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Problems of Criminal Law Regulation of Special Confiscation in Ukraine

Anna Vynnyk[1], Iryna Hazdayka-Vasylyshyn[2],
Taras Sozanskyi[3] & Vitalii Gatseliuk[4]

Abstract

The purpose of the article is to study the main problematic aspects of the legal regulation of special confiscation in the Criminal Code of Ukraine, which are related to legislative changes introduced by the Law of Ukraine "On amendments to certain legislative acts of Ukraine regarding a simplified pre-trial investigation of certain categories of criminal offences" from November 22, 2018 and the issue raised at the constitutional level regarding the inconsistency of the provisions on special confiscation with the Constitution of Ukraine. To obtain reliable results, a number of philosophical, general scientific and special research methods were used, namely: dialectical, formal-logical, hermeneutic, logical-semantic, comparative-legal, etc. As a result of the study, the following was proved: the Ukrainian criminal legislation on special confiscation remains imperfect in terms of regulating the grounds and procedure for applying this measure of a criminal law nature; the main shortcomings of the legal regulation are due to both unsystematic legislative changes and the imperfection of legal techniques during their introduction.

Keywords: Special Confiscation, Confiscation of Property, Measure of Criminal Law Nature, Security Measure, Punishment.

Introduction

Transformation of scientific approaches to the issue of criminal law response of the state to committing criminal offenses, introduction of special confiscation into national legislation and granting it a separate criminal law status is a positive trend and reflects Ukraine's compliance with the chosen vector of European integration. The latter, in turn, requires not just bringing the current domestic legislation in line with the legislation of the European Union, but first and foremost – the effectiveness of the

[1]Department of Criminal Law and Criminology,Lviv State University of Internal Affairs, Lviv, Ukraine. Ukraine.anna.vynnyk@ukr.net
[2]Department of Criminal Law and Criminology, Lviv State University of Internal Affairs, Lviv, Ukraine. iryna.hazdayka_vasylyshyn@ukr.net
[3]Department of Criminal Law and Criminology, Lviv State University of Internal Affairs, Lviv, Ukraine. taras.sozanskyi@proton.me
[4]Department of Criminal Law, Criminology and Judicial System Issues, V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Kyiv, Ukraine. vitalii.gatseliuk@outlook.com

rules and the legality of those instruments used by the state to protect human rights and interests. As noted in the literature, the possibility of a state's accession to the European Union mainly depends on whether the legal mechanism for the protection of human and civil rights and freedoms is central to the state’s legal system (Tatsiy, 2021).

Thus, the effectiveness of the introduced institution of special confiscation directly depends on how successful its legal regulation will be in the current legislation. At the same time, the rule-making process must be systemic and comprehensive and ensure the consistency of all criminal law requirements. It is the inconsistency of the legislator during the introduction of legislative changes that leads to errors in legal understanding and complicates the law enforcement process, violates the principle of legal certainty (Komarov & Tsuvina, 2021). The norms that regulate the issue of special confiscation are precisely the norms that have been negatively affected by the reform of the criminal legislation of Ukraine in 2018. The imperfection of the legal regulation of the institution of special confiscation not only indicates the ineffectiveness of this measure of criminal influence, but in general allows us to talk about its unconstitutionality (Batyrhareyeva, 2014, p. 105).

The issues raised in this publication have long been studied by both domestic and foreign scientists. Generally, foreign scholars consider the institute of special confiscation in terms of adapting and unifying the legislation of their own countries to the requirements of the European Union Directives on confiscation of property. The scholarly studies and papers of the following scientists have a direct bearing for the subject of this study: Voltaire (1956), Eser (1969), Gallant (2005), Simonato (2017, p. 374), Doyle (2015), Svetlichnyj (2019), Toots et al. (2022) and others.

In the domestic scientific literature, the issue of special confiscation was considered both at the level of publications on certain issues of special confiscation and at the dissertation level. At the monographic level, a comprehensive analysis of special confiscation as a criminal-law measure was previously carried out by one of the authors of this article (Vynnyk, 2018; 2019a).

Similar research on property seizure as a mean of criminal law response was conducted by Lozovyi (2018). Some aspects of this measure of impact within the framework of scientific articles or other scientific publications were considered by the following authors: Batyrgareeva (2014, p. 106) – as a mean of crime prevention; Yermak (2015a) – distinguished between confiscation measures provided by the norms of Criminal and Criminal Procedure Law; Orlovska (2015, p. 142) – researched the main issues of legal regulation of special confiscation in Ukraine.

Materials and Methods

Comprehensive disclosure of the subject of research is carried out through the integrated use of philosophical and worldview, general scientific and special methods. A number of methods of scientific cognition were used in the research process. In particular, the dialectical method made it possible to study the development of scientific thought in the approach to determinate the legal nature and place of special confiscation in the system of current legislation of Ukraine. Using the hermeneutic approach, the analysis of the content of criminal law sources and their understanding was carried out, which contributed to the extended understanding of the essence of special confiscation (Horbachova, 2008). The use of the logical and semantic method made it possible to analyze the content of the basic concepts related to the subject of this study. The comparative legal method made it possible to compare the features of special confiscation and confiscation as a type of punishment, to identify common and different features and to conclude about their differences.

The process of implementation of the special confiscation into the current criminal legislation of Ukraine and its further reforming is not completed today. Despite the fact that after numerous legislative changes special confiscation has found its normative definition in the Criminal Code (CC) as a criminal-law measure, this institute is only at the initial stage of its development: its legal regulations are actively criticized in the scientific community and needs improvement.

Among the new challenges facing the institute of special confiscation is the adoption of the Law of Ukraine No. 2617-VIII "On amendments to certain legislative acts of Ukraine regarding a simplified pre-trial investigation of certain categories of criminal offences" (2018), which introduced the institute of misdemeanor offenses. These legal developments cause the need to rethink the list of acts for which special confiscation is applied, as well as intensify the discussion concerning the legal nature of the latter.

The fact, that today the Constitutional Court of Ukraine is considering a case on the constitutional petition of 47 deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) Articles 96-1 and 96-2 of the CC of Ukraine, provides acuteness to the problem of determining the place, tasks and, accordingly, the criminal-law nature of special confiscation (Criminal Code of Ukraine, 2001). In this submission, the applicants request for declaring these provisions of the criminal law unconstitutional. This circumstance, in fact, calls into question the legality of such a crimanla law measure as a special confiscation, at least in the frames of criminal law.

Taking into account the above mentioned, there is a need to solve new theoretical and applied problems of special confiscation application in Ukraine, our attention will be focused on these issues in this publication.

Results and Discussion

Nowadays the institute of special confiscation is quite clearly regulated in the current legislation of Ukraine. As a result of reform of criminal law on special confiscation in 2016 this institute received a clearly defined criminal legal status, the concept of special confiscation gets its own definition in Article 96-1 of the Criminal Code of Ukraine, and property seizure was excluded from the sanctions provided in the Special Part of the Criminal Code of Ukraine (2001). Such legislative steps were positively received by the scientific community and put an end to the long discussions on the criminal procedure nature of special confiscation, which until then had been defined differently (Yermak, 2019). Thus, some authors identified special confiscation with punishment and emphasized that it was endowed with all the signs of punishment (Panov, 2006). It was proposed to call special confiscation a type of punishment, which consists in the forced gratuitous deprivation of a person of the right of ownership over illegally owned, used or transferred property (Sobko, 2010, p. 39). It was emphasized that special confiscation should be modeled in the structure of the criminal law as a type of additional punishment (Zadoya, 2012, p. 82). The second group of scholars held the position that special confiscation is a measure of criminal law and security (Orlovska, 2015, p. 139), which can be applied to a person along with punishment (Orlovska, 2013). Noting that, in essence, special confiscation is a security measure, it was pointed out that it is aimed at preventing and stopping violations of the law or stopping actions that violate (or may violate) the interests of others, society, state, eliminate the preconditions of crime, prevent the commission of new socially dangerous acts by such a person, as well as the protection of the rights and interests of society and the state from socially dangerous encroachments by such a person (Adamenko, 2022; Varnalii, 2022). At the same time, they stressed the need to include special confiscation as a measure of criminal law in the system of security measures that operate within the framework of "other measures of criminal law" (Shpilyarevy, 2015). Also, in the literature there were opinions that special confiscation in its essence and content is a purely criminal procedure instrument, and even considered the latter as a civilist category (Kondra, 2010, p. 279; Yermak, 2015b, p. 158).

Reforming the provisions of Art. 96-1 and 96-2 of the Criminal Code of Ukraine in 2016 changes the scientific views in the approach to determining the legal nature of special confiscation, which has since been given independent legal significance and ceased to be identified with punishment (Criminal Code of Ukraine, 2001). In the doctrine of criminal law, there is a tendency to distinguish between confiscation as a type of punishment and special confiscation, as well as the selection of essential features of the latter as a criminal-law measure (Vynnyk, 2019a, p. 27). It is argued that the content, subject and purpose of special confiscation is a non-punitive measure of criminal law, the legal regulation of which should not be limited to criminal procedure, which is a secondary regulator of public relations and provide rules for implementing substantive law (Polyakov, 2016, p. 133). As we had mentioned earlier in our researchments and this position was later confirmed in the works of other authors (Nikolaenko et al., 2021, p. 25) the otherness of special confiscation and its difference from punishment is precisely in the fact that by its nature it belongs to other (non-punitive) measures of criminal nature, as it is not incorporated in the types of punishments (Art. 51 of the CC of Ukraine), but is placed in Section XIV of the General Part of the Criminal Code of Ukraine, entitled "Other measures of criminal law nature" (Criminal Code of Ukraine, 2001; Vynnyk, 2019b). The issue of expediency of excluding confiscation of property from the system of punishments of Ukraine and recognizing only special confiscation as another measure of criminal law is also gaining relevance (Klychko, 2013, p. 341; Yermak, 2015c, p. 75).

It should be pointed out that such approaches of national scholars to the determination of the place and legal nature of special confiscation to some extent coincide with the opinion of foreign scholars. In the literature, we find the division of confiscation measures into four different types, such as: criminal confiscation, confiscation of items involved in the crime, confiscation of objects "malum in se" and civil confiscation (Gallant, 2005). There is also a statement that although all crimes cause these four types of confiscation, the latter should be classified as civil or criminal confiscation, depending on the nature of the process (Doyle, 2015; Honcharenko, 2022). Other authors point out that the introduction of the possibility of confiscation of property from a third party is due to the fact that compared to the traditional concept of confiscation, according to which deprivation of property is possible only as a result of conviction of a person, the new forms of confiscation provide a weakened link between the offense and confiscated proceeds (Simonato, 2017, p. 372).

However, with the changes of 2018, the legislator violates the prevailing in the doctrine of criminal law stability of views on the legal nature of special confiscation and throw doubts on the question of certainty. In the scientific literature on this subject, it is noted that those who design laws have not fully understood that the legislative technique requires a unified approach to the construction of sanctions for the law on criminal liability (Yermak, 2019; Filatova, 2020).

We support the critical views of scientists on the implementation of these changes and try to consider the main approaches to theoretical and applied problems that need to be resolved immediately. Thus, with the introduction of the category of criminal offense in the domestic criminal legislation, the wording of the provisions of Part 1 of Article 96-1 of the CC of Ukraine has altered. According to this Article, the application of special confiscation is possible only in the presence of one of the following three cases: 1) committing an intentional criminal offense under the Special Part of the Criminal Code of Ukraine, which is punishable by imprisonment or a fine of more than three thousand tax-exempt minimum incomes; 2) committing an act that contains elements of a criminal offense, which is punishable by imprisonment or a fine of more than three thousand tax-exempt minimum incomes; 3) committing a criminal offense directly listed in the list given in Part 1 of Art. 96-1 of the Criminal Code of Ukraine. That is, for committing criminal offenses under Part 1 of Art. 150; Art. 154; Part 2 and Part 3 of Art. 1591; Part 1 of Art. 190; Art. 192; Part 1 of Art. 204; Part 1 of Art. 209-1; Part 1 of Art. 210; Part 1 and Part 2 of Art. 212; Part 1 and Part 2 of Art. 2121-1; Part 1 of Art. 222; Part 1 of Art. 229; Part 1 of Art. 239-1; Part 1 of Art. 239-2; Part 2 of Art. 244; Part 1 of Art. 248; Part 1 of Art. 249; Part 1 and Part 2 of Art. 300; Part 1 of Art. 301; Part 1 of Art. 310; Part 1 of Art. 311; Part 1 of Art. 313; Part 1 of Art. 318; Part 1 of Art. 319; Part 1 of Art. 362; Art. 363; Part 1 of Art. 363-1; Art. 364-1; Art. 365-2 of the CC of Ukraine (Criminal Code of Ukraine, 2001).

The legislator has defined a single criterion for the formation of these conditional groups of criminally illegal acts in Part 1 of Art. 961 of the Criminal Code of Ukraine – the amount of the fine and the type of punishment (Yermak, 2019; Criminal Code of Ukraine, 2001). Thus, the concept of special confiscation in the

Ukrainian legislation is associated with the punishment of the committed act (Bidna, 2019). Based on this criterion, according to the rules of Part 2 of Article 12 of the CC of Ukraine, all the mentioned criminally illegal acts are criminal offenses, because for their commission, the law provides for the main punishment in the form of a fine of not more than three thousand tax-exempt minimum incomes or other punishment not related to imprisonment. Exceptions are only the acts provided by the provisions of Part 1 of Article 204 of the CC of Ukraine (Unlawful manufacturing, storage, sale or transportation for selling purposes of excisable goods) and Part 3 of Art. 154 of the Criminal Code of Ukraine (Compulsion to sexual intercourse) (Criminal Code of Ukraine, 2001). Sanctions of both of these articles do not include these acts in the category of misdemeanors, because committing an act under Part 1 of Art. 204 of the Criminal Code of Ukraine is punishable by a fine of five thousand to ten thousand tax-exempt minimum incomes with confiscation and destruction of illegally manufactured goods (Criminal Code of Ukraine, 2001). The sanction of Part 3 of Art. 154 of the Criminal Code of Ukraine provides for punishment in the form of restriction of liberty for up to three years or imprisonment for the same term. Obviously, the provisions of Part 1 of Art. 204 of the Criminal Code of Ukraine as well as the provisions of Part 3 of Art. 154 of the Criminal Code of Ukraine are the basis for the application of special confiscation in accordance with the criteria set out in Part 1 of Article 96-1 of the CC of Ukraine for acts of the first conditional group. Therefore, the additional separation of these acts, as a separate ground for the application of special confiscation seems illogical, indicates the inconsistency of the legislator during rule-making and requires a legislative solution by excluding these articles from the specified in Part 1 of Article 96-1 of the CC of Ukraine list of additional acts that are the basis for the application of special confiscation (Criminal Code of Ukraine, 2001).

The provisions of Art. 204 of the Criminal Code of Ukraine are of particular interest in the context of the criminal-law nature of special confiscation. On the one hand, Art. 204 of the Criminal Code of Ukraine is provided among the bases of application of special confiscation. On the other hand, the sanction of this article indicates the use of special confiscation. Thus, in Part 1 of Art. 204 of the Criminal Code of Ukraine, the legislator provides for the possibility of confiscation of illegally manufactured goods; the sanction of Part 2 of Art. 204 of the Criminal Code of Ukraine provides for the confiscation of illegally produced goods or purchased goods, equipment, raw materials for their manufacture; and the sanction of Part 3 of Art. 204 of the Criminal Code of Ukraine provides for confiscation, as well as seizure and destruction of illegally produced or purchased products, equipment for its manufacture (Criminal Code of Ukraine, 2001).

Thus, for the commission by a person of the act provided for in Part 1 and 2 of Art. 204 of the Criminal Code of Ukraine the legislator allows applying both special confiscation and confiscation – punishment, which it is directly specified in the sanction of article (Criminal Code of Ukraine, 2001). As for the provisions of Part 3 of Art. 204 of the Criminal Code of Ukraine, the legislator, describing the sanction of the article, tries to avoid the term “special confiscation” and replaces it with the term “seizure” (Criminal Code of Ukraine, 2001). However, such terminological substitution in no way affects the content of the sanction of the analyzed article, which also allows applying to a person both confiscation – punishment and special confiscation.

The problem is that until 2016 confiscation of property was called a special confiscation, which was provided by the provisions of sanctions of certain articles of the Special Part of the CC of Ukraine (Criminal Code of Ukraine, 2001). Sanctions directly provided for the confiscation of property specified in these articles, namely confiscation of objects, equipment, and means of committing crimes (Kondra, 2010, p. 289). It is the mention of special confiscation in the sanction of the article of the Special Part that allowed some authors to argue that the legal nature of special confiscation is identical to the nature of punishment. However, the decision of the legislator to exclude instructions on special confiscation from the sanctions of the articles of the Special Part of the CC of Ukraine became the basis for forming the position established in the modern doctrine of criminal law (Criminal Code of Ukraine, 2001). This position concerns the difference between special confiscation and property seizure as a punishment not only by content but also by purpose (Shpilyarevych, 2015).

Thus, the changes in 2018 not only indicate the lack of consistency of the legislator in the approach to the regulation of this measure of influence (Lukomska, 2020, p. 190), but cause a new wave of controversy over the legal nature of special confiscation. It should also be noted that today in the current criminal law of Ukraine, this is the only norm that indicates the use of special confiscation in its sanction (Criminal Code of Ukraine, 2001). At the same time, its presence in the sanction of substantive law calls into question the finality and certainty in the approach of the legislator regarding the legal nature of special confiscation, its purposes and in general the place in the system of legal norms.

We see the solution of this problem through the removal of such a criminal act as illegal manufacture, storage, sale or transportation for sale of excisable goods from the list of grounds for special confiscation, while excluding from the sanction of criminal law, which provides for the specified instruction to use special confiscation.

The issues of legal regulation of special confiscation considered above are the basis for a critical assessment of the effectiveness of the criminal and legal measures and, in general, make it possible to question the constitutionality of the institute of special confiscation. This is precisely the problem that is perhaps the most important and requires special theoretical understanding and solution. The last one can be carried out through a critical legal analysis of some, the most important, as it seems, provisions of the Constitutional proposal on the constitutionality of Art. 96-1 and 96-2 of the Criminal Code of Ukraine, which is currently being considered by the Constitutional Court of Ukraine (Criminal Code of Ukraine, 2001).

Thus, the central place among the arguments, according to the authors of the presentation, indicate the unconstitutionality of special confiscation, is the actual uncertainty of its legal nature. The submission states that special confiscation completely duplicates confiscation as a type of punishment, which contradicts the principle of proportionality and proportionality of punishment.

Analyzing this thesis, let us repeat that the controversy on the issue of identifying special confiscation of property and property seizure as a form of punishment is, to a certain extent, resolved today. Special confiscation has its own definition, which is not identical with confiscation-punishment, its own characteristics and purpose, different from confiscation-punishment. The grounds and procedure for applying these measures are also different. In particular, special confiscation is intended to deprive a person who has committed a crime not of all the property belonging to him, but only of what he has seized as a result of committing an intentional crime. It is free of charge, i.e. a person does not receive any compensation from the state for property confiscated from a person (Lapkin et al., 2019). It is applied compulsorily for committing crimes defined in the criminal law. The purpose of special confiscation has a threefold component and is to stop criminally illegal activities, restore social justice, as well as to prevent the commission of new offenses (Vynnyk, 2020; Rudenko et al., 2021).

Special confiscation is inherently different from punishment precisely because of the property to be confiscated during its use. The latter person receives as a result of the crime, does not acquire it legally, and therefore owns it without legal grounds. Seizure of such property from a person does not violate or deprive a person of the person's right of ownership over it. There is a restoration of the state that existed before the person committed the crime, which does not contain an element of punishment or the task of the person of certain suffering. Therefore, it is quite justified to refer special confiscation to the system of other measures of criminal law, rather than punishment, as we have already indicated in our works (Vynnyk, 2019b).However, the recent scientific researches evidence that formally defined by the legislator species affiliation of special confiscation to other measures of criminal law impact by itself, without additional arguments and assessment of what burden this measure imposes on a person and for what purpose, it cannot be a reason to conclude that special confiscation is not a punishment (Denkovych & Kryklyvets, 2020, p. 267).

Here, to some extent, it should be agreed that only the theoretical development of this institute of criminal law without proper reflection in the rulemaking makes it difficult to solve the outlined problems. The current national legislation of Ukraine on special confiscation needs to be improved, both in terms of defining the concept of special confiscation and enshrining in the Criminal Code of Ukraine, if not the purpose of special confiscation, then at least a single purpose for all measures of criminal law. Such a suggestion has already been reflected in the literature (Vynnyk, 2019b). Relevant legislative changes, in our opinion, would make it impossible to raise the issue of the unconstitutionality of the articles of the CC of Ukraine (Criminal Code of Ukraine, 2001). And due to those legislative shortcomings of legal regulation mentioned in the first part of this article, the issue of referring special confiscation to the system of criminal law would be fully resolved.

As for the provisions of Part 1 of Art. 8 of the Constitution of Ukraine on the principle of proportionality, it should be noted that the fact itself of enshrining in the criminal-law system the institute of special confiscation, as well as the similarity of this measure with the property seizure as a type of punishment, cannot be considered a violation of this principle (Criminal Code of Ukraine, 2001). The use of special confiscation by the court along with the punishment should be solved by the court in each case, taking into account the gravity of the act, as well as in terms of the possibility of the use of alternatives in choosing both types and degree of punishment.

The next thing that is of scientific interest to us is the statement that the special confiscation ceases to be constitutional due to the norm of law of applying it to the assets of the third parties, in respect of which there is no conviction, and t is also, to some extent, subject to be refuted.

Paragraph 4 of Part 1, Article 96-2 of the Criminal Code of Ukraine reads that the legislator establishes the rule according to which if the legal owner of the property (it is about money, valuables and other property that were found, manufactured, adapted or used as a means or instrument of a criminal offense) makes a mistake as to the true purpose of its use by another person, such property may not be the subject of special confiscation (Criminal Code of Ukraine, 2001). Under other conditions, there is a presumption of improper performance by the property owner of his constitutional obligation to own the property, namely, the possibility of its use to the detriment of the interests of the state. In this case, the special confiscation becomes only a measure of state control over the use of such property and should not be subject to some type of punishment (Denkovych & Kryklyvets, 2020, p. 268).

At the same time, the provisions of paragraph 2 of Part 1 of Art. 96-2 of the Criminal Code of Ukraine does not include such indication that if the owner of the property did not know and could not have known about its illegal use, such property is not subject to special confiscation (Criminal Code of Ukraine, 2001). It leads to the conclusion that regardless of the presence or absence of fault of the legal owner of the property that it is illegally used by another person, the property specified in paragraph 2 of Part 1 of Article 96-2 of the Criminal Code of Ukraine (money, valuables, other property intended or used) to persuade a person to commit a criminal offense, financing and / or material support of a criminal offense or reward for its commission) is subject to special confiscation. In other words, if the legal owner of the property makes an error in the lawfulness of the use of such property by another person, i.e. did not know and could not have known about its illegal use, such property will be subject to special confiscation. It is obvious that such legislative provisions bring special confiscation closer to punishment in terms of its content, and, therefore, there is reason to believe that its application in these circumstances violates the presumption of innocence envisaged by Part 1 of Art. 62 of the Constitution of Ukraine (Criminal Code of Ukraine, 2001).

It is clear that the issues of legal regulation of special confiscation are not limited. However, the considerations set out in this study may serve as a basis for further research of the institute of special confiscation of property. The proposed solutions can be taken into account during further law-making process.

Conclusions

The research has proven the importance of the issue under the study, as the quality of regulatory and legal support for the functioning of such a criminal law institute as special confiscation depends not only on the effectiveness of its application, but in general – the legality or, in other words, the constitutionality of relevant rules. This article has attempted to cover some of the most pressing issues that threaten the existence of the institute of special confiscation in Ukraine today; their analysis has proven the necessity of a comprehensive approach to addressing the issue of legal regulation of special confiscation. At the same time, in our opinion, the ways to tackle the above-mentioned problems are as follows:

1) to exclude from the sanction of part 1 of Article 204 of the Criminal Code of Ukraine the words "with confiscation and destruction of illegally manufactured goods";

2) to exclude from the sanction of part 2 of Article 204 of the Criminal Code of Ukraine the words "with confiscation and destruction of illegally produced or purchased goods, tools of production, raw materials for their manufacture";

3) to exclude from the sanction of part 3 of Article 204 of the Criminal Code of Ukraine the words "with the seizure and destruction of illegally produced or purchased products, equipment for its manufacture";

4) to exclude figures "204" from part 1 of Art. 96-1 of the Criminal Code of Ukraine;

5) to determine the purpose of special confiscation in the criminal law, while supplementing part 2 of Article 96-1 of the Criminal Code of Ukraine after the word "applied" with the words: "in order to stop criminal activity, restore social justice and prevent new criminal offenses".

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