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ПЕРЕГЛЯД ПІДХОДІВ ДО ІНСТИТУТУ ЦИВІЛЬНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ У ПРОЦЕСІ РЕКОДИФІКАЦІЇ ЦИВІЛЬНОГО КОДЕКСУ УКРАЇНИ

Анотація. *Проблематика цивільно-правової відповідальності хоча і не є новою для цивілістичної доктрини, втім не втрачає актуальності. У дослідженнях українських вчених спостерігаються два підходи до розуміння поняття цивільно-правової відповідальності – позитивно-перспективний та негативно-ретроспективний. Втім, останнім часом активно починає обговорюватись питання поширення на договірні відносини, відносини, пов'язані з ризиком, категорії «цивільно-правова відповідальність». Звучать думки, що у випадках порушення договірних зобов'язань чи завдання шкоди у результаті ризикової діяльності важко обґрунтувати і застосувати заходи цивільно-правової відповідальності. Тим більше що й у зарубіжній доктрині порушення договору традиційно не вважається правопорушенням. Тому метою цієї статті є напрацювання підходів до інституту цивільно-правової відповідальності та окреслення напрямів оновлення цивільного законодавства з урахуванням сучасних європейських тенденцій. У роботі на підставі економічного аналізу права з використанням діалектичного, порівняльного, логічно-догматичного та інших методів аналізуються підходи до розуміння поняття цивільно-правової відповідальності та розмежовуються заходи цивільно-правової відповідальності і заходи захисту цивільних прав. Зокрема робиться висновок, що виправданим є використання категорії «цивільно-правова відповідальність» до випадків вчинення правопорушення, тобто протиправного завдання шкоди. Доцільним видається уведення до цивільного законодавства поряд з категорією «правові наслідки невиконання зобов'язання» більш широкої правової категорії «правові наслідки невиконання (порушення) цивільного обов'язку», оскільки цивільні обов'язки можуть виникати як із зобов'язань, так і з інших юридичних фактів. Це дасть змогу розширити можливості захисту прав і законних інтересів та ефективно відновити порушене право, оскільки відновлювальна функція притаманна саме заходам захисту суб'єктивних цивільних прав*

Ключові слова: *цивільне право, делікт, захист цивільних прав, відшкодування шкоди, оновлення цивільного законодавства*

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OVERVIEW OF APPROACHES TO THE INSTITUTE OF CIVIL LEGAL RESPONSIBILITY IN THE PROCESS OF RECODIFICATION OF THE CIVIL CODE OF UKRAINE

Abstract. *Although the issue of civil liability is not new to civil doctrine, it is still relevant. In the research of Ukrainian scientists there are two approaches to understanding the concept of civil liability – positive-perspective and negative-retrospective. However, recently the issue of extension to contractual relations, risk-related relations, the category of "civil liability" has been actively discussed. There are opinions that in cases of breach of contractual obligations or damage as a result of risky activities, it is difficult to justify and apply measures of civil liability. Moreover, in foreign doctrine, breach of contract is not traditionally considered an offense. Therefore, the purpose of this article is development of approaches to the institute of civil liability and outlining the directions of updating civil legislation considering current European trends. The work based on economic analysis of law using dialectical, comparative, logical-dogmatic and other methods analyzes approaches to understanding the concept of civil liability and distinguishes between measures of civil liability and measures to protect civil rights. In particular, it is concluded that the use of the category of "civil liability" to cases of offense, i.e. unlawful infliction of harm, is justified. It seems appropriate to introduce into civil law, along with the category of "legal consequences of default" a broader legal category "legal consequences of non-performance (violation) of civil duty", as civil obligations may arise from both obligations and other legal facts. This will allow expanding the possibilities of protection of rights and legitimate interests and effectively restore the violated right, as the restorative function is inherent in the measures to protect subjective civil rights*

Keywords: *civil law, tort, protection of civil rights, compensation for damages, updating of civil legislation*

INTRODUCTION

The institute of civil liability in the doctrine of civil law has not received a clear understanding. In a way, the position on the two meanings of the concept of responsibility can be considered established in Ukrainian science: positive-perspective and negative-retrospective. According to V. Eugenzicht, responsibility is a multifaceted concept that is connected not only with the past (with a misdemeanor already committed), but also with the future. Duty and responsibility always depend on each other. The legal concept of responsibility is primarily a responsible attitude to their responsibilities, which ensures their proper performance. Responsibility for violations is a consequence of irresponsible behaviour, breach of duty, a consequence of the fact that individuals have betrayed the "sense of responsibility" [1, p. 6]. That is, the positive-perspective understanding of civil liability is associated with the performance of its preventive function, and negative-retrospective – compensatory. According to I.S. Kanzafarova, the attempt of scientists to formulate the concept of positive responsibility cannot give an effective result given the lack of signs of a legal phenomenon [2, p. 80].

It should be noted that today negative-retrospective understanding dominates legal responsibility as a law enforcement institution, which provides for state coercive measures for the offense and is to establish for the offender negative consequences in the form of restrictions of personal and property nature [3, p. 86]. In this context, civil liability is considered within the framework of protective legal relations, where the restoration or protection of violated rights can be carried out through the application of measures of civil liability. In this sense of civil liability, the use of coercive measures provided for at the regulatory level, most civilians associated with the commission of an offense in both contractual and non-contractual areas [4, p. 365-366].

For a long time, the basis of civil liability was the composition of the offense in the field of property or personal non-property rights, which was understood as a set of signs of objective and subjective nature. One of the authors of the concept of the composition of a civil offense is quite rightly considered to be G. Matveev Matveev [5, p. 29]. Later, the term "composition of the offense" was abandoned in civil law, calling the basis (or conditions) of civil liability illegal behavior, harm, causal link between wrongdoing and harm, guilt of the offender. However, according to N. Kuznietsova, this is nothing more than a detail of one and in principle the only basis, which is an offense (civil, disciplinary, etc.). However, sharp criticism of this approach has not yet changed the general assessment of the doctrine of the composition of civil offense, which in almost all textbooks still occupies a prominent place [4, p. 193, 195].

Judicial practice also uses the term "composition of the offense". In particular, in case 3-72gs12 the Commercial Chamber of the Supreme Court of Ukraine noted that according to Article 1166 of the Civil Code of Ukraine [6] to apply such a measure of liability as damages requires the presence of all elements of a civil offense, namely: wrongful conduct, losses, the causal link between the debtor's wrongful conduct and damages, guilt. In the absence of at least one of these elements, civil liability does not arise [7]. In this regard, we cannot agree with those authors who argue that although the law does not contain a list of conditions of a civil offense, but they can be distinguished by logical interpretation of articles of the Central Committee of Ukraine (Article 22, Article 1166) [6]. Of course, it is impossible not to consider the presence in cases provided by law, "truncated" composition of the offense (Article 1176, Article 1187 of the Civil Code of Ukraine [6]).

Modern unification of private law and the introduction of European standards have necessitated updating the provisions of current legislation on the institution of civil liability. Thus, the harmonisation of civil law in the field of non-contractual obligations is carried out under the influence of the Principles of European Tort Law (Principles of European Tort Law – PETL) [8]. However, the approach implemented in PETL cannot coexist with the above construction of civil liability, as tortious liability can also occur in the case of lawful infliction of damage or regardless of the fault of the perpetrator [9, p. 416]. The question of the relationship between measures of responsibility and measures to protect civil rights, which were mostly studied separately, also needs a separate study [10]. The civilist literature emphasises that the application of measures of responsibility is always based on the principle of guilt. When a person is assigned a duty that already existed, but which the person did not perform voluntarily, it is not a measure of responsibility, but a measure of protection [11, p. 95-96].

In Europe, outdated approaches to understanding civil liability have long been revised. In particular, after the reform of French contract law in France, the second stage of modernization of civil law began – the reform of civil liability law. The main tasks of the reform: consolidation of legislation; considering the principle positions that are actively discussed in the professional environment; supplementing the current legislation with a number of short stories [12, p. 108-109]. In Ukraine, there is also an urgent need to review approaches to the institution of civil liability. Modern law enforcement practice requires a well-developed and scientifically sound concept of civil liability, which would allow to achieve maximum efficiency in the restoration and protection of violated civil rights. This should consider the main functions of civil liability, such as compensation (aimed at restoring the affected area of the victim) and preventive (providing appropriate incentives to take optimal precautionary measures to reduce or avoid expected liability).

Given the ambiguity of the understanding of civil liability, its place in the mechanism of legal regulation, the lack of a single concept of liability, there is a need to discuss the issue of civil liability. *The purpose of this article* is to develop approaches to the institution of civil liability and outline areas for updating civil law, taking into account current European trends.

1. MATERIALS AND METHODS

Transformations in socio-economic life, the emergence of new global risks: terrorism, hybrid wars, coups, natural and social cataclysms encourage the revision of existing mechanisms for regulating relations based on legal positivism and natural law approach, in terms of their effectiveness. The focus on the development of a single legal space, a developed civil society, a common system of protection of rights and interests, and protection against global dangers makes it necessary to unite efforts to develop effective approaches to regulating public relations. Ukraine, which recently joined the socialist system with a dominance of planning and administrative approaches to governance, is only at the beginning of the path of forming the rule of law and integration into the developed world community. And this, in turn, necessitates a rethinking of approaches to understanding the law and change the legal consciousness.

The current trend is the introduction of rationalist legal understanding as a balance of general legal, sociological and economic analysis of law. Such a rationalist concept of understanding the essence of law

presupposes the awareness of law as a self-sufficient phenomenon that actively influences other, non-legal, social phenomena (economics, ethics, religion, etc.), which leaves an imprint on methodology. Therefore, the perception of law is not limited to the normative reflection of material (economic) relations. Law is seen as a defining form of social life for the economy. Therefore, when studying civil liability, it is advisable to use economic analysis of law and use such general techniques as dialectical, formal-logical, comparative, along with the logical-dogmatic method of interpreting law as a special method of scientific knowledge, combined with hermeneutics.

Economic analysis of law is a method by which ideas taken from economics are combined with legal theories and principles in order to predict the impact of legal norms on the behavior of subjects and study the economic consequences of such behavior. The fundamental basis of economic analysis of law is the category of efficiency, which, having economic content, can become an important criterion in the creation of legal norms. However, no less important is the basic value for law – justice. Given that economic efficiency cannot contradict justice (and morality in general), the study of civil liability was carried out in terms of justice, taking into account the concept of economic efficiency. These basic categories – economic efficiency and equity – can be sufficient criteria for drawing conclusions about the need to distinguish between protection measures and civil liability measures. However, economic analysis was used as a subsidiary (additional) methodological toolkit, along with traditional methods of legal science – logical-dogmatic method.

Using the dialectical method, various social phenomena are studied in their development. This method allowed analysing the contradictions of approaches to understanding civil liability. Formal-logical approach was used to substantiate the proven theories of judgment on the application of measures of civil liability. And the comparative method made it possible to analyse and identify differences between measures of civil liability and measures of protection. The state of doctrinal developments on the understanding of civil liability was also studied with the help of a comparative method.

The logical-dogmatic method of scientific research is aimed at identifying obvious signs (aspects, characteristics) of legal phenomena without immersion in the internal essential connections. It was aimed at cognising the dogma of law, which solves the problems of systematisation, interpretation, and application of law, as well as the development of law. The combination of the dogmatic method with the method of hermeneutics, which involves the spread of knowledge of the intellect, feelings, intuition of the researcher, allowed considering civil liability through the prism of its perception by researchers from different countries.

The main stages of the study of civil liability were: 1) the hypothesis that the concept of "civil liability" should be used in the understanding of law enforcement, which provides for coercive measures for the offense; 2) analysis of approaches to understanding civil liability; 3) development of directions of delimitation of measures of responsibility and measures of protection; 4) formulation of the conclusion that the category of "responsibility" should be used in a negative retrospective sense, and in order to expand the protection of rights and legitimate interests to introduce into civil law the category of "legal consequences of failure (violation) of civil duty".

2. RESULTS AND DISCUSSION

2.1. Approaches to understanding the concept of civil liability

In foreign doctrine, the doctrine of civil liability is reduced to the following theories: the theory of responsibility as a duty (liability as duty), the theory of responsibility as a price (value) (liability as cost) and the theory of liability as a vulnerability (liability as vulnerability). According to the first theory, liability is understood as a secondary obligation that arises as a result of failure to perform the primary duty. In this case, the secondary obligation is a legal consequence of the violation of primary rights or failure to perform primary obligations, but the initial obligation does not disappear, but is transformed into another form. Liability as a price is considered in the context of those costs, losses, fees that the perpetrator must pay for the violation. And a relatively new theory – the theory of responsibility as a vulnerability was formulated by N. Oman. In his opinion, the first two theories have a significant drawback: they focus on state coercion. But such state coercion will not be applied without appropriate action by the victim. Instead, responsibility as a vulnerability is explained by the author that being responsible means that a person is exposed to an attack to which he has not been subjected before. The property and liberty of the defendant, who has been found not liable for certain civil offenses, remain protected from any further action by the plaintiff. However, when the defendant is found responsible, everything changes. Now the plaintiff has the right to apply to the coercive apparatus of the state with a request to coerce the defendant to perform a certain duty. Since the defendant is no longer "invulnerable" as a result of the defense of the state, the coercive mechanism that protected him is now given to the plaintiff to use as he sees fit. Of course, there are limitations on the defendant's vulnerability. The plaintiff has only

certain remedies at his disposal. The defining feature of the legal status of civil liability is precisely this unstable situation – the possibility of being subjected to private attack by the plaintiff [13, p. 393-394]. (To be liable means that one is exposed to attack in a way that one was not previously exposed. The property and liberty of a defendant who has been found not liable for some civil wrong remains protected from any further action by the plaintiff. Once a defendant is found liable, however, this changes. Now the plaintiff has the power to call upon the coercive apparatus of the state to do things to the defendant. In the absence of civil liability, this machinery lies inert. It is unlawful for a private party to employ it against an opponent. In many cases it is even unlawful for the state to employ the machinery against the defendant. Once the defendant is found liable, however, this changes. Now he is exposed. As he is no longer "invulnerable, impenetrably armed" by the protection of the state, the very coercive apparatus that protected him is now put at the disposal of the plaintiff to use or not as he or she sees fit. To be sure, there are limits on the vulnerability of the liable defendant. Only certain remedies are put at the disposal of the plaintiff. What defines the legal status of civil liability, however, is precisely this precarious position of exposure to private attack by the plaintiff.)

As already mentioned, in the Ukrainian civil doctrine, civil liability is understood in two aspects: as retrospective liability (liability for a civil offense) and long-term or positive liability (the obligation to act lawfully, the requirement to comply with legal norms) [4, p. 196]. In accordance with paragraph 22 of Part 1 of Art. 92 of the Constitution of Ukraine [14, p. 196] exclusively the laws of Ukraine determine the principles of civil liability; acts that are crimes, administrative or disciplinary offenses, and responsibility for them. Considering the issue of official interpretation of the provisions of paragraph 22 of Part 1 of Art. 92 of the Constitution of Ukraine [14, p. 196]. The Constitutional Court of Ukraine (hereinafter – CCU) used the concept of legal responsibility in understanding the application of measures of public law for non-performance or improper performance of their duties. A systematic analysis of the above constitutional provisions led the CCU to conclude that the content of paragraph 22 of the first part of Article 92 of the Constitution of Ukraine is not aimed at establishing a list of types of legal liability. It stipulates that only the laws of Ukraine should regulate the principles of civil liability (general grounds, conditions, forms of liability, etc.), the basis of criminal, administrative and disciplinary liability – acts that are crimes, administrative or disciplinary offenses (the main features of offenses their composition), and responsibility for them [15, p. 196]. Thus, we can state that in contrast to criminal, administrative and disciplinary liability, the grounds for civil liability are not limited to those established by law. This allows talking about a fairly broad understanding of civil liability, which includes breaches of obligations.

In foreign scientific literature, the term "responsibility" is used in connection with torts [16; 17]. For example, in a publication examining trade agreements, the term "liability" is used in the context of non-contractual claims. [17, p. 83]. The purposes of tort law are compensation for damage and deterrence of future tort behaviour [18, p. 443], which in essence is the performance of compensatory and preventive functions of civil liability. It is also suggested that breach of contract is not traditionally considered an offense [19]. In the Concept of updating the Civil Code of Ukraine, members of the Working Group on recodification (updating) of civil legislation of Ukraine within the systematic update of the Civil Code of Ukraine [6] (hereinafter – the CC of Ukraine) proposed to reconsider the normative approach to the relationship responsibility". Instead of the phrase "liability for breach of obligation" in the opinion of the authors it is advisable in the title of Chapter 51 of the Civil Code of Ukraine [6] to use the category "legal consequences of default". Instead, the category of "liability" should be used in cases of illegal harm [20, p. 43].

It is clear that liability for unlawful infliction of harm and the legal consequences of non-performance are covered by the retrospective and prospective notions of civil liability, respectively. The first is the result of an offense, and the second is the failure to fulfill an obligation or obligation. However, the concept of civil liability, including its grounds and measures, it is advisable to clarify. In particular, is it appropriate to cover the concept of civil liability and, accordingly, to apply the conditions of civil liability to those situations where there is no responsible attitude of the subjects to their responsibilities, which ensures their proper implementation. And how to deal with risky activities in this case – it is covered by the conditions of civil liability or not, because the risk characterizes the activities carried out within the legal field. And so, it is difficult to talk about the first condition of responsibility – the illegality of behaviour. And although the category of "civil liability" is often confused with the category of "risk", however, in their legal orientation and legal consequences, they differ significantly. The risk goes far beyond property liability and in many cases, due to regulations, a person is forced to bear negative property consequences in the absence of illegality of his behaviour. In this regard, the ratio of risk and liability is manifested in the fact that the risk allows to overcome the negative consequences, which are not due not only to the illegality of the debtor's behavior, but also his behavior in general. Liability in any case is associated with adverse consequences for the person who violated the law [21, p. 95].

On the other hand, it is worth remembering that responsibility together with the function of compensation performs the function of deterrence, which allows to ensure an effective (socially and economically) result [22, p. 156]. From the economic standpoint, the rules of responsibility are a tool for internalising risks, thus creating incentives for socially beneficial behavior [23, p. 150]. For example, when it comes to a special type of activity associated with the relationship of the use of technology, artificial intelligence, or the implementation of certain professional activities, the concept of higher responsibility is used in a positive and long-term sense. This means a responsible attitude of the subjects to their responsibilities, which ensures their proper performance. At the same time, conditioned upon the peculiarities of activities related to the use of technology or the implementation of certain types of professional activities, the requirements for a responsible attitude to responsibilities are inflated compared to other activities. Compensation for the culprit in such cases should be understood as a measure of civil liability. In the case of innocent harm, compensation is a measure of protection for the victim.

In general, approving the above-mentioned idea expressed in the Concept of updating the Civil Code of Ukraine, it seems appropriate to introduce into the Civil Code of Ukraine the category "legal consequences of non-performance (violation) of civil duty" [6]. In this case, the concept of "legal consequences of non-performance (violation) of civil duty" will cover 1) measures to protect civil rights and interests; 2) measures to ensure the restoration of the dynamics and functioning of civil relations; 3) measures of civil liability. In this regard, it is appropriate to amend Art. 14 of the Civil Code of Ukraine, in particular to set out Part 3 of Art. 14 in the following wording: "The performance of civil duties is ensured by means of encouragement, the application of measures of responsibility and other legal consequences established by the contract or act of civil law" [6]. This will expand the possibility of protection of violated rights and interests and their effective restoration.

There is also a need to amend the title of Chapter 51 of the Civil Code of Ukraine. Now this chapter is called "Legal consequences of breach of obligation. Liability for breach of obligation". This wording is not very correct, as the legal consequences of violation of goiter' binding is opposed to responsibility. However, liability is only a component of the legal consequences of breach of obligation. Therefore, it is expedient to rename Chapter 51 of the Civil Code of Ukraine [6] to "Liability and other legal consequences of non-performance (breach) of the obligation". At the same time, it is necessary to think about the delimitation of such categories as "measures of civil liability" and "measures to protect civil rights".

2.2. Distinguishing between measures of civil liability and measures to protect civil rights

In legal doctrine, the protection of rights and interests is understood as:

– a comprehensive system of measures of material and procedural order, which includes forms, methods, means, which are independently chosen by the person whose rights and interests are violated, and is used to ensure such rights [24, p. 47];

– An integrative legal model based on the protection of civil rights and legally protected interests as an interdisciplinary (mixed) legal institution that exists on the border of substantive and procedural law, contains rules of private and public law and, accordingly, considers substantive and procedural aspects of civil rights protection. interests protected by law, covers its material, procedural and procedural elements, and combines static and dynamic states of protection [25, p. 156-157];

– legal activities aimed at eliminating obstacles to the exercise of their rights and the termination of the offense, the restoration of the situation that existed before the offense. At the same time Yu. Pritika notes that the term "measure of protection" is synonymous with the word "methods", while "means" and "forms" of protection should not be confused with the concept of "method" of protection of rights [26, p. 16-17]. We will adopt this approach and in the future we will proceed from the identity of the concepts of "protection measure" and "protection method".

The opinion of O. Cot seems appropriate that measures to protect civil rights and measures of civil liability are coercive, which is expressed not in their implementation solely through state coercive activities, but in the fact that their use is provided by possible coercion [27, p. 221]. In addition, the relationship between measures to protect subjective civil rights and civil liability is manifested in the fact that: 1) and measures of responsibility and methods of protection are certain legal means, legal instruments to influence the relevant social relations; 2) they are aimed at localizing the consequences of violations of rights, but methods of protection in their scope is a broader concept, which involves not only the restoration of the violated right or compensation for losses, but also prevention, suppression and elimination of violations of civil law; 3) the list of methods of protection of civil rights is wider than the measures of responsibility provided by law. Responsibility measures are an integral part of protection [28, p. 206], confirmed by the content of Art. 16 of

the Civil Code of Ukraine [6], in which responsibility is inherent only in some ways of protecting civil rights and interests. It should be borne in mind that liability alone cannot provide such protection, as it is a static legal category. This function is realized through the application of specific measures of responsibility, which in civil science are called sanctions [29]. Quite common today is the legal position that civil liability is the imposition on the offender of legal consequences, which are manifested in the deprivation of his certain rights or in replacing the default with a new one, or joining the default additional [30, p. 97; 31, p. 127].

O. Cot, clarifying the criteria for distinguishing liability measures from other protection measures, adds that liability is associated with the deprivation of existing rights or the imposition of new additional responsibilities and performs compensatory, not restorative function, which is characteristic of measures to protect subjective civil rights. This opinion is supported by other scholars, who point out that the absence of this feature indicates that this method of protection of civil rights is not a measure of civil liability [32, p. 137]. Finally, measures of legal responsibility are not factual, but legal in nature, which distinguishes them from self-defence, or property compensatory nature, which distinguishes them from measures of operational influence, which are organisational in nature [27, p. 230-233]. It is believed that such an approach is balanced and corresponds to the essence of measures to protect civil rights and civil liability and allows to effectively protect the violated right. In fact, this possibility of choosing the form of protection of rights or interests is a manifestation of the principle of dispositiveness, as the realisation of the right to protection involves self-determination of all issues related to the choice of remedies and their practical implementation [33, p. 144].

In this context, it is appropriate to note that at the time of adoption of the Central Committee of Ukraine, Art. 16, which enshrines ways to protect civil rights and interests, contained an extremely progressive (if not revolutionary) rule establishing the right of the court to apply other than those expressly provided for in this article, methods of protection: not only those provided by law, but and those established by the treaty [6]. According to the authors of the Central Committee of Ukraine, the parties, concluding the contract, had the opportunity, not limited to statutory means of protection, to provide effective, in their opinion, a way to protect rights in such a particular situation. But in practice, this idea did not work: when concluding the contract, the parties did not go so far in managing contractual risks to not only anticipate the consequences of non-performance or improper performance of the contract, but also to minimise them by identifying a unique method of protection. In the best case, when concluding the contract, they were limited to an indication of the means of protection established by the current legislation. However, the ambiguous case law on the application of the provisions of Part 2 of Art. 16 of the Civil Code of Ukraine [6] gave impetus to the negative trend that led to mass rejection of lawsuits due to the fact that the plaintiff, applying to the court, chose a method of protection not established by law or contract to protect the right or interest violated, unrecognised or disputed. The situation was partially remedied in 2017, when procedural legislation, including the Civil Procedure Code of Ukraine [34], was amended to expand the court's capacity to protect the rights, freedoms and interests of individuals. In the same year, in particular on October 3, Part 2 of Art. 16 of the Civil Code of Ukraine was supplemented with the words "or by a court in cases specified by law." Now this norm reads as follows: "The court may protect a civil right or interest in another way established by contract or law or court in cases specified by law" [6]. This has improved the position of persons who apply to the court to protect their violated right or legitimate interest, as such a rule is aimed at implementing the provisions of Articles 55, 124 of the Constitution of Ukraine and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [6, p. 491-494]. However, such an updated rule came into conflict with the norm of Part 2 of Art. 5 of the CPC of Ukraine [34], according to which the court has the right to determine such a method of protection, which does not contradict the law, which has already been noted in the literature [28, p. 61]. Thus, protection measures and measures of civil liability are correlated as general and partial, i.e. protection measures are a broader concept that includes measures of civil liability [35, p. 81-86].

Currently, in the context of the recoding of civil law, the proposal to formulate the current principle of freedom of contract as broader – the principle of freedom of transaction – is considered promising. It is proposed to consider further expansion of the content of this principle in such a way as to generally declare freedom of entry into civil law relations (of course, subject to the requirements of reasonable and fair conduct of the subjects of legal relations) [36, p. 194]. Therefore, it seems logical not only to expand the possibility of entry of subjects into civil law relations, but also the possibility of protection of rights and legitimate interests by introducing into civil law category "legal consequences of non-performance (violation) of civil duties". And the category of "liability" to use in cases of illegal harm.

CONCLUSIONS

Revision of approaches to the institute of civil liability is already not only a matter of scientific discussion, but also a request for law enforcement practice. Unification of private law and harmonisation of civil law requires a coherent theory of civil liability, which must be developed by doctrine and ensure maximum efficiency in the restoration and protection of violated civil rights. To this end, the category of "responsibility" should be used in the negative-retrospective understanding as a law enforcement institution that provides for coercive measures for the offense and consists in establishing negative consequences for the offender in the form of restrictions of a personal and property nature. The obligation to act lawfully, the requirement to comply with legal norms – a positive perspective of responsibility – is rather a category related to the exercise of civil rights and the performance of civil duties. Failure to do so, especially in the case of a contractual relationship, a risk relationship, may not always be covered by the conditions of civil liability or, moreover, the concept of "composition of a civil offense". Therefore, it is advisable in such cases to use the category of "legal consequences of non-performance (breach) of the obligation." Accordingly, it was proposed to amend the title of Chapter 51 of the Civil Code of Ukraine, stating it as follows: "Liability and other legal consequences of non-performance (breach) of obligation." This approach will allow not only to use measures of civil liability to restore the violated civil law, but also to apply other measures to protect civil rights and interests.

The distinction between protection measures and civil liability measures is made based on the ratio of general and partial, where protection measures, as a general category, cover measures of civil liability. At the same time, protection measures are not only legal instruments of influence on the relevant public relations and are aimed at localising the consequences of violations of rights, but also provide for the prevention, suppression and elimination of violations of civil law. In addition, the list of ways to protect civil rights is broader than statutory liability measures. This allows significantly expanding the actual possibility of protection of violated rights and restoring the violated rights as effectively as possible and to encourage participants in civil relations to socially desirable behaviour. At the same time, the issues of general grounds for liability for damage and conditions of civil liability, as well as certain measures (sanctions) for its application are also promising for further research.

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