**Summary to the Decision of the Second Senate of the Constitutional Court of Ukraine dated November 16, 2022 No. 9-r(ІI)/2022 in the case upon the constitutional complaint of Private Joint-Stock Company “Odesteplokomunenergo” regarding the compliance of a separate provision of Article 37 of the Law of Ukraine “On State Registration of Property Rights to Immovable Property and Encumbrances” with the Constitution of Ukraine (regarding the inviolability of property rights)**

The Private Joint-Stock Company “Odesteplocomunenergo” (hereinafter referred to as the Company) appealed to the Constitutional Court with a request to consider the constitutionality of subparagraph “a” of Article 37.6.2 of the Law “On State Registration of Property Rights to Immovable Property and Encumbrances” dated July 1, 2004 No. 1952-IV as amended (hereinafter referred to as the Law).

According to subparagraph “a” of Article 37.6.2 of the Law, the Ministry of Justice and its territorial bodies make a reasoned decision to satisfy (in full or partially) the complaint in the manner of making a decision on “cancellation of the decision on state registration of rights”.

The Constitutional Court takes into account that in line with subparagraph 14 of paragraph 2 of Section I of the Law “On Amendments to Certain Laws of Ukraine Regarding the Improvement of the Anti-Raiding Mechanism” dated May 12, 2022 No. 2255-IX (hereinafter referred to as the Law No. 2255), Article 37 of the Law was set out in a new edition.

As a result, subparagraph “a” of Article 37.6.2 of the Law is set out in Article 37.7.1 of the Law as amended by Law No. 2255, namely, “cancellation of the decision of the state registrar, cancellation of the decision of the territorial body of the Ministry of Justice”.

In assessing the amendments to Article 37 of the Law in the context of maintaining the subject of constitutional review in this case, the Constitutional Court is guided primarily by the reasoning that the introduction of amendments to normative acts for their improvement is a recurring and, under certain conditions, a desirable feature of law-making activity.

At the same time, the introduction of amendments to the laws and other normative acts is not a ground for terminating constitutional proceedings in the case when the subject of constitutional review is a provision that has not lost its validity, but was only set forth in an unchanged version in another structural part of the act, or has undergone such changes that do not affect its essential content. In these cases, the Constitutional Court, in order to protect the Constitution and constitutional rights and freedoms, continues to consider the case on the merits.

The acquisition of ownership rights to immovable property is based on several legal facts: on the basis of the emergence of ownership rights in the sense of Article 11 of the Civil Code (agreement and other transactions, etc.), the decision on state registration of rights, the corresponding registration entry in the State Register of Rights. The specified legal facts collectively constitute a complex legal fact.

Under the current legislation, a person acquires the right of ownership of real estate and has the opportunity to fully exercise it, in particular, by disposing of his/her property, after state registration of ownership of real estate, i.e. availability) of the corresponding registration entry in the State Register of Rights.

According to the Constitution, the legal positions of the Constitutional Court, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the case law of the European Court of Human Rights, the right to property is not absolute and may be subject to certain restrictions. However, any interference with property rights must be based on the law, have a legitimate aim and be proportionate.

In the impugned provision of Article 37 of the Law, it is determined that in case of satisfaction of a complaint against decisions, actions or omissions in the field of state registration of rights or confirmation of the fact that other persons use the state registrar’s access identifiers to the State Register of Rights by other persons, the Ministry of Justice, its territorial bodies take a decision “to cancel the decision of the state registrar”.

Therefore, the powers of the Ministry of Justice to cancel the decision on state registration of rights are based on the Law.

The procedure for acquiring ownership of immovable property, determined in the Law, the Civil Code and other legal acts, should protect owners from violation of their rights and from unreasonable acquisition of rights by unscrupulous acquirers due, in particular, to the commission of criminal, other unlawful and (or) bad faith actions aimed at seizure of someone else’s property, as well as a result of making erroneous or illegal decisions and actions in the field of state registration of rights, etc.

The Constitutional Court came to the conclusion that the possibility of appealing against decisions, actions or omissions in the field of state registration of rights and the powers of the Ministry of Justice to consider these complaints and adopt decisions based on the results of such consideration testify to the legitimacy of the purpose of the Law, i.e. to ensure state protection of property rights as one of the constitutional values.

The Constitutional Court states that the adoption by the Ministry of Justice of a decision to cancel the state registration of ownership of real estate can be qualified as the termination of official recognition and confirmation by the state of the legal fact of acquiring such a right by a person, as a result of which an entry is made in the State Register of Rights about cancellation of state registration of ownership.

Therefore, as a result of making a registration entry on the cancellation of the state registration of property rights in the State Register of Rights, the Company loses the opportunity to freely and at its own discretion dispose of real estate in the way of its alienation, since under the current legislation, the alienation of real estate is possible only if there is a registration entry on state registration of the right ownership of such property.

Although the Ministry of Justice’s application of the impugned provision of Article 37 of the Law does not deprive the Company of the right to ownership of immovable property, as a result of the cancellation of the decision on state registration of rights and the entry into the State Register of Rights of a registration entry on the cancellation of state registration of rights, the state does not officially recognise and does not confirm the existence of Company’s ownership on real estate.

The norms-principles formulated in Articles 3.2, 8.1 of the Constitution oblige the state to guarantee and ensure human rights and freedoms in the manner and within the limits determined by the Constitution and laws, as well as to refrain from bringing a person to legal liability or applying other excessive sanctions to him/her in case of erroneous or unlawful decisions, actions or omissions of public authorities and other bodies or persons exercising the functions of the state.

The Constitutional Court proceeds from the premise that the state, in fulfilling its main duty – asserting and ensuring human rights and freedoms – and supporting the effectiveness of the principle of the rule of law, must not only refrain from using excessive means of interference with the right to property and other good faith possession, but also take appropriate measures to ensure that everyone at their own discretion can freely exercise them, taking into account the limits of the exercise of such rights, which are established by the law, the provisions of which correspond to the principle of legal certainty, are aimed at achieving a legitimate goal and are proportionate.

The cancellation by the Ministry of Justice of the decision on state registration of the Company’s property rights is an interference with its property rights, since in the absence of a corresponding entry in the State Register of Rights, the Company cannot freely and at its own discretion dispose of its property. In addition, the adoption by the Ministry of Justice of such a decision terminates the official recognition and confirmation by the state of the Company's ownership of real estate and the legal fact of acquiring this right, as a result of which the very existence of the Company’s ownership is questionable.

The Constitutional Court ascertains the legitimacy of the aim of interfering with the ownership of the Company to protect the public interest in preventing the acquisition of ownership rights to immovable property as a result of erroneous or illegal actions of state registrars and (or) other persons.

However, the state, when interfering with the ownership of the Company, must take into account the need to ensure, in such an interference, a “fair balance” in protecting the specified public interest and protecting the right to property as one of the fundamental rights, and thus is obliged to achieve proportionality in the application of legal means by which the owner, to satisfy a certain public interest, is either deprived or restricted in the exercise of its right of ownership.

The Constitutional Court draws attention to the fact that the grounds for cancellation of the state registrar’s decision were the erroneous actions and decisions of the state registrar itself, and not the mistakes or illegal actions of the Company, and also that the impugned provision of Article 37 of the Law does not empower the Ministry of Justice with the authority to make decisions that are not connected with the cancellation of the state registration of the Company’s property right, and (or) a decision to pay the Company compensation or other type of appropriate compensation due to the fact that the interference with its property rights occurred as a result of erroneous actions and decisions of the state registrar, that is, the entity that performed the actions and decide on the performance of the functions of the state.

Thus, the Constitutional Court of Ukraine held to declare Article 37.7.1 of the Law “On State Registration of Property Rights to Immovable Property and Encumbrances” dated July 1, 2004 No. 1952-IV as amended by the Law “On Amendments to Certain Laws of Ukraine Regarding the Improvement of the Anti-Raiding Mechanism” dated May 12, 2022 No. 2255-IX, namely the wording “cancellation of the decision of the state registrar” 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.

The Verkhovna Rada, within six months from the date of adoption of this Decision, should bring the normative regulation established by Article 37.7.1 of the Law “On State Registration of Property Rights to Immovable Property and Encumbrances” dated July 1, 2004 No. 1952-IV, as amended by the Law “On Amendments to Certain Laws of Ukraine Regarding the Improvement of the Anti-Raiding Mechanism” dated May 12, 2022 No. 2255-IX, in accordance with the Constitution and this Decision.

**References:**

Decisions of the Constitutional Court of Ukraine:

- No. 6-rp/2001dated May 23, 2001,

- No. 7-rp/2001 dated May 30, 2001,

- No. 3-rp/2002 dated February 12, 2002,

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

- No. 14-rp/2011 dated November 9, 2011,

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

- No. 5-r(ІІ)/2020 dated June 18, 2020,

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

- No. 6-r(ІІ)/2022 dated June 22, 2022,

- No. 1-r/2022 dated June 30, 2022,

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

The first protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,

Judgments of the European Court of Human Rights:

- Beyeler v. Italy dated January 5, 2000 (application no. 33202/96),

- Krayeva v. Ukraine dated January 1, 3, 2022 (application no. 72858/13),

- East/West Alliance Limited v. Ukraine dated January 23, 2014 (application no. 19336/04),

- Scordino v. Italy (No. 1) dated March 29, 2006 (application no. 36813/97),

- Rysovskyi v. Ukraine dated October 20, 2011 (application no. 29979/04),

- Kryvenkyy v. Ukraine dated February 16, 2017 (application no. 43768/07),

Report on the Rule of Law adopted by the European Commission for Democracy through Law (Venice Commission) at its 86th plenary session on 25-26 March 2011 [CDL-AD(2011)003rev],

Study No. 711/2013 of the European Commission for Democracy through Law (Venice Commission) “Rule of Law Checklist” [CDL-AD(2016)007].