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SUBJECT COMPOSITION OF THE PROCEDURE FOR CONCILIATION OF THE PARTIES IN THE ADMINISTRATIVE JUDICIARY OF UKRAINE AND EU MEMBER STATES

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The article discloses the subject composition of the procedure of conciliation of the parties in the administrative proceedings of Ukraine and EU member states. It is noted that the main subjects of the procedure of conciliation of the parties in administrative proceedings are the parties to the dispute themselves, who wished to reconcile, and the legislation should influence these subjects only with the aim of facilitating their achievement of peace. It is indicated that today the judge appears in the conciliation procedure as: 1) “relatively active conciliator”; 2) the subject of judicial control over compliance with legality in the reconciliation procedure; 3) the legalizer of the terms of reconciliation. In practical reality, this role of the judge is manifested in the fact that the terms of reconciliation of the parties to a public-law dispute, which they set out in the application for reconciliation, acquire legal significance for them (create real legal obligations for the parties, which they must comply with) only after, as the judge approves them. It was established that in Ukraine there is a simple model of the subject composition of the parties' reconciliation in administrative proceedings, which is characterized by certain elements of a relatively complicated model of the corresponding subject composition (the judge encourages the parties to try to reconcile, however, does not provide them with certain options for reconciliation, which they should be considered). It is noted that, unlike in Ukraine, a judge in the French Republic can not only

suggest that the parties to the dispute resort to the conciliation procedure, but also oblige them to try to reconcile when he sees this as a real possibility. It was concluded that in some EU member states (for example, in the Kingdom of Spain), in which public-law disputes can be resolved through judicial conciliation (conciliation in administrative proceedings), a judge can act as a “relatively active conciliator”, who, having convinced himself of the possibility to reconcile the parties to the dispute, can form for them an option (options) of reconciliation that can be accepted (modified, rejected). In addition, in some EU member states (French Republic and Kingdom of Spain), the activity of conciliators, who are certified lawyers (as a rule, lawyers), is provided for.

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

Problem formulation. Taking into account the subject structure of the participants in the process (one of which is the subject of power), the reconciliation of the parties in the administrative proceedings of Ukraine has its own peculiarities and difficulties in comparison with other types of proceedings. After all, in contrast to civil or economic processes, there are very few examples in judicial practice when the parties reconciled as a result of consideration of an administrative claim. Therefore, a clear understanding of the subject composition of the participants in the process, their rights and obligations, as well as the implementation of the practice of conciliation from European countries into our legislation will necessarily have a positive effect on the resolution of administrative disputes through conciliation.

Analysis of the problem study. The problems of the procedure of conciliation of the parties in the administrative proceedings of Ukraine and the EU member states and the question of the subject composition of this procedure were given attention by many administrative lawyers: T. O. Antsupova, S. S. Biluha, I. L. Zheltobriyukh, M. M. Zaika, O. M. Zdrok, O. M. Mykhailov, O. D. Sydelnikov, M. I. Smokovych, O. V. Shemeneva and L. R. Yukhtenko.

The article is aimed at research of the subject composition of the procedure of conciliation of the parties in the administrative proceedings of Ukraine and EU member states.

Presenting main materials. The main subjects of the procedure of conciliation of the parties in administrative proceedings are the parties to the dispute themselves who wished to reconcile, and the legislation should affect these subjects only with the aim of facilitating their achievement of peace. At the same time, this is not entirely fair, taking into account the fact that subjects who wish to reconcile should only act in such a way that (at least):

1) really reconcile (resolving a public-law dispute by conciliation cannot be used for the purpose of applying any dishonest actions, the result of which will be coercion by one party of another to a specific decision);

2) not to violate the current legislation;

3) not to harm the public interest, as well as the rights and legitimate interests of third parties.

Taking this into account, it is quite natural that in the framework of consideration of the procedure of conciliation of the parties in the administrative proceedings of Ukraine and EU member states, attention should be paid to the judge exercising judicial control over conciliation, as well as to the “conciliator”, who is the subject, which is involved in the reconciliation procedure in individual EU member states (in particular, in the Kingdom of Spain and the French Republic).

It should be agreed that in Ukraine “the subject of the administrative process will always be the administrative court, while the parties, third parties, representatives, assistant judge, secretary of the court session, bailiff, witness, expert, legal expert, translator, specialists are only participants in the

administrative process, that is, persons who take part in the law enforcement activities of the administrative court” [1, p. 73]. Instead, critically analyzing the subject composition of the parties in the administrative proceedings of Ukraine and the EU member states, we can come to the conclusion that the following models of the subject composition of reconciliation are currently envisaged by the legislators:

1. A simple model of the subject composition of the reconciliation of the parties in administrative proceedings. Within the framework of this model, which is used in Ukraine, the subject composition of reconciliation is reduced to the parties to a public-law dispute who wish to reconcile (including their representatives), as well as to the judge who checks the legality of the terms of reconciliation formulated by them, approves these conditions. For example, domestic scientist and judge I. L. Zheltobriyukh, analyzing the content of Art. 190 of the Civil Procedure Code of Ukraine, came to the correct conclusion that it “fixes many powers of the administrative court regarding the implementation of the institution of reconciliation of the parties (for example, at the request of the parties, the court stops the proceedings in the CoAP of Ukraine for the time they need for reconciliation, the terms of the reconciliation of the parties are approved by a court decision, etc.), but the first part of this article clearly testifies to the possibility of the existence of procedural relations between the parties to the CoAP of Ukraine, in which the court does not take part” [2, p. 24]. In other words, “the parties independently, without the involvement of the court, can fully or partially settle the dispute on the basis of mutual concessions” [2, p. 24]. At the same time, the dispute will be considered fully settled only when the way to achieve peace between the parties to the dispute is verified by the court and approved by the relevant court decision.

2. A relatively complicated model of the subject composition of parties’ reconciliation in administrative proceedings. This “model”, in addition to covering the parties to a public legal dispute (their representatives), also provides for the extended participation of the judge in the conciliation procedure, in particular:

a) the judge can encourage (or even require) the parties to the dispute to try to reconcile, and also provides the parties with a preliminary option to achieve reconciliation;

b) a judge can participate in the conciliation procedure as an “active conciliator”, holding conciliation meetings (analogous to dispute resolution with the participation of a judge).

3. A complicated model of the subject composition of the reconciliation of the parties in administrative proceedings. In the framework of the studied model, in addition to the parties to a public-law dispute (their representatives) and the judge, a so-called “third party” participates, namely: an “active conciliator” is involved in the process of resolving the dispute through the reconciliation of the parties (or the judge considering the CoAP of Ukraine). In this regard, scientists note that “when the procedure is entrusted to a third party (tiers), its only mission is an attempt (tenter) to reconcile the respective points of view of the parties to the dispute, without the aim of imposing a certain decision on them, since it in fact, must emanate only from the parties themselves and, in any event, must be accepted only by them. Unlike a judge or arbitrator, a third party does not have the authority to settle a dispute or impose any decision on the parties. This person only plays the role of a catalyst (catalyseur) in finding a way to resolve the dispute between the parties” [3]. That is why the relevant involved person is often called “tiers aviseur” (tiers aviseur) by scientists and legal practitioners [3].

Although Ukraine has a legislatively established “simple model” of the subject composition of the parties’ reconciliation in administrative proceedings (although it has some features of a “relatively complicated model” given that the judge can encourage the parties to the dispute to try to reconcile in accordance with the requirements of paragraph 2 part 1 of article 180 and part 5 of article 194 of the Civil Code of Ukraine), it should be borne in mind that in EU member states the models outlined by us can coexist within the framework of the same legal regime of a certain state (their use depends on situations, in which they are found, and urgent needs that can be adequately satisfied using the corresponding

“models”). For example, in France, the parties to a public-law dispute can resolve the dispute through conciliation by contacting a conciliator (“complicated model”), as well as by reaching reconciliation without the involvement of such an entity (“simple model”) [4, p. 83].

The subject composition of the procedure of conciliation of the parties in the administrative proceedings of Ukraine and EU member states, one way or another, involves the participation of the following subjects:

1. Parties to a public legal dispute. In general, “the parties to a public legal dispute can be public administration bodies, natural and legal entities” [5, p. 28]. Thus, “the mandatory subject of public legal disputes must be a body of public administration, or such disputes arise between two bodies of public administration” [5, p. 28]. In this context, it is necessary to talk about the administrative and legal status of the parties to the dispute – a public service body (subject of public administration) and a private person, the analysis of whose legal status, according to the purpose of the relevant legal construct [6, p. 31, 7, p. 157], allows you to understand: 1) who they are in relation to reconciliation; 2) the scope of their actions and inactions in this legal relationship; 3) conditions, grounds and order of their activity [8].

The domestic lawyer-administrative V. V. Tereshchuk notes that the subject of public administration has a special legal status, which is considered “institutional superstatus – a generalizing legal construct that characterizes the single legal position of various subjects of public administration in administrative-legal relations, due to the extent of legal personality, competence (subject of assignment, powers) and legal responsibility of these subjects” [9, p. 66]. At the same time, in the narrow sense, the indicated status, according to the scientist, “should be understood as a legal structure fixed at the legislative level, which is an institutional superstatus, the elements of the structure of which (legal personality, competence, legal responsibility) determine the peculiarities of the creation and activity of subjects of public administration, the limits of the tasks and functions assigned to them, the place of these subjects in the mechanism of public administration, in the mutual relations between themselves, legal entities of public and private law, citizens and their associations” [9, p. 66].

As for private subjects, the administrative-legal status of a person, according to V. O. Timashov, “is guided by the principles of the completeness of human rights and freedoms, their guarantee, the combination of individual interests with state and public interests, the rule of law, transparency, dynamism of rights and human freedoms” [10, p. 28], “reflected in her general, social and individual status” [10, p. 28]. At the same time, the system of elements of the administrative and legal status of citizens consists of: “administrative legal capacity; administrative capacity; rights and obligations; guarantees of rights and freedoms of citizens; legal responsibility” [11, p. 29]. Similarly, “the administrative-legal status of a legal entity depends on the extent of its legal capacity and legal capacity (determined by the number and content of types of activity)” [12, p. 359].

This allows to interpret the legal status of a party to a public-law dispute that is being reconciled as the status of a subject of administrative law, who has the right to resolve the dispute through reconciliation, exercises this right, acting in the manner prescribed by law, bearing legal responsibility for such actions. We note that the relevant legal status and its structure are not clearly defined in the legislation of the EU member states and in the legislation of Ukraine, however, its elements can be clarified by us in view of the essence of reconciliation, the status of the parties to reconciliation and certain provisions of the current national legislation (in particular, Part 6 of Article 47, Part 1 of Article 54, Articles 142, 180, 190, Clause 4 of Part 1 of Article 236 of the Civil Code of Ukraine) and the legislation of EU member states (for example, Part 2 of Article 77 of the Law Kingdom of Spain “On Judicial and Administrative Jurisdiction” of July 13, 1998 No. 29/1998 [13], Article L421-2 of the Code on Relations between Society and Administration [14], Decision of the State Council of December 6, 2002 No. 249153 [15] etc.). So, this status covers the following elements:

- 1) rights and obligations of a party to a public-law dispute that is being reconciled;
 - 2) legal responsibility of a party to a public-law dispute that is being reconciled.
2. Judge. To date, the judge in the conciliation procedure appears as:

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

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

b) is an entity interested in ensuring that not only law prevails in society, but also peace, especially when a dispute has arisen between the parties that can be resolved through reconciliation, and therefore is involved in the reconciliation of these parties, every time (when necessary) reminding them of the possibilities of an appropriate way to resolve the dispute. This follows, for example, from the content of Clause 2, Part 2, Art. 180 and Part 5 of Art. 194 of the CoAP of Ukraine [16]. A corresponding approach was also used by the German legislator;

2) the subject of judicial control over compliance with legality in the reconciliation procedure;

3) the legalizer of the terms of reconciliation. In practical reality, this role of the judge is manifested in the fact that the terms of reconciliation of the parties to a public-law dispute, which they set out in the application for reconciliation, acquire legal significance for them (create real legal obligations for the parties, which they must comply with) only after, as the judge approves them.

The attempt to outline the conciliatory nature of the judge in Spain seems quite positive, which does not harm the optimal use of time spent on the effective administration of justice and helps the parties to a public-law dispute to reach mutual understanding. For example, in paragraph 1 part 1 art. 77 of the Kingdom of Spain Law dated July 13, 1998 No. 29/1998 states that during the trial of the CoAP of Ukraine, the judge, at his discretion or at the request of the disputing party, after hearing the arguments of the disputing parties, may outline a preliminary agreement (acuerdo) capable of putting an end to the disagreements of the parties' dispute [13]. In our opinion, the specified model of the judge's participation in the reconciliation of the parties to the dispute (not related to the participation in the “advisory” procedure of agreeing on the terms of reconciliation) can also be reflected in the Ukrainian practice of the reconciliation of the parties in administrative proceedings.

A judge in France acts in a similar way today. Starting from 2019, a judge in this European country, in accordance with Art. 22-1 of the Law of the French Republic dated February 8, 1995 No. 95-125 may, at any stage of the proceedings, oblige the parties to a public legal dispute to try to reconcile (apply to the appropriate conciliator), if the judge comes to the opinion that a peaceful resolution of the dispute is entirely real [17]. That is, in contrast to Ukraine, a judge in the French Republic can not only suggest that the parties to the dispute resort to the conciliation procedure, but also oblige them to try to reconcile when he sees this as a real possibility.

Conclusions. In Ukraine, there is a simple model of the subject composition of parties for reconciliation in administrative proceedings, which is characterized by certain elements of a relatively complicated model of the corresponding subject composition (the judge encourages the parties to try to reconcile, however, does not provide them with certain options for reconciliation that they should consider). At the same time, in some EU member states (for example, in the Kingdom of Spain), in which public-law disputes can be resolved through judicial conciliation (conciliation in administrative proceedings), a judge can act as a “relatively active conciliator”, who, convinced of opportunities to reconcile the parties to the dispute, can form for them a reconciliation option (options), which can be accepted (modified, rejected) by them. In addition, in some EU member states (French Republic and Kingdom of Spain), the activity of conciliators, who are certified lawyers (as a rule, lawyers), is provided for.

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СУБ'ЄКТНИЙ СКЛАД ПРОЦЕДУРИ ПРИМИРЕННЯ СТОРІН В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ УКРАЇНИ ТА ДЕРЖАВ-ЧЛЕНІВ ЄС

Розкрито суб'єктний склад процедури примирення сторін в адміністративному судочинстві України та держав-членів ЄС. Зазначено, що основними суб'єктами процедури примирення сторін в адміністративному судочинстві є самі сторони спору, що забажали примиритись, а законодавство повинно впливати на цих суб'єктів лише з метою сприяння досягнення ними миру. Вказано, що на сьогодні суддя в процедурі примирення постає в якості: 1) “відносно активного примирителя”; 2) суб'єкта судового контролю за дотриманням законності в процедурі примирення; 3) легалізатора умов примирення. У практичній дійсності ця роль судді виявляється у тому, що умови примирення сторін публічно-правового спору, котрі 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. Встановлено, що в Україні існує проста модель суб'єктного складу примирення сторін в адміністративному судочинстві, котра характеризується певними елементами відносно ускладненої моделі відповідного суб'єктного складу (суддя спонукає сторін спробувати примиритись, однак не надає їм певних варіантів примирення, які повинні ними бути розглянуті). Зазначено, що на відміну від України, суддя у Французькій Республіці може не лише пропонувати сторонам спору звернутись до процедури примирення, але й зобов'язати їх спробувати примиритись, коли він вбачатиме у цьому реальну можливість. Зроблено висновок, що в окремих державах-членах ЄС (наприклад, у Королівстві Іспанія), в яких публічно-правові спори можуть бути вирішені шляхом судового примирення (примирення в адміністративному судочинстві), суддя може поставати “відносно активного примирителя”, котрий, переконавшись у можливості примирити сторони спору, може сформулювати для них варіант (варіанти) примирення, які можуть бути ними прийняті (доопрацьовані, відхилені). Крім того, в окремих державах-членах ЄС (у Французькій Республіці та Королівстві Іспанія) передбачена діяльність примирителів, якими є сертифіковані юристи (як правило, адвокати).

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