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THE ROLE OF A JUDGE IN THE CONCILIATION PROCEDURE OF THE PARTIES IN THE ADMINISTRATIVE JUDICIARY OF UKRAINE AND EU MEMBER STATES

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The article analyzes the place and role of the judge in the procedure of conciliation of the parties in the administrative proceedings of Ukraine and the EU Member States. It is established that in Ukraine there is a simple model of the subjective composition of conciliation of the parties in administrative proceedings, which is characterized by certain elements of a relatively complex model of the relevant subject composition (the judge encourages the parties to try to reconcile, but does not provide them with certain options to be considered).

It has been found that in some EU Member States, in which the judge previously took an active part in reconciling the parties to the public-legal dispute, due to a set of socio-legal and political problems (crises of democracy and public power; the urgent need to reform the subjects of public administration; the need to increase the availability of justice), judicial and legal reforms are currently being carried out, which “distance” judges from the relevant procedures, thus ensuring greater democratism of reconciliation and promoting real unloading of ships. France is an illustrative example of a country with reforms mentioned hereof.

It is established that today the judge in the reconciliation procedure appears as:

1) “relatively active conciliator”;
2) the subject of judicial control over compliance with the law in the reconciliation procedure;

3) legalizer of the conditions of reconciliation. This feature of the role of the judge in the conciliation of the parties to a public law dispute is derived from the power to exercise judicial control in conciliation. In practice, it is manifested in the fact that the conditions of conciliation of the parties to a public law dispute, which they set out in the statement of conciliation, acquire legal significance for them (create real legal obligations for the parties, which they must comply) only after the judge will approve them.

It is emphasized that the role of the judge in conciliation of the parties to the dispute in administrative proceedings is currently difficult to underestimate even in those EU member states where the judge is no longer obliged to perform a “conciliation mission” and therefore is

not an “active conciliator”. In Ukraine, the role of a judge in conciliation is manifested in his indifference to the parties to the dispute, whom he periodically calls to try to reconcile, as well as in monitoring the results of conciliation and their legalization when they meet the requirements of the CoAP of Ukraine.

Key words: court, judge, reconciliation of the parties, administrative proceedings, European Union.

Problem formulation. In Ukraine, there is a simple model of the subject composition of reconciliation of the parties in administrative proceedings, which is characterized by certain elements of a relatively complicated model of the relevant subject composition (the judge encourages the parties to try to reconcile, however, does not provide them with certain options for reconciliation that should be considered by them). At the same time, in some EU Member States, in which public-law disputes can be resolved through judicial conciliation (reconciliation in administrative proceedings), a judge may appear as a “relatively active conciliator” who, convinced of the possibility of reconciling the parties to the dispute, can form for them an option (options) of reconciliation that can be adopted by them (finalized, rejected). Therefore, appealing to the foreign experience of the judge’s participation in the procedure of reconciliation of the parties is relevant.

Analysis of the problem study. The solution to certain issues of legal regulation of reconciliation of the parties in administrative proceedings is reflected in the works of domestic lawyers-administrative lists, including S. S. Biluha, I. V. Zheltobriukh, M. M. Zaika, O. M. Mykhailov, T. A. Pluhatar, O. D. Sydelnikov, L. R. Iukhtenko and others. However, it is worth noting that the attention of scientists to the subject composition of the procedure for conciliation of the parties in administrative proceedings is insufficient.

The article is aimed at studying the role of a judge in the procedure of conciliation of the parties in the administrative proceedings of Ukraine and the EU Member States.

Presenting main materials. In paragraph 12 of the preamble, Art. 3 EP and Council Directives of 21 May 2008 No. 2008/52/EC contains a rule according to which a judge may appear as an intermediary (mediator), however, such a role can be performed by a judge only in cases which he does not directly consider [1]. A similar role of the judge was also observed in the conciliation procedure of individual EU member states (this is natural, as the EP and Council Directive No. 2008/52/EU is considered applicable in the EU member states by concept and to reconciliation and other alternative dispute resolution), although today the situation is changing significantly.

Given this, domestic scientists assess the fact of involving judges in alternative ways of resolving disputes as “the implementation of advanced trends in the development of procedural legislation of European countries, which, of course, is a positive component of judicial reform in Ukraine” [2]. At the same time, it should be emphasized that this trend is currently ambiguous regarding the issue of reconciliation of the parties to the public legal dispute. The corresponding ambiguity is justified as follows:

1) “reconciliation of the parties to a public legal dispute” in Ukraine is not identical to the “settlement of a dispute with the participation of a judge” and does not require the active participation of a judge in this procedure. The inequality of these procedures, as noted by I. L. Zheltobriukh, is significant [3, p. 24], although in accordance with Part 2 of Article 186 of the CoAP of Ukraine “the judge directs the settlement of the dispute with the participation of a judge to achieve reconciliation by the parties” [4] (despite this, the resolution of the dispute through reconciliation and settlement of the dispute with the participation of the judge are clearly distinguished in paragraph 2 of Part 2 of Article 180 of the CoAP of Ukraine). In clarifying the place of the judge in the process of conciliation of the parties, it should be borne in mind that the judge in Ukraine is not directly involved in agreeing on the terms of reconciliation, just as it takes place, in particular, in mediation procedures in the individual EU Member States (taking into account also cases of “moderately active” participation of a judge in reconciliation);

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2) in Ukraine there is a personnel crisis, judges are overloaded with the volume of cases that they must decide, and therefore the “distraction” of judges to the implementation of reconciliation procedures is not fully appropriate, which is confirmed by the logic of the domestic legislator in regulating alternative ways of resolving public-legal disputes. N. S. Kucheruk notes that “one of the reasons that do not contribute to the settlement of the dispute with the participation of a judge is the establishment of time limits by law. Thus, the legislator allows this procedure only before the start of consideration of the case on the merits and within no more than 30 days from the date of the ruling on its holding. Obviously, such restrictions complicate the effective functioning of this institute. After all, quite often the question of the possibility of reconciliation arises precisely during the consideration of the case on the merits, after clarifying its circumstances, hearing the participants, etc.” [5, p. 24]. However, it is precisely in these circumstances that the logic of the legislator regarding the effective use of the judge's time is revealed:

a) settlement of a dispute with the participation of a judge is an alternative way of resolving a dispute, which provides for the involvement of a judge in order to achieve peace between the parties to the dispute;

b) this method of resolving the dispute is long in time and its application: it is justified when no longer spent time on consideration of the case by the court; cannot be used to delay the dispute resolution process;

c) the parties to the dispute, without taking advantage of the possibility of resolving the dispute with the participation of a judge, may at all times turn to the possibilities of reconciliation, without thereby creating an additional workload for the court. In this sense, one of the most important features of resolving a public-legal dispute through reconciliation is revealed.

You should pay attention to the fact that in some EU Member Countries in which the judge has previously taken an active part in reconciling the parties to a public-legal dispute, due to a set of socio-legal and political problems (crises of democracy and public power; the urgent need for reform of public administration entities; the need to increase the availability of justice [6, p. 61]) judicial and legal reforms are currently being carried out, which “distance” judges from the relevant procedures, thus ensuring greater democratism of reconciliation and contributing to the real unloading of the courts. An illustrative example of this is France. In particular, in the “Dictionary of Legal Terms”, posted on the official website of the Ministry of Justice of the France, the concept of “conciliation” is interpreted as “the process of peaceful resolution of disputes, the intervention of a judge to try to bring the parties closer together and reach an agreement” [7]. Conciliation of the parties to the dispute (including in administrative proceedings) involves the participation of a “conciliator”, which is a judge who (unlike the mediation procedure) does not play an active role in the conciliation process (in other words, the judge appears as a relatively active conciliator). K. Buchser-Martin (Catherine Buchser-Martin) and B. Montu (Bénédicte Manteaux) point to the same fact, pointing out that reconciliation and mediation are closely linked procedures. However, they differ significantly in the characteristics of the status of mediator and conciliator, and in the specifics of dispute resolution methods used in these procedures: in the mediation process the parties usually have to find ways to resolve the dispute as “in the process of reconciliation, the conciliator can often offer solutions to the parties” [8, p. 5].

At the same time, it seems quite positive to try to outline the conciliatory nature of the judge in Spain, which does not harm the optimal use of time spent on the effective administration of justice and contributes to the parties to the public-legal dispute reaching an understanding. For example, in Paragraph 1 of Part 1 of Article 77 of the Kingdom of Spain Law of July 13, 1998, No. 29/1998, it is noted that during the trial the judge at his own discretion or at the request of the party to the dispute, after hearing the arguments of the parties to the dispute, may outline a preliminary agreement (acuerdo) capable of ending the disagreements between the parties to the dispute [9]. This model of participation of a judge in conciliation of the parties to the dispute (not related to participation in the “advisory” procedure of conciliation), in our opinion, may be reflected in the Ukrainian practice of conciliation of parties in administrative proceedings.

Actions of the judge are similar in France today. Starting from 2019, a judge in this European country, in accordance with Art. 22-1 of the Law of the France Republic 8, 1995 No. 95-125, may at any stage of the consideration of the case oblige the parties to the public-legal dispute, try to reconcile (appeal to the appropriate conciliator), if the judge decides that the peaceful resolution of the dispute is quite real [10]. That is, unlike in Ukraine, a judge in the France can not only invite the parties to the dispute to turn to the reconciliation procedure but also oblige them to try to reconcile when he sees this as a real possibility.

At present, the judge in the reconciliation procedure appears as:

1) “relatively active conciliator”. In Ukraine and in one way or another in the EU Member countries, in which public-legal disputes can be resolved through conciliation, the judge:

a) is not an intermediary (mediator) between the parties to the dispute (therefore, reconciliation is not equal in its conceptual and formal manifestation of mediation);

b) is a subject interested in not only law but also peace in society, especially when a dispute has arisen between the parties that can be resolved through reconciliation and are therefore involved in the reconciliation of those parties, each time (when necessary) reminding them of the possibilities of an appropriate way of resolving the dispute. The above follows, for example, from the content of paragraph 2 of Part 2 of Art. 180 and part 5 art. 194 of the CoAP of Ukraine [4]. The corresponding approach was also used by the German legislator. In particular, in paragraph 1 of part 1 of Article 87 of the CoAP of Germany stipulates that, before an oral hearing, the chairman (or rapporteur) must take all measures necessary to resolve the legal dispute at the oral hearing stage, if possible. In particular, these measures covered the court's proposal to the parties to the dispute to discuss during oral hearings the state of affairs and the essence of the dispute, as well as to resolve the relevant legal dispute peacefully and agree to a settlement agreement (Vergleich) [11]. That means, the relativity of the judge's active actions as a conciliator is manifested in the fact that he persuades the parties to the dispute to reconcile, not participating directly in the conciliation procedure (in particular, does not submit to the parties conciliation options, which the parties reject or agree);

2) the subject of judicial control over compliance with the law in the reconciliation procedure. Judicial control in the administrative and legal sense can be interpreted as:

a) “exercise of the control function of the state by the judicial branch of power within the judicial and judicial form” [12, p. 344];

b) “the adversarial procedure by which a private person transfers a dispute with a public authority to the (administrative) courts” [13, p. 539];

c) “a type of control that is inherent only in the judiciary and which is based on the legitimate activities of the courts to verify the legality of acts, decisions, inaction, and actions of the public administration, its officials with the application (if necessary) of legal sanctions, at the special request of the person or entity concerned in accordance with the procedure established by law” [14, p. 267].

From the above, an opinion may be formed that the essence of the judiciary and the peculiarity of judicial control in a rule-of-law state exclude the possibility of using the reconciliation of the parties to a public legal dispute in administrative proceedings. It is this position on this issue that is common among many European administrative lawyers. For example, in the 2016 Report of the Supreme Court of the Kingdom of Spain “Alternatives to Resolving Disputes Falling Under the Jurisdiction of the Administrative Court” (hereinafter referred to as the 2016 Report), attention is drawn to the fact that among lawyers (in particular, judges) the opinion has become widespread that the resolution of public legal disputes is impossible outside the consideration of the relevant case on the merits by the administrative court [15], after all, the above would directly contradict Art. 106 of the Constitution of Spain (this norm the constitutional declared that only “the courts exercise control over the exercise of administrative powers and the legality of the actions of the administration, as well as the compliance of their activities with the provisions established by law” [16]; “private persons, in accordance with the procedure provided by law, are entitled to compensation for any damage caused to their property or rights as a result of public service actions, except for force majeure situations”) [16]. At the same time, the analysis of the decisions of the

Spanish Constitutional Court of 31/2000 of 03 February 2000 [17] and 177/2011 of 08 October 2011 [18] gives grounds to assert that this Court confirms the importance of judicial control in a rule-of-law state (in the meaning of Article 106 of the Spanish Constitution) and the inadmissibility of restricting access to judicial protection. Taking into account this, the Supreme Court of the Kingdom of Spain notes in the 2016 Report that the Spanish Constitution does not provide, among other things, for the interpretation as unacceptable creation and existence of certain mechanisms for the extrajudicial settlement of administrative and legal disputes, but “most likely does not prevent their creation with the possibility of a final review of decisions made in these procedures in the relevant courts and tribunals” [15]. Thus, the reconciliation of the parties to a public-legal dispute not only does not interfere with the implementation of judicial control but also provides for such control, since without judicial control reconciliation, as such, cannot be fulfilled: the application for reconciliation of the parties to a public legal dispute can be approved by a court decision only after the court: analyzes the terms of reconciliation for compliance with the requirements of the legislation, the reality of their implementation; will find out whether the parties to the dispute have really achieved such reconciliation without forcing anyone to do so, etc.;

3) legalizer of reconciliation conditions. This feature of the role of a judge in reconciling the parties to a public-legal dispute is derived from the authority to exercise judicial control in reconciliation. In practical reality, it is manifested in the fact that the conditions for conciliation of the parties to the public-legal dispute, which they outlined in the application for reconciliation, acquire legal significance for them (create real legal obligations for the parties, which they must comply with) only after the judge approves them.

Conclusions. The role of the judge in reconciling the parties to a dispute in administrative proceedings is currently difficult to underestimate, even in those EU Member States where the judge is no longer obliged to carry out a “conciliation mission” and is therefore not an “active conciliator”. In Ukraine, the role of a judge in conciliation is manifested in his indifference to the parties to the dispute, whom he periodically calls to try to reconcile, as well as in monitoring the results of conciliation and their legalization when they meet the requirements of the CoAP of Ukraine.

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РОЛЬ СУДДІ У ПРОЦЕДУРІ ПРИМИРЕННЯ СТОРІН В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ УКРАЇНИ ТА ДЕРЖАВ-ЧЛЕНІВ ЄС

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Здійснено аналіз місця та ролі судді у процедурі примирення сторін в адміністративному судочинстві України та держав-членів ЄС. Встановлено, що в Україні існує проста модель суб'єктного складу примирення сторін в адміністративному судочинстві, яка характеризується певними елементами відносно ускладненої моделі відповідного суб'єктного складу (суддя спону-

кає сторони спробувати примиритись, однак не надає їм певних варіантів примирення, які повинні ними бути розглянуті).

З'ясовано, що в окремих державах-членах ЄС, в яких суддя раніше брав активну участь у примиренні сторін публічно-правового спору, в силу множини суспільно-правових і політичних проблем (кризи демократії та публічної влади; назрілої необхідності реформи суб'єктів публічної адміністрації; потреби у підвищенні доступності правосуддя) наразі здійснюються судово-правові реформи, які "віддаляють" суддів від відповідних процедур, забезпечуючи таким чином більший демократизм примирення та сприяючи реальному розвантаженню судів. Показовим прикладом цьому є Франція.

Встановлено, що на сьогодні суддя в процедурі примирення постає в ролі:

- 1) "відносно активного примирителя";
- 2) суб'єкта судового контролю за дотриманням законності в процедурі примирення;
- 3) легалізатора умов примирення.

Ця особливість ролі судді в примиренні сторін публічно-правового спору є похідною від повноваження здійснювати судовий контроль у примиренні. У практичній дійсності вона виявляється у тому, що умови примирення сторін публічно-правового спору, які вони виклали у заяві про примирення, набувають для них юридичного значення (створюють для сторін реальні юридичні обов'язки, яких вони повинні дотримуватись) лише після того, як суддя їх затвердить.

Наголошено, що роль судді в примиренні сторін спору в адміністративному судочинстві на сьогодні важко недооцінити навіть у тих державах-членах ЄС, в яких суддя вже не зобов'язується виконувати "примирну місію", а отже, не є "активним примирителем". В Україні ж роль судді у примиренні виявляється в його небайдужому ставленні до сторін спору, яких він періодично закликає спробувати примиритись, а також у контролюванні результатів примирення та їх легалізації, коли вони відповідають вимогам КАС України.

Ключові слова: суд, суддя, примирення сторін, адміністративне судочинство, Європейський Союз.