**Summary to the Decision of the Second Senate of the Constitutional Court of June 15, 2022 No. 4-r(II)/2022 in the case upon constitutional complaints of Hevork Barsehian and Nataliia Linenko on compliance of Article 485 of the Customs Code of Ukraine with the Constitution of Ukraine (regarding the individualisation of legal liability)**

H.S. Barsehian and N.M. Linenko, as subjects of the right to constitutional complaint, appealed to the Constitutional Court with requests to review the constitutionality of Article 485 of the Customs Code Ukraine (hereinafter referred to as the Code).

H.S. Barsehian and N.M. Linenko argued that Article 485 of the Code is inconsistent with Articles 41.1, 48, and 61.2 of the Constitution.

As the two constitutional complaints dealt with the same subject matter, the Second Senate of the Constitutional Court by its Resolution of June 16, 2021 No. 4-up(ІІ)/2021 merged constitutional proceedings into one constitutional proceedings.

In his constitutional complaint, H.S. Barsehian noted that “the sanction of the norm enshrined in Article 485.1 of the Customs Code limited the complainant’s right guaranteed by Article 61 of the Constitution to individualise his legal liability. The legislator, without foreseeing the possibility for complainant to refer during the consideration of the case on violation of customs rules and during the trial to the specific circumstances of the offense, property status, as well as other circumstances that could mitigate his responsibility and affect the penalty, thereby admitted that his constitutional rights was limited. By preventing the complainant from seeking a fine in the amount commensurate with the circumstances of a particular offense, the impugned provision of the Customs Code made it impossible to individualise the penalty and ensure a fair consideration of the case.”

The complainant also believed that “the unhindered (only to a triple size sum of unpaid customs payments) amount of a fine for violation of customs rules, provided for in Article 485 of the Customs Code, turns into an instrument for depriving a person of his/her property, suppressing economic independence and initiatives that excessively restrict the right to an adequate standard of living that does not meet the requirements of Articles 41 and 48 of the Constitution.”

In her constitutional complaint, N.M. Linenko argued that Article 485 of the Code does not define alternative types of sanctions for the commission of the relevant offense, which does not allow “to apply this provision given the principle of individualisation of legal liability of the offender, which is contrary to Article 61.2 of the Constitution.”

The principle of individualisation of legal liability in the procedure for bringing a person to administrative responsibility, with reference to Article 485 of the Code, should be manifested not only in bringing to justice a person guilty of an offense, but also in assigning him/her the type and the amount of punishment, with the obligatory consideration of the nature of the committed illegal act, type of guilt, the characteristics of this person, the possibility of compensation for the harm caused, the existence of circumstances mitigating or aggravating responsibility.

The legitimate aim of establishing certain restrictions on the rights and freedoms of a person and a citizen in the field of customs relations, and bringing the perpetrator to justice for the violation of customs rules, is the need to protect the customs interests and customs security of Ukraine.

An analysis of the norms enshrined in the Code and the Code of Administrative Offenses, regulating relations regarding bringing a person to administrative responsibility for the violation of customs rules, demonstrates these norms should develop, concretise and detail the principles of the Basic Law, particularly, the principle of individualisation of legal liability, defined in Article 61.2 of the Constitution.

The Constitutional Court first acknowledges the possibility of establishing in acts of public legislation (administrative, criminal, etc.) absolutely definite and (or) uncontested sanctions, which is undoubtedly a positive phenomenon in the case when the subject of law enforcement is a non-judicial body.

At the same time, the Constitutional Court reiterates that in the legislative regulation of relations on bringing a person to administrative or criminal liability, the constitutional principle of individualisation of legal liability must be observed.

Accordingly, the establishment of absolutely definite and (or) uncontested sanctions in acts of public law should be balanced with providing discretion to the subject of imposing an administrative penalty or criminal punishment on the issue of determining the type and amount of the penalty or punishment, given the nature of the committed unlawful act, the form of characterisation of the person guilty in the commission of an offense, the possibility of compensation for the harm caused, the existence of circumstances mitigating or aggravating liability.

Assessing the impugned provision of Article 485 of the Code for compliance with the principle of individualisation of legal liability, the Court takes into account that this provision establishes responsibility for a number of different unlawful acts, defined in the first paragraph of the same Article of the Code. These acts, although they have the key unifying feature, namely the aim, the “evasion of customs payments”, are different in terms of the degree of social harmfulness, content, etc.

Despite such a variety of objective aspects of this administrative offense, the sanction of Article 485 of the Code has the characteristics of a definite and non-alternative, that is, one that establishes only one type of penalty, a fine, which is also determined at a constant interest rate.

At the same time, due to the absence of other types of penalties in the impugned provision of Article 485 of the Code, and the impossibility of changing the percentage amount on which the fine is determined, it is impossible to implement the principle of individualisation of the legal liability of the violator of customs rules, given the nature of the committed illegal act, the type of guilt, the characteristics of the person guilty, the possibility of compensation for the harm caused, the existence of circumstances mitigating or aggravating liability.

The need to individualise the size of the fine is urgent in cases where this amount is significant, as a result of which its application may be an excessive interference with a number of constitutional rights of the guilty person.

According to the Court’s opinion, established in the impugned provision of Article 485, the deprivation of the subject of imposition of an administrative penalty (customs authority) from the possibility of individualising an administrative penalty, given the entire circumstances of the case, makes it impossible to implement the principle of individualisation of legal liability when bringing a person to administrative responsibility on the basis of Article 485 of the Code and does not create a proper legal basis for the application of appropriate measures to the violator of customs regulations.

Assessing Article 485.2 of the Code in the context of creating preconditions for preventing excessive interference with a person’s property rights in order to ensure a fair balance between the requirements of public interest in protecting Ukraine’s customs interests and security, on the one hand, and protecting property rights, on the other, the Constitutional Court came to the conclusion that this provision of Article 485 of the Code does not provide the desired flexibility in the actions and decisions of public authorities in determining the amount of the fine against the offender, given all the circumstances of the case. For this reason, due to the application of the impugned provision of Article 485 of the Code, a fair balance between the requirements of public interest and protection of property rights is not provided, and this provision is the normative basis for excessive interference with property rights guaranteed by the Basic Law of Ukraine.

The Constitutional Court takes into account that the recognition of Article 485.2 of the Code as unconstitutional will exclude the possibility of holding persons liable for actions and (or) inaction aimed at unlawfully exempting from paying customs duties or reducing their size, as well as other illegal acts aimed at evasion.

In order to prevent violation of the customs interests and customs security of Ukraine, the Constitutional Court considers it appropriate to postpone the termination of Article 485.2 for six months since the adoption of this Decision by the Constitutional Court.

Thus, the Constitutional Court of Ukraine held to declare Article 485.2 of the Customs Code to be inconsistent with the Constitution (unconstitutional). It shall cease to have effect in six months after the adoption of this Decision by the Constitutional Court.

The Verkhovna Rada shall bring the normative regulation established by Article 485.2 of the Customs Code of Ukraine, which was declared unconstitutional, in line with the Constitution of Ukraine and this Decision.

*References:*

Decisions of the Constitutional Court of Ukraine:

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

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

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

No. 11-r/2020 of September 16, 2020,

No. 3-r(II)/2021 of July 21, 2021.

Judgments of the European Court of Human Rights:

 “Engel and others v. The Netherlands” of June 8, 1976 (applications No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72),

“Lutz v. Germany” of August 25, 1987 (application No. № 9912/820),

“Gurepka v. Ukraine” of September 6, 2005 (application No. 61406/00),

“A. Menarini Diagnostics S.R.L. v. Italy” of September 27, 2011 (application No. 43509/08),

“Imeri v. Croatia” of June 24, 2021 (application No. 77668/14),

“The Former King of Greece and Others v. Greece [GC]” of November 28, 2002 (application No. 25701/94),

“Jahn and Others v. Germany [GC]” of June 30, 2005 (applications No. 46720/99, 72203/01, 72552/01),

“Gogitidze and Others v. Georgiа” of May 12, 2015 (application No. 36862/05),

“Krayeva v. Ukraine” of January 13, 2022 (application No. 72858/13)/

Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.