**Summary to the Decision of the Grand Chamber of the Constitutional Court No. 1-r/2022 dated June 30, 2022 in the case upon the constitutional petition of 47 People's Deputies regarding the conformity of Articles 96¹ and 96² of the Criminal Code to the Constitution of Ukraine (the case on special confiscation)**

The subject of the right to constitutional petition - 47 People's Deputies - appealed to the Constitutional Court with a request to declare 96¹ and 96² of the Criminal Code (hereinafter referred to as “the Code”) regarding special confiscation and cases of application of special confiscation as such that do not comply with Articles 1, 3, 8.1, 8.2, 21, 22.2, 22.3, 41.1, 41.4, 41.6, 58, 61.2, 62.1 and 64 of the Constitution.

The Verkhovna Rada adopted the Law “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Regarding the Implementation of the Action Plan on the Liberalisation of the Visa Regime for Ukraine by the European Union” No. 222-VII dated April 18, 2013 (hereinafter referred to as “the Law No. 222”).

According to the Law No. 222, Chapter XIV of the General Part of the Code was titled “Other measures of criminal law nature” and was supplemented by Article 96¹ “Special confiscation” and Article 96² “Cases of application of special confiscation”, which define the concept of “special confiscation”, the procedure for its application, etc.

The regulation of relations with the application of special confiscation by disputed articles of the Code was carried out with the aim of adapting, unifying and harmonising the domestic legislation of Ukraine with the acts of the European Union as components of the European integration process of Ukraine. In turn, the European integration of Ukraine requires the establishment of true democracy, respect for human rights and the rule of law as common European values.

The Constitutional Court proceeds from the fact that the principle of appropriateness (proportionality) in the field of criminal law manifests itself, in particular, in the fact that the applied types of punishment and (or) other measures of a criminal law nature must be appropriate. This requirement is general, it applies to all cases of application of types of punishments, other criminal law measures, including special confiscation.

According to Article 3.3 of the Code, only the Code determines the criminal illegality of an act, as well as its punishment and other criminal law consequences.

Article 51 of the Code defines an exhaustive list of types of punishments that can be applied by the court to persons found guilty of committing a criminal offense. This list of punishments, in particular, includes confiscation of property (paragraph 7), which, according to Article 52.2 of the Code, is an additional type of punishment.

In addition to confiscation of property as a type of punishment, the Code defines special confiscation as another measure of criminal law nature (Chapter XIV “Other measures of criminal law nature” of the General Part).

Procedural decisions, on the basis of which special confiscation can be applied, are defined by Articles 96¹.2 and 96¹.3 of the Code (court verdict, court ruling on the release of a person from criminal liability, court ruling on the application of coercive measures of a medical nature, etc.).

Confiscation of property as a form of punishment and special confiscation as a measure of a criminal law nature are different in purpose, grounds, conditions, subjects and objects, that is, they are not identical.

Confiscation of property consists in the forced free seizure of property that is the property of the convicted person. As a result, confiscation of property is a type of punishment, the application of which is aimed at punishing the guilty party, correcting him/her and preventing the commission of new criminal offenses by this and other persons.

Instead, special confiscation is applied when property is seized from a person who is not the owner or bona fide owner of such property, and therefore this measure of influence on a person is non-punitive in nature, the purpose of which is to stop the use of money and other property acquired as a result of criminal or other illegal activity, as a goal or a means of criminal and illegal activity. In contrast to the confiscation of property as a form of punishment, the application of special confiscation as a measure of a criminal law nature is not affected by the severity of the intentional criminal offense committed, data characterising the person who committed such an offense, etc.

At the same time, confiscation of property and special confiscation have in common the same method of achieving the goal of application - forced free seizure of property on the basis of a relevant court decision (verdict, ruling).

The Constitutional Court notes that the application of special confiscation to a third person, on the one hand, is not related to the establishment of the fact that this person committed an intentional criminal offense or a socially dangerous act that falls under the characteristics of an act defined by the Special Part of the Code, on the other hand, the application of this criminal law measure in the form of forced free seizure of property can be qualified as excessive interference with the right to property or the right to possess property in good faith.

To ensure the effectiveness and efficiency of the guarantees provided by the Basic Law and to prevent the violation of the constitutional rights of all participants in criminal procedure relations, the state, guided by the law and the principle of respect for human rights, is obliged to organise the criminal justice system accordingly.

Therefore, in order to comply with the procedure for the application of special confiscation of the rights and interests of a third person, that is, a person who is not suspected or accused of committing an intentional criminal offense or a socially dangerous act that falls under the characteristics of an act defined by the Special Part of the Code, procedural relations with his/her participation should be properly regulated in the Criminal Procedure Code (hereinafter referred to as “CPC”). The proper regulation of legal relations involving such third party should include giving him/her, first of all, an independent procedural status and a number of relevant procedural rights and obligations by the provisions of the CPC.

From the current analysis of the provisions of the legislation establishing special confiscation and determining the subjects, objects and the procedure for its application, it follows that special confiscation is not a type of criminal punishment, therefore its application, in particular, forced free seizure of property from an unscrupulous third party, based on a court decision (verdict, ruling), does not constitute criminal liability.

Special confiscation is applied to property that, according to the provisions of the CPC, on the basis of sufficient evidence, the court in the relevant decision (verdict, ruling) recognised as obtained as a result of the commission of an intentional criminal offense or a socially dangerous act that falls under the characteristics of an act defined by the Special Part of the Code, was intended (was used) to induce a person to commit a criminal offense, finance and/or material support of a criminal offense or reward for its commission, was the subject of a criminal offense, etc. (Article 96².1 of the Code).

Thus, such state interference is based on the law, the competence to implement it is given to the most qualified law enforcement entity - the court, which records it in a legal act of individual action (verdict, ruling). It corresponds to a legitimate goal: termination the application of property as a goal or means of criminal and illegal activity

No provision of the Basic Law guarantees the protection of illegal and dishonest ownership of property temporarily acquired as a result of criminal or other illegal activity.

The Constitutional Court proceeds from the fact that ownership of property, acquired as a result of the commission of an intentional criminal offense or a socially dangerous act falling under the characteristics of an act defined by the Special Part of the Code, can be qualified neither as a “law-defined” procedure for acquiring the right to property ownership (Article 41.2 of the Constitution), nor as a “not prohibited by law” basis for acquiring the right of ownership or the right to possess property in good faith (Article 328 of the Civil Code).

The application of special confiscation terminates not the right of ownership or the right of bona fide possession of property, but illegal and dishonest possession, temporarily acquired as a result of the commission of an intentional criminal offense or a socially dangerous act that falls under the characteristics of an act defined by the Special Part of the Code, i.e. in violation of the provisions of the Constitution and laws, rights and interests of participants in social relations.

Thus, the Constitutional Court of Ukraine held to declare Articles 96¹ and 96² of the Criminal Code as conforming to the Constitution of Ukraine (constitutional).

*References:*

Decisions of the Constitutional Court:

* No. 9-rp/99 dated October 27, 1999,
* No. 16-rp/2004 dated November 11, 2004,
* No. 3-rp/2012 dated January 25, 2012,
* No. 1-r/2019 dated February 26, 2019,
* No. 3-r(ІІ)/2021 dated July 21, 2021,
* No.5-r(ІІ)/2022 dated June 22, 2022,

Judgments of the European Court of Human Rights:

* Gogitidze and Others v. Georgia dated May 12, 2015 (application No. 36862/05),
* Iatridis v. Greece dated March 25, 1999 (application No. 31107/96),
* Frizen v. Russia dated March 24, 2005 (application No. 58254/00),

First Protocol to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms,

United Nations Convention against Transnational Organized Crime dated November 15, 2000,

United Nations Convention against corruption dated October 31, 2003,

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime dated November 8, 1990 (ETS No. 141),

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism dated May 16, 2005 (CETS No. 198),

Criminal Law Convention on Corruption dated January 27, 1999 (ETS No. 173),

Evaluation report based on the results of the Joint First and Second rounds of evaluation regarding Ukraine [GRECO Eval I-II Rep (2006) 2 E], approved by GRECO (Group of States against corruption) at its 32nd Plenary Meeting (Strasbourg, 19–23 March 2007),

Report on the Implementation of the Recommendations [GRECO RC-I/II (2009) 1E], approved on 11-13 May 2009 at the 42nd GRECO Plenary Meeting,

Supplementary Implementation Report [GRECO RC-I/II (2009) 2E], approved on 23-27 May 2011 at the 51st GRECO Plenary Meeting,

Second Supplementary Implementation Report [GRECO RC-I/II (2009) 1E], approved on 20-23 March 2012 at the 54th GRECO Plenary Meeting,

A summary of the Organization for Economic Cooperation and Development's assessment and recommendations for Ukraine (as part of the “Istanbul Anti-Corruption Action Plan - Regional Anti-Corruption Action Plan for Armenia, Azerbaijan, Georgia, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine” dated January 21, 2004),

International standards for combating money laundering and the financing of terrorism and arms proliferation, prepared by the Financial Action Task Force on Money Laundering (in the 2012 wording),

Technical guide to the UN Convention on Combating Corruption,

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.