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Prosecutor's Procedural Guidance on Pre-Trial Investigation: International Experience and National Realities

Marharyta O. Bibikova*

National Academy of Internal Affairs
03035, 1 Solomianska Sq., Kyiv, Ukraine

■ **Abstract.** One of the main problems of reforming the institution of the prosecutor's office is the partial uncertainty of the function of procedural guidance of pre-trial investigations as an element of supervisory powers. The lack of provisions on effective influence on the implementation of instructions on the management of the investigation, bringing investigators to justice, etc. indicates the need to review the existing approaches to the scope of the prosecutor's powers. The purpose of the study is to analyse existing approaches to the scope of the prosecutor's powers regarding the procedural management of pre-trial investigations and to analyse the international experience of the functioning of this institution of criminal procedure. When writing this paper, terminological, system and structural, comparative and legal methods were used. The paper analyses the current state of procedural guidance in Ukraine and a number of European and post-Soviet countries to identify positive innovations and develop proposals for their implementation in the national law enforcement environment. The necessity of bringing approaches to the consolidation of this institution in the legislation in accordance with the provisions of the Constitution of Ukraine is discussed. The paper considers in detail the requirements of the legislation of Germany and Georgia regarding the consolidation of the institution of procedural guidance for pre-trial investigations. The classification of states according to the powers of their prosecutor's offices in terms of procedural management of pre-trial investigations is carried out. It is proved that the institute of procedural management of pre-trial investigations in Ukraine requires application of the experience of foreign countries. The findings can be used in rule-making and law enforcement activities

■ **Keywords:** supervision; powers; inquiry; criminal procedure; investigators; procedural actions

■ Introduction

The current stage of reforming the law enforcement system in Europe and the former Soviet Union has not yet been completed. This stage is characterised by the creation of new institutions (agreements in criminal proceedings, adversarial parties, etc.), the abolition of existing ones (the institution of pre-investigation verification and initiation of criminal proceedings), the reform of existing ones (bringing to criminal responsibility (suspicion, accusation), choosing a preventive measure, etc.). In this regard, one of the main problems is the reform of the institution of the prosecutor's office and the introduction of the function of procedural guidance of pre-trial investigation as an element of

supervisory powers, which today is not homogeneous in the countries that have introduced this function, and the structure of criminal justice and the place, role and even name of such a body as the prosecutor's office.

Issues of procedural management of the prosecutor's pre-trial investigation were the subjects of study by many researchers. In particular, O. Kaplina [1] raises the issue of determining the competence of a prosecutor and investigator that is relevant for modern law enforcement practice. The author emphasises that this problem is partly caused by the uncertainty of the current criminal procedure legislation, including in terms of the prosecutor's implementation of procedural management of the pre-trial investigation. A. Palyukh [2] examines the essence and content of procedural guidance as the basis of the prosecutor's activity at the stage of pre-trial investigation during the implementation of evidentiary activities, emphasising that the prosecutor's activities to ensure the speed, completeness, and impartiality of pre-trial investigation is unthinkable without the use of authority to lead the investigation,

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■ *Corresponding author

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which consists in the fact that the prosecutor organises and controls the activities of the investigator for evidence in criminal proceedings. The researcher also highlights the problematic issue of the fact that in most of the studied criminal proceedings, the prosecutor does not directly conduct investigative (search) and other procedural actions. V. Klochkov [3] examines the problem of legislative support for the activities of the procedural controller – prosecutor in relation to criminal proceedings in the pre-trial investigation. The prosecutor must perform the tasks of criminal proceedings to protect rights and freedoms and legitimate interests, to ensure a quick, complete, and impartial investigation.

In the above papers, the authors quite fully revealed the issues under study. However, a number of problematic issues (the lack of regulatory provisions regarding the effective influence of the prosecutor on the implementation of instructions on the management of the investigation, bringing investigators to justice) regarding the implementation of the functions of the prosecutor – procedural controller remain unresolved, which requires a review of existing approaches to the scope of the prosecutor's powers and the need to investigate the international experience of the functioning of this institution of criminal procedure.

The purpose of the study is to define and revise the scope of the prosecutor's powers and the specifics of their implementation in the context of the institution of procedural management of the pre-trial investigation, considering the international experience of its functioning.

■ Materials and Methods

When writing this paper, terminological, system and structural, comparative and legal methods were used. In particular, the terminological method was used to clarify the essence of the concepts of “procedural management of pre-trial investigation”, “supervision of compliance with laws”. The system and structural method was used in the process of considering the legal institution of procedural guidance of a pre-trial investigation through its components. The comparative legal method is widely used in the study of the norms of foreign procedural legislation and their comparison with the norms of the national procedural law.

During the study, the Ukrainian criminal procedure legislation, the scientific doctrine on the competence of the prosecutor's office, and the norms of foreign procedural legislation were considered. In particular, the following laws and regulations were analysed: the Constitution of Ukraine [4], the Criminal Procedure Code of Ukraine [5], the Law of Ukraine “On the Prosecutor's Office” [6], the Criminal Procedure Code of Ukraine of 1961 [7], the Criminal Procedure Code of Germany [8], the Law of Georgia “On the Prosecutor's Office” [9], the Criminal Procedure Code of Georgia [10], the procedure for maintaining

a single record in police bodies (divisions) of statements and reports of criminal offences and other events [11].

■ Results and Discussion

Procedural guidance in Ukraine

In Ukraine, procedural guidance is a new institution of criminal procedure, which is at the stage of establishment and reform. The activities of prosecutors at the stage of pre-trial investigation are associated not only with the exercise of supervisory powers, but also with the implementation of the function of procedural guidance. The powers of the prosecutor, which are determined by the Criminal Procedure Code of Ukraine [5] (hereinafter – CPC), are not just of an authoritative nature, but are actually of an authoritative and administrative nature. Coordinating the work of the investigator, taking a direct part in the implementation of investigative actions, timely pointing out the mistakes made during the investigation, the prosecutor acquires the actual and legal opportunity to firmly defend in court their own views on the proven fact of the crime and the guilt of the defendant [1, p. 76].

The prosecutor's procedural powers are much broader than those given to the heads of investigative departments. Heads of pre-trial investigation bodies are obliged to follow the instructions of prosecutors provided in the written form. Procedural guidance by a prosecutor should be understood as organising the process of the entire pre-trial investigation, determining its vectors, coordinating the entire set of necessary procedural actions, ensuring compliance with legal norms during the investigation, and helping to ensure conditions for the normal exercise of their functions by investigators [3, p. 262].

Supervision of compliance with laws, which is carried out as a form of procedural guidance of pre-trial investigation, is revealed in the implementation by the prosecutor, along with the exercise of supervisory powers, activities associated with determining the range of evidence, methods of obtaining it in a separate criminal proceeding, and with the conduct of appropriate investigative (search) and secret investigative (search) actions, and with ensuring in this process the legality in the actions of investigators [12, p. 108]. For its part, the procedural supervisor combines the head of the investigator and prosecutor, who supervise the investigation, and accordingly, the management of the investigation [13 p. 137].

On November 20, 2012, the new CPC of Ukraine came into force [5], in which the prosecutor's activities underwent significant changes. In fact, the prosecutor's supervision of the CPC of 1961 was replaced by prosecutor's supervision of compliance with laws during pre-trial investigations in the form of procedural guidance [7]. If under the 1961 CPC [7] the prosecutor was away from the investigation process itself, monitoring

compliance with laws and interfering with the process itself only when violations of the law were detected or when final decisions were made, then under the 2012 CPC [5] in each criminal proceeding from the moment it was entered into the Unified Register of pre-trial investigations (hereinafter – the Register), the prosecutor is appointed as the procedural controller. The procedural controller can conduct prosecution by giving instructions, participating in investigative actions, coordinating relevant petitions and decisions, thereby preparing evidence for making a final decision in the proceedings. The investigator can no longer carry out investigative actions that restrict the rights of citizens without the consent of the prosecutor.

In addition, according to the CPC of 1961 [7], only the head of the prosecutor's office or deputy had the right to sign decisions in a criminal case, but now every prosecutor – procedural controller makes almost all decisions and signs all procedural documents in criminal proceedings [14, p. 271]. The process has also changed significantly. Thus, the stages of pre-investigation verification, initiation of criminal proceedings have disappeared, it is consolidated that all statements about crimes are entered in the Register and all facts are investigated by investigators. The powers of operational units are limited to the execution of instructions of the investigator and prosecutor, at the same time, investigators received the right to independently conduct secret investigative actions, an analogue of operational search activities, in fact becoming analogues of detectives that exist in other countries of the world [2, p. 478].

Such novelties in the procedural law [5] immediately led to significant changes in the registration of criminal offences (crimes) and provoked an increase in the burden on investigators and prosecutors – procedural managers. The first months of the CPC 2012 [5] showed that law enforcement agencies, primarily the police and prosecutors, were not fully ready to work under the new legislation [15, p. 80]. First of all, this was conditioned by the fact that the structure of law enforcement agencies was not changed in a timely manner in accordance with the CPC 2012 [5]. For example, as of 11/20/2012, the Ministry of internal affairs employed 8,142 investigators, the number of operational employees exceeded 40 thousand, making the ratio of investigators and employees of operational units one to five. That is, the reserve for increasing the number of investigative units was significant, but there was no mass transfer of operational employees to investigative units. After the reform of the police, the number of investigators generally decreased [5].

In order to address the issues of reducing the burden on investigators and prosecutors from the first days of the CPC 2012 [5], the way of issuing bylaws was chosen, some of which, as it turned out later, contradicted the law [16, p. 112].

In the system of the Ministry of internal affairs, an order was issued on unified accounting [11], which provides that the decision to enter an application in the unified state register of legal entities is made by the deputy head of the district department – the head of the investigative department, and other applications are written off to the order, since they do not contain information about the commission of a criminal offence. This order is still valid today. It has led to thousands of appeals against refusals to register applications to the court, which are satisfied by the court in almost all cases of appeal. At the same time, the prosecutor provides procedural guidance from the moment of registration of the application in the unified state register of legal entities and therefore does not legally have the authority to respond to violations of the law when the application is refused registration in the Register.

In addition, after the start of the new procedural legislation [5], the right of the prosecutor to respond to the inaction of investigators and heads of investigative units was significantly restricted [1, p. 80]. Criminal liability of investigators was provided for deliberate failure to follow the instructions of prosecutors, but with an avalanche-like increase in the number of cases for each of the investigators, it was impossible to prove the premeditation of the latter's actions regarding non-compliance with the instructions. A total of 18 such proceedings were registered, and all of them were closed. In the future, the norm on criminal liability of investigators for failure to comply with the prosecutor's instructions was abolished. At the moment, the prosecutor has only the right to provide mandatory instructions to the investigator, but does not have the ability to respond to their non-compliance [5].

In general, the prosecutor's procedural guidance has remained virtually unchanged for almost 10 years of the CPC 2012 [5], but as a result of the reform of law enforcement agencies, it has become much more complicated, which indicates the inconsistency of the legislation. In the Constitution of Ukraine [4] in Paragraph 2 of Part 1 of Article 131-1, the functions of the prosecutor's office include the powers to organise and provide procedural guidance for pre-trial investigation, supervision of secret and other investigative and search actions carried out by law enforcement agencies, and the solution of other issues that arise during criminal proceedings in accordance with the norms of legislation [4]. Part 2 of Article 36 of the CPC of Ukraine [2] stipulates that prosecutors monitor compliance with the provisions of the relevant laws during the pre-trial investigation. The form of such supervision is called procedural management of pre-trial investigation [5]. In the Law of Ukraine "On the Prosecutor's Office" [6], the prosecutor's office is assigned such functions as supervision of compliance with laws by bodies that carry out operational search activities, pre-trial investigation, inquiry, and in this norm procedural guidance is not consolidated [6].

International experience in procedural guidance

The above indicates the need to bring approaches to the consolidation of this institution in legislation in accordance with the provisions of the Constitution of Ukraine [4]. In addition, the practical application of the norms of laws revealed a number of problematic issues in the exercise of the prosecutor's functions. First of all, this concerns the lack of provisions on effective influence on the implementation of instructions for managing the investigation, bringing investigators to justice, and others, which also indicate the need to review existing approaches to the scope of the prosecutor's powers. The process of further reform should be based on the investigation and application of international experience.

Since the CPC of Ukraine [5] is similar to the CPC of Germany [8], due to the implementation of the norms of the latter, when developing the Ukrainian Criminal Procedure Law, it is necessary to consider the regulation of this institution in Germany. Thus, in German criminal proceedings, only the prosecutor's office has the right to initiate criminal proceedings and support the prosecution. According to §170, p. 1 of the German CPC [8], if in the course of conducting an inquiry sufficient grounds for initiating a public accusation are obtained, the prosecutor's office brings it by submitting an indictment to the court [17, p. 233]. In addition, §163 of the German CPC [8] delegates the duties of investigating the circumstances of a criminal action to the police, although it is not an officially recognised body of inquiry. This order also grants police authorities and officials the right to "First Access" (in German – "erster Angriff") to find out the reasons for the act committed and prevent complications during the investigation. Police bodies are considered subsidiary bodies to the prosecutor's office due to the fact that they must transfer the collected materials to it without unnecessary delay to ensure the performance of their function, as required by § 163 p. 2 of the German CPC [8].

The approach of the German CPC [8] provides for the priority of prosecutor's orders over so-called "emergency" judge decisions, and also regulates the ability to give orders and instructions to the investigator directly, without the consent of the head of the investigative body [18]. An interesting Institute of German Criminal Procedure Law is the *Erbittlungspersonen der Staatsanwaltschaft* Institute (the literal translation is prosecutor's persons of inquiry, but given that there are no analogues of this institution in Ukrainian legislation, the study suggests that the full content of this institute will reveal the term "prosecutor's office inquirers") of police officials who are involved by the prosecutor's office to conduct an inquiry. These persons are authorised to conduct certain procedural actions during the inquiry, both on behalf of the prosecutor's office, which gave instructions, and on behalf of the prosecutor, who gave instructions to

conduct them. It is with the help of this institution that the prosecutor can give instructions to a specific police officer without involving their leadership [17].

Georgia's experience in these matters is also of interest. Thus, according to Articles 32 and 33 of the CPC of Georgia [10], the prosecutor's office is a criminal prosecution body. To ensure the performance of this function, the prosecutor's office provides procedural guidance to the investigation. In cases provided for by the CPC of Georgia [10], and in accordance with the established procedure, the prosecutor's office fully investigates crimes, supports state prosecution in court [19, p. 194]. Georgian legislation, along with other tasks, assigns the prosecutor the function of exercising procedural supervision at the stage of preliminary investigation to secure charges. To fulfil these powers, according to Articles 23-28 of the Law of Georgia "On the Prosecutor's Office" [9], it is responsible for introducing such acts of prosecutor's response as submission, protest, ruling, instruction, approval, and complaint [9].

According to Article 33 of the CPC of Georgia [10], the prosecutor has the right to:

- a) entrust the investigation of a criminal case to a particular law enforcement agency or investigator; withdraw the case from one investigator and transfer it to another;
- b) take part in conducting investigative actions or independently conduct a preliminary investigation;
- c) in the course of the investigation, give mandatory instructions to the law enforcement agency or (and) the lower prosecutor;
- d) request separate materials of the criminal case;
- e) apply to the court with a request to adopt a court ruling on the election, modification, or cancellation of preventive measures against the accused subjects, conduct investigative actions or (and) operational search measures restricting human rights, and in other cases provided for by the code;
- f) cancel the decisions of the investigator or the lower prosecutor;
- g) discontinue the criminal prosecution or (and) the investigation or discontinue the criminal prosecution;
- h) allow complaints about the actions or (and) decisions of the investigator, and in case of their appeal to the court – to give the necessary explanations to the court;
- i) change the charges;
- j) enter into a procedural agreement with the accused and submit a petition to the court for sentencing against the accused without the court considering the criminal case on its merits;
- k) submit evidence to the court, participate in the consideration of the issue of their admissibility;
- l) apply to the court to request evidence from private individuals during the investigation process;
- m) demand and freely receive documents or other material evidence from state bodies;

n) make decisions on the search for the accused (convicted person);

o) recognise a person as a victim and explain to them their rights and obligations;

p) exercise other powers provided for in the Code [19, p. 196].

The Chief Prosecutor of Georgia or an authorised person is granted the right, according to which, regardless of the jurisdiction, they can withdraw the case from a certain investigative body and transfer it for investigation by another investigative body; remove the lower prosecutor from exercising procedural guidance and assign their functions to another prosecutor [9].

In the above-mentioned and other countries of the near and far abroad, where prosecutor's offices operate, their officials are assigned the following functions in pre-trial investigation:

1) prosecution (in Albania and Denmark);

2) prosecution; supervision of compliance with laws by the bodies that conduct pre-trial investigation of criminal offences (Bulgaria, Armenia, Brazil, Czech Republic, Estonia, Yemen, Portugal, Republic of Kazakhstan);

3) prosecution; supervision of the implementation of legal requirements by the bodies that investigate criminal offences; procedural guidance on the activities of pre-trial investigation bodies (China, Greece, Japan, Romania);

4) prosecution; procedural guidance on the activities of pre-trial investigation bodies (Norway, Austria, Turkey, the Netherlands, France, Switzerland);

5) prosecution; supervision of law enforcement by bodies that investigate criminal offences, human rights function (Argentina, Uzbekistan, Kyrgyzstan);

6) prosecution; supervision of the implementation of laws by the bodies that investigate criminal offences; procedural guidance on the activities of pre-trial investigation bodies; direct investigation of criminal offences (Vietnam, Azerbaijan, Georgia);

7) prosecution; supervision of compliance with laws by bodies that investigate criminal offences; direct investigation of criminal offences; coordination function (Tajikistan, Lithuania, Belgium, Poland) [20, p. 277].

In a number of countries (Denmark, Belgium, Georgia), prosecutors perform at the stage of pre-trial investigation only the function of prosecution and direct investigation of criminal offences or prosecution functions; supervision of the implementation of the law by the bodies that conduct pre-trial investigation of criminal offences; direct investigation of criminal offences [20, p. 276]. The function of supervision (control) over compliance with laws during pre-trial investigations is performed in Bulgaria, Armenia, Brazil,

Yemen, Portugal, Republic of Kazakhstan, Estonia, Czech Republic, China, Greece, Japan, Romania, Argentina, Uzbekistan, Kyrgyzstan, Vietnam, Azerbaijan, Georgia, Tajikistan, Lithuania, Belgium, Poland; the function of procedural guidance of bodies that investigate criminal offences is performed by prosecutors in Norway, Austria, Turkey, the Netherlands, France, Switzerland, China, Greece, Japan, Romania, Vietnam, Azerbaijan, Georgia; the function of direct investigation of criminal offences – in Vietnam, Azerbaijan, Georgia, Tajikistan, Lithuania, Belgium, Poland; human rights protection – in Argentina, Uzbekistan, Kyrgyzstan.

In recent years, the function of prosecutors providing procedural guidance to pre-trial investigations has become particularly widespread. Prosecutors, as procedural controllers, determine the strategy and tactics of pre-trial (or preliminary) investigation, provide written instructions on the implementation of certain investigative and other procedural actions, cancel unjustified or illegal decisions of the latter.

■ Conclusions

There is no homogeneous institution of criminal procedure, in general, and the institution of procedural guidance by the prosecutor of pre-trial investigation, in particular. In connection with the studied positive experience in the criminal process of Ukraine, it is necessary to apply: following the example of Germany – the exclusive right of the prosecutor to initiate criminal proceedings (pre-trial investigation); from the experience of Germany – the existence of the right of the prosecutor to give instructions to a specific police officer without involving the management; the right of the prosecutor to initiate disciplinary responsibility of investigators, employees of bodies conducting operational search activities, for violations of the law, non-performance or improper performance of official duties, instructions of the prosecutor; the right of the prosecutor to issue an order to initiate disciplinary proceedings against an investigator; from the experience of Georgia – to transfer proceedings from one investigator to another, to terminate criminal prosecution in all cases provided for by law.

In addition, the Institute of German Criminal Procedure Law, called *Eritlungspersonen der Staatsanwaltschaft*, which refers to officials who are involved by the prosecutor's office to conduct an inquiry is also of interest to borrow in Ukraine. The literal translation may sound like "prosecutor's persons of inquiry". There are no analogues of this institution in Ukrainian legislation. The study suggests that the introduction of this institution will have a positive impact on the effectiveness of prosecutors' implementation of procedural guidance in pre-trial investigations.

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Здійснення прокурором процесуального керівництва досудовим розслідуванням: міжнародний досвід і національні реалії

Маргарита Олександрівна Бібікова

Національна академія внутрішніх справ
03035, пл. Солом'янська, 1, м. Київ, Україна

■ **Анотація.** Однією з основних проблем реформування інституту прокуратури є часткова невизначеність функцій процесуального керівництва досудовим розслідуванням як елемента наглядових повноважень. Відсутність положень щодо ефективного впливу на виконання вказівок стосовно керівництва слідством, притягнення слідчих до відповідальності свідчать про необхідність перегляду наявних підходів до обсягу повноважень прокурора. Метою статті є аналіз наявних підходів до обсягу повноважень прокурора щодо процесуального керівництва досудовим розслідуванням і вивчення міжнародного досвіду функціонування цього інституту кримінального процесу. Під час написання статті застосовано термінологічний, системно-структурний, порівняльно-правовий методи. У статті проаналізовано сучасний стан процесуального керівництва в Україні, низці країн Європи та пострадянського простору щодо визначення позитивних інновацій та розроблення пропозицій щодо їх впровадження в національне правозастосовне середовище. Аргументовано необхідність приведення підходів до закріплення цього інституту в законодавстві відповідно до положень Конституції України. Детально проаналізовано приписи законодавства Німеччини та Грузії стосовно закріплення інституту процесуального керівництва досудовим розслідуванням. Здійснено класифікацію держав за повноваженнями їхніх органів прокуратури в частині процесуального керівництва досудовим розслідуванням. Доведено, що інститут процесуального керівництва досудовим розслідуванням в Україні потребує застосування досвіду зарубіжних держав. Зауважено, що результати дослідження можуть бути використані в нормотворчій і правозастосовній діяльності

■ **Ключові слова:** нагляд; повноваження; дізнання; кримінальний процес; слідчі дії; процесуальні дії