

SANCTIONS AND JUDICIAL REVIEW IN UKRAINE: LIMITS OF JUDICIAL DISCRETION AND PROTECTION OF HUMAN RIGHTS

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Annotation. Sanctions in Ukrainian law serve as a special instrument of the state's response to threats to national security, sovereignty, and economic interests. The normative basis of the sanctions mechanism is formed by the Law of Ukraine «On Sanctions» of 14 August 2014 No. 1644-VII (hereinafter – the Law) [1], which defines sanctions as special economic and other restrictive measures applied for the purpose of protecting national interests, national security, and the territorial integrity of Ukraine (Art. 1). The mechanism of their application has a complex character and includes a preparatory stage (formation of proposals on the application of sanctions by the entities defined in Part 1 of Art. 5 of the Law, in particular the Cabinet of Ministers of Ukraine, the Security Service of Ukraine, and the National Bank of Ukraine), the adoption of a decision by the National Security and Defense Council of Ukraine (hereinafter – the NSDC), and its enactment by a decree of the President of Ukraine, as well as further judicial review of the relevant acts [1].

The relevance of the study is due to the fact that sanctions, being an instrument for ensuring public interests, simultaneously have a significant impact on human rights and freedoms, in particular the right to property and the right to effective judicial protection.

The aim of the work is to conduct a comprehensive analysis of the mechanism of judicial appeal against sanctions in Ukraine from the perspective of determining the limits of judicial review, identifying its restrictions, and assessing the effectiveness of the protection of individual rights.

The methodological basis of the study consists of the formal legal method used for the analysis of legislative provisions, a systematic approach to the consideration of the sanctions mechanism as an integral legal construction, as well as the comparative legal method for comparing national practice with European standards of human rights protection.

Results of the study show that judicial review of the application of sanctions in Ukraine has a limited nature and is mainly reduced to verifying the formal legality of acts of the President of Ukraine without proper assessment of their substantiation and evidentiary basis. It has been found that the absence of a full-fledged examination of the factual grounds for the application of sanctions, as well as the use of lowered standards of proof in cases concerning the recovery of assets to state revenue, create risks of violation of the right to a fair trial and the right to property.

Key words: sanctions, sanctions mechanism, judicial review, protection of human rights, right to property, right to a fair trial.

1. Introduction.

In the modern international legal order, sanctions have become widespread as an instrument of response by states and international organizations to violations of international law, security threats, and other actions that contradict the fundamental principles of international relations. Over recent decades, sanctions

mechanisms have become an important component of the national security policy of many states, and their application covers a wide range of economic, financial, and other restrictive measures.

At the same time, sanctions are increasingly becoming the subject of legal discussions, as their application significantly affects the rights and interests of natural and legal persons. First of all, this concerns property rights, freedom of economic activity, and the right to effective judicial protection. In this regard, in modern legal doctrine special attention is paid to the issues of the legal nature of sanctions, the limits of their application, and the mechanisms for control over the relevant decisions of state authorities.

The relevance of this issue is determined by the necessity to ensure an appropriate balance between the interests of the state in the field of national security and the guarantees of human rights protection. For this reason, the study of legal mechanisms that allow verifying the legality of sanctions and preventing possible abuses of power is of particular importance.

In this context, judicial review should play a special role, being intended to restore justice, ensure compliance with the principle of the rule of law, and provide effective protection of the rights of persons subject to restrictive measures. However, in practice, it does not fulfill this function: courts limit themselves to checking formal procedures without conducting a proper assessment of the substantive grounds for the application of sanctions.

2. Analysis of scientific publications.

The issue of judicial review of sanctions in Ukraine is relatively new for national legal science, which is due to the increased use of sanctions after 2014 and especially under martial law. In this regard, scientific research in this field is still in the process of formation and is characterized by significant attention to administrative judiciary practice and the role of the Supreme Court. A significant contribution to the study of the sanctions mechanism was made by M. M. Stefanchuk and O. V. Salenko in their article «Jurisdictional Concept of Recovery to the State Revenue of Assets of Sanctioned Persons» [2]. The authors draw attention to the fact that the corresponding mechanism has a composite legal nature and combines features of different types of state coercion.

The problems of practical application of sanctions and their judicial review are also studied in the work of V. S. Bunyak «Individual Sanctions in Ukraine: Controversial Practice in the Context of the ECtHR Decision M. S. L., TOV v Ukraine», who notes that «*judicial protection at the level of the Supreme Court is recognized as an «ineffective means of protection», which is an infrequent case regarding the assessment of the practice of the highest judicial body of a member state of the Council of Europe»* [3].

A separate direction of research is the analysis of judicial practice in cases concerning the application of sanctions, which is presented in the work of Ye. Kruk, T. Slipachuk, and A. Bagan «Sanctions in Ukraine: Between Practice and International Law. Discussion of Judges and Lawyers» [4]. As noted in the respective study, «*at present it is not determined under what conditions the state has the right to move from temporary restriction to the permanent deprivation of a person's property rights. Without a clear normative boundary between these two instruments, there is a risk of disproportionate or even arbitrary interference with the right to property»*.

Despite the existence of a significant number of scholarly works dedicated to specific aspects of sanctions policy and judicial review of its application, it should be noted that this issue remains the subject of active scientific inquiry. In modern legal literature, there are numerous interesting and substantive studies that analyze both the legal nature of sanctions and the procedural features of their appeal. At the same time, most of these studies are fragmentary in nature and focus primarily on individual elements of the problem – specifically, on the procedure for applying sanctions, the role of courts, or standards of proof.

3. The aim of the article is a comprehensive study of the mechanism of judicial appeal of sanctions decisions in Ukraine with a focus on determining the actual limits of judicial review and the nature of

discretionary powers of public authorities in this sphere. Special attention is paid to identifying procedural and substantive limitations that arise during the consideration of relevant cases. The study is also aimed at analyzing the effectiveness of the existing model of judicial protection of the rights of persons subject to sanctions, taking into account its ability to ensure the real restoration of violated rights, and not only a formal verification of the legality of the respective acts. A separate task is to clarify the relationship of the sanctions mechanism with other forms of state coercion, in particular criminal law restrictions, and to analyze the extent to which the application of sanctions may in fact approximate criminal punishment in its consequences. This allows for an assessment of the impact of the sanctions mechanism on guaranteed rights and freedoms of individuals, particularly regarding procedural guarantees provided by criminal proceedings, and to identify the risks of bypassing classical protection standards in the context of implementing state security measures.

4. Review and discussion.

In the system of public law, sanctions play a special role as an instrument for protecting the national interests of Ukraine. The law defines sanctions as special economic and other restrictive measures applied for the purpose of protecting national security, sovereignty, territorial integrity, and the economic interests of the state (Art. 1 of the Law) [1]. Sanctions are not a form of criminal liability or punishment, they are aimed at restricting certain rights and opportunities of individuals within the legal framework of public relations.

The normative model of sanctions application in Ukraine provides for three interrelated stages. The first is the preparatory stage, within which the authorized state bodies (in particular, the Security Service of Ukraine, the National Bank of Ukraine, and the Cabinet of Ministers of Ukraine) collect, verify, and assess information regarding specific subjects whose activities may pose a threat to national security. Based on this analysis, the respective materials are submitted for consideration by the NSDC. The second stage is the adoption by the NSDC of a decision on the application of sanctions, which, in accordance with Part 7 of Article 107 of the Constitution of Ukraine, is enacted by a decree of the President of Ukraine [5].

Finally, the third stage is the judicial review of sanctions decisions. Its essence lies in the possibility for an individual or legal entity, against which restrictive measures have been applied, to appeal to the Supreme Court with a claim for recognition of the illegality of the decree of the President of Ukraine that enacted the NSDC decision. This is due to the fact that, in accordance with Part 4 of Article 22 of the Code of Administrative Procedure of Ukraine (hereinafter – CAP Ukraine), it is the Supreme Court, as a court of first instance, that has jurisdiction over cases regarding the appeal of acts of the President of Ukraine [6].

At the same time, in practice, the exercise of the right to judicial protection in cases concerning the application of sanctions remains limited. Formally, a sanctioned person has the opportunity to apply to the court and challenge the respective decree of the President of Ukraine. However, the subject of judicial review is the decree itself, as an act of individual action, and not a full assessment of the reasonableness of the decision on the application of sanctions. Within administrative proceedings, the court usually focuses on verifying the legality of the act and compliance with the procedure of its adoption, that is, the conformity of the decree with the requirements of the laws of Ukraine and the limits of the powers of the President of Ukraine. Meanwhile, questions regarding the factual grounds for the application of sanctions, in particular the sufficiency of evidence that formed the basis for the respective NSDC decision, remain outside the scope of judicial review.

At the same time, in cases concerning the appeal of sanctions, there is no possibility for a full multi-stage review of the judicial decision, which objectively narrows the procedural guarantees of the individual. In situations where sanctions can significantly restrict property rights, business reputation, and other fundamental interests of a person, such a structure of judicial control raises questions regarding the adequacy of procedural guarantees for effective judicial protection.

Such a model of judicial control leads to a situation in which a person against whom sanctions have been applied is deprived of the opportunity to challenge the reasonableness of the allegations brought against them or to demand a full review of the evidentiary basis that formed the grounds for restricting their rights.

As a result, judicial proceedings are reduced to verifying the formal legality of the President's decree, while a substantive assessment of the grounds for applying sanctions remains within the discretion of state authorities. Under such conditions, the effectiveness of judicial control as a tool for restoring violated rights raises legitimate questions and discussions in legal doctrine and law enforcement practice.

In this context, the practice of the European Court of Human Rights is illustrative. In particular, in the case of *Witkowski v. Poland*, the Court noted the following: «*The Court recalls that provisions regarding formal requirements related to the submission of remedies aim to ensure the proper administration of justice, including respect for the principle of legal certainty. Interested parties must be able to expect compliance with these provisions. The Court has repeatedly stated that, although the right to submit a remedy is undoubtedly subject to legal requirements, courts, applying procedural law norms, must avoid both excessive formalism, which could undermine the principle of fair proceedings, and excessive flexibility, which would lead to the annulment of procedural requirements established by law*» [7].

The above ECHR practice demonstrates an important principle: procedural rules should serve the purposes of justice and not create barriers to access. For this reason, excessive formalism in the activity of courts is regarded as one of the factors that undermines the effectiveness of the right to judicial protection.

A particular problem of the sanctions appeal mechanism is that judicial review is the only form of legal protection available to a sanctioned person. The law does not provide for any alternative administrative procedure for reviewing or canceling sanctions decisions, which means that judicial control itself must ensure the effective restoration of violated rights. At the same time, the procedural model of such control has a number of significant limitations. In particular, according to Part 4 of Article 22 of the CAP Ukraine, cases regarding the appeal of acts of the President of Ukraine are under the jurisdiction of the Supreme Court as a court of first instance [6]. This means that the consideration of the case effectively begins immediately at the level of the highest judicial body. Under such conditions, the procedural structure of judicial control does not provide sufficient depth for verifying the circumstances of the case and objectively narrows the possibilities for a full and comprehensive examination of evidence, which ultimately affects the effectiveness of protecting the rights of the person against whom sanctions have been applied.

In view of this, the issue of the effectiveness of judicial control in cases regarding the application of sanctions becomes particularly significant. If judicial review is effectively the only form of legal protection, the procedure of such review must meet the highest standards of fair trial. Limiting the court's ability to verify the reasonableness of applying sanctions or to examine the evidence that formed the basis for their imposition calls into question the effectiveness of this mechanism in terms of the guarantees provided by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The issue gains particular importance given that sanctions directly affect the right to private property, which is traditionally recognized as one of the fundamental human rights. Even in Roman law, private property was considered a sacred and inviolable right of the individual. Subsequently, this idea was enshrined in the European legal tradition and is reflected in modern international standards, in particular in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right of every person to peacefully enjoy their possessions [8]. For this reason, the mechanism of judicial control over decisions that may lead to the actual blocking or loss of property must meet the highest standards of legal certainty and procedural fairness.

Special attention should be given to the correlation between the sanctions mechanism and the criminal-law instruments of state coercion. By their nature, certain types of sanctions (in particular, asset freezes, restrictions on property use, prohibition of business activities) effectively lead to consequences equivalent to measures of securing criminal proceedings or forms of punishment. For example, the seizure of property in criminal proceedings, according to Part 1 of Article 170 of the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine), is defined as «*a temporary deprivation, until its cancellation in the manner established by this Code, by decision of an investigating judge or a court, of the right to alienate, dispose of, and/or use property in respect of which there is a set of grounds or reasonable suspicions to consider that it is evidence of a criminal offense, subject to special confiscation from the suspect, the accused, the convicted, or third parties ...*» [9]. Thus, the seizure of property in criminal proceedings is applied exclusively by court

decision, whereas sanctions in the form of asset freezes effectively achieve a similar result without the need to establish the person's guilt in criminal proceedings.

At the same time, a fundamental distinction is that criminal proceedings are accompanied by a system of procedural guarantees enshrined in the Constitution of Ukraine and the CPC of Ukraine. In particular, according to Article 62 of the Constitution of Ukraine, a person is considered innocent of committing a crime and may not be subjected to criminal punishment until their guilt has been proven in accordance with the law and established by a court's conviction [5]. Criminal proceedings also provide for the adversarial principle, the right to defense, and the examination of evidence in a court hearing. In contrast, the application of sanctions occurs in a non-judicial manner and does not require adherence to these guarantees. The absence of the need to prove the individual's guilt, as well as the lack of procedural mechanisms for a full adversarial hearing, significantly differentiates the sanctions mechanism from the criminal process, even despite the similarity of their actual consequences.

Particularly illustrative in this context is the institution of asset recovery in favor of the state. According to paragraph 2 of Part 1 of Article 5-1 of the Law, such a sanction as the recovery of assets of natural or legal persons in favor of the state may be applied during the period of martial law or after its termination or repeal, and on the condition that a sanction in the form of asset freezing has already been imposed on the relevant natural or legal person in the manner prescribed by this Law [1]. Thus, the legislator directly links the possibility of final confiscation of property with the prior restriction of the right to dispose of it, which increases the intensity of interference in the sphere of property rights.

It is important that even within the framework of judicial consideration of cases concerning asset recovery in favor of the state, criminal-law standards of proof are not applied. This is confirmed by judicial practice. In particular, in case No. 991/5120/24 of 24.07.2024, the High Anti-Corruption Court (hereinafter – HACC) stated the following: «*The procedure for applying the sanction in the form of asset recovery in favor of the state under conditions of martial law does not reach the level of a criminal accusation and therefore does not require providing the Respondent, under an administrative claim, with such guarantees as are established for the exercise of the 'classic' right to defense in criminal proceedings*» [10].

In cases concerning the recovery of assets in favor of the state, the HACC must establish that the respondent's actions created a significant threat to the national security, sovereignty, or territorial integrity of Ukraine, or substantially contributed to the commission of such actions by other persons. However, as noted in the analysis of the High Anti-Corruption Court's practice regarding the application of the sanction in the form of asset recovery in favor of the state for 2022–2025 by the Legislative Ideas Institute, authors T. Khutor, B. Karnaukh, A. Klymosiuk, T. Riabchenko, «*this fact must be established using not a criminal-law, but a reduced civil-law standard of proof, which the HACC somewhat inaccurately calls the «preponderance of evidence» standard*» [11]. This means that interference with an individual's property rights may occur at a significantly lower level of evidentiary proof than in criminal proceedings, despite the similarity of legal consequences.

In this context, there arises a risk of forming a kind of «parallel accountability mechanism», which allows the state to achieve an effect comparable to criminal punishment without observing the guarantees inherent in criminal proceedings. This concerns not only the absence of the requirement to prove the person's guilt beyond a reasonable doubt but also the lack of a full adversarial process, the possibility of directly examining evidence, and effectively refuting the allegations. In practice, a person suffers significant restrictions on their rights – primarily property rights – without being provided with procedural instruments traditionally considered minimally necessary for a fair hearing. Under such conditions, judicial review, even if formally available, does not always compensate for the deficit of guarantees at the stage of the decision to apply sanctions.

This gives rise to a deeper problem, manifested in the internal contradiction of the sanctions mechanism. On the one hand, sanctions are officially not recognized as measures of legal liability, which allows avoiding the application of criminal-procedural standards. On the other hand, in terms of their legal consequences, they may be identical or comparable to criminal-law restrictions, particularly regarding the actual deprivation of a person's ability to use and dispose of their property. Such a construct creates a dangerous precedent in which the state obtains an instrument of substantial interference with individual

rights without proper judicial control and without ensuring basic procedural guarantees. As a result, there is a risk of circumventing criminal-procedural standards, which undermines the rule of law and calls into question the fairness and legitimacy of applying such measures.

Accordingly, a key task of law enforcement practice should be to prevent the substitution of criminal-law mechanisms with sanctions instruments and to ensure that even in the sphere of national security, interference with individual rights remains constrained by the principles of proportionality, legal certainty, and effective judicial review.

5. Conclusions.

The conducted research allows us to assert that the sanctions mechanism in Ukraine functions as an instrument of public influence applied outside the framework of classical judicial procedure, while at the same time causing significant interference with the rights and interests of natural and legal persons.

Judicial control over the application of sanctions is limited. The Supreme Court, when considering cases on the appeal of decrees of the President of Ukraine, focuses on checking the formal legality of the respective acts, without conducting a full analysis of the factual grounds for their adoption, the sufficiency of evidence, and the proportionality of interference with the rights of the individual. Such an approach narrows the content of the right to effective judicial protection and does not ensure the real restoration of violated rights.

The absence of alternative procedures for reviewing sanctions decisions and the concentration of case consideration in the Supreme Court as the court of first instance objectively limit the possibilities for a comprehensive examination of the circumstances of the case. As a result, judicial control does not fully perform the function of restraining the discretionary powers of state authorities.

The relationship between sanctions and criminal-law measures deserves particular criticism. In their consequences, sanctions – particularly the blocking of assets and their subsequent recovery in favor of the state – are comparable to criminal-law restrictions, yet they are applied without compliance with the standard of proof of guilt, the presumption of innocence, and other basic procedural guarantees. This creates a situation in which the state effectively exercises coercive influence equivalent to criminal punishment, outside the framework of criminal proceedings.

Thus, the current model of the sanctions mechanism is characterized by structural inconsistency: formally not being a form of legal liability, sanctions perform a function close to punitive. In the absence of proper judicial control, this creates a risk of circumventing constitutional guarantees and undermines the principle of the rule of law.

To eliminate these problems, it is necessary to shift the focus of judicial control from formal verification of acts to a substantive analysis of the grounds for the application of sanctions, including the assessment of evidence and the proportionality of interference with the rights of the individual. Only with real, rather than formal, judicial control is it possible to ensure an appropriate balance between national security interests and guarantees of human rights protection.

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