

## **Realization of the prosecutors power's in pre-trial investigation in criminal proceedings of Ukraine and Poland**

According to part 2 of the article 36 CPC of Ukraine<sup>1</sup> the prosecutor supervises the abidance of laws during the pre-trial investigation in the form of procedural management of pre-trial investigation. Not going back to the discussion about the correlation between supervision and procedural management, in this research we shall distinguish two independent functions of the prosecutor in the criminal proceedings of Ukraine - procedural management of pre-trial investigation and supervision of pre-trial investigation.

Unlike the law of Ukraine, the Law of Poland "On Prosecution" as well as polish criminal procedural legislation fixe the key role of the prosecutor during pre-trial investigation. In particular, the participation of the prosecutor in the pre-trial investigation is possible in two forms:

- 1) prosecutor conducts pre-trial investigation independently;
- 2) prosecutor supervises the pre-trial investigation conducted by another authorized body (part 1 of Art. 3 of the Law of Poland "On Prosecution")<sup>2</sup>.

In its turn, the pre-trial investigation in Poland can be conducted in two forms: investigation or inquiry. As a general rule the prosecutor performs his own preliminary investigation in the form of investigation. In this case he launches investigation, passes all major decisions (except those that require the approval of the court) and conducts procedural actions independently, approves the indictment and handles it to the court, etc. Such prosecutor's activity by its nature substantially differs from the supervision of the pre-trial investigation, conducted by another body. Conducting his own investigation, the prosecutor appears to be de facto not procedural manager, but investigator. His powers in this case are defraud of leading character, as there is anyone to guide.

Elements of procedural management can exist only when the prosecutor entrusts investigation fully or in part, or conduct of certain procedural actions to

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<sup>1</sup> Кримінальний процесуальний кодекс України від 13 квітня 2012 року №4651-VI [із змінами і доповненнями на 17.08.2015] // Офіційний вісник України. – 2012. – №37. – ст. 1370.

<sup>2</sup> O prokuraturze: ustawa z 20 czerwca 1985 r. [Electronic version]. Source: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19850310138>.

police (§ 2 art. 311 CCP of Poland). So the police will carry out this order, and the prosecutor will supervise its actions. The decision on the part in which the prosecutor shall entrust the investigation to the police, depends on the circumstances prevailing at a particular stage of the investigation<sup>3</sup>. Having found a violation of the law, the prosecutor shall promptly take measures to eliminate them. To do this, the prosecutor uses the following forms of his powers realization.

1. Introduction of information to the Unified Register of pre-trial investigations (URPTI).

It should be noted that this form of the prosecutor reaction belongs to the fundamental functions of the prosecutor as for the implementation of his obligation to conduct prosecution on the pre-trial stage of criminal proceedings. According to Ukrainian legislation, the prosecutor is authorized to commence pre-trial investigation on the grounds provided by law (art. 36 of the CPC of Ukraine). According to § 3 art. 305 of CPC of Poland, the prosecutor issues a decree on the beginning of the investigation<sup>4</sup>. Promulgation of this decision is the prerogative of the prosecutor only. The decision describes an act and its legal qualification. Resolution on refusal to start investigation or the termination of the investigation is issued by the prosecutor or the police. Hereby the decrees issued by the police, are asserted by the prosecutor. This approval has in fact a preventive nature. Thus the prosecutor controls the police, and if necessary eliminates the violations.

Criminal procedural legislation of Poland fixes the obligation of everyone who became aware of a criminal offense, to inform on this fact the prosecutor or the police. Police should immediately inform the prosecutor about the received data on commission of the crime in respect of which the investigation should be carried out. This will allow the public prosecutor to begin the investigation as soon as possible if the grounds for this exists, to prevent violations of the law and eliminate those already existing.

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<sup>3</sup> R.A. Stefański. Obligatoryjne śledztwo prokuratorskie w świetle noweli do kpk z 2003 r. [Text] / R.A. Stefański // Prokuratura i Prawo. – 2003. - №1. – p. 146.

<sup>4</sup> Kodeks postępowania karnego: ustawa z dnia 6 czerwca 1997 r. [Electronic version]. Source: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970890555>.

Immediately after the beginning of the preliminary investigation the prosecutor shall compile depending on what is needed investigation plan or plan of inquiry, especially in complex cases and serious crimes cases. In the event new circumstances arise a plan should be improved.

**2. Written instructions and orders of the prosecutor** (p. 2 ch. 4 art. 36 of CPC).

Prosecutor's instructions are not a new phenomenon in the criminal process of Ukraine. In the CPC of 1960 it was envisaged that the prosecutor, exercising supervision over the implementation of laws by bodies of inquiry and investigation, within his competence gives written instructions on the investigation of crimes, on the election, modification or cancellation of the preventive measures, crime qualification, carrying out of separate investigations and detection of persons who have committed crimes, including the extradition of the person.

Even in Soviet times it was considered as necessary to have all written instructions of the prosecutor to be entered upon the record. Under such circumstances, from the records it can be seen on the one hand whether the instructions of the prosecutor are reasonable and appropriate, and on the other – whether the investigator regarded those instructions with due thoroughness and whether he fulfilled them in full<sup>5</sup>.

According to cl.11.2.2 of the Instruction on the record keeping in the prosecution office<sup>6</sup>, copies of the written instructions of the prosecutor shall be filed into the supervisory proceedings, instituted for criminal proceedings.

As to the content and structure of written instructions of the prosecutor, it is not settled in the legislation. In the scientific literature it is believed that there shall be the same requirements to the instructions of the prosecutor as to the resolutions of the prosecutor. Every prosecutor's instruction on any issue should be lawful,

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<sup>5</sup> Н.В. Жогин. Предварительное следствие в советском уголовном процессе [Текст] / Н.В. Жогин, Ф.Н. Фаткуллин – М.: Юрид. лит., 1965. – С. 81.

<sup>6</sup> Інструкція з діловодства в органах прокуратури: наказ ГПУ України від 15.01.2013 р. №3 [Електронний ресурс]. – Режим доступу: [http://www.gp.gov.ua/ua/iopd.html?\\_m=publications&\\_t=rec&id=94103](http://www.gp.gov.ua/ua/iopd.html?_m=publications&_t=rec&id=94103).

reasonable and reasoned<sup>7</sup>. Based on the above statement, the instructions as well as decisions shall specify the place and time of issue; name, surname, position of the person issuing written instructions; circumstances which are grounds for instructions issuing, motivation, motivation grounds and a link to the CPC of Ukraine; purport of instructions; place and time of execution, person who shall execute instructions, possibility and procedure of appeal.

**In our opinion, prosecutor's instructions shall be issued on the prosecutor office letterhead with the signature of the procedural manager and consist of three parts: introduction, motivation and resolution.** Introduction should indicate the place and time of the publication of written instructions, a person to whom it is addressed the instructions, indicate the number of criminal proceeding and legal qualifications.

As to the motivation of written instructions, we consider that it is the same for all written instructions and its content follows the objectives of the prosecutor's tasks as a procedural manager and general tasks of criminal proceeding. All instructions shall be issued under the provisions of art. 36 of the CPC of Ukraine for comprehensive, complete and objective investigation of all circumstances of criminal offense and passing of legitimate and reasonable decision on criminal proceeding.

The resolute part of the prosecutor's instructions - is actually the essence of the adopted procedural decisions. This is a list of specific actions that should be performed by the addressee. It is important to state reasonable time to perform the instructions.

V.M. Sawicki reasonably notes that the prosecutor's instructions differ from its decisions (resolutions) by the fact that they foresee the executor. Being legal facts they breed certain procedural relationships between prosecutor and

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<sup>7</sup> І. С. Марочкін. Прокурорський нагляд в Україні [Текст]: Підручник для студентів юрид. спеціальностей вищих навч. закладів / І. С. Марочкін, П. М. Каркач, Ю. М. Грошевой та ін. За ред. проф. І. С. Марочкіна, П. М. Каркача. – Х.: ТОВ «Одіссей». – 2006. – С. 143.

investigator. Instructions may be issued only to eliminate violations of the law and should in no way interfere in the sphere of investigator procedural independence<sup>8</sup>.

Written prosecutor's instructions - is a written document which defines prosecutor's instructions to investigator obligatory investigative (detective) actions, undercover investigative (detective) actions and other procedural and organizational actions.

The prosecutor gives instructions on the investigation of criminal offenses; on the choosing, change or repeal of the secure measures in criminal proceedings; on qualification of criminal offenses; on conduct of certain investigative (detective) or undercover investigative (detective) actions; on allocation or allotment of criminal proceedings; on detection of persons who have committed a criminal offense, etc.

It is necessary to clarify the legal nature of orders and to distinguish them from the instructions. Modern Ukrainian Language Dictionary defines the order as: 1) action of entrust; deed assigned to anyone; task; 2) a document that gives someone else the right to act on behalf of the person issuing the document; power of attorney. The word "to order" shall be interpreted as to impose on someone performing of something<sup>9</sup>.

Also it is necessary to analyze the provisions of the CPC of Ukraine, which refers to the prosecutor's orders to investigator. Such articles are not rare, while written instructions are mentioned only in art. of the 36 CPC of Ukraine, but then the Code doesn't set specific instances of instructions issuance.

In particular, CPC of Ukraine fixes the duty of the prosecutor to inform individuals whose constitutional rights were temporarily limited during the undercover investigation (search) actions, as well as the suspect, his advocate about such restrictions. Such persons must be informed in written form by the prosecutor or investigator on prosecutor's order.

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<sup>8</sup> В.М. Савицкий. Очерк теории прокурорского надзора в уголовном судопроизводстве [Текст] / В.М. Савицкий. – М.:Наука, 1975. – С. 177.

<sup>9</sup> Великий тлумачний словник сучасної української мови [Текст] / уклад. і голов. ред. В. Т. Бусел. – К.: Ірпінь: ВТФ «Перун», 2009. – С. 345.

During the pre-trial investigation interference in private communication can be applied on certain grounds. If the prosecutor intends to use at court hearing information obtained as a result of interference in private communication or some fragment of it as evidence, he is obliged to ensure the safety of all the information or instruct the investigator to ensure the safety (art. 259 of the CPC of Ukraine). Prosecutor's orders shall be mentioned during disclosure of the criminal proceedings records to the other party. Having recognized collected during the preliminary investigation evidences as sufficient for drawing up an indictment, a motion on application of compulsory measures of medical or educational treatment, prosecutor or investigator on prosecutor's order shall inform the suspect, his advocate, legal representative and defender of the person who is expected to be subjected to compulsory measures of medical or educational treatment on the completion of the preliminary investigation and provide access to the pre-trial investigation records (part 1 art. 290 of the CPC of Ukraine). Prosecutor or investigator on prosecutor's order must provide access to the pre-trial investigation records that are at his disposal.

Victim shall be informed on the opening of the criminal proceedings. This notification shall be also carried out by the prosecutor or investigator on prosecutor's order (p. 7 art. 290 of the CPC of Ukraine).

In all the above cases some powers belong to the prosecutor, but he can entrust its implementation to the investigator. CPC of Ukraine does not provide for the investigator's duty to carry out the following actions independently or opportunity to conduct them on his own initiative.

Thus we can formulate the definition of the order. The written order of the prosecutor - is written document in the form of regulations, in which the prosecutor imposes on the investigator, head of the pretrial investigation body, operative units the duty (and thereby entitles) to conduct certain investigative (detective) actions, undercover investigative (detective) actions and other procedural actions.

The principal difference between the instructions and the orders is that actions, fixed in the prosecutor's orders to the investigator can be carried out by the

investigator even without prosecutor's orders. For example, the investigator may on its own initiative for the achievement of the objectives of the criminal proceedings examine witnesses, suspect, recognize person as a victim of a crime if necessary grounds exist. Prosecutor's instructions in this case are only striking manifestation of leadership, direction and proper organization of the investigator to insure quick, full and impartial investigation. Meanwhile the prosecutor by his order assigns to investigator certain acts which he is authorized to carry out independently, but considers it necessary that such actions be carried by investigator. The reasons for this vary, the main is the busyness of the prosecutor. One could also say that the prosecutor issues instructions in cases when criminal proceedings are conducted by investigator and orders when he conducts criminal proceedings himself. But as of today CPC of Ukraine does not entitle procedural manager for personal inquiry of a criminal offense in full, the prosecutor cannot himself conduct the proceedings, he only leads it.

It is necessary to characterize separately the powers of the prosecutor to entrust carrying of investigative (detective) operations and undercover investigative (detective) actions to the operative units. Prosecutor gives to operative units only orders, written instructions to these units are not given. In accordance with art. of the 41 CPC of Ukraine, prosecutor, by his written order can oblige operative units to conduct any investigative (detective) actions and undercover investigative (detective) actions in criminal proceedings. During the fulfillment of prosecutor's orders employee of operative unit gets new procedural status - investigator. This status is endowed to employee of operative unit only for the time of the relevant investigative (detective) activity or tacit investigative (detective) actions. Employees of operative units have the right to fulfill procedural actions in the criminal proceedings on their own initiative or to apply with the motion to the investigating judge or prosecutor.

In Poland, prosecutor exercising supervision over pre-trial investigation, is authorized **to issue regulations, resolutions or orders** (p. 4 § 3 art. 326 of CPC of

Poland). It is believed that this power gives the prosecutor the possibility of unlimited influence on the course and direction of the pre-trial investigation<sup>10</sup>.

Prosecutor's regulations at pre-trial investigation fixes one of the key procedural decisions. In particular, the prosecutor issues a decision in case of beginning of investigation, refusal in its beginning, termination of the investigation, notification on suspicion, appropriation of examination, search conduct, imposition of collateral security.

As for the resolutions of the prosecutor, as noted in the literature, prosecutor's management, which consists in determining the directions of the investigation and issuing resolutions on this issues, is realized in two forms: instructions and consultations<sup>11</sup>[11,p.730].

Art. 14 of the Law of Poland "On Police" fixes police duty to perform the prosecutor's orders within the limits prescribed by law. This limit is set in art. 15 of the CPC of Poland, which states that the prosecutor as the leading procedural body over the police has the power to issue binding instructions to the police, but this subordination of the police to the prosecutor is purely procedural in nature, not administrative. The order is one of the procedural tools of the prosecutor supervision over pre-trial investigation.

The order is the proceedings of another kind rather than regulations and resolutions, they are binding just for dependant bodies<sup>12</sup>. The orders do not entail legal consequences for other participants of the process, and shall be executed only by the bodies to which are addressed. CPC of Poland does not specify in what form the orders should be issued. Given their mandatory nature, orders must be issued in writing.

Prosecutor's Orders may be issued in cases prescribed by law. The law, on the one hand fixes a general authority to issue orders (p. 4 § 3 art. 326 of the CCP

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<sup>10</sup> P. Hofmanski. Kodeks postępowania karnego. Komentarz do artykułów 297–467. – Tom II. [Text] / K. Zgryzek, P.Hofmański, E. Sadzik. – Warszawa: C.H. Beck, 2011. – P. 238.

<sup>11</sup> P. Strzelec. Uwagi o nadzorze prokuratorskim sprawowanym w trybie art. 326 kodeksu postępowania karnego, (w:) W teorii i praktyce prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska. [Text] / P. Strzelec. - Lublin, 2005. – P. 730.

<sup>12</sup> P. Hofmanski. Kodeks postępowania karnego. Komentarz. – Tom I. [Text] / K. Zgryzek, P.Hofmański, E. Sadzik. – Warszawa, 2007. – P. 130.



of Poland). This authority belongs to the prosecutor who performs supervision. On the other hand, Code envisages orders issue in specific cases (e.g. § 1 art. 220 of the CPC of Poland as for prosecutor's order to conduct a search)<sup>13</sup>.

#### **4. Cancellation of illegal or ungrounded regulations of subordinate prosecutor and investigator.**

The prosecutor's right to revoke unlawful and ungrounded regulations of the investigators is an important power of the prosecutor, which aims to eliminate violations of the law (cl. 7 p. 2 article 36 of the CPC of Ukraine). This power is very essential in view of the fact that it, perhaps like no other, defines the essence of all the leading prosecutor role in the pre-trial investigation.

The prosecutor has the right to cancel the unlawful and unjustified regulations of the investigator. This power derives from the principle of unity and centralization of the organization and operation of prosecution bodies. Providing supervision over the implementation of laws by bodies which conduct pre-trial investigation, prosecutors are guided by established institutional hierarchy of departmental levels of prosecution bodies, investigative and inquiring bodies in the distribution of competence on supervision objects of subordinate prosecutors.

We believe that the prosecutor should issue a regulation on the abolition of the resolution of the investigator, which shall comply with the general rules set out in the art.110.of the CPC of Ukraine The regulation on cancellation must certainly specify the reasons for the cancellation, and should also indicate ways to eliminate committed violations.

In the context of the aforementioned powers of the prosecutor is noteworthy to mention his power to cancel investigator's regulation on termination of criminal proceeding. According to p. 5 art.284 of the CPC of Ukraine the prosecutor is entitled to cancel regulation due to illegitimacy or unreasonableness within twenty days after receiving the copy of the regulation. Investigator's regulation on termination of criminal proceeding can also be cancelled upon the complaint of the

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<sup>13</sup> P. Hofmanski. Kodeks postępowania karnego. Komentarz do artykułów 297–467. – Tom II. [Text] / K. Zgryzek, P.Hofmański, E. Sadzik. – Warszawa: C.H. Beck, 2011. – P. 629.

applicant, the victim, if such complaint is handled within ten days after receipt copy of regulation by applicant, victim.

According to p. 6.2 of the Order №4 of the Prosecutor General's Office of Ukraine, prosecutors should immediately cancel illegal regulations of the investigators on termination of criminal proceeding<sup>14</sup>. In our opinion, prosecutors should always comply with this provision of departmental order. Procedural manager has not only the right to cancel the illegal investigator's regulations on termination of criminal proceeding, it is his direct duty. Besides, the prosecutor should not wait for a complaint from the applicant or victim, and should make the relevant decision in the case of illegality of investigator's regulation. In Poland, the prosecutor has the right to change or repeal resolutions and regulations issued by the person who carries out the investigation (§ 3 art. 326 of the CPC of Poland). This powers is also aimed on elimination of law violations.

**5. Initiation of investigators eradication from further conduct of pretrial investigation** if they committed violations the law during the investigation of the case. The prosecutor, who oversees procedural activity, has the right to eradicate investigator from further investigation if he violated criminal procedural law. The violations of law which can be grounds for eradication, shall be determined by the prosecutor in each specific case, depending on the specific circumstances of the case and the nature of the violation. In addition, the prosecutor eradicates the person in case of his challenge or rejection. Considering the relevant request, the prosecutor must carefully check its motives.

While the grounds for investigator challenge are settled in the CPC of Ukraine, the inefficient preliminary investigation carried out by the investigator, shall be determined by the prosecutor in each specific case. The prosecutor must take into account the specific circumstances of the case, acts of the investigator, nature of violations and gaps, committed by investigator, effectiveness of realization of the prosecutor's orders by the investigator.

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<sup>14</sup> Про організацію діяльності прокурорів у кримінальному провадженні: наказ ГПУ України від 19.12.2012 р. №4 гн [Електронний ресурс]. – Режим доступу: [http://www.gp.gov.ua/ua/gl.html?\\_m=publications&\\_t=rec&id=94102](http://www.gp.gov.ua/ua/gl.html?_m=publications&_t=rec&id=94102).

In the literature it is indicated that eradication of the investigator is a procedural sanction, which is used for: 1) violations of the law, committing of a serious professional crime that constitutes procedural violation that prevents further participation of investigator in the investigation; 2) omission, delay of investigation; 3) unjustified change of the preventive measure against the suspect<sup>15</sup>.

Deprivation of prosecutor of the right to eradicate independently the investigator from pre-trial investigation has undoubtedly negative effect on the efficiency of the implementation of prosecutor's function of procedural management of pre-trial investigation. But we still consider that the eradication of the investigator from conduct of pre-trial investigation should be the prerogative of the head of the body of pre-trial investigation. This is element of administrative management, not procedural. The investigator, who shall carry out investigation, is appointed by the head of the pre-trial investigation body, and if necessary, he should be eradicated from this duty by the same person.

Under the legislation of Poland the prosecutor can initiate an official inquiry regarding the investigator. Prosecutor's decisions, issued during pre-trial investigation are mandatory for those to whom they are addressed. In case of non-fulfillment of resolutions, regulations or orders, issued by the prosecutor overseeing pre-trial investigation, the prosecutor **initiates an official inquiry**. This official inquiry shall be pursued by the official person, superior over who has not fulfilled the request of the prosecutor and this official person shall report the results of the inquiry to the prosecutor.

### **5. Changes to the indictment or motions, drawn up by the investigator, independent drawing of indictment.**

The indictment is a procedural decision in which the prosecutor brings charges in committing criminal offense and completes pre-trial investigation. In the previous section we considered such power of the prosecutor as approval or refusal of approval of the indictment, motions on the use of compulsory measures

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<sup>15</sup> О.А. Кожевников. Участие прокурора в досудебных стадиях уголовного судопроизводства [Текст]: монография / О.А. Кожевников; Уральская государственная юридическая академия. – М.: Волтерс Клувер, 2011. – С. 110.

of medical or educational treatment, which aims at detection of law violations. In p.13 cl. 2 art.36 of the CPC of Ukraine is also fixed that the prosecutor is authorized to amend the indictment drawn up by the investigator or the aforementioned motions, as well as independently draw indictment or specified motions. In our opinion, this prosecutor's right is directed to elimination of law violations which he found. The indictment can be drawn up by the prosecutor, especially if he does not agree with the indictment, which was drawn up by investigator.

Changes to the indictment drawn up by investigator, motions on the use of compulsory measures of medical or educational treatment, independent drawing up of the indictment, are in fact the concluding power of the prosecutor at pre-trial investigation aimed at violations of law elimination. Therefore, the prosecutor shall approach this issue with all the carefulness in order to prevent the accusation of innocent person.

Summarizing the aforesaid, we can conclude that the Criminal Procedural Code grants rather wide range of powers to the prosecutor in the sphere of reaction to the violations of law by the pre-trial investigation bodies. Criminal procedural legislation of Ukraine and Poland stipulates a number of similar powers of the prosecutor, but it is worth noting that the CPC Ukraine does not regulate in detail the implementation of his powers by the prosecutor compared the CPC of Poland.

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## **Abstract**

The article deals with the analysis of the Realization of the prosecutors power's in pre-trial investigation in criminal proceedings of Ukraine and Poland.

Legal regulation of this institute in criminal procedural law of Ukraine and Poland is studied. Functions of the prosecutor and prosecutor's documents have been researched. Conclusions have been made as for comparison of legal institutes, foreseen in Criminal Procedural Codes of Ukraine and Poland.

Key words: prosecutor, pre-trial investigation, prosecutor's order, prosecutor's instruction.

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