

THE PROSECUTOR'S POWERS TO COLLECT EVIDENCE AT THE INITIAL STAGE OF INQUIRY

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Annotation. Given the criminal procedural regulation regarding the peculiarities of the inquiry initiation, as well as the prosecutor's powers to supervise the observance of laws during the pre-trial investigation in the form of procedural guidance of the pre-trial investigation, the scope and content of the prosecutor's powers to collect evidence at the beginning of the inquiry are determined and characterized. The article emphasizes that the primary task at the initiation of the inquiry is to appoint a prosecutor to carry out procedural guidance in a particular criminal proceeding in compliance with the requirements provided for in Articles 37, 110, 214 of the CPC of Ukraine. Furthermore, it is established that the prosecutor's powers to collect evidence at the initiation of the inquiry are exercised by: checking compliance with the terms and procedure for initiating criminal proceedings established by criminal procedure legislation; and finding out whether the preliminary criminal law qualification of a criminal offence is correct and whether it corresponds to the circumstances of the offence; determining the jurisdiction and verifying the rules of compliance with the rules of jurisdiction for conducting a pre-trial investigation in the form of an inquiry; determining the scope of circumstances to be proved at the initial stage of a pre-trial investigation of a criminal offence and the procedural methods of their collection; determining compliance with the requirements for the grounds and procedural order of urgent investigative (search) and other procedural actions aimed at establishing circumstances important for criminal proceedings; responding to detected violations of the law from the moment of receipt of information (application, notification or self-detection) about a criminal offence; deciding on the consolidation or separation of pre-trial investigation materials; cancellation of unlawful or unjustified decisions of inquirers; direct participation in conducting/independently conducting certain procedural actions aimed at identifying, recording, seizing and examining evidence; giving instructions, orders to the inquirer, the head of the inquiring body or other subjects of evidence during the inquiries.

Key words: prosecutor; powers; collection of evidence; proof; pre-trial investigation; criminal offence; inquiry; initiation of inquiry.

1. Introduction.

«The duration of criminal proceedings is an important criterion for assessing the success of pre-trial investigation bodies, and preventing unjustified delays is an important element of organisational and managerial measures aimed at reforming the criminal judiciary. Formalised delays in solving criminal offences create a negative image of the entire criminal justice system.» [1, c. 513]. Therefore, this issue requires a comprehensive solution. As it is reasonably noted in this regard in Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe to Member States on the simplification of criminal justice, «the delays in the administration of criminal justice can be eliminated not only by allocating specific resources and ways of using them, but also by setting clearer priorities in the conduct of criminal policy in terms of both form and substance through: the application of the principle of discretionary prosecution; so-called summary procedures; simplification of ordinary court procedures» [2].

In particular, the institute of 'inquiry' is enshrined in the national criminal procedure legislation with the aim of introducing simplified criminal justice. This is one of the forms of pre-trial investigation in which criminal offences are investigated [3]; one of the ways to simplify criminal proceedings [1, p. 513]. The inquiry involves the rationalisation of the procedure for those criminal offences that have a low level of public danger and are not of great public importance [1, p. 513], thereby ensuring the effective organisation of the activities of pre-trial investigation bodies in order to relieve investigators and to ensure a quick, complete, comprehensive investigation of criminal offences [4, c. 54].

Most of all, the above is fully correlated with such a principle of criminal proceedings as reasonable time. In particular, according to Article 28 of the Criminal Procedure Code (hereinafter - the CPC) of Ukraine, the reasonableness of the criminal proceedings is determined by the following criteria: the complexity of the criminal proceedings, which is determined taking into account the number of suspects, accused and criminal offences in respect of which the proceedings are conducted, the scope and specificity of procedural actions necessary for the pre-trial investigation, etc. At the same time, at the stage of pre-trial investigation, the reasonableness of the terms of its conduct is ensured by the prosecutor and investigating judge (in terms of the terms of consideration of issues within his/her competence) [3].

In view of the above circumstances, it is relevant and urgent from both theoretical and pragmatic points of view to develop a unified approach to the interpretation of provisions on the specifics of the prosecutor's exercise of his/her powers, in particular, the collection of evidence, during the investigation at all its stages, from the moment of the investigation to its completion.

2. An analysis of publications that have addressed this issue.

The peculiarities of the inquiry institute formation in the criminal procedure of Ukraine, problematic aspects of its regulatory and legal regulation and law enforcement practice of pre-trial investigation of criminal misconduct in criminal proceedings are often the subject of scientific research in the works of many lawyers. For example, these issues are covered in the works of such scholars as: P.O. Balov, A.G. Harkusha, O.F. Kobzar, A.I. Kuntia, E.D. Lukianchykova, B.E. Lukianchykova, O.A. Marchenko, M.Y. Romanov, A.Y. Khitra, S.S. Cherniavskyi, A.M. Chorny and others. However, despite the significant and substantial achievements in this area, many issues still remain unresolved and controversial. As A.M. Chorny rightly emphasises in this regard, «in connection with the daily activities of the investigative bodies, an increasing number of practical issues arise in connection with the novelties of legislation and new provisions of the CPC regarding pre-trial investigation of criminal offences, due to the lack of necessary comments on the latest rules and a single consistent practice»[5, c. 125].

3. The purpose of the article is to determine the powers of the prosecutor to collect evidence at the initiation of an inquiry. According to this purpose, the objectives of the study are as follows: to examine the provisions of criminal procedure legislation regarding the peculiarities of the initiation of pre-trial investigation of criminal offences; to determine the role of the prosecutor in the activities related to collection of evidence at the inquiry initiation; to clarify the scope and content of the prosecutor's powers to collect evidence at the inquiry initiation.

4. Presentation of the main body of material.

According to part 2 of Article 298 of the CPC of Ukraine, the inquiry is carried out in accordance with the general rules of pre-trial investigation provided for by the CPC of Ukraine, taking into account the provisions of Chapter 25 'Peculiarities of Pre-trial Investigation of Criminal Offences'. The general rules for initiating a pre-trial investigation are set out in Article 214 of the CPC of Ukraine. In particular, an investigator, pre-trial investigator, or prosecutor, having received information about a possible criminal offence from a statement, report, or as a result of self-detection from any source, must immediately, but not later than 24 hours, enter the relevant

information into the Unified Register of Pre-trial Investigations (hereinafter - the URPTI). The pre-trial investigation of the criminal offence (inquiry) begins from the moment the information on the commission of the criminal offence is entered into the URPTI. At the same time, under martial law, in the absence of technical access to the URPTI, the investigator, inquirer, and prosecutor are authorised to initiate an inquiry by issuing a resolution to initiate a pre-trial investigation. At the same time, the issuance of the said procedural decision does not relieve the obligation to enter information about the committed criminal offence into the URPTI (Article 615(1)(1) of the CPC of Ukraine) [3].

In accordance with the general provisions of the pre-trial investigation, the inquirer who will conduct the pre-trial investigation of a criminal offence is appointed by the head of the inquiry body or, in the absence of an inquiry unit, by the head of the pre-trial investigation body. At the same time, in accordance with part 6 of Article 214 of the CPC of Ukraine, the inquirer is obliged to inform the head of the prosecutor's office immediately of the commencement of a pre-trial investigation of a criminal offence, the grounds for commencing the inquiry, the preliminary criminal law qualification of the criminal offence, etc. Such notification is made in a written form [3]. The head of the prosecutor's office appoints a prosecutor to supervise the observance of laws during the inquiry in the form of procedural guidance of the pre-trial investigation within the powers enshrined in Article 36 of the CPC of Ukraine [3].

In particular, according to part 1 of Article 37 of the CPC of Ukraine, 'the prosecutor who will exercise the powers of a prosecutor in a particular criminal proceeding is determined by the head of the relevant prosecutor's office after the initiation of the pre-trial investigation'. If necessary, the head of the prosecutor's office may appoint a group of prosecutors who will exercise the powers of prosecutors in a particular criminal proceeding, while determining the senior prosecutor of such a group [3]. In addition, based on the provisions of Article 37(2) of the CPC of Ukraine, it can be assumed that only the prosecutor who has been duly appointed by the head of the prosecution authority is entitled to exercise the powers of a prosecutor in criminal proceedings, except in cases specified in Article 36(4), (5), (3), (3), (2), (341), (3) of the CPC of Ukraine.

At the same time, the decision to appoint a prosecutor (group of prosecutors) to provide procedural guidance in a particular criminal proceeding must be made in the form of a resolution and meet the requirements of Article 110 of the CPC, i.e. such a resolution must be contained in the pre-trial investigation materials and signed by the official who adopted it. The absence of this resolution in the pre-trial investigation materials or its non-signature by the head of the relevant prosecutor's office causes the inadmissibility of evidence collected during the pre-trial investigation as such that was collected under the supervision and procedural guidance of a prosecutor (group of prosecutors) who did not have legal authority to do so [6, p. 48]. Moreover, according to the Order of the Prosecutor General's Office dated 30.09.2021 No. 309 'On the Organisation of Prosecutors' Activities in Criminal Proceedings', heads of prosecutor's offices at all levels must appoint a prosecutor in a particular criminal proceeding immediately, but no later than one day after receiving the notice of the inquiry officer on the commencement of a pre-trial investigation, and issue a relevant resolution in compliance with the requirements of Part 6 of Article 110 of the CPC of Ukraine [7]. In particular, such requirements include the preparation of a resolution on the appointment of a prosecutor in criminal proceedings on an official letterhead and its signature by the official who made the relevant procedural decision [3].

In case of violation of the procedural order for determining the prosecutor who exercises the powers of the prosecutor in a particular criminal proceeding, all evidence obtained as a result of the prosecutor's exercise of his/her powers under Article 36 of the CPC of Ukraine will be considered inadmissible. This follows from the analysis of the provisions of paragraph 2 of part 3 of Article 87 of the CPC, according to which «evidence obtained <...> after the commencement of criminal proceedings through the exercise by the pre-trial investigation or prosecution authorities of their powers not provided for by this Code to ensure pre-trial investigation of criminal offences is also inadmissible» [3].

Considering the above, the primary task at the beginning of the inquiry is to appoint a prosecutor to carry out procedural guidance in a particular criminal proceeding in compliance with the requirements

stipulated by Articles 37, 110, 214 of the CPC of Ukraine. In this case, special attention should be paid to the fact that the resolution on the appointment of a prosecutor in a particular criminal proceeding should be signed by the head of the prosecutor's office or the prosecutor performing his/her duties. It is from the moment the resolution on the appointment of a prosecutor in criminal proceedings is issued that such a prosecutor begins to exercise his or her powers under part 2 of Article 36 of the CPC of Ukraine. The first thing the prosecutor should do is to find out whether there were any violations during the process of receiving information about the commission of a criminal offence and entering information about it into the URPTI. Particular attention should also be paid to the issue of collecting evidence at the beginning of the inquiry, since the efficiency and final outcome of the inquiry depend on the volume and quality of the evidence and other information collected at the first stages of the pre-trial investigation of criminal offences.

Analysing the provisions of the CPC of Ukraine which define the principles and peculiarities of proof in criminal proceedings, it becomes evident that the prosecutor as a representative of the prosecution is charged with the burden of proof (part 1 of Article 92 of the CPC of Ukraine), which consists in collecting, verifying and evaluating evidence in order to establish the circumstances relevant to criminal proceedings (part 2 of Article 91 of the CPC of Ukraine) [3]. From the above, it is noteworthy that the prosecutor, in accordance with Part 2 of Article 36 of the CPC of Ukraine, in addition to the powers specified in this provision, is authorised to exercise other powers provided for by the CPC of Ukraine (paragraph 21 of Part 2 of Article 36 of the CPC of Ukraine) [2]. Such other powers are the powers to collect evidence.

Given the above, and taking into account the purpose of the presented research, the article will focus on the prosecutor's powers to collect evidence at the beginning of the inquiry, while being guided by the peculiarities of the beginning of the pre-trial investigation of criminal offences and collection of evidence during the inquiry.

First of all, it is worth noting that in accordance with Article 36(2)(1) and Article 214(1) of the CPC of Ukraine, the prosecutor is a person authorised to initiate pre-trial investigations, including criminal offences. In addition, according to the Order of the Prosecutor General's Office dated 30.09.2021 No. 309 «On the Organisation of Prosecutors' Activities in Criminal Proceedings», the prosecutor is responsible for ensuring compliance with the requirements of the law when accepting, registering, reviewing and resolving applications and reports of criminal offences, timely entering information into the URPTI [7]. If the prosecutor enters information about a criminal offence into the URPTI, the latter 'is obliged to transfer the materials available to him/her to the relevant pre-trial investigation body within five working days from the date of entering such information in compliance with the rules of jurisdiction and to instruct the pre-trial investigation' (part 7 of Article 214 of the CPC of Ukraine) [3].

Pre-trial investigation in general and criminal misconduct in particular is carried out only from the moment of entering information into the URPTI or issuing a decision to initiate a pre-trial investigation in accordance with Article 615 of the CPC of Ukraine. Accordingly, the activities of proving cannot be carried out outside the criminal proceedings, which, in turn, begin from the moment the pre-trial investigation is initiated. The only exception is the inspection of the scene of the incident and other actions provided for in part 3 of Article 214 of the CPC of Ukraine in urgent cases, before entering information about the commission of a criminal offence into the URPTI/issuing a decision to initiate a pre-trial investigation. This is fully correlated with Articles 298-1 and 298-3 of the CPC of Ukraine. The above demonstrates that in criminal proceedings on criminal misdemeanours, not only the list of procedural sources of evidence has been expanded, but also the means of collecting evidence. This tendency is also evident in the analysis of the content of Article 300 of the CPC of Ukraine. As I.P. Zinkovskyi, «the instrumental component has the most peculiarities, because, having provided for specific sources of evidence for misdemeanours (Article 298-1 of the CPC of Ukraine), the legislator also differentiated the means of collecting evidence. In addition to the general means of collecting evidence for all criminal offences, the CPC of Ukraine has provided» special means of collecting evidence in criminal proceedings concerning criminal offences [8, p. 109]. At the same time, the scholar emphasises that «the procedural component is different in that a common feature of all inquiry-

specific procedural actions is that they do not have a clear proper procedure for their conduct and recording, which will definitely call into question both the admissibility and reliability of the factual data obtained» [8, c. 111].

The above circumstances do not only determine the specific features of the inquiry, which, in turn, indicate the difference between the latter and the pre-trial investigation, but also determine the scope and content of the prosecutor's powers to collect evidence during the inquiry. The analysis of the provisions of Part 2 of Article 36 of the CPC of Ukraine leads to the conclusion that the legislator defines the powers of the prosecutor in criminal proceedings through: 1) direct participation in conducting/performing certain procedural actions or making procedural decisions; 2) issuing instructions (orders). For example, in accordance with clause 3 of Section V, the investigator is obliged to carry out the prosecutor's orders and instructions given in a written form during the investigation. In addition, clause 5 of the same section states that «written orders and instructions of the prosecutor <...> are binding on the investigator». Also, clause 2 of the said legal act states that «during the pre-trial investigation of criminal offences, the investigator independently makes procedural decisions, except where the law provides for the adoption (approval) of a decision by an investigating judge, court or the consent of the prosecutor, and is responsible for the lawful and timely execution of these decisions». [9].

Consequently, the prosecutor's powers to collect evidence at the initiation of the inquiry are exercised through his/her direct participation in conducting/independently conducting certain procedural actions aimed at identifying, recording, seizing and examining evidence or giving instructions, orders to the investigator, the head of the inquiry body or other subjects of evidence during the inquiry. Most of all, at the initial stage of the inquiry, the prosecutor mainly exercises his/her powers in terms of:

- verifying compliance with the terms and procedure for initiating criminal proceedings established by the criminal procedure legislation;
- determining the proper preliminary criminal law qualification of a criminal offence and its relevance to the circumstances of the offence;
- determination of jurisdiction and verification of compliance with the rules of jurisdiction in relation to pre-trial investigation in the form of inquiry;
- determination of the scope of circumstances to be proved at the initial stage of the pre-trial investigation of a criminal offence and the procedural methods of their collection;
- determining compliance with the requirements for the grounds and procedural order for conducting urgent investigative (detective) and other procedural actions aimed at establishing circumstances important for criminal proceedings;
- responding to detected violations of the law from the moment of information receipt (application, notification or self-detection) about a criminal offence;
- deciding on the consolidation or separation of pre-trial investigation materials;
- cancellation of unlawful or unjustified decisions of investigators, etc. [3; 22].

In addition to the above, the prosecutor, as a representative of the prosecution, and therefore the subject of collecting evidence in criminal proceedings, in particular on criminal offences, is authorised to perform actions specified in part 2 of Article 93 of the CPC of Ukraine, or to entrust them to the investigator, the head of the investigating authority. In addition, the prosecutor, exercising the function of supervising the observance of the law during the inquiry, is authorised to have full access to materials, documents and other information relating to the pre-trial investigation. On the other hand, this allows timely detection of violations of the evidence collection procedure by other participants in criminal proceedings. Moreover, the prosecutor is authorised to give instructions to the inquirer, the head of the inquiring body on the procedure for conducting certain procedural actions in order to prevent significant violations of human rights and freedoms, as well as to obtain sufficient, reliable and appropriate evidential information.

5. Conclusions.

In summary, the primary task at the initial stage of the inquiry is to appoint a prosecutor to provide procedural guidance in a particular criminal proceeding in compliance with the requirements of Articles 37, 110, 214 of the CPC of Ukraine. The powers of the prosecutor to collect evidence at the initial stage of the inquiry are exercised by: verifying compliance with the terms and procedure for opening criminal proceedings established by the criminal procedure legislation; determining the correctness of the preliminary criminal law qualification of a criminal offence and its compliance with the circumstances of the offence; determining jurisdiction and verifying compliance with the rules of jurisdiction for conducting a pre-trial investigation in the form of an inquiry; determining the scope of circumstances to be proved at the initial stage of the pre-trial investigation of a criminal offence and the procedural methods of their collection; ascertaining compliance with the requirements for the grounds and procedural order for urgent investigative (search) and other procedural actions aimed at establishing circumstances important for criminal proceedings; responding to detected violations of the law from the moment of receipt of information (application, notification or self-detection) about the commission of a criminal offence; deciding on the consolidation or separation of pre-trial investigation materials; cancellation of illegal or unjustified decisions of inquirers; his/her direct participation in conducting/independently conducting certain procedural actions aimed at identifying, recording, seizing and examining evidence; giving instructions, orders to the inquirer, the head of the inquiring body or other subjects of evidence during the inquiry, etc.

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