**Identification: UKR-2021-**

а) Ukraine/ b) Constitutional Court / с) Second Senate/ d) 21.07.2021 / е) № 3-r (II)/2021 / f) on the constitutionality of certain provisions of Article 471.2 of the Customs Code / g) Офіційний вісник України, Ophitsiynyi Visnyk Ukrayiny (Official Gazette) № / 2021 / h)

**Keywords of the Systematic Thesaurus:**

**05.03.13.01.04** **Fundamental Rights** **-** Civil and political rights - Procedural safeguards, rights of the defence and fair trial - Scope - Litigious administrative proceedings

**05.03.39.03** **Fundamental Rights** **-** Civil and political rights - Right to property - Other limitations

**Keywords of the alphabetical index:**

Property, confiscation, court, decision, exclusively/property, right, limitation/ penalty, administrative, confiscation/ limitation, goods, transborder, movement, “corridor”, “green” /

**Headnotes:**

Separate provisions of Article 471.2 of the Customs Code, namely "in case if the direct objects of the offense are goods which movement across the customs border of Ukraine is prohibited or restricted by the legislation of Ukraine - also confiscation of these goods" do not comply with the Constitution of Ukraine (are unconstitutional).

**Summary:**

Olena Odintsova appealed to the Constitutional Court to consider the constitutionality of separate provisions of Article 471.2 of the Customs Code (hereinafter - the Code), which defines the responsibility for violating the procedure for customs control in areas (corridors) of simplified customs control.

The complainant considers that the content of the "sanction" of Article 471 of the Code does not comply with Articles 8.1, 41.1, 41.4, 41.6 of the Constitution, as it provides for disproportionate, unbalanced, unjust punishment in the form of confiscation of funds, circulation and cross-border movement of which is not prohibited or restricted by any normative document; the application of foreclosure in the form of confiscation under this article of the Code is unalterable, inflexible and peremptory, and therefore disproportionate, unfair and inconsistent with the rule of law, and also looks like an excessive property burden for the citizen, does not meet public interests and is a state interference in the peaceful possession of property.

The requirements for confiscation of property set forth in the provisions of Article 41.6 of the Basic Law, which must be applied only by court decision in cases, to the extent and in the manner prescribed by law, are constitutional guarantees of inviolability of private property and are aimed at protecting every person from unlawful deprivation of property belonging to him or her on legal grounds. The Constitutional Court notes that restrictions on the right to private property may be established at the legislative level, in particular in the form of confiscation of property.

The Constitutional Court emphasises that in accordance with the principle of the rule of law, the legislator may not arbitrarily restrict the constitutional human and citizen’s rights and freedoms in determining the cases, procedure and amount of confiscation of property.

In accordance with certain provisions of Article 471.2 of the Code, the movement across the customs border of Ukraine by a person who has chosen the form of customs control passage through the "green corridor", including goods which movement across the customs border of Ukraine is prohibited or restricted by Ukrainian legislation, including currency values in the amount exceeding the equivalent of 10 thousand euros, if such goods are the direct objects of the offense, results in two administrative penalties: the main - a fine of one hundred non-taxable minimum incomes and additional - confiscation of these goods.

The Constitutional Court, assessing the provisions of Articles 458 and 465 of the Code, emphasises that confiscation of these goods is a type of administrative penalty for an administrative offense established in Article 471 of the Code and applies to the property of a person belonging to him or her, including on legal grounds, so such confiscation is incompatible with the established by Article 41.4 of the Constitution inviolability of the right of private property.

Confiscation of goods as deprivation of property rights under Article 471 of the Code is aimed at ensuring the constitutional order, security of society, human rights and freedoms and is an appropriate measure.

The Constitutional Court draws attention to the fact that the restriction of property rights in the interests of society requires not any measures that are less burdensome for the rights and freedoms of individuals, but those that are able to achieve a legitimate goal at the same quality level. That is, the legislator is obliged to choose the type of administrative penalty that is less burdensome for the rights and freedoms of the individual in a particular case, and must first determine an adequate measure of administrative responsibility to achieve its goal, while courts provide individualisation of such responsibility depending on the circumstances of the case within the sanction defined by law.

According to Article 471 of the Code, the mandatory confiscation of these goods for violation of customs control in the zones (corridors) of simplified customs control is justified by the need to achieve a deterrent effect from such offenses, reduce existing risks and is a necessary measure given the legitimate purpose of deprivation of property rights.

The Constitutional Court notes that the public benefit of administrative penalties for administrative offenses is not to replenish the state budget, but to ensure the constitutional order, security of society and the rights and freedoms of every person. Public benefit from the use of confiscation of goods under Article 471 of the Code as an administrative penalty is not measured in property equivalent, its essence is to achieve a lasting effect of protection of customs interests of Ukraine, customs security through the introduction of adequate measures of administrative responsibility. However, for the rights and freedoms of a person, the damage from this administrative penalty, which is defined by Article 471 of the Code, should not be excessive, which is a necessary condition for maintaining a fair balance between the requirements of public interest and protection of property rights of individuals.

Legal regulation of cross-border movement of currency values ​​in Ukraine determines that the actual movement across the customs border of Ukraine of currency values ​​in excess of the equivalent of 10 thousand euros does not necessitate payment of customs duties or any other payments in favor of the state, but only requires compliance with the additional requirements established by the legislator for the written declaration of these values, after exercising of which the prohibitions or restrictions do not apply to such movement, and it is not characterised as illegal in accordance with the laws of Ukraine.

The disputed provisions of Article 471 of the Code do not ensure a fair balance between the requirements of public interest and protection of property rights and allow unjustified deprivation of such rights, because according to these provisions of the Code, currency values in the amount exceeding the equivalent of 10 thousand euros are subject to mandatory confiscation, in any case and in full, regardless of the legality of their source and purpose of further use, the form of guilt of the person and the negative impact of such confiscation on his or her property.

In view of this, the principle of the rule of law, in particular its requirement as the principle of proportionality, are interrelated fundamental principles of the functioning of the entire legal system of Ukraine, including the normative establishment of administrative liability by the legislator. Specific sanctions for administrative offenses must be fair and commensurate with the principles of proportionality, i.e. the legislator must determine administrative penalties taking into account their justification and the need to achieve a legitimate aim, taking into account the requirements of the adequacy of the consequences caused by such sanctions (including for the person to whom they apply), the damage resulting from an administrative offense.

The Constitutional Court concludes that the issue of choosing the type of administrative penalty in accordance with Article 92.1.22 of the Constitution is decided exclusively by the legislator, taking into account the provisions of the Constitution, in particular the principle of the rule of law.

The impugned provisions of Article 471 of the Code have a criminal nature both in their punitive and deterrent purpose and in the severity of the additional mandatory administrative penalty in the form of confiscation of certain goods, so the imposition of such a penalty should be based on the principles and guarantees inherent in criminal proceedings.

The Constitutional Court considers that in order to ensure the fairness of sentencing in criminal proceedings, its proportionality of the gravity of the crime, the court in accordance with the Criminal Code is endowed with discretion on the forms of criminal liability.

Given the provisions of the Special Part of the Criminal Code, which contain such a type of punishment as confiscation of property, the Constitutional Court stresses that even when confiscation of property is imposed alongside the most severe basic punishment - imprisonment, then such additional mandatory punishment is the discretion of the court according to the provisions of Article 69 of this Code.

Instead, the disputed provisions of Article 471 of the Code establish mandatory confiscation in any case and in full amount of currency values in excess of the equivalent of 10 thousand euros, as goods which movement across the customs border of Ukraine is restricted by law, if such goods are direct objects of the offense. The Code of Administrative Offenses does not provide for procedural mechanisms that would allow courts to reduce the measure of administrative liability set out in Article 471 of the Code, depending on the mitigating circumstances of the case, and would allow such confiscation to be applied in part or not at all. According to Article 22 of the Code of Administrative Offenses, only exemption from administrative liability is possible in case of insignificance of the committed administrative offense.

The application of confiscation of these goods under the disputed provisions of Article 471 of the Code in cases of administrative offenses is not carried out on all principles and guarantees of criminal proceedings, in particular, does not take into account constitutional guarantees in criminal proceedings to ensure fairness of punishment, indicating excessive and arbitrary nature of such administrative penalty.

References:

*Decisions of the Constitutional Court of Ukraine:*

No. 15-rp/2004 of November 2, 2004

No. 24-rp/2008 of October 16, 2008

No. 23-rp/2010 of December 22, 2010

No. 2-rp/2016 of June 1, 2016

No. 3-r(I)/2019 of June 5, 2019

*Judgments of the European Court of Human Rights:*

* in the case of “Sadokha v. Ukraine” of 11 July 2019 (application No.77508/11);
* in the case of “Gyrlyan v. Russia” of 9 October 2018 (application No.35943/15);
* in the case of “Engel and Others v. the Netherlands” of 8 June 1976 (applications No.No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72);
* in the case of “Nadtochiy v. Ukraine” of 15 May 2008 (application No.7460/03).

*International Treaties, Agreements and Other Acts of International Law:*

United Nations Convention against Transnational Organized Crime adopted by the UN General Assembly (Resolution 55/25 of November 15, 2000).

**Language:** Ukrainian.