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COMPARATIVE ANALYSIS OF CRIMINAL, CIVIL AND ADMINISTRATIVE LIABILITY IN THE FIELD OF TELECOMMUNICATIONS

Abstract. Purpose. The purpose of the article is a comparative analysis of criminal, civil and administrative liability in the field of telecommunications. **Results.** An offense under the contract for the provision of services in the field of telecommunications is defined as unlawful behaviour of a party to the contract, which has violated the rights of the other party or caused property damage and/or non-pecuniary harm to the other party. In general, this unlawful behaviour is depicted in non-compliance by the parties with the terms of the contract and is actually expressed in illegal actions that may result in property damage or non-pecuniary harm to the parties to the contract for the provision of telecommunications services. The general conditions for bringing the parties to the contract for the provision of services in the field of telecommunications to civil liability for committing a civil offense are: unlawful behaviour; harmful consequences; causal link between unlawful behaviour and harmful consequences; guilt. Under the contract for the provision of telecommunications services, the most common type of civil liability for violation of the contract for the provision of telecommunications services is the payment of a penalty. The terms, procedure for payment and the amount of the penalty are provided for by the provisions of legislation and contracts. **Conclusions.** It is concluded that in practice it is quite difficult to find and punish the person guilty of committing these crimes. The complexity and specificity of the search for criminals of these crimes and evidence of the offenders' guilt is due to the characteristic features (transnationality) of the Internet. Both search and destruction of computer viruses are difficult. Despite the fact that specialists in the development of antivirus programs search for the latest viruses and improve the protection of antivirus programs, their complete destruction is not possible, because viruses change, develop, spread, and their new varieties are constantly formed. This is due to the fact that viruses and other software provide an opportunity to make profits not only to those who create them, but also to those who produce software to combat them. Despite a rather significant role of telecommunication services in human life, the issue of protection of violated consumer rights in relation to telecommunication services and the specificities of liability of the parties to the contract for the provision of telecommunication services in Ukraine has not been fully studied.

Key words: civil liability, compensation for damages, provision of services, telecommunications.

1. Introduction

Legal liability is an important element of the regulatory mechanism for social legal relations, the content thereof can be described as a targeted impact on individual behavior through legal means. This complex influence enables to fully regulate relations in society, to give them the appropriate features of stability and consistency, to implement the principles of social justice and to avoid aggravation of social conflicts. At all times, the existence of law in the form of a regulator of relations of society is directly conditioned by the need

to maintain law and order in a heterogeneous society, filled with internal contradictions, in order to prevent any deviations and violations of the established rules of conduct.

Legal liability as an independent and necessary component of the legal regulatory system can be characterised by three specific features:

- It is a type of state coercion.
- The exclusive ground for legal liability is an offence.
- This legal category is implemented and functions by taking appropriate remedies against persons who have committed offences (Hrek, 2010, p. 42).

The category of legal liability is classified on various grounds. In practical terms, the most appropriate classification is considered to be based on the nature of sanctions and the sectoral feature. According to the latter, it is customary to distinguish the types of legal liability, such as criminal, administrative, disciplinary, civil, constitutional and international legal liability.

The purpose of the article is a comparative analysis of criminal, civil and administrative liability in the field of telecommunications.

2. Specificities of criminal liability in the field of telecommunications

The Criminal Code of Ukraine contains articles establishing criminal liability in the field of telecommunications (Articles 360, 361, 361¹, 361², 362, 363, 363¹ of the Criminal Code of Ukraine) (Criminal Code of Ukraine, 2001).

Article 360 establishes liability for intentional damage to communication lines (cable, radio relay, overhead type), wire broadcasting or structures/equipment that are part of them, in the event that it has temporarily stopped communication in the form of:

- 1) a fine of 100 to 200 tax-free minimum incomes of citizens;
- 2) correctional labour up to 1 year;
- 3) deprivation of liberty up to 2 years.

Those subject to liability under this Article may be not only employees of telecommunications operators, but also other persons who have committed these actions, including using their official position.

Article 361 of the Criminal Code of Ukraine establishes liability for unauthorised interference with computers, automated systems, computer or telecommunication networks. Liability under this Article shall be incurred in case of commission of this offense, which resulted in loss, forgery, leakage, information blocking, distortion of information processing procedure or violation of the procedure of its routing. Liability under this article is imposed in the form of:

- 1) fines from 600 to 1000 tax-free minimum incomes;
- 2) deprivation of liberty from 2 to 5 years;
- 3) imprisonment for up to 3 years, with or without a ban on holding certain positions or engaging in certain activities for up to 2 years.

Qualifying features are repeated commission of the crime or its commission by a group of persons by prior conspiracy, in case of significant damage, which entails a sentence of imprisonment for 3 to 6 years.

Article 361¹ of the Criminal Code of Ukraine contains provisions on the crime of creating for the purpose of use, sale or distribution of malicious software or hardware intended for unauthorised interference with computers,

automated systems, computer and telecommunication networks. Liability under this article is imposed in the form of:

- 4) fines from 500 to 1000 tax-free minimum incomes;
- 5) correctional labour up to 2 years;
- 6) imprisonment for up to 2 years.

For the same actions committed for the second time, or by a group of persons by prior conspiracy, or in case of causing significant damage, the perpetrators shall be imprisoned for up to 5 years.

Article 361² of the Criminal Code of Ukraine regulates liability for unauthorised sale or dissemination of restricted information stored in computers, automated systems, computer networks or data carriers, in particular, a fine of 500 to 1000 tax-free minimum incomes or imprisonment for up to 2 years. Qualifying features are actions committed for the second time, or by a group of persons by prior conspiracy, in case of significant damage, for which the perpetrator is imprisoned for 2 to 5 years.

The next crime under the Criminal Code of Ukraine (Article 362) is unauthorised actions committed by a person who has the right to access information processed in computers or their networks, automated systems, or stored on data carriers. For unauthorised alteration, destruction or information blocking, the guilty person shall be fined from 600 to 1000 tax-free minimum incomes or punished by correctional labour for up to 2 years. For unauthorised interception or copying of data processed in computers and their networks, automated systems, or stored on the carriers of such data, if the above has led to their leakage, the guilty person shall be punished by imprisonment for up to 3 years with deprivation of the right to hold certain positions or engage in relevant activities for the same term.

For the same actions committed for the second time, or by a group of persons by prior conspiracy, or in case of causing significant damage, the perpetrators shall be imprisoned for 3 to 6 years with deprivation of the right to hold positions and engage in relevant activities for up to 3 years.

Article 363 of the Criminal Code of Ukraine regulates liability for violation of the rules of computer operation, as well as automated systems, computer networks and telecommunications or the procedure/rules for the protection of information processed in them in the event of significant damage, in the form of:

- 7) a fine of 500 to 1000 tax-free minimum incomes;
- 8) deprivation of liberty for up to 3 years with restriction of the right to hold certain positions or engage in relevant activities for the same period.

The offenders of this crime are persons responsible for the operation of automated systems, computer networks and telecommunications.

Finally, the article that regulates the issue of criminal liability is Article 363¹, which covers the crime of interfering with the operation of computers, their networks and telecommunication networks, automated systems, by deliberately disseminating telecommunication messages without the prior consent of the addressees. For this crime, in accordance with Part 1 of Article 363¹ of the Criminal Code of Ukraine, the perpetrator shall be punishable by a fine of 500 to 1000 untaxed minimum incomes or imprisonment for up to 3 years. According to part 2 of the article, qualifying features are the same actions committed for the second time or by a group of persons by prior conspiracy, in case of causing significant damage, which entails deprivation of liberty or imprisonment for up to 5 years, with deprivation of the right to hold relevant positions or engage in relevant activities for up to 3 years.

3. Specificities of administrative liability in the field of telecommunications

The Code of Administrative Offences contains a special Chapter 10 "Administrative Offences on Transport, Road Facilities and Communications" (Kaliuzhnyi, Komziuk, Pohribnyi, 2008), part of which regulates telecommunications issues, such as:

1. Violation of the rules and conditions governing the activities in the telecommunications sector and in the use of radio frequency resources of Ukraine provided for by permits and licenses – Art. 145 of the CoAO.

2. Violation of implementation, operational rules of radio electronic means and devices of radiating nature, as well as the use of radio frequency resources of Ukraine – Art. 146 of the CoAO.

3. Violation of the rules of protection of communication lines and structures – Art. 147 of the CoAO.

4. Damage to a payphone – Art. 148 of the CoAO.

5. Violation of the rules of providing and receiving telecommunications services – Art. 148¹ of the CoAO.

6. Violation of the terms and procedure for the provision of communication services in public networks – Art. 148² of the CoAO.

7. Use of communication means for the purpose contrary to the state interest, violation of public order and violation of honor and dignity of citizens – Art. 148³ of the CoAO.

8. Use of technical means and equipment used in communication networks of general use, in the absence of a document confirming compliance – Art. 148⁴ of the CoAO.

9. Violation of rules for interconnection of public telecommunications networks – Art. 148⁵ of the CoAO.

Analysis of the provisions of both procedural and substantive law directly related to the provision of telecommunication services proves that almost all the main types of liability provided for by Ukrainian legislation are used in this field (with the exception of disciplinary measures, which are specific to labour relations). This means that in case of violations related to the procedure of providing telecommunication services, measures of criminal, administrative and civil liability are applied (Kabalkin, 1984).

Some provisions of the CoAO and the CC of Ukraine have been considered above, and now it is proposed to consider the provisions of the Civil Code of Ukraine (CCU) and analyse civil liability in the telecommunications industry.

First of all, the focus should be on the issue of civil liability of telecommunication operators and providers, who are service providers, and liability of consumers (legal entities and individuals), who are customers of telecommunications services.

4. Specificities of civil liability in the field of telecommunications

Civil liability of telecommunication entities arises for violation of regulations and agreements on the provision of services in the field of telecommunications. Its grounds, conditions and amount may be provided for by the general provisions established by the Civil Code (in particular, Chapter 63 and Articles 633, 634 of the CCU), the special Law "On Telecommunications". Depending on the parties, the provisions of the Law "On Consumer Protection" are additionally applied (if the consumer is a natural person). In addition to the provisions provided for by the peremptory laws, the parties may clarify and change certain provisions on liability in the contract, as well as establish additional liability not provided for by law for violation of certain terms of the contract.

It should be noted that civil liability should be understood as only those sanctions that are associated with additional burdens on the offender, that is, it is an appropriate punishment for the committed legal violation (Sergeev, Tolstoi, 1997, p. 254).

In other words, civil liability is the use of state-type coercive measures against an offender who commits an offense provided for by a contract or legislation – additional civil liabilities of a property nature (sanctions). It is a remedy for the participants in civil law relations, which is determined by the limits of permissible and necessary behavior (Borysova, Spasybo-Fatieieva, Yarotskyi, 2014, pp. 268–271).

O.S. Ioffe argues that civil liability is a sanction for legal violations, which entails negative consequences for the guilty person in the form of deprivation of civil rights of actors or imposition of new or additional civil obligations (Ioffe, 1975, p. 97).

Next, the concept of “legal grounds for civil liability in the contract for the provision of telecommunication services” should be considered. For example, they are understood as real circumstances that, under the terms of the contract or law, are associated with depriving the party, which has violated obligations, of its subjective civil rights, or with imposing new or additional civil obligations on it. In fact, the legal ground for civil liability of the parties to the contract for the provision of telecommunications services should be understood as their unlawful acts, which indicate the improper use of their own subjective rights and fulfillment of legal obligations. In other words, the legal ground for civil liability of any of the parties to the contract for the provision of services in the field of telecommunications is a legal fact, that is, the commission of an offense (Borysova, Spasybo-Fatieieva, Yarotskyi, 2014).

An offense under the contract for the provision of services in the field of telecommunications is defined as unlawful behaviour of a party to the contract, which has violated the rights of the other party or caused property damage and/or non-pecuniary harm to the other party. In general, this unlawful behaviour is depicted in non-compliance by the parties with the terms of the contract and is actually expressed in illegal actions that may result in property damage or non-pecuniary harm to the parties to the contract for the provision of telecommunications services.

The general conditions for bringing the parties to the contract for the provision of services in the field of telecommunications to civil liability for committing a civil offense are:

- unlawful behaviour;
- harmful consequences;
- causal link between unlawful behaviour and harmful consequences;
- guilt.

The legal consequences of committing a civil offense under a contract for the provision of services in the field of telecommunications are considered to be the imposition of certain burdens on the party responsible for this, which are depicted as an additional obligation or deprivation of subjective rights. In accordance with Part 3 of Article 40 of the Law “On Telecommunications”, Article 549, Article 906 of the Civil Code, this obligation is:

- 1) compensation for actual damages;
- 2) compensation for lost profits;

3) compensation for non-pecuniary damages;

4) payment of a penalty;

5) the use of other property measures, which are regulated by the contract for the provision of services in the field of telecommunications.

At this point, the general provisions that are relevant to this form of civil liability in the form of compensation for damages should be considered before its consideration in relation to the provision of services in the telecommunications industry.

Neither the provisions of the current law “On Telecommunications”, nor the law “On Communications”, which has ceased to be in force, establish uniform requirements for full or limited liability. It should be noted that the legal relations of telecommunications operators and providers with consumers are subject to full liability established by the laws in force.

According to the Law “On Telecommunications”, damages may be compensated to each party to the contract for the provision of services in the field of telecommunications, because each party may violate the right of the other and cause damage to the other party. Part 4 of Article 36 of the Law “On Telecommunications” states that if damage to the telecommunications network caused by the fault of the consumer is detected, the costs of repairing the damage to the administrative and telecommunications operator, compensation for other losses (including lost profits) are borne by the consumer.

Part 3 of Article 40 of the Law “On Telecommunications” stipulates that compensation for actual damages, non-pecuniary damage, lost profits incurred by consumers in case of improper performance of obligations under the contract for the provision of telecommunications services by the telecommunications operator and provider shall be resolved in court.

In general, the most typical civil liability for breach of a telecommunications services contract is payment of a penalty. Under the contract for the provision of telecommunications services, the most common type of civil liability for breach of the contract for the provision of telecommunications services is the payment of a penalty. The terms, procedure for payment and the amount of the penalty are provided for by the provisions of legislation and contracts.

The penalty can be in several forms: a fine (which, according to Part 2 of Article 549 of the Civil Code, is a penalty calculated as a percentage of the amount of improperly or unfulfilled obligation), penalty (which, in accordance with Part 3 of Article 59 of the Civil Code, is defined as a penalty calculated as a percentage of the amount of untimely fulfilled mone-

tary obligation for each day of delay), which the debtor shall pay to the creditor in case of breach of obligation.

Frequently, the fine is a measure of liability under the contract for the provision of services in the field of telecommunications in accordance with paragraph 1 of part 1 of Article 40 of the Law "On Telecommunications" (Law of Ukraine on Telecommunications, 2003).

According to the contract on the provision of services in the field of telecommunications, the parties also use the payment of a penalty, in case of long-term violation depending on the expiration of the relevant time in accordance with paragraph 3 of Part 1 of Article 40 of the Law "On Telecommunications".

5. Conclusions

The above crimes are socially dangerous and unlawful acts that encroach on public relations in the field of security of computer information and the normal functioning of computers, their networks and systems, as well as telecommunication networks, causing them harm or threatening to cause such harm.

However, in practice it is quite difficult to find and punish the person guilty of committing these crimes. The complexity and specificity of the search for criminals of these crimes and evidence of the offenders' guilt is due to the characteristic features (transnationality) of the Internet. Both search and destruction of computer viruses are difficult. Despite the fact that specialists in the development of antivirus programs search for the latest viruses and improve the protection of antivirus programs, their complete destruction is not possible, because viruses change, develop, spread, and their new varieties are constantly formed. This is due to the fact that viruses and other software provide an opportunity to make profits not only to those who create them, but also to those who produce software to combat them.

Despite a rather significant role of telecommunication services in human life, the issue of protection of violated consumer rights in relation to telecommunication services and the specificities of liability of the parties to the contract for the provision of telecommunication services in Ukraine has not been fully studied.

References:

- Hrek, T.B.** (2010) Pravova pryroda yurydychnoi vidpovidalnosti: poniattia, pryntsyipy ta vydy [Legal nature of legal liability: concepts, principles and types]. *Advokat – Lawyer*, 10, 41–45 (in Ukrainian).
- Kaliuzhnyi, R.A., Komziuk, A.T., Pohribnyi, O.O.** (2008). Kodeks Ukrainy pro administratyvni pravoporushennia: nauково-praktychnyi komentar [Code of Ukraine on Administrative Offenses: scientific and practical commentary]. Kyiv: Vseukrainska asotsiatsiia vydavstiv «Pravova yednist» (in Ukrainian).
- Kabalkin, A.Ju.** (1984). *Posledstviya narusheniya dogovorov organizacijami, obsluzhivajushimi grazhdan* [Consequences of violation of contracts by organizations serving citizens]. Vil'njus (in Russian).
- Sergeev, A.P., Tolstoj, Ju.K.** (1997). *Grazhdanskoe pravo* [Civil law]. Moskva: Prospekt (in Russian).
- Borysova, V.I., Spasybo-Fatieieva, I.V., Yarotskyi, V.L.** (2014). *Tsyvilne pravo* [Civil law]. Kharkiv: Pravo (in Ukrainian).
- Ioffe, O.S.** (1975). *Objazatel'stvennoe pravo* [Law of Obligations]. Moskva: Jurid. lit. (in Russian).
- Kryminalnyi kodeks Ukrainy vid 05.04.2001 № 2341-III [Criminal Code of Ukraine of April 5, 2001 № 2341-III]. (2001). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (in Ukrainian).
- Zakon Ukrainy Pro telekomunikatsii: vid 18.11.2003 № 1280-IV [Law of Ukraine on Telecommunications of November 18, 2003 № 1280-IV]. (2003). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1280-15#Text> (in Ukrainian).

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ПОРІВНЯЛЬНИЙ АНАЛІЗ КРИМІНАЛЬНОЇ, ЦИВІЛЬНОЇ ТА АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ У СФЕРІ ТЕЛЕКОМУНІКАЦІЙ

Анотація. Мета. Метою статті є порівняльний аналіз кримінальної, цивільної та адміністративної відповідальності у сфері телекомунікацій. **Результати.** Правопорушенням у рамках договору про надання послуг в галузі телекомунікацій визначається протиправна поведінка сторони договору, через яку порушено права другої сторони чи іншій стороні завдано майнових збитків та/або немайнової шкоди. Загалом дана протиправна поведінка зображується в недотриманні сторонами умов договору та фактично виражається в протиправних діях, в результаті котрих може бути

завдано майнових збитків чи немайнової шкоди сторонам договору про надання послуг у галузі телекомунікацій. Загальними умовами притягнення сторін договору про надання послуг в галузі телекомунікацій до цивільної відповідальності за вчинення правопорушення цивільного типу є: поведінка протиправного характеру; наслідки шкідливої природи; причинний зв'язок протиправної поведінки й шкідливих наслідків; вина. За договором щодо надання послуг в галузі телекомунікацій найтипівішим різновидом цивільної відповідальності за порушення договору щодо надання послуг в галузі телекомунікацій є оплата неустойки. Умови, порядок сплати та розмір неустойки передбачено положеннями законодавства й договорів. **Висновки.** Зроблено висновок, що на практиці досить важко віднайти й покарати особу, що є винною в скоєнні даних злочинів. Складність та особливість пошуку злочинців даних злочинів й доказів вини правопорушників зумовлена характерними рисами (транснаціональністю) Інтернету. Видається важким як пошук, так і знищення комп'ютерних вірусів. Незважаючи на той факт, що спеціалісти щодо розробки програм антивірусного типу роблять пошук новітніх вірусів й здійснюють вдосконалення захисту антивірусних програм, повноцінне їхнє знищення не є можливим, адже віруси змінюються, розвиваються, поширюються, й постійно утворюються їх нові різновиди. Це обумовлене тим, що віруси та інше програмне забезпечення надають змогу одержувати прибутки не тільки тим, хто їх створює, а й тим, хто виробляє програмне забезпечення для боротьби із ними. Незважаючи на досить значну роль послуг в рамках телекомунікацій в житті людини, питання захисту порушених споживацьких прав щодо послуг в галузі телекомунікацій й особливості відповідальності сторін договору щодо надання послуг в галузі телекомунікацій в Україні не повноцінно досліджено.

Ключові слова: цивільна відповідальність, відшкодування збитків, надання послуг, телекомунікаційна.

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