2016. – № 1 (38). – S. 145-149.

7. *Hospodarskyi kodeks Ukrainy* vid 16.01.2003 r. № 436-IV // *Vidomosti Verkhovnoi Rady Ukrainy*. – 2003. – № 18. – St. 144.

8. *Aktualni problemy hospodarskoho prava: navch. posib.* / za red. V.S. Shcherbyny. – K.: Yurinkom Inter, 2012. – 528 s.

9. *Konstytutsiia Ukrainy* vid 28.06.1996 r. № 254к/96-ВР // *Vidomosti Verkhovnoi Rady Ukrainy*. – 1996. – № 30. – St. 141.

Я. В. Горбатюк

ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ГОСПОДАРСЬКО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ ЗА ЧИННИМ ЗАКОНОДАВСТВОМ УКРАЇНИ

Національний авіаційний університет
проспект Космонавта Комарова, 1, 03058, Київ, Україна
E-mail: yana_gorbatyuk@ukr.net

Мета: у статті автор аналізує існуючі в науці господарського права підходи до розуміння поняття господарсько-правової відповідальності та визначає відсутність вказаного визначення в Господарському кодексі України. **Методи:** феноменологічний; герменевтичний; порівняльно-правовий; соціологічний; логічний; діалектичний. **Результати:** визначено принципи, межі та суб'єкти застосування господарсько-правової відповідальності; вказано на можливість застосування досудового порядку реалізації господарсько-правової відповідальності, передбаченої законодавством; проаналізовано фактичну та юридичну підстави застосування господарсько-правової відповідальності. **Обговорення:** неможливості двічі притягувати особу до юридичної відповідальності одного виду за одне й те саме правопорушення через призму норм Господарського кодексу України та вказується на існування певної колізії у цій ситуації.

Ключові слова: господарсько-правова відповідальність, господарювання, штрафні санкції, відшкодування збитків, оперативно-господарські санкції, адміністративно-господарські санкції.

**ОСОБЕННОСТИ ПРИМЕНЕНИЯ ХОЗЯЙСТВЕННО-ПРАВОВОЙ ОТВЕТСТВЕННОСТИ
ПО ДЕЙСТВУЮЩЕМУ ЗАКОНОДАТЕЛЬСТВУ УКРАИНЫ**

Национальный авиационный университет
проспект Космонавта Комарова, 1, 03680, Киев, Украина
E-mail: yana_gorbatyuk@ukr.net

Цель: в статье автор анализирует существующие в науке хозяйственного права подходы к пониманию понятия хозяйственно-правовой ответственности и определяет отсутствие указанного определения в Хозяйственном кодексе Украины. **Методы:** феноменологический; герменевтический; сравнительно-правовой; социологический; логический; диалектический. **Результаты:** определены принципы, границы и субъекты применения хозяйственно-правовой ответственности; указано на возможность применения досудебного порядка реализации хозяйственно-правовой ответственности, предусмотренной законодательством; проанализированы фактические и юридические основания применения хозяйственно-правовой ответственности. **Обсуждение:** невозможности дважды привлекать лицо к юридической ответственности одного вида за одно и то же правонарушение через призму норм Хозяйственного кодекса Украины и указывается на существование определенной коллизии в этой ситуации.

Ключевые слова: хозяйственно-правовая ответственность, хозяйствование, штрафные санкции, возмещение ущерба, оперативно-хозяйственные санкции, административно-хозяйственные санкции.