

MEASURES TO PREVENT AND COUNTER ABUSE OF PROCEDURAL RIGHTS IN THE JUDICIAL SYSTEM OF UKRAINE

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Annotation. The article clarifies the concept of measures to prevent and counteract the abuse of procedural rights in administrative and civil proceedings, identifies their types, determines their effectiveness and proposes certain ways of their improvement.

It is clarified that measures to prevent and counteract the abuse of procedural rights in administrative proceedings are measures to prevent and stop the abuse of such rights and measures to hold accountable the persons who committed them, which are applied by the court on the grounds and in the manner prescribed by law and taking into account the explanations and interpretations of the Constitutional and Supreme Courts.

It has been proven that, taking into account the functionality, these measures can be divided into two groups: 1) organizational, which include - implementation of simplified claim proceedings, ensuring the possibility of conducting a case review in the absence of the parties and other participants in the case, creating technical conditions for the functioning of electronic justice by introducing the Unified Judicial Information and Telecommunications System, establishing special rules for changing the composition of the court in the event of circumstances that complicate the timely consideration of the case, using the dispute settlement procedure with the participation of a judge, establishing restrictions on cassation appeals of certain categories of cases, using the mechanism of disciplinary liability of judges and lawyers; 2) procedural - consolidation of the principles of good faith and inadmissibility of abuse of procedural rights, establishment of a general obligation of good faith use of procedural rights and strict fulfillment of procedural duties, definition of an open list of actions that can be qualified as abuse of administrative procedural rights, establishment of general consequences of abuse of procedural rights, imposition on the court of the obligation to take measures to prevent abuse of procedural rights, etc.

It has been established that it would be more correct from the point of view of legislative technique to improve (supplement) existing procedural norms that provide for the application of preventive measures, cessation of abuse of procedural rights and establishment of liability for their commission than to isolate them in a separate section of the relevant codes.

Key words: judicial proceedings, judicial process, principles of judicial process, abuse of procedural rights, measures to prevent and counteract abuse of procedural rights.

1. Introduction.

The development of the court system in Ukraine, careful selection for the position of judge, increasing the requirements for the legal profession, constant changes to procedural laws that regulate the judicial procedure for considering cases are the key to building an effective and fair judicial system in the future as a guarantee of respecting the rights and freedoms of citizens. However, during the long period of transition from the Soviet system of state building, which was built on the principles of fairly strict management and the need to strictly fulfill the requirements of public authorities, to the system of building a democratic state, in which the key principle of building power is human-

centered, in which public authorities are created by citizens to provide them with high-quality public services, there has been a certain abuse of the principles of democracy and effective state building in our society. And this abuse is manifested in the fact that individuals and legal entities are looking for weak links in the legislation in order to evade the implementation of the law, for example, they evade paying taxes, using schemes to hide real income, want to receive an administrative service in a shorter period than specified by law, want to receive benefits from the state not provided for by law. These negative phenomena are also inherent in the judicial system, in particular, the parties, abusing procedural rights, try to delay the consideration of the case, discredit the judge and disqualify him, request documents that are potentially impossible to obtain, etc. The number of cases of abuse of procedural rights and the use of coercive measures against participants in the trial during the consideration of both private and public disputes remains quite high. The negative consequences of committing such illegal actions by participants in the trial are indirectly reflected in the terms of conducting the trial of cases, which leads, in particular, to the postponement of their consideration, the use of procedural coercive measures, etc.

The lack of a consistent understanding of the category of abuse of procedural rights, its qualifying features, as well as effective measures to counteract them leads to a low level of application of the norms of the Code of Administrative Procedure of Ukraine (CAPU) and the Code of Civil Procedure of Ukraine (CPC of Ukraine), which provide for measures of procedural influence against unscrupulous participants in the judicial process. The adoption of amendments to the CAPU and CPC of Ukraine in 2017 and 2020 formed the foundations of a modern mechanism for preventing, counteracting and terminating abuse of procedural rights in administrative and civil proceedings, however, law enforcement practice continues to reveal a significant range of legislative gaps in this area and demonstrates different application by courts of the norms of the CAPU and CPC of Ukraine when counteracting such abuse.

2. Status of development of research problems.

The problem of abuse of procedural rights was studied by specialists from various fields of law, namely: I.G. Andrushchenko, O.M. Barmina, N.V. Basalyuk, M.A. Bolovnev, V.L. Gribanov, R.A. Kalyuzhny, D.A. Kozachuk, A.Ya. Kurbatov, R.D. Lyashenko, V.Yu. Polishchuk, V.P. Tarkin, O.S. Fonova, T.S. Yatsenko and others. However, procedural forms of preventing and combating abuse of procedural rights in administrative and civil proceedings have not been sufficiently researched and to a greater extent before the judicial reform of 2016.

3. Purpose and objectives of the study.

In this regard, to achieve the purpose of the study within the framework of this scientific article, namely - to clarify measures to prevent and counteract the abuse of procedural rights in the judicial system of Ukraine, we set and plan to implement the following tasks: to clarify procedural forms of preventing and counteracting the abuse of procedural rights in administrative and civil proceedings, to determine their effectiveness and to propose individual ways of their improvement.

4. Presentation of the main provisions.

Since the amendments to the Code of Administrative Procedure of Ukraine and the Code of Civil Procedure of Ukraine in 2017 and 2020, which formed a modern mechanism for preventing and combating the abuse of procedural rights, there is an urgent need to study modern mechanisms for preventing and combating the abuse of procedural rights, generalize the established judicial practice of applying the relevant norms, identify shortcomings, and develop proposals for their elimination. The new mechanism for preventing and stopping the abuse of procedural rights was enshrined in the Code of Administrative Procedure of Ukraine by the Law of Ukraine of October 3, 2017 No. 2147-VIII "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of

Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts" [1]. This law supplemented the Code of Administrative Procedure of Ukraine and the Code of Civil Procedure of Ukraine with the following norms that form the basic principles for preventing, stopping, and combating the abuse of procedural rights by participants in the judicial process: 1) p. 9 Part 3 of Article 2 of the Code of Civil Procedure and Clause 11 Part 3 of Article 2 of the Code of Civil Procedure define as one of the principles of judicial proceedings the inadmissibility of abuse of procedural rights; 2) Article 44 of the Code of Civil Procedure and Article 45 of the Code of Civil Procedure "Inadmissibility of abuse of procedural rights" define the list and content of actions that may be recognized by the court as abuse of procedural rights; 3) Part 8 of Article 139 of the Code of Civil Procedure provides for the possibility of the court to impose on the party that abused procedural rights the court costs in full or in part regardless of the results of the dispute resolution; 4) Article 148 of the Code of Civil Procedure and Article 149 of the Code of Civil Procedure determine the right of the court to apply measures of procedural coercion to induce relevant persons to comply with the rules established in court, to perform procedural duties in good faith, to stop the abuse of rights and to prevent the creation of unlawful obstacles in the conduct of judicial proceedings, as well as the content and procedure for applying such measures [2; 3].

The obviousness of the solution (minimization of the negative impact) of the problem of abuse of procedural rights necessitated the adoption by the Verkhovna Rada of Ukraine on January 15, 2020 of the Law of Ukraine "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure for Considering Court Cases" [4]. The explanatory note to the bill states that one of the goals of its development was to improve a number of norms in order to prevent abuse by the participants in the case of their procedural rights and optimize the procedure for considering cases [5]. As Polishchuk V.Yu. correctly notes, "that Ukraine, given the amendments to the 2017 and 2020 KASU, currently has the highest degree of detailing of the mechanism for preventing abuse of procedural rights in administrative proceedings among the CIS countries by defining: the principle of inadmissibility of abuse of procedural rights; establishing a list of actions of the participants in the process that may be recognized by the court as an abuse of procedural rights; the ability of the court to impose legal costs on the party that abused procedural rights in full or in part regardless of the results of the dispute resolution; granting administrative courts the authority to apply procedural coercive measures to subjects who abuse procedural rights" [6, p.150]. One should partially agree with this, because the norms regulating the types of abuse of procedural rights, and especially those regulating measures to prevent them, are not systematized in nature, there is no single-vector case law on the expediency and legality of their application, and accordingly these issues require detailed study.

To fulfill the objectives of the study, we will clarify the system (types of measures) of preventing and counteracting the abuse of procedural rights in administrative and civil proceedings. Given that these issues have similar legal regulation in the CASU and the CPCU, given the volume of research material, we will carry out such an analysis using the example of the CASU. In the absence of a systematic approach to legal regulation of types of measures to prevent and counteract abuse of procedural rights in administrative proceedings, it is advisable to consider the position of researchers on their classification and characteristics, as well as proposals for their legal regulation. According to Polishchuk V.Yu. "the main measures of the mechanism for counteracting abuse of procedural rights in administrative proceedings include: 1) preventive measures, namely legal norms that establish the principle of good faith use of procedural rights, a ban on abusing such rights, improving legal norms; statistical reporting on the facts of abuse and applicable measures of procedural coercion to such participants, expansion of judicial discretion, clarifications of higher judicial instances 2) termination measures, which are largely measures of procedural coercion; 3) measures of prosecution, usually fines and increased amounts of compensation for court costs for abuse of procedural rights" [6, p.152].

Having analyzed the practice of the courts of Ukraine in applying measures to combat the abuse of procedural rights and their regulatory consolidation, Dmytro Luspenyk attributed to the measures to combat procedural abuses: 1) legislative consolidation of the obligation of the parties to exercise their procedural rights in good faith; 2) refusal of the court to take certain actions, in particular,

refusal to satisfy the petitions and statements of a person, refusal to accept a counterclaim, etc.; 3) rejection of an appeal and cassation complaint; 4) leaving the claim without consideration; 5) compensation for damages caused by the person who commits the abuse of procedural rights; 6) compensation for damages caused by securing the claim; 7) refusal to accept evidence submitted in violation of the deadlines established by law; 8) adoption of a court decision based on the evidence available in the case; 9) summoning the parties to provide personal explanations in the case; 10) reimbursement of court costs in the event of unjustified actions of the plaintiff in the event of closing the proceedings in the case and leaving the claim without consideration; 11) imposition of a court fee on the party that abused procedural rights, regardless of the results of the dispute resolution; 12) a separate ruling; 12) a fine; 13) measures of administrative (Article 185-3 of the Code of Administrative Offenses) and criminal (Article 382 of the Criminal Code of Ukraine) liability; 14) disciplinary liability of the lawyer and loss of the status of representative for a representative who is not a lawyer; 15) cancellation of the court decision in the event that all interested persons were not involved in the case; 16) negative consequences that occur for a person who has not fulfilled his procedural obligations, etc. [7]. He proposed the following classification of means of preventing abuse of procedural rights: 1) procedural (procedural) remedies, which include preventive remedies aimed at preventing procedural abuses and intervening remedies designed to stop attempts at procedural abuses; 2) compensatory remedies aimed at ensuring fair satisfaction for the abuses that have occurred, which have a monetary equivalent - an obligation to pay court costs, a fine [7].

O. Kibenko, systematizing the above measures of procedural coercion and other procedural mechanisms that can be applied by the court in the event of recognizing a certain action (inaction) of a participant in the case as an abuse of procedural rights, proposed to distinguish the following groups of countermeasures: 1) leaving the complaint without consideration; 2) issuing a warning; 3) imposing a fine [8].

Petrash K. also proposes to distinguish between personal remedies, which are personalized in nature, and procedural remedies, noting that the first category allows for a separate ruling to be issued against unscrupulous participants in the case; the specificity of the second category is primarily related to the court's ability to apply the powers granted by law [9].

Bernazyuk Ya.O., having systematized the opinions of scientists and practitioners, comes to the conclusion that measures to counteract the abuse of procedural rights can be divided into: a) those applied to violators of law and order in the courtroom (warning, removal from the courtroom); b) those that ensure the process of proving (temporary removal of evidence for examination by the court, pretext, fine). The author quite correctly stated that similar in content provisions on means of counteracting the abuse of procedural rights, provided for in Art. Art. 2, 10, 45, 139, 144-148, 167, 188, 198, 205 of the Code of Civil Procedure of Ukraine, are contained in Art. Art. 2, 12, 44, 141, 143, 148 and 262 of the Civil Procedure Code of Ukraine (CPC of Ukraine), Art. Art. 2, 13, 43, 129, 131, 135 and 246 of the Commercial Procedural Code of Ukraine (CPC of Ukraine) [10, p.310].

Also, scholars in this field have proposed certain steps to improve the regulatory legal regulation of combating procedural abuse of law. In particular, T. Polyanskyi includes these: 1) in the Law of Ukraine "On the Bar and Advocacy" it is advisable to supplement the procedural obligations of lawyers (through a broader explanation of the content of the concept of "advocacy ethics" or to set them out in a separate paragraph) with a provision on "the good faith exercise of their procedural rights and obligations" or on "non-abuse of their procedural rights and obligations". The content of these concepts can be detailed in the Rules; 2) in the Rules it would be worth: a) to list the main signs of abuse of procedural rights in separate paragraphs and to provide a non-exhaustive list of them and b) to define and describe in a separate article (paragraph) the procedure for making a decision on the presence of abuse of rights in the actions of a lawyer; c) to establish liability for such acts; 3) in each of the procedural codes to establish the requirement not only for the conscientious exercise of procedural rights and obligations, but also: a) to provide a description of the characteristic signs of abuse of rights for each of the procedural branches and a non-exclusive list of possible ways of committing them; b) to establish legal liability for such acts at any stage of the relevant process [11, p.35].

As a result of the monographic study conducted, Polishchuk V.Yu. comes to the conclusion that the norms that determine the elements of the mechanism for preventing and combating the abuse of procedural rights of the CACU are: 1) clause 9, part 3, article 2, which defines one of the principles of administrative justice as the inadmissibility of abuse of procedural rights; 2) article 45 "Inadmissibility of abuse of procedural rights", which defines the list and content of actions that may be recognized by the court as an abuse of procedural rights; 3) part 8, article 139, which provides for the authority of the court to impose legal costs on the party that abused procedural rights in full or in part regardless of the results of resolving the dispute; 4) article 144 – 149, which determine the right of the court to apply procedural coercive measures to induce relevant persons to comply with the rules established in court, perform procedural duties in good faith, stop abuse of rights and prevent the creation of unlawful obstacles in the conduct of justice, as well as the content and procedure for applying such measures [12, p. 140]. He substantiated the expediency of supplementing the Code of Civil Procedure with Section 4-1 "Prevention and Counteraction to Abuse of Procedural Rights", to which he proposes to include articles that will separately define – "criteria and content of abuse of procedural rights", "types of abuse of procedural rights", "measures to prevent abuse of procedural rights", "measures to stop abuse of procedural rights", "liability for abuse of procedural rights", "compensation for abuse of procedural rights" [12, p.181]. This opinion should be supported, however, the introduction of this section into the Code of Administrative Procedure has led to the exclusion of provisions on the application of certain measures of prevention of procedural rights, which are enshrined in various norms of the Code of Administrative Procedure regulating certain stages of administrative proceedings, since such measures are applied both at the stage of filing a claim and at the stage of appeal (cassation) proceedings, which will lose the logical structure of the norm and its content and will lead to an ambiguous interpretation of these norms. Therefore, it would be more correct from the point of view of legislative technique to improve (supplement) the existing procedural norms, which provide for the application of preventive measures, the cessation of abuse of procedural rights and the establishment of liability for their commission.

5. Conclusions.

In conclusion, it should be noted that measures to prevent and combat the abuse of procedural rights in administrative proceedings are measures to prevent and stop the abuse of such rights and measures to hold accountable the persons who committed them, which are applied by the court on the grounds and in the manner prescribed by law and taking into account the explanations and interpretations of the Constitutional and Supreme Courts.

Taking into account the functionality, measures to prevent and counteract the abuse of procedural rights in administrative proceedings can be divided into two groups: 1) organizational, which include - implementation of simplified claim proceedings (Chapter 10 of the Code of Administrative Procedure), ensuring the possibility of conducting a case review in the absence of the parties and other participants in the case (Part 3 of Article 205 of the Code of Administrative Procedure), creating technical conditions for the functioning of electronic proceedings by introducing the Unified Judicial Information and Telecommunications System (Article 18 of the Code of Administrative Procedure), establishing special rules for changing the composition of the court in the event of circumstances that complicate the timely consideration of the case (Article 31 of the Code of Administrative Procedure), using the procedure for resolving the dispute with the participation of a judge (Chapter 4 of the Code of Administrative Procedure), establishing restrictions on cassation appeals of certain categories of cases (Article 328 of the Code of Administrative Procedure), using the mechanism of disciplinary liability of judges and lawyers; 2) procedural - establishing the principles of good faith and inadmissibility of abuse of procedural rights (Article 2 of the Code of Civil Procedure), establishing a general obligation to use procedural rights in good faith and strictly fulfill procedural obligations (Article 44 of the Code of Civil Procedure), defining an open list of actions that may be qualified as abuse of administrative procedural rights (Part 2 of Article 45 of the Code of Civil Procedure), establishing the general consequences of abuse of procedural rights (Part 3 of Article 45 of the Code of Civil Procedure), imposing on the court the obligation to take measures to prevent abuse of procedural rights (Part 4 of Article 45 of the Code of Civil Procedure), etc.

In addition, as some researchers rightly point out, the effectiveness of any sphere of public administration, including the judicial system, is increased not only by clear direct management of legal norms, but also by the use of effective methods and forms of activity of managers in this sphere, in our case, judges [13, p.91;14, p.40]. Judges in this sense are given discretionary powers and, taking into account the case materials, the behavior of the parties, and if there is evidence, they may recognize actions other than those listed in the law as abuse of procedural rights.

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