**Summary to the Decision of the First Senate of the Constitutional Court of Ukraine dated October 12, 2022 No. 8-r(І)/2022 in the case upon the constitutional complaint of Roman Unukovych regarding the compliance of a separate provision of Article 204-3.1.2 of the Code of Ukraine on Administrative Offenses with the Constitution of Ukraine**

The subject of the right to constitutional complaint argues that the mandatory application of the confiscation of goods does not meet the criteria of justice and reasonableness, therefore the provision of paragraph 2 of Article 204-3.1 of the Code “with the confiscation of such goods” contradicts the provisions of Articles 8.1, 41.1, 41.4, 41.6, 64.1 of the Basic Law.

The Constitutional Court emphasises that the Verkhovna Rada has the authority to adopt laws regulating the grounds and procedure for bringing persons to administrative liability, observing constitutional norms and principles.

Administrative liability for violation of the procedure of movement of goods to or from the area of an anti-terrorist operation was imposed in view of the adoption of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Regarding the Procedure of Movement of Goods to or from the Area of an Anti-Terrorist Operation” dated July 17, 2015 No. 649-VIII.

According to the Constitutional Court, the state (a body of state power) using appropriate measures to control the movement of goods to or from uncontrolled territories of Ukraine has a legitimate goal, because control over the movement of goods not only affects the level of the state’s defenсe capabilities, the possibility of deterring armed aggression, but also helps to reduce the number of other crimes/offences. The general requirement to notify the movement of goods, which applies to any person crossing an administrative border at checkpoints, prevents the clandestine import and export of goods/cash, and confiscation as a result of failure to report them to the relevant authorities is part of the overall regulatory framework established to combat these crimes/offences. In order to achieve a legitimate goal in the case of applying restrictions on the exercise of constitutional rights and freedoms, the legislative regulation of the procedure for bringing a person to legal liability must necessarily be based on the constitutional principle of individualiіation of legal liability (assigning a person to a certain type and amount of punishment/penalty with mandatory consideration of the nature of the committed illegal act, form of guilt, characteristics of the guilty person, compensation for the damage caused, circumstances mitigating or aggravating liability).

The Constitutional Court observes that the state establishes as necessary those measures of intervention in the right to property, which make it possible to achieve a legitimate goal in compliance with the principles of lawful intervention; the legislator must determine a proportionate measure of administrative liability to achieve a legitimate goal, and the courts must ensure the individualisation of such liability depending on the circumstances of the case.

Article 204-3 of the Code establishes liability for violation of the procedure for moving goods to or from the area of an anti-terrorist operation and defines their confiscation as an alternative type of sanction – “imposing a fine on persons who move such goods from ten to one hundred tax-free minimum incomes of citizens with confiscation of such goods”. The specified provision of the Code has an imperative character; confiscation of the subject, which has become the direct object of an administrative offense, is mandatory in such a case. The Constitutional Court notes that it follows from the content of Article 204-3.1 of the Code that the legislator did not determine a fair measure of administrative liability to achieve a legitimate goal, as a result of which the courts, taking into account the imperative nature of the disputed provision of the specified Article of the Code, cannot ensure the individualisation of such liability depending on the circumstances cases in view of the impossibility of changing the type of administrative punishment taking into account the nature of the committed illegal act, the form of guilt, the characteristics of the person, the possibility of compensation for the damage caused, the presence of circumstances mitigating or aggravating liability.

The Constitutional Court considers that the application of the provision of Article 204-3.1 of the Code makes it impossible for the court to resolve the issue of the expediency of applying to the guilty person a penalty in the form of confiscation of goods and does not ensure the achievement of a fair balance between the requirements of public interests and the protection of a person's property rights, and therefore, this provision of the Code allows unjustified deprivation of such a right, as it establishes that any goods are subject to mandatory confiscation in any case in full, regardless of the legality of the source of its origin, the purpose of further application and the negative impact of such confiscation on a person’s property. Regardless of whether the confiscated amount (the value of the confiscated goods) will be significant for the person who is brought to administrative liability, or whether damage has been caused to the state, if the person is found guilty, the question of the legality of the origin of the funds does not affect the adoption of confiscation judgments by the courts. Accordingly, a person will not be able to exercise his right to a fair trial, and therefore the interference with the right to property cannot be considered proportionate. Thus, the specific provision of Article 204-3.1 of the Code regarding the non-alternative nature of confiscation of goods is such that it contradicts Articles 8.1, 8.2, 41.1, 41.4, and 64.1 of the Constitution.

The Constitutional Court considers it expedient, in order to prevent offenses encroaching on the established management procedure, to postpone the loss of effect of a specific provision of paragraph 2 of Article 204-3.1 of the Code for six months from the date of adoption of this Decision by the Constitutional Court. The Verkhovna Rada, from the date of adoption of this Decision, but no later than six months from the date of adoption of this Decision by the Constitutional Court, shall bring the normative regulation established by a specific provision of paragraph 2 of Article 204-3.1 of the Code, which is declared unconstitutional, into compliance with the Constitution and this Decision.

Thus, the Constitutional Court of Ukraine held to declare the provision of the second paragraph of Article 204-3.1 of the Code of Administrative Offenses, namely the wording “with the confiscation of such goods” (regarding the lack of alternative to the confiscation of such goods) as such that do not comply with the Constitution (are unconstitutional). The said provision shall lose its effect six months after delivering this Decision by the Constitutional Court.

**References:**

Decisions of the Constitutional Court:

No. 15-rp/2004 dated November 2, 2004;

No. 26-rp/2009 dated October 19, 2009;

No. 23-rp/2010 dated December 22, 2010;

No. 5-rp/2015 dated May 26, 2015;

No. 3-rp/2019 dated June 5, 2019;

No. 11-rp/2020 dated September 16, 2020;

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

No. 4-r(II)/2022 dated June 15, 2022;

Judgments of the European Court of Human Rights:

Engel and others v. The Netherlands dated June 8, 1976 (applications Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72),

Gurepka v. Ukraine dated September 6, 2005 (application No. 61406/00),

А. Menarini Diagnostics S.R.L. v. ltaly dated June 27, 2011 (application No. 43509/08),

Gabric v. Croatia dated February 5, 2009 (application No. 9702/04),

Viktor Konovalov v. Russia dated May 24, 2007 (application No. 43626/02),

Gyrlyan v. Russia dated October 9, 2018 (application No. 35943/15),

Boljevic v. Croatia dated January 31, 2017 ( application No. 43492/11 ),

Yaremiychuk and others v. України dated December 9, 2021 (application No. 2720/13 and six other applications),

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (Adopted by General Assembly resolution 45/110 of 14 December 1990),

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