

EXPEDIENCY OF INTRODUCTION OF LEGAL INSTITUTIONS OF CRIMINAL LAW “CRIMINAL LIABILITY OF ENTERPRISES” AND “CRIMINAL AND LEGAL MEASURES FOR ENTERPRISES” FOR CRIMES AGAINST THE ENVIRONMENT IN THE MARITIME ECONOMY

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INTRODUCTION

Relevance of the research. One of the most pressing and controversial issues of criminal law is the issue of criminal liability of enterprises. As practice shows, a certain number of crimes are committed for or with the use of enterprises. As a result, there is a need to impose direct criminal sanctions on an enterprise as a subject of a crime. Therefore, on May 23, 2013, the Verkhovna Rada of Ukraine adopted the Law of Ukraine № 314-VII “On Amendments to Certain Legislative Acts of Ukraine” on September 1, 2014¹. This Law amended the Criminal Code of Ukraine. In particular, Section 14–1 has been added, entitled “Criminal and legal measures against enterprises”.

Formulation of the problem. The problem of recognizing enterprises as subjects of criminal offenses arose in the theory of criminal law in connection with their unjustified impunity for committing crimes with a high degree of public danger. Until recently, a fairly balanced system of legal liability of enterprises was formed in Ukraine, but the legislator refused to apply its strictest form – criminal liability. The introduction of the institute of criminal liability of an enterprise should help reduce the number of facts of illegal actions on their part. It should also be noted that the issue of criminal liability of enterprises for crimes against the environment has not found its legislative implementation yet. This is a rather big problem in terms of prevention of their commission, because the ecological security of the state, along with national and economic security, are strategic directions for the development of state formation.

¹ Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vykonannia Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhyumu dlia Ukrainy stosovno vidpovidalnosti yurydychnykh osib (23.05.2013) Zakon Ukrainy [On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization of the Visa Regime for Ukraine by the European Union Concerning Liability of Legal Entities (23.05.2013) Law of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/314-18>

Analysis of recent research and publications. Processing status issues of criminal liability of enterprises as a legal institution of criminal law of Ukraine, as well as measures of criminal law nature applied to enterprises, are theoretically substantiated in the works of such foreign and domestic scholars as B. V. Volzhenkin, T. O. Gonchar, V. K. Hryshchuk, I. B. Krasnytsky, N. E. Krylov, S. Ya. Lykhova, O. O. Mykhailov, A. V. Naumov, A. S. Nersesyan, A. S. Nikiforov, N. A. Orlovskaya, M. I. Panov, O. F. Paseka, I. V. Sitkovsky, V. S. Sotnichenko, V. S. Ustinov, M. I. Havronyuk, O. Shumilo, V. I. Tsymbaliuk, H. Z. Yaremko. However, the problem of criminal liability of enterprises in our country is currently not fully resolved, especially for crimes against the environment.

The purpose of the article. Justification of expediency and possibility of criminal prosecution of enterprises; clarification of the legal nature of criminal liability of enterprises and on the basis of this definition of the concept of measures of criminal law nature in relation to enterprises; delimitation of the concept of criminal liability and measures of criminal law nature in relation to enterprises; proposing to enshrine at the legislative level the issue of criminal liability of enterprises in the field of crimes against the environment.

GENERAL ISSUES OF THE RELATIONSHIP BETWEEN CRIMINAL LIABILITY OF ENTERPRISES AND CRIMINAL AND LEGAL MEASURES FOR ENTERPRISES

The introduction of criminal liability of enterprises in Ukraine was quite unusual for the legal system of independent Ukraine, but today in our country provides for the liability of enterprises in civil, tax, environmental, antitrust and other areas. Therefore, the introduction of criminal liability under the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Implementation of the Action Plan on Visa Liberalization by the European Union for Ukraine on Liability of Enterprises” was an organic step in harmonizing Ukrainian legislation with European legislation².

In general, the issues of criminal liability at one time dealt with L. V. Bahrii-Shakhmatov, Yu. V. Baulin, O. O. Dudorov, V. O. Merkulova, I. V. Krasnytsky, I. I. Mitrofanov, E. O. Pismensky and Y. I. Solovii³. But they

² Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vykonannia Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhymu dlia Ukrainy stosovno vidpovidalnosti yurydychnykh osib(23.05.2013) Zakon Ukrainy [On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization of the Visa Regime for Ukraine by the European Union Concerning Liability of Legal Entities (23.05.2013) Law of Ukraine.] URL: <https://zakon.rada.gov.ua/laws/show/314-18>

³ Bahrii-Shakhmatov, L. V. (2000) Sotsyalno-pravovye problemy uholovnoi otvetstvennosti y form ee realizatsyy Odessa : AO Bakhva,; Bahrii-Shakhmatov L. V.

revealed such issues from the point of view of criminal liability only of individuals. But this is a fundamental development that can form the basis of a study of the legal institution of criminal liability and enterprises.

For a more effective disclosure of the topic should provide some definitions proposed by the above scientists.

Thus, L. V. Bahrii-Shakhmatov recognizes that in its content criminal liability is regulated by the rules of criminal law social relations (criminal relations)⁴.

Yu. V. Baulin defines criminal liability as the restriction of the rights and freedoms of an individual guilty of a crime, which is provided by the Criminal Code of Ukraine and is applied by the court and carried out by state bodies specially authorized to execute the court's conviction.⁵

It is well known that the social and legal essence of criminal responsibility is that it: first, is the state's reaction to the crime committed by an individual, and secondly, is the official state assessment in the conviction of the act as a crime, and the individual who committed as a criminal, thirdly, causes the

(2001) Sotsyalno-pravovye problemy uholovnoi otvetstvennosti y form ee realizatsyy kurs lektsyi Odessa : Odes. hos. mor. un-t.; Baulin, Yu. V. (2004) Zvlnennia vid kryminalnoi vidpovidalnosti K. : Atika, 2004; Krasnytskyi, I. V. (2008) Kryminalna vidpovidalnist yak instytut kryminalnogo prava Frantsii i Ukrainy: porivnialnyi analiz Lviv : Lviv. derzh. un-t vnutr. sprav, 2008; Merkulova, V. O. (2007) Kryminalna vidpovidalnist: okremi teoretychni ta sotsialno-pravovi aspekty monohrafiia O. : OIuI KhNUVS; Mytrofanov, I. I. (2010) Teoretychni problemy mekhanizmu realizatsii kryminalnoi vidpovidalnosti Kremenchuk : Vyd-vo P. P. Shcherbatykh O. V; Pysmenskyi, Ye. O. (2011) Zvlnennia vid pokarannia ta yoho vidbuvannia: problemy kryminalnogo zakonodavstva ta praktyky yoho zastosuvannia monohrafiia. Luhansk : TOV "Virtualna realnist"; Solovii, Ya. I. (2009) Mezhi kryminalnoi vidpovidalnosti Ivano-Frankivsk : ZAT "Nadvirnianska drukarnia" [Bahriy-Shakhmatov, L.V. (2000) Socio-legal problems of criminal liability and forms of its implementation Odessa : Bakhva JSC; Bahriy-Shakhmatov LV (2001) Socio-legal problems of criminal liability and forms of its implementation course of lectures Odessa : Odessa. state mor. un-t.; Baulin, Yu. V. (2004) Exemption from criminal liability K. : Attica, 2004; Krasnytsky, IV (2008) Criminal liability as an institute of criminal law of France and Ukraine: a comparative analysis Lviv: Lviv. state University of Internal Affairs Affairs, 2008; Merkulova, V. O. (2007) Criminal liability: some theoretical and socio-legal aspects of the monograph O.: OYUI KhNUVS; Mitrofanov, II (2010) Theoretical problems of the mechanism of realization of criminal responsibility Kremenchuk: Publishing house of PE Shcherbatykh O.V.; Pismensky, Ye. O. (2011) Exemption from punishment and its serving: problems of criminal legislation and practice of its application monograph. Luhansk: LLC "Virtual Reality"; Soloviy, Ya. I. (2009) Limits of criminal liability Ivano-Frankivsk: CJSC "Nadvirna Printing House"]

⁴ Bahriy-Shakhmatov L. V. (1976) Uholovnaia otvetstvennost y nakazanye Mynsk, "Vishcha. shkola" (pp. 27) [Bahriy-Shakhmatov L. V. (1976) Criminal liability and punishment Minsk, "Higher. school" (pp. 27)]

⁵ Baulin Yu. V. (2004) Zvlnennia vid kryminalnoi vidpovidalnosti K.: Atika (pp. 30) [Baulin Yu. V. (2004) Exemption from criminal liability K.: Attica (pp. 30)]

occurrence of certain adverse consequences for the individual who committed the crime in the form of sanctions provided by criminal law.

Until recently, the theory of criminal law has consistently defined such features of criminal responsibility as: predictability and settlement by criminal law, which occurs for the commission of a crime, the subjects of which can be only individuals over 16 years, and in cases provided by law – 14 years. In this case, it is purely personal and based on the presumption of innocence, accompanied by the imposition of punishment on the guilty and creates a state of conviction.

Therefore, such an approach cannot be a question of criminal liability of enterprises. But the development of crime encourages the creation of more effective measures to combat it. Therefore, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization of the Visa Regime for Ukraine in Respect of Liability of Enterprises” of May 23, 2014⁶ and Laws of Ukraine № 1261-VII of May 13, 2014, № 731-VIII of October 8, 2015, № 361-IX of December 6, 2019⁷ were introduced in addition to the introduction of criminal law measures against enterprises.

⁶ Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vykonannia Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhymu dlia Ukrainy stosovno vidpovidalnosti yurydychnykh osib (23.05.2014) Zakon Ukrainy Vidomosti Verkhovnoi Rady (VVR), 2014, № 12, st.183 [On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization by the European Union of the Visa Regime for Ukraine Concerning Liability of Legal Entities (May 23, 2014) Law of Ukraine Vidomosti Verkhovnoi Rady (VVR), 2014, № 12, p. 183]

⁷ Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy u sferi derzhavnoi antykoruptsiinoi polityky u zviazku z vykonanniam Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhymu dlia Ukrainy (13.05.2014) Zakon. URL: Vidomosti Verkhovnoi Rady (VVR), 2014, № 28, st. 937; Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo zapobihannia i protydii politychnii koruptsii (08.11.2015) Zakon Ukrainy. URL: Vidomosti Verkhovnoi Rady (VVR), 2015, № 49-50, st. 449; Pro zapobihannia ta protydiiu lehalizatsii (vidmyvanniu) dokhodiv, oderzhanykh zlochynnym shliakhom, finansuvanniu teroryzmu ta finansuvanniu rozpovsiudzhennia zbroi masovoho znyschennia (06.12.2019) Zakon Ukrainy. URL: [On Amendments to Certain Legislative Acts of Ukraine in the Sphere of State Anti-Corruption Policy in Connection with the Implementation of the Action Plan on Visa Liberalization by the European Union for Ukraine (May 13, 2014) Law. URL: Information of the Verkhovna Rada (VVR), 2014. 937; On Amendments to Certain Legislative Acts of Ukraine Concerning the Prevention and Counteraction of Political Corruption (November 8, 2015) Law of Ukraine. URL: Vidomosti Verkhovnoi Rady (VVR), 2015, № 49-50, p. 449; On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction (December 6, 2019) Law of Ukraine.] URL: <https://zakon.rada.gov.ua/laws/show/361-IX>

In this regard, there is a problem of the expediency of criminal liability of enterprises and the relationship between the concept of criminal liability and criminal and legal measures for enterprises.

It should be noted that the approach of the possibility of prosecuting only an individual, given the practical experience of foreign countries, today does not seem as established as it was in Soviet times. Today, the security of countries, including our state of Ukraine, needs more effective levers of law. With the development of large corporations, there is a tendency to ignore the interests of both the security of states in general and ordinary citizens in particular. It should be noted that compensation for pecuniary damage through the institutions of civil and commercial law can no longer be considered sufficient, as it is criminal and legal measures for enterprises will allow, *inter alia*, to terminate the enterprise that committed the crime, not just cover damages, thus only after experiencing material stress.

Based on the norm of Part 1 of Article 81 of the Civil Code of Ukraine, enterprises are created by merging individuals or property⁸. Once created, an enterprise acquires certain characteristics that characterize it as an enterprise that can be an independent subject of legal relations and has civil capacity. According to Part 1 of Article 91 of the Civil Code of Ukraine, an enterprise is able to have the same civil rights and obligations (civil capacity) as a natural individual, except for those that by their nature can only belong to an individual. And part 1 of Article 92 defines the possibility for an enterprise to exercise civil rights and obligations through its bodies, which act in accordance with the constituent documents and the law. Also, parts 1 and 2 of Article 96 of the Civil Code stipulate that an enterprise is liable for its obligations. That is, an enterprise has a similar civil status as an individual for further study of the possibility of considering it as a possible subject of criminal law.

Until recently, only a few authors tried to combine measures of influence of private law and public law nature. As noted by GG Moshak, that the concepts of punishment in Germany and Ukraine exclude the existence of private law punitive elements and do not disclose its content, the essence of which would clearly distinguish between violations of civil and criminal law. Meanwhile, according to GG Moshak through civil law influence on the property status of an individual can achieve a significant restriction of his rights, freedoms, actions. Conversely, he notes, criminal restriction of liberty does not always (or not fully) lead to deprivation of property rights⁹. This

⁸ Tsyvilnyi kodeks Ukrainy (16.01. 2003) [The Civil Code of Ukraine (16.01. 2003)]. URL: <https://zakon.rada.gov.ua/laws/show/435-15>

⁹ Moshak H. H. (2020) *Vykorystannia zasobiv pryvatnoho prava u zapobihanni zlochynnosti (za materialamy FRN): monohrafiia*. 2-he vyd. (pp. 25) Kharkiv: Pravo [Moshak GG (2020) *The use of private law in crime prevention (according to Germany): monograph*. 2nd ed. 25 p. Kharkiv: Law]

cannot be fully agreed with, as the tools of civil law and criminal law are mostly different, as civil law influence one of the functions involves a compensatory function, and such a function as punitive has no influence in its arsenal. When committing crimes on behalf of and in the interests of an enterprise, only the compensatory function of influencing the offender is not sufficient, as sanctions are needed that would limit the illegal action of the subject.

Therefore, it is considered quite reasonable to apply to it precisely the measures of criminal law, which is aimed at the punishment itself, and not only, for example, liability for damages. It should be noted that the concepts of civil and criminal liability cannot be substituted or equated. They have different legal tools and different purposes. The purpose of civil liability is to compensate for possible damages, compensation, etc. The purpose of criminal liability is to punish the offender, to impose punishment on him in accordance with the crime, to limit his further criminal activity. In this sense, it is expedient to combine, rather than replace, criminal liability with civil liability, as a symbiosis of the institutions of compensation for damages and punishment for a crime committed.

Therefore, it is advisable to consider the relationship between the concepts of punishment, the measure of criminal law and criminal liability.

It is well known that criminal liability is not limited to punishment. Thus, Part 3 of Article 3 of the Criminal Code of Ukraine stipulates that the criminality of an act, as well as its punishment and other criminal consequences are determined only by the Criminal Code. In accordance with Part 2 of Article 4 of the Criminal Code, crime and punishment, as well as other criminal consequences of the act are determined by the law on criminal liability in force at the time of the act. To such consequences of the committed crime besides punishment some scientists carry also criminal record as one more form of realization of criminal liability which follows execution of criminal punishment¹⁰.

Assigning a criminal record to the forms of criminal liability, L. V. Bahrii-Shakhmatov proves his disagreement with some aspects of some positions of V. I. Kurdlyansky and I. S. Noi, who conducted a study of the relationship between criminal responsibility and punishment, characterized punishment as “one of the results of responsibility”, “its finale”¹¹.

¹⁰ Bahryi-Shakhmatov L.V.(1976) Uholovnaia otvetstvennost y nakazanye. (pp. 115) Mynsk, “Visha shkola” [Bahrii-Shakhmatov LV (1976) Criminal liability and punishment. (pp. 115) Minsk, “Higher. school]

¹¹ Noi I. S. (1962) Voprosy teoryy nakazaniya v sovetskom uholovnom prave. (pp. 121) Saratov [Noah I. S. (1962) Questions of the theory of punishment in Soviet criminal law. (pp. 121) Saratov]

In the opinion of the authors, criminal liability is a multi-vector concept. The entire Criminal Code can be called the Law on Criminal Liability. It covers absolutely the whole spectrum of criminal law relations, so criminal liability in a broad sense is also a multi-vector concept. A. M. Boyko, L. P. Brich, W. K. Gryshchuk defines criminal liability as a special legal institution within which an official assessment of an individual's behavior as a criminal is carried out. They note that criminal liability arises from the entry into force of a court conviction and materializes in a court conviction. It usually includes convicting an individual for a crime, sentencing him, serving it, a criminal record, and so on. They also point out that criminal prosecution, as a stage of criminal prosecution, begins when an individual is charged with a crime¹².

But, in the opinion of the authors, the stages of criminal responsibility begin from the moment the crime is committed. Of course, one can refer to the presumption of innocence that no one can be found guilty of a crime before a court sentence. But it is not a question of admitting the guilt of an individual and bringing him to criminal responsibility, but of the emergence of criminal responsibility in the objective sense of the fact of committing a crime. In this case, criminal liability can be divided into four stages: the first stage – the emergence of grounds for criminal liability; the second stage – resolving the issue of criminal liability; the third stage – sentencing, release from punishment, sentencing to coercive medical and educational measures and the award of measures of a criminal nature for enterprises; the fourth – stage – execution of punishment.

Thus, it is possible to realize that criminal liability and punishment and criminal and legal measures for enterprises are correlated as a whole and a share. Moreover, it should be noted that the concepts of punishment, release from punishment and sentencing to coercive medical and educational measures are specific only to individuals, and measures of a criminal nature are used for enterprises. Although in a broad sense, punishment for enterprises looks like a measure of criminal law.

Given that an enterprise has its own civil capacity and legal capacity, as well as recognized by the Criminal Code of Ukraine as an independent subject of crime, it is subject to criminal law measures, which are in the form of punishment, but in a rather truncated form compared to types of punishment of individuals. According to Article 966 of the Criminal Code of Ukraine, such measures of a criminal law nature as a fine may be applied to enterprises by a court; confiscation of property; liquidation. Despite the fact that fines and

¹² Boiko A.M., Brych L. P., Hryshchuk V. K. Komentar do Kryminalnoho kodeksu. [Boyko A. M., Brich L. P., Grishchuk V. K. Commentary to the Criminal Code.] URL: <https://legalexpert.in.ua/komkodeks/uk/81-uky/1681-3.html>

liquidation can be applied to enterprises only as the main measures of a criminal law nature, and confiscation of property only as an additional one. This is due to the legal nature of the enterprise. Attention should also be paid to cases of exemption from the application of criminal law measures for enterprises, which occur only in the case of limitation.

Analyzing the grounds for applying to enterprises measures of a criminal nature, set out in Article 963 of the Criminal Code of Ukraine, it can be determined that they are the actions of an authorized individual acting on behalf and in the interests of the enterprise. The question arises why the Criminal Code is burdened with additional articles, if the Criminal Code of Ukraine already has section 17 “Crimes in the field of official activities and professional activities related to the provision of public services”, which contains, *inter alia*, Article 3641 “Abuse of office” an individual of an enterprise of private law, regardless of the organizational and legal form. But in fairness, it should be noted that Articles 963 to 9611 of the Criminal Code of Ukraine, concerning measures of criminal law against enterprises provide for such measures for certain types of crimes under the Special Part of the Criminal Code, in particular, section 1 – crimes against Fundamentals of National Security of Ukraine, Section 3 – Crimes against the Will, Honor and Dignity of the Individual, Section 5 – Crimes against Electoral, Labor and Other Individualal Rights and Freedoms of Man and Citizen, Section 7 – Crimes in the Sphere of Economic Activity, Section 9– Crimes against Public security, section 13 – crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues or precursors and other crimes against public health, section 20 – crimes against peace, security of mankind and world law and order.

It should be noted that section 17 “Crimes in the sphere of official activity and professional activity related to the provision of public services”, mentioned above, is not included in the list of sections, the articles of which provide for sanctions of criminal law for enterprises. This is logical, because one of the signs of crimes in the sphere of official activity is criminal activity in one’s own interests, and crimes where the subject is an enterprise – the official acts in the interests and on behalf of the enterprise. And this, in the author’s opinion, is a qualifying feature of the crime and separates the onset of negative consequences of a criminal nature for both individuals and enterprises.

But the inconsistency of the legislator is seen in another. Today, the world is on the brink of ecological catastrophe, which is recognized by the entire world community. Therefore, the passive silence of the Ukrainian legislator on the problems of application of criminal law measures in relation to crimes against the environment seems rather strange. Based on this, it will be useful to devote the next section of the monograph to this issue.

Thus, this section considers the theoretical justification for the application of criminal law measures for enterprises, namely:

The expediency of the correlation between the concepts of punishment, measures of criminal law and criminal liability is considered.

Criminal liability is defined as a multi-vector concept in a broad sense and it is proposed to divide it into four stages: the first stage – the emergence of grounds for the application of criminal liability; the second stage – resolving the issue of criminal liability; the third stage – sentencing, release from punishment, sentencing to coercive medical and educational measures and the award of measures of a criminal nature for enterprises; the fourth – execution of punishment.

The expediency of combining the instruments of criminal liability and civil liability as a symbiosis of institutions of compensation and punishment for a crime has been proved.

CRIMINAL LIABILITY OF ENTERPRISE AND CRIMINAL AND LEGAL MEASURES FOR ENTERPRISES FOR CRIMES AGAINST THE ENVIRONMENT IN THE MARITIME ECONOMY

Ukraine is a maritime state, so the relevant topics of study, among others, are the maritime economy and water resources. Given the state of the ecological situation of our state, in particular, marine water resources, the relevance of the research topic is quite timely.

Article 13 of the Constitution of Ukraine stipulates that the Earth, its subsoil, atmospheric air, water and other natural resources located within the territory of Ukraine, natural resources of its continental shelf, exclusive (marine) economic zone are objects of property of the Ukrainian people. On behalf of the Ukrainian people, the rights of the owner are exercised by state authorities and local self-government bodies within the limits set by this Constitution. Ownership is binding. Property should not be used to the detriment of man and society.

The state ensures the protection of the rights of all subjects of property rights and management, the social orientation of the economy. All property rights are equal before the law¹³.

Part 1 of Article 50 of the Law of Ukraine “On Environmental Protection”¹⁴ defines environmental safety as a state of the environment in

¹³Konstytutsiia Ukrainy (28.06.1996) [Constitution of Ukraine]. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

¹⁴ Pro okhoronu navkolyshnoho pryrodnoho seredovyshcha (25.06.1991) Zakon Ukrainy [On Environmental Protection (June 25, 1991) Law of Ukraine.]. *Vidomosti Verkhovnoi Rady Ukrainy*. 1991. № 41. Ст. 546.

which the prevention of deterioration of the environmental situation and the emergence of danger to human health.

Thus, it can be concluded that environmental security is part of national security, and crimes against the environment, including the object of which water resources, in particular, which are part of the maritime economy, are also a type of crime against national security.

In general, water offenses are an integral part of environmental offenses that have an object, an objective side, a subjective side, and a subject. Specific types of liability for violation of water legislation (civil, administrative, criminal, disciplinary) are provided for in current legislation and are applied within the established limits in the presence of conditions and grounds for liability.

It should be noted that crimes against the environment are those crimes whose public danger, as a general rule, is not confirmed by official statistics. The latency of crimes against the environment is quite high compared to other types of crimes. This is evidenced by the fact that the environmental situation in the country, unfortunately, is constantly deteriorating, and the number of registered environmental crimes remains quite small. The real latency of crimes against the environment, according to experts, is about 98 % of all crimes. This is one of the indicators of the public danger of crimes against the environment¹⁵.

It should also be acknowledged that there are almost no cases in the courts for damages for violations of environmental legislation in the waters of the Black Sea in Ukraine. One of the reasons for this situation is the insufficient development of the legal framework for resolving such disputes.

The case of the April 30, 2020 reset is indicative, but not yet complete. It concerns the discharge of pollutants (palm oil) in the amount of 8449.5 kg from the vessel STAVANGER IMO9278507 into the water area of the Pivdenny seaport, on the territory of berth № 4, which caused pollution of the internal sea waters of Ukraine. This reset occurred due to violation of the requirements of environmental legislation of Ukraine.

The fact of committing this offense is confirmed by the protocol on administrative offense № 000196 of April 30, 2020 and the resolution № 000196 of April 30, 2020 on the imposition of administrative penalties, drawn up by the State Ecological Inspectorate of the Crimean Black Sea District.

The shipowner is MARINO SHIPPING CO PTE LTD with registration in Singapore, and its representative in Ukraine is a limited liability company

¹⁵ Shulha A.M. (2012) Zlochyny proty dovkillia. Pytannia kvalifikatsii: naukovo-praktychne vydannia (pp. 17-18) Kh.: NikaNova [Shulga AM (2012) Crimes against the environment. Qualification issues: scientific and practical edition (pp. 17-18) H.: NikaNova]

“Euroham Shipping / Odessa /, LTD”, which in accordance with the payment order № 46 from 04 May 2020 paid an administrative fine for the captain of the vessel in the amount of 1190 hryvnias.

In addition, as the losses in the amount of USD 2,416,557, amounting to UAH 65,174,542.29 in the national currency, MARINO SHIPPING CO PTE LTD was not voluntarily reimbursed, the Acting Head of the Comintern Local Prosecutor’s Office of Odesa Oblast referred to on the provisions of Article 111 of the Water Code of Ukraine, Article 69 of the Law of Ukraine “On Environmental Protection”, Article 304 of the Code of Merchant Shipping of Ukraine, appealed to the court with a claim and a motion to seize the vessel¹⁶.

However, a representative of MARINO SHIPPING CO PTE LTD issued a letter of guarantee dated 11 May 2020 from London R&I Club as an insurance company covering the third party claims against shipowners following the incident in the port of Pivdenny. The insurance company recognized the incident as an insured event for the entire amount of the claims and provided compensation for damages caused to the state of Ukraine as a result of the incident. An amount of USD 1,000,000 was also deposited in the court’s deposit account, which the MARINO SHIPPING CO PTE LTD representative considered to be sufficient security for the applicant’s claim and could be grounds for releasing the vessel from custody¹⁷.

Considering this incident, it is possible to see the incomplete ratio of the amount of damages and the qualification of the violation only as administrative. That is, the violation is inherently particularly serious, the property equivalent of which is 65,174,542.29 hryvnias, and this is only economic damage caused to the marine environment, but does not take into account environmental and future anthropogenic damage.

Unfortunately, the qualification of crimes in Article 12 of the Criminal Code of Ukraine¹⁸ classifies crimes by sanctions, not by consequences. Such a classification, in the opinion of the authors, seems rather subjective, since sanctions are imposed by the legislator, i.e. by human will, and the consequences of which it would be proposed to classify crimes is a more objective criterion for this.

¹⁶ Ukhvala Hospodarskoho sudu Odeskoi oblasti (13.05. 2020) sprava № 916/1287/20 [The decision of the Commercial Court of Odessa region (13.05. 2020) case № 916/1287/20]. URL: <http://reyestr.court.gov.ua/Review/89182664>

¹⁷ Ukhvala Hospodarskoho sudu Odeskoi oblasti (15.05. 2020) sprava № 916/1287/20 [The decision of the Commercial Court of Odessa region (15.05. 2020) case № 916/1287/20]. URL: <http://reyestr.court.gov.ua/Review/89321037>

¹⁸ Kryminalnyi kodeks Ukrainy [Criminal code of Ukraine] (05.04 2001). URL: <https://zakon.rada.gov.ua/laws/show/2341-14>

An administrative penalty was imposed on the offender and executed against the captain of the vessel “STAVANGER” IMO9278507. But, in the author’s opinion, in this case there were all grounds to classify offenses under Article 243 of the Criminal code of Ukraine “Pollution of the sea”. The ship’s captain would be held liable under current law. Sanctions provide for a fine in a certain amount, depending on the part of the article, restriction or imprisonment for a period specified in the article, depending on its part, with deprivation of the right to hold certain positions or engage in certain activities. But now, if the discharge from the ship was not the fault of the captain, but the fault of the shipowner, for example, due to malfunction of the ship’s mechanisms, due to untimely repairs or any other actions and inaction of the shipowner, the activities of such a company are socially dangerous environmental security of the state and, consequently, national security in general.

As mentioned above, the environment in general, and water resources in particular, are in circulation despite the borders of states. Therefore, offenses against the environment are dangerous for the entire international community, not just for an individual state. In view of this, it would be expedient to include, in addition to crimes against national security, measures of criminal law for enterprises, articles of the Criminal Code of Ukraine, which provide for criminal liability for crimes against the environment, providing under certain conditions measures of criminal law for enterprises.

It should be reminded that most of the criminal law rules that provide for liability for crimes against the environment are blanket norms. This means that in order to clarify the disposition of a particular article, it is necessary to refer to other regulations that by their nature relate, for example, to environmental, administrative, etc.

Thus, at the international level, Ukraine has signed but not yet ratified the Convention on the Protection of the Environment through Criminal Procedure CETS № 172, which was concluded in Strasbourg on November 4, 1998¹⁹.

Paragraph 1 of Article 9 of this Convention provides for so-called corporate liability, i.e. liability of legal individuals. Namely, “each Party shall take the necessary measures to create the conditions for the application of criminal or administrative sanctions or measures of influence to legal individuals on whose behalf the offense referred to in Articles 2 or 3 was committed by their authorities or members or another representative”, but paragraph 3 of the same article provides that “any State may, at the time of signature of this Convention or deposit of an instrument of ratification,

¹⁹ Konventsiia pro zakhyst dovkillia zasobamy kryminalnoho zakonodavstva [Convention for the Protection of the Environment by means of Criminal Law] (ETS N 172) 04.11. 1998). URL: https://zakon.rada.gov.ua/laws/show/994_560

acceptance, approval or accession by application to the Secretary General of the Council of Europe to declare that it reserves the right not to apply paragraph 1 of this Article or any other part thereof or that the provisions of the Article apply only to the offenses set forth in the declaration”. That is, the Convention in this part is purely advisory in nature, but determines the possibility of applying criminal law measures for enterprises.

When disclosing criminal law measures against enterprises, the issue of possible sanctions should be investigated, especially against foreign enterprises that have committed crimes against the environment on the territory of Ukraine.

The Convention on the Protection of the Environment by means of Criminal Law CETS № 172 provides for such sanctions for environmental crimes as imprisonment, fines, measures to restore the environment, confiscation measures²⁰.

As we can see, the Convention does not distinguish between public and private law sanctions. As you know, according to the theory of the right to imprisonment, fines and confiscation measures are public law measures, and the restoration of the environment – are measures that characterize the compensatory function of civil liability. It is known that civil liability provides for the liability of the subjects of environmental offenses for damages caused by them as a result of violations, including water legislation in the maritime economy. Civil liability is the obligation of the offender to compensate the injured party for property or moral damage caused as a result of violation of legal environmental requirements. The peculiarity of civil liability is that it can be imposed on the offender along with the application of measures of disciplinary, administrative and criminal influence, ie together. The specific purpose of this type of liability is to compensate for the damage caused by an environmental offense. Civil liability involves the imposition on the guilty individual of adverse property consequences for him for water offenses. When assigning liability, the general conditions for the application of a particular type of liability are required. However, damage is a prerequisite for civil liability. If it is absent, accordingly, there are no grounds for bringing the perpetrators to justice²¹. Meanwhile, some components of crimes against the

²⁰ Статті 6-8 Конвенції про захист довкілля засобами кримінального законодавства [Articles 6–8 of the Convention on the Protection of the Environment by means of Criminal Law] (ETS N 172) (04.11.1998). URL: https://zakon.rada.gov.ua/laws/show/994_560

²¹ Borshchevska O. M. (2008) Prioritytetnist zastosuvannia zakhodiv tsyvilno-pravovoi vidpovidalnosti za ekolohichni pravoporushennia u vodnomu zakonodavstvi (pp. 88) *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav: zbirnyk naukovykh prats* [Borshchevskaya OM (2008) Priority of application of measures of civil liability for environmental offenses in water legislation (pp. 88) *Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs: a collection of scientific papers*]

environment do not provide such a mandatory condition as causing harm, but have other grounds for prosecuting the offender, as they are socially dangerous, in particular part 2 of Article 244 of the Criminal Code of Ukraine. Therefore, it is seen that not only damage to the environment can be a sufficient basis for prosecution. And the achievement of the goal of maintaining public order, in particular, in the protection of the environment in the maritime economy should be attributed to the priorities that are achieved by means of criminal liability.

Based on the above, it is proposed not to include economic damage as an integral qualifier in the composition of crimes against the environment. It is sufficient to consider the commission by their illegal actions of the possibility of damage, such as entering the territorial waters of a vessel with dangerous radioactive cargo, etc.

If we compare the measures of a criminal law nature with respect to enterprises enshrined in Articles 966–969, it should be noted that such measures as fines and confiscations are accompanied by liquidation, with fines and liquidations being the main and confiscation additional.

O. Shumilo's proposal seems interesting, in which he considers it expedient for crimes against the environment to expand measures of a criminal law nature, providing for a ban on: advertising of economic activities, products and services; use of grants, subsidies or other forms of financial assistance; use of assistance from international organizations of which Ukraine is a member; bringing the sentence to the public's attention²². We can agree with this, but all these measures do not have a criminal law burden and can be considered in context of administrative liability and measures of compliance and influence in conduct of business activities, which will characterize the enterprise as dishonest.

In the question of application of measures of criminal law character concerning enterprises it is necessary to investigate more deeply essence of such measures from the point of view of criminal law. Considering the problem of criminal law measures against enterprises for crimes against the environment, in particular, in the maritime sector, it should be noted that it is impossible to consider such a measure as imprisonment for enterprises, because the enterprise has no components of freedom. We can talk about the ratio of sanctions "liquidation" as a measure of criminal law for enterprises and "imprisonment" for individuals. But this is also not a fair and equivalent comparison. Because, in essence, imprisonment provides for its possible restoration on certain grounds,

²² O. Shumilo (zhovten, 2014) Kryminalna vidpovidalnist yurydychnykh osib za zlochyny proty dovkillia (pp. 185). *Natsionalnyi yurydychnyi zhurnal: teoriia i praktyka* [O. Shumilo (October, 2014) Criminal liability of legal entities for crimes against the environment (pp. 185). *National Legal Journal: Theory and Practice*]

and the concept of liquidation implies the final termination of the enterprise. Moreover, it is impossible to talk about liquidation in relation to foreign enterprises, because the legal mechanism of liquidation of such an enterprise can be complex and multilevel, especially since the crime against the environment will be committed in one or more countries, and the place of registration of the enterprise will be completely other.

Therefore, in view of this, it is proposed to envisage for crimes against the environment such measures of a criminal nature against enterprises as the prohibition or restriction of activities of any nature on the territory of Ukraine, in its territorial waters and on the continental shelf.

CONCLUSIONS

Thus, on the basis of the above material, it should be noted that in Ukraine the need for changes in legislation is finally ripe, which is due to serious problems of environmental protection, especially in the maritime sector.

The paper identifies both theoretical and practical aspects of the feasibility of introducing legal institutions of criminal law such as “criminal liability of enterprises” and “criminal and legal measures for enterprises” for crimes against the environment in the maritime economy. Namely:

1. The question of expediency of correlation of concepts of punishment, measures of criminal-legal character and criminal responsibility is considered.

2. Criminal liability is defined as a multi-vector concept in a broad sense and it is proposed to divide it into four stages: the first stage – the emergence of grounds for the application of criminal liability; the second stage – resolving the issue of criminal liability; the third stage – sentencing, release from punishment, sentencing to coercive medical and educational measures and the award of measures of a criminal nature for enterprises; the fourth stage – execution of punishment.

3. The expediency of combining the instruments of criminal liability and civil liability as a symbiosis of institutions of compensation and punishment for a crime has been proved.

4. It is expedient to introduce, along with crimes against national security, which provide for criminal law measures for enterprises, to include articles of the Criminal Code of Ukraine, which provide for criminal liability for crimes against the environment, providing under certain conditions measures of criminal law for enterprises.

5. It is proposed not to include economic damage as an integral qualifying feature in any part of crimes against the environment. It is sufficient to consider the commission by their illegal actions of the possibility of harm

6. For crimes against the environment, it is recommended to provide for such measures of a criminal nature against enterprises as the prohibition or

restriction of activities of any nature on the territory of Ukraine, in its territorial waters and on the continental shelf.

SUMMARY

The issue is to determine the feasibility of introducing legal institutions of criminal law “criminal liability of enterprises” and “criminal and legal measures for enterprises” for crimes against the environment in the maritime economy. Given the urgency of this issue in the international community and in the world of changes to the Criminal Code of Ukraine, the issue of applying criminal measures to enterprises for crimes against the environment in the maritime economy has become urgent. The authors define the general purpose of the article in substantiating the expediency and possibility in the application of criminal law measures against enterprises for crimes against the environment in the maritime economy. In the process of consideration of the topic, the authors touch upon the topics of determining the stages of criminal liability in the perspective of its relationship with measures of criminal law in relation to enterprises. It is emphasized that the environmental security of the state is a part of the national security of the state and is therefore subject to special protection, which can be achieved by introducing the institution of criminal law measures against enterprises for crimes against the environment, in particular in the maritime economy. The study is based on international and national law, the results of case law and basic research by scholars in the field of criminal and civil law. The findings can be used to improve legislation and practice.

REFERENCES

1. Konstytutsiia Ukrainy (28.06.1996) [Constitution of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>
2. Konventsiiia pro zakhyst dovkillia zasobamy kryminalnoho zakonodavstva [Convention on the Protection of the Environment by means of Criminal Law] [(ETS N 172) (04.11.1998) URL: https://zakon.rada.gov.ua/laws/show/994_560
3. Kryminalnyi kodeks Ukrainy [Criminal code of Ukraine] (05.04 2001) URL: <https://zakon.rada.gov.ua/laws/show/2341-14>
4. Tsyvilnyi kodeks Ukrainy (16.01. 2003) [The Civil Code of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/435-15>
5. Pro okhoronu navkolyshnoho pryrodnoho seredovyshcha (25.06.1991) Zakon Ukrainy [On Environmental Protection (June 25, 1991) Law of Ukraine] URL: Vidomosti Verkhovnoi Rady Ukrainy. 1991. № 41. Art. 546.
6. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vykonannia Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom

vizovoho rezhymu dlia Ukrainy stosovno vidpovidalnosti yurydychnykh osib (23.05.2013) *Zakon Ukrainy [On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization of the Visa Regime for Ukraine by the European Union Concerning Liability of Legal Entities (23.05.2013) Law of Ukraine]* URL: <https://zakon.rada.gov.ua/laws/show/314-18>

7. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy u sferi derzhavnoi antykoruptsiinoi polityky u zviazku z vykonanniam Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhymu dlia Ukrainy (13.05.2014) *Zakon URL: Vidomosti Verkhovnoi Rady (VVR), 2014, № 28, st. 937;*

8. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vykonannia Planu dii shchodo liberalizatsii Yevropeiskym Soiuzom vizovoho rezhymu dlia Ukrainy stosovno vidpovidalnosti yurydychnykh osib (23.05.2014) *Zakon Ukrainy Vidomosti Verkhovnoi Rady (VVR), 2014, № 12, st.183 [On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Liberalization by the European Union of the Visa Regime for Ukraine Concerning Liability of Legal Entities (May 23, 2014) Law of Ukraine Vedomosti Verkhovnoi Rady (VVR), 2014, № 12, p. 183.*

9. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo zapobihannia i protydii politychnii koruptsii (08.10.2015) *Zakon Ukrainy URL: Vidomosti Verkhovnoi Rady, 2015, № 49-50, st.449 [Law on Ukraine On Amendments to Certain Legislative Acts of Ukraine Concerning the Prevention and Counteraction of Corruption (October 8, 2015). Information of the Verkhovna Rada, 2015, № 49-50, Article 449]*

10. Pro zapobihannia ta protydiu lehalizatsii (vidmyvanniu) dokhodiv, oderzhanykh zlochynnym shliakhom, finansuvanniu teroryzmu ta finansuvanniu rozpovsiudzhennia zbroi masovoho znyschennia (06.12.2019) *Zakon Ukrainy [On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction (December 6, 2019) Law of Ukraine]* URL: <https://zakon.rada.gov.ua/laws/show/361-IX>

11. Ukhvala Hospodarskoho sudu Odeskoi oblasti (13. 05. 2020) sprava № 916/1287/20 [Decision of the Commercial Court of Odessa region (13.05.2020) case № 916/1287/20] URL: <http://reyestr.court.gov.ua/Review/89182664>

12. Ukhvala Hospodarskoho sudu Odeskoi oblasti (15.05 2020) sprava № 916/1287/20 [Ruling of the Commercial Court of Odessa region (15.05.2020) case № 916/1287/20] URL: <http://reyestr.court.gov.ua/Review/89321037>

13. Bahryi-Shakhmatov L. V. (1976) Uholovnaia otvetstvennost y nakazanye. (p.384) Mynsk, "Vishchaa. Shkola" [Bagriy-Shakhmatov L. V. (1976) Criminal liability and punishment. (p. 384) Minsk, "Higher. School"]
14. Bahrii-Shakhmatov, L. V. (2000) Sotsyalno-pravovye problemy uholovnoi otvetstvennosti y form ee realizatsyy [Tekst] / L. V. Bahrii-Shakhmatov. Odessa : AO Bakhva [Bahriy-Shakhmatov, LV (2000) Socio-legal problems of criminal liability and forms of its implementation [Text] / L. V. Bahriy-Shakhmatov. Odessa: JSC Bakhva]
15. Baulin Yu. V. (2004) Zvlnennia vid kryminalnoi vidpovidalnosti. (p. 296) K.: Atika [Baulin Yu. V. (2004) Exemption from criminal liability. (p. 296) K.: Attica]
16. Noi I. S. (1962) Voprosy teoryy nakazaniya v sovetskom uholovnom prave. (p.156) Saratov [Noah I. S. (1962) Questions of the theory of punishment in Soviet criminal law. (p. 156) Saratov]
17. Boiko A. M., Brych L. P., Hryshchuk V. K. Komentar do Kryminalnoho kodeksu [Boyko A. M., Brich L. P., Grishchuk V. K. Commentary to the Criminal Code]. URL: <https://legalexpert.in.ua/komkodeks/uk/81-uky/1681-3.html>
18. Borshchevska O. M. (2008) Priorytetnist zastosuvannia zakhodiv tsyvilno-pravovoi vidpovidalnosti za ekolohichni pravoporushennia u vodnomu zakonodavstvi (pp. 85–94). *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav: zbirnyk naukovykh prats. № 4* [Borshchevskaya OM (2008) Priority of application of measures of civil liability for environmental offenses in water legislation (pp. 85–94) *Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs: a collection of scientific papers. № 4*]
19. Krasnytskyi, I. V. (2008) Kryminalna vidpovidalnist yak instytut kryminalnoho prava Frantsii i Ukrainy: porivnialnyi analiz Lviv : Lviv. derzh. un-t vnutr. sprav [Krasnytsky, I. V. (2008) Criminal liability as an institution of criminal law of France and Ukraine: a comparative analysis of Lviv: Lviv. state University of Internal Affairs affairs]
20. Merkulova, V. O. (2007) Kryminalna vidpovidalnist: okremi teoretychni ta sotsialno-pravovi aspekty O.: OIuI KhNUVS [Merkulova, V. O. (2007) Criminal liability: some theoretical and socio-legal aspects of O.: OYUI KhNUVS]
21. Mytrofanov, I. I. (2010) Teoretychni problemy mekhanizmu realizatsii kryminalnoi vidpovidalnosti Kremenchuk : Vyd-vo PP Shcherbatykh O. V., Moshak H. H. (2020) Vykorystannia zasobiv pryvatnoho prava u zapobihanni zlochynnosti (za materialamy FRN): monohrafiia 2-he vyd. (p. 196) Kharkiv: Pravo [Mitrofanov, II (2010) Theoretical problems of the mechanism of realization of criminal responsibility Kremenchuk: Publishing house of PE Shcherbatykh O. V., Moshak G. G. (2020) The use of private law

in crime prevention (according to Germany): monograph 2nd ed. (p. 196) Kharkiv: Law]

22. Pysmenskyi, Ye. O. (2011) *Zviltнення vid pokarannia ta yoho vidbuvannia: problemy kryminalnoho zakonodavstva ta praktyky yoho zastosuvannia monohrafiia* Luhansk: TOV “Virtualna realnist”, 2011 [Pismensky, EA (2011) *Exemption from punishment and its serving: problems of criminal law and practice of its application monograph* Lugansk: LLC “Virtual Reality”, 2011]

23. Solovii, Ya. I. (2009) *Mezhi kryminalnoi vidpovidalnosti Ivano-Frankivsk: ZAT “Nadvirnianska drukarnia”* [Soloviy, Ya. I. (2009) *Limits of criminal liability Ivano-Frankivsk: CJSC “Nadvirna Printing House”*]

24. Shulha A. M. (2012) *Zlochyny proty dovkillia. Pytannia kvalifikatsii: naukovo-praktychne vydannia* (p. 192). Kh.: NikaNova, 2012 [Shulga A. M. (2012) *Crimes against the environment. Qualification issues: scientific and practical edition* (p. 192). X.: NikaNova, 2012]

25. Shumilo O. (2014, zhovten) *Kryminalna vidpovidalnist yurydychnykh osib za zlochyny proty dovkillia* (pp. 181–185) *Natsionalnyi yurydychnyi zhurnal: teoriia i praktyka* [Shumilo O. (2014, October) *Criminal liability of legal entities for crimes against the environment* (pp. 181–185) *National Legal Journal: Theory and Practice*]

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