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Enhancement of the Prosecution and Defence Tactics During the Temporary Access to Objects and Documents

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■ **Abstract.** The article sets out the main recommendations for improving the activities of the prosecution and the defence in criminal proceedings during the procedure of providing temporary access to objects and documents. During the investigation, the prosecutor or investigator in almost every proceeding is required to seize any carriers of evidentiary information about the crime committed. In turn, defenders often use their authorities to conduct temporary access to objects and documents. The practice of applying this measure to ensure criminal proceedings indicates a significant number of mistakes made by the parties to criminal proceedings, as a result of which this measure is not carried out, the court refuses to make a decision, so the goal that was set is not achieved. The purpose of the article is to improve the quality of temporary access to things and documents by the parties to criminal proceedings, to obtain a positive practice of court decision-making on its conduct and to obtain results to ensure the tasks of criminal proceedings. To achieve this goal, the formal-logical method, system-structural, comparative-legal and statistical methods were used. The study compares the procedural and tactical legal capabilities of different parties to criminal proceedings – prosecution and defence. The mistakes commonly committed by them during the process of temporary access to objects and documents are highlighted. Considering this, proposals were put forward to improve both the general tactics inherent in both sides of the process and specific tactical and procedural actions and techniques characteristic of each separately. A number of recommendations were received for prosecutors, investigators and lawyers, aimed at improving the quality of the parties to criminal proceedings during temporary access to objects and documents

■ **Keywords:** : temporary access to objects and documents; party to criminal proceedings; prosecution; defence

■ Introduction

Prosecutorial, investigative and advocacy activities, like any human activity, are inherently subject to mistakes. Only by performing activities and committing mistakes [1], the subject of such activity improves. As a result, the quality of one's work and the final result improve. Two parties – the prosecution and the defence – participate in criminal proceedings based on adversarial rights, pursuing different goals. Their activities are imperfect both in the criminal process in general and in conducting individual procedural actions in particular. Temporary access to objects and documents provided for

in paragraph 5 of Article 131 of the CPC of Ukraine as a measure to ensure criminal proceedings is no exception to this rule [2].

Investigative and prosecutor's practice shows that this measure as a means of collecting evidentiary information in the process of investigating a crime is the most used in criminal proceedings both in Ukraine and in European countries [3]. The European Court of Human Rights has also focused on this measure in its practice [4-6].

In the state, this trend has been constant since the entry into force of the Criminal Procedure Code of Ukraine. In particular, in 2013, the largest number of applications for the application of measures to ensure criminal proceedings were applications for temporary access to objects and documents in accordance with Art. 163 of the CPC of Ukraine (about 70% of the total number of applications considered by the investigating judge of the local general court during the pre-trial investigation, 90% of which

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were satisfied) [7]. In addition, in recent years, the official statistics of the State Judicial Administration of Ukraine on the consideration of criminal proceedings by the courts of the first instance confirms the tendency to maintain a significant number of applications for temporary access to things and documents considered by investigating judges. In particular, in 2017, the investigating judges considered 256.255 applications for temporary access to objects; in 2019 – 264.185 applications, of which 87.3% were granted, which is 35.001 more applications than in 2018. The number of motions for temporary access to things and documents considered by investigating judges in 2019 is 27.57% of the total number of motions, complaints, and statements during the pre-trial investigation considered by investigating judges for the specified year [8].

The mentioned security measure is of interest due to the following aspects:

- first, the subjects of its execution, along with the prosecution, are also the defence;
- secondly, how efficiently it is substantiated in the petition to be approved by the court;
- thirdly, whether the purpose of this measure is achieved.

Consequently, the number of procedural documents within criminal proceedings is constantly increasing, which causes a significant number of errors and issues in law enforcement, and therefore requires greater scientific and practical attention aimed at improving criminal procedural activity in this segment. Thus, it is too early to consider this dialectical process of self-improvement of the parties to the proceedings completed. This is confirmed by the constant interest in this topic, which is reflected in the publications and scientific works of legal scholars on this topic [9; 10].

The issues of application of temporary access to objects and documents during the investigation of criminal proceedings at different times have been the subject of a significant number of scientific works, in particular by such legal scholars as: S.YE. Ablam-skyi, S.V. Andrusenko, Yu.P. Alenin, I.V. Basysta, V.V. Vintsuk, V.I. Galagan, G.I. Globenko, I.V. Glovyuk, Yu.M. Hroshevyi, O.M. Humin, O.V. Kaplina, M.P. Klymchuk, O.I. Korovaiko, O.M. Kuziv, B.A. Kuspis, V.A. Loboiko, L.M. Lyulich, M.A. Makarov, P.M. Malanchuk, O.R. Mykhailenko, V.T. Malyarenko, V.V. Nazarov, V.K. Nersesova, D.P. Nor, V.T. Pysmennyi, M.A. Pogoretskyi, O.A. Podkovskyi, V.O. Romanov, V.V. Sokurenko, M.I. Sofin, O.S. Starentkyi, M.S. Strogovych, O.S. Tarasenko, L.D. Udalova, V.I. Farynnyk, V.M. Fedchenko, V.O. Finahiev, S.S. Chernyavskyi, A.V. Chub, O.G. Shylo, M.E. Shumylo, O.O. Yukhno, and others. Scientists

have paid enough attention to this topic. However, the issues of overcoming gaps in the procedural activity during the application of temporary access by the parties to the proceedings, and elimination of errors remain insufficiently researched.

The purpose of the article is to develop procedural and tactical recommendations aimed at improving the algorithm for conducting the procedure of temporary access to objects and documents as an effective measure to ensure criminal proceedings.

■ Results and Discussion

Given the content of the requirements of Art. 131 of the CPC of Ukraine, measures to ensure criminal proceedings are applied in order to achieve the effectiveness of this proceeding, one of which is temporary access to things and documents. Given the content of the requirements of Art. 131 of the CPC of Ukraine, measures to ensure criminal proceedings are applied in order to achieve the effectiveness of this proceeding, one of which is temporary access to things and documents. Temporary access to objects and documents is carried out on the basis of the decision of the investigating judge or court.

With the development of advanced technologies, the legislator distinguishes the type of access to electronic information systems or their parts, mobile terminals of communication systems, which is carried out by making a copy of the information contained in such electronic information systems or their parts, mobile terminals of communication systems, without their seizure. The procedural order of execution is described in detail in Chapter 15 of the CPC of Ukraine.

According to the law, both the investigator with the prosecutor and the defence counsel have the same right to obtain temporary access. Despite the equality of the parties in criminal proceedings, which is ensured by the principle of adversarial proceedings, the majority of applications to the court for temporary access belong to the prosecution, not the defence [11]. At the same time, the role of the defender in temporary access is wider than that of the investigator or prosecutor, since the defender can initiate such a measure through the court in one case, and directly participate in it as a defender of the person who is being subjected in the other.

The prosecutor and investigator have the right to request the necessary information upon written requests for obtaining information relevant to establishing the truth in criminal proceedings. The defender also has the right to promptly receive such information at the request of the advocate (Article 24 of the Law of Ukraine “On the Bar and Practice of Law”) [12]. However, the procedural order for obtaining originals or copies of any documents,

even those containing publicly available information, is related to the decision of the investigating judge or court. Some scholars do not fully approve of this practice, since, in their opinion, this position of the legislator significantly increases the volume of documents and reduces the level of efficiency in making important procedural decisions [13]. And this is quite reasonable.

Thus, to obtain permission from the court to carry out this measure, the parties to the proceedings must draw up a petition - a procedural document with which they must apply to the investigating judge during the pre-trial investigation or the court during the trial.

The authors believe, it is the petition that is the main source of prosecutorial and investigative and lawyer's errors in this case. Articles 160 and 163 of the CPC regulate the process of drafting a motion by the parties to criminal proceedings and its consideration in court. Among the formal requirements for the petition, the most important are the next two. The first one – regarding the substantiation of the necessity of seizure of objects and originals or copies of documents, if the relevant issue is raised by a party to the criminal proceedings (paragraph 7 of Article 160). The second is the necessary evidence of sufficient grounds to believe that there is a real threat of alteration or destruction of objects or documents (Part 2 of Article 163). Why are these requirements crucial for convincing the investigating judge to make a positive decision? Since it is the detailed substantiation of the circumstances of the criminal offence, qualification, information about objects and documents, their location and significance for the case and their use as evidence that will create for the judge a qualitative overall picture of the crime and the opportunity to prove the need for such a measure by making an appropriate court decision.

The petition is the cornerstone for the implementation of temporary access to objects and documents, as the further legal fate of the entire measure depends on the quality of its elaboration. The party to the criminal proceedings must set out in the motion the maximum number of procedural arguments that will be sufficient for the investigating judge to satisfy it.

Practice shows that it is the errors in this document that result in the refusal to comply with it or return it to the party that filed it.

Despite the fact that the prosecution and the defence have different procedural vectors of activity, according to the principle of proportionality [14], recommendations have been developed for both parties, the implementation of which will serve to establish the truth and fulfil the tasks of criminal proceedings established by Art. 2 of the CPC of Ukraine.

As for the prosecution. The main reason for returning the motion or refusing to satisfy it is primarily non-compliance with the provisions of Article 160 of the CPC of Ukraine [15].

Currently, there are two procedural orders for consideration by the investigating judge, the court of the motion for temporary access to objects and documents.

The first is that after receiving the motion, the investigating judge and the court summons the person in possession of such things and documents. Failure to appear at the court summons of such a person without valid reasons or failure to notify of the reasons for non-appearance is not an obstacle to the consideration of the petition (Part 4 of Article 163 of the CPC of Ukraine).

The second option is applied if the party who filed the application proves that there are sufficient grounds to believe that there is a real threat of changing or destroying things or documents. In this case, the motion is considered by the investigating judge and the court without summoning the person in whose possession they are. Such a request shall be considered immediately. Emphasis should be placed on the content of the request in case it is necessary to obtain information about the customer and communications regarding several persons or several terminal devices. The High Specialised Court of Ukraine for Civil and Criminal Cases previously stated: "Investigating judges must account for homogeneous issues that must be clarified within the framework of one criminal proceeding by applying one or different types of interim measures related to each other (at the same time, the need to clarify such issues is justified by the same circumstances), may be initiated by the investigator (prosecutor) within one motion and decided by the investigating judge in one ruling". This approach should be used to consider motions for temporary access to documents held by telecommunications operators and providers and containing information about the subscriber and communication (Article 159, paragraph 7 of Part 1 of Article 162 of the CPC of Ukraine) [16]. These explanations remain relevant today.

According to clause 4 of part 2 of Article 160 of the CPC of Ukraine, the motion for temporary access to objects and documents must contain the grounds to believe that the objects and documents are or may be in the possession of the relevant individual or legal entity.

The analysis of judicial practice shows that often, in contradiction to the requirements of paragraph 4 of Part 2 of Article 160 of the CPC of Ukraine, the main reason for refusal to provide information is a request for temporary access to objects and documents in the possession of telecommunications

operators, banks and other business entities, but the fact that such branches do not have the status of a legal entity is not considered, which makes it impossible to positively resolve this issue.

For the most part, investigators, in addition to ignoring the specified norm, unreasonably include in the motion information about their consideration without the participation of persons in possession of certain things or documents. Thus, the motions contain formal references to the possibility of persons destroying things and documents without substantiated evidence of such facts. Unfortunately, investigating judges do not always consider such circumstances regarding the groundlessness of the petitions in terms of their consideration without the participation of the person, which subsequently leads not only to unreasonable approval of the position of the investigator or prosecutor but also to non-compliance with the basic principles of criminal procedure in general. Particularly, the motion must contain all the details, including the name of the telecom operator. For example, the provider “Lifecell” in official documents is spelt with a small letter – “lifecell”. Therefore, it should be indicated correctly in the motion. This is important when the prosecutor and investigator need to quickly solve the crime and save time [17].

To identify the offender in proceedings, it is often necessary to obtain objects and documents containing legally protected confidential information, in particular information from telecommunications operators and providers (paragraphs 7, 8 of Art. 162 of the Criminal Procedure Code of Ukraine) on communication, subscriber, provision of telecommunication services, in particular the receipt of services, their duration, content, transmission routes, etc. and which is necessary for the preparation, approval and consideration of applications for permission to conduct further covert investigative (detective) actions.

It is also necessary to distinguish the so-called zero calls. We are talking about an outgoing (incoming) connection between subscribers in cases where the connection was not established. That is, one subscriber called another, the latter recognised who it was from and why, but did not pick up the phone. This scheme of silent communication is used by criminals to commit crimes for the purpose of high secrecy and non-dissemination of information. Such calls can be a command to fire, during contract killings, the detonation of explosives in the process of committing terrorist acts, etc. The defining feature of a zero call is that the operator does not profit from it. Therefore, such information is useless for the operator. Therefore, there is no need to store it,

and hence the storage period of such data is from 7 to 14 days [18].

Given the above, prosecutors and investigators should consider this feature when substantiating these circumstances in the petition, namely:

indicate that some types of information (e.g., data on zero duration calls)

- is stored for a short time, and therefore its receipt due to the threat of destruction should be carried out promptly, immediately in the first hours or days after a high-profile crime was committed;

- since this type of temporary access to objects and documents from telecommunications operators and providers requires a prompt response, motions are considered without calling a representative of the telecommunications operator. This precise set of procedural decisions and actions will allow obtaining and consolidating evidentiary information quickly [11].

Also, the ruling of the investigating judge on granting temporary access to objects and documents states that in case of failure to comply with it, the investigating judge, at the request of the party to the criminal proceedings, which is granted the right to access to objects and documents, has the right to issue a ruling on a search to find and seize the said objects and documents.

If the representative of the law enforcement agency fails to provide access to the objects and documents within the period specified in the ruling of the investigating judge, the investigator, in agreement with the prosecutor, or the prosecutor must re-apply with the request, indicating, in particular, the circumstances that prevented him from providing such access within the time specified in the ruling of the investigating judge.

Regarding the defence side. The dominance of the number of requests of the investigating authorities to conduct this measure after the entry into force of the CPC of Ukraine in 2012 has persisted to this day. The study of the Unified Register of Court Decisions in all courts of Ukraine for the period from January 1, 2016, shows a significant advantage of the number of court decisions made as a result of consideration of motions for temporary access to objects and documents filed by representatives of the prosecution over the motions of the defence, and especially the victim. A significant part of them are the decisions on returning the motion (although this type of decisions for temporary access is not provided for in the CPC) [8] or refusal to satisfy it. The share of satisfied motions is so insignificant that in the entire body of court decisions on this issue they are hardly visible. This may be due to the following factors: 1) investigating judges are still not used to considering the defence and the victim as an active

subjects of collecting evidence by this means; 2) low activity of participants in criminal proceedings in the issue of filing relevant motions; 3) shortcomings in the preparation and formation of a motion for temporary access to objects and documents [19].

Since there are certain uncertainties concerning the procedure of execution of the ruling by the owner of the property, in case of a court decision in favour of the prosecution, is clearly regulated in the CPC of Ukraine. However, it is preferable to prepare the list of documents to be handed over to law enforcement officers personally without asking the representatives of the pre-trial investigation to make copies of such documents to be transferred. The description of the property transferred to the defender should be done personally: no law enforcement officer will be as patient as the owner of the property to carry out the description. Such advice can also be given in relation to the execution of rulings in the interests of the defence. However, in relations with the defence party, the question arises: how should the transfer of property and documents to the defence be formalised? The CPC does not answer this question, but in practice, it is decided by discretion. This may be a joint act with the defender on the transfer of property and documents pursuant to the decision of the investigating judge or a unilateral letter of the property owner on the transfer of property and documents. Another alternative is a receipt by the defender that everything listed in the ruling of the investigating judge has been received from the owner of the property, which, in turn, may be contained in the ruling, which remains at the disposal of the property owner [20].

In addition, practice shows that during the consideration of motions for temporary access to objects and documents, the investigator, or prosecutor is often limited to providing only information on entering information into the URPI, copies of witness interrogation protocols, resolutions on the creation of a group of investigators, reports of operational officers. The most common violations committed include failure to attach to the petition for temporary access to objects and documents a duly certified copy of the extract from the URPI on criminal proceedings; failure to indicate in the petition the legal qualification of the criminal offence, only indicating the article (part of the article) of the Criminal Code of Ukraine; lack of complete and specific information about the objects and documents to which temporary access is to be obtained [11]. If the above violations are detected during the consideration of the relevant motions for temporary access to things and documents, while performing the function of defence/representation, the lawyer should draw the attention

of the investigating judge to such violations, insisting on the need to dismiss the motions. It should be noted that during the preparation of motions for temporary access to objects and documents, defenders do not always comply with the provisions of Part 2 of Article 160 of the CPC of Ukraine, which define the requirements for the content of the motion. This results in decisions to deny temporary access to objects and documents. Typical mistakes of a lawyer include: lack of a clearly defined list of things and documents to which access is planned to be obtained; failure to provide evidence of the need for temporary access to things and documents; lack of information about the identifying features of the relevant things and documents; failure to indicate the name, address of institutions, enterprises and organizations in possession of things and documents; insufficient justification of the grounds and proof that things and documents may be in the possession of a person; things and documents specified in the petition contain [21].

If it is necessary to obtain temporary access to original documents for the purposes of the defence, the justification of the application in this part should also be taken seriously. In practice, requests for temporary access to original documents are more common among investigators and prosecutors. However, such a need may also arise on the part of the defence, for example, to perform a handwriting examination. Motions for temporary access to objects and documents and data stored by telecommunications operators and providers should be submitted in different packages (one operator – one motion). First of all, this is relevant when the defence raises the issue of consideration of the motion in a closed court session. Also, in relation to the persons indicated in the ruling, the investigating judge may grant temporary access not only to the lawyer who filed the motion but also to other lawyers who defend this suspect, if confirmation of authority is provided to the motion [22].

Besides, the attention of the parties to criminal proceedings should be directed to personal participation in the consideration of the motion by the court. Since its consideration without the initiator deprives the party of the proceedings of the opportunity to add arguments in its own favour, further justify the position if the court does not have enough justification set out in the petition and substantiate the need for this interim measure.

■ Conclusions

Tactical mistakes of the prosecution and the defence in criminal proceedings are technically extraordinarily similar. The difference lies in the procedural aspect since each of the parties performs its inherent

function of criminal proceedings, and for different purposes – to incriminate the committed crime to the suspect, and to protect against prosecution and acquit their client. To achieve their goal, the parties use the same tactical methods and means within the limits of the rights and powers granted to them by law, in particular, if any party uses such a procedural

measure, which is a measure to ensure criminal proceedings in the form of temporary access to objects and documents. It is one of the most common and frequently used subjects of proceedings in criminal procedural activities. Thus, the parties' recognition of their errors will allow for a more effective and efficient improvement of their activities.

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Удосконалення тактики дій сторони обвинувачення та захисту під час проведення тимчасового доступу до речей і документів

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■ **Анотація.** У статті викладено основні рекомендації для вдосконалення діяльності сторони обвинувачення та сторони захисту в кримінальному провадженні під час проведення заходу забезпечення – тимчасового доступу до речей і документів. Під час розслідування в прокурора, слідчого майже в кожному провадженні постає необхідність у вилученні будь-яких носіїв доказової інформації про вчинений злочин. Своєю чергою захисники також дедалі частіше використовують свої повноваження для проведення тимчасового доступу до речей і документів. Практика застосування цього заходу забезпечення кримінального провадження засвідчує значну кількість допущених помилок сторонами кримінального провадження, унаслідок чого зазначений захід не проводять, суд відмовляє в ухваленні рішення, тож мету, яку ставили, не досягають. Метою статті є підвищення якості проведення тимчасового доступу до речей і документів сторонами кримінального провадження, отримання позитивної практики ухвалення судом рішень про його проведення та отримання результату для забезпечення завдань кримінального провадження. Для досягнення поставленої мети застосовано формально-логічний метод, системно-структурний, порівняльно-правовий та статистичний методи. У публікації здійснено порівняння процесуальних і тактичних можливостей різних за напрямом своєї діяльності сторін кримінального провадження – обвинувачення та захисту. Висвітлено характерні помилки, яких вони припускаються під час здійснення своєї діяльності в процесі проведення тимчасового доступу до речей і документів. З огляду на це, висунуто пропозиції з удосконалення як загальної тактики, притаманної обом сторонам процесу, так і конкретних тактичних та процесуальних дій і прийомів, характерних кожній окремо. Отримано низку рекомендацій для прокурорів, слідчих та адвокатів, метою яких є підвищення якості діяльності сторін кримінального провадження під час проведення тимчасового доступу до речей і документів

■ **Ключові слова:** тимчасовий доступ до речей і документів; сторона кримінального провадження; обвинувачення; захист