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SOME PROBLEMS OF PROSECUTOR AND PRELIMINARY INVESTIGATION BODIES COOPERATION UNDER THE NEW CRIMINAL PROCEDURAL CODE OF UKRAINE

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SUMMARY

In the scientific article topical issues of prosecutor and preliminary investigation bodies cooperation under the new Criminal procedural code of Ukraine on the basis of research of statistical data are considered. Nature of such cooperation is studied, as well as its main forms and ways. Problems in this sphere come to light, ways of their solving are offered. The conclusion about the need of further expansion of powers of the prosecutor for pre-judicial investigation is given reason.

Key words: prosecutor, preliminary investigation bodies, investigator, instructions of the prosecutor, procedural management, criminal proceedings.

АННОТАЦИЯ

В статье на основании исследования статистических данных рассмотрены актуальные вопросы взаимодействия прокурора и органов досудебного расследования по новому Уголовному процессуальному кодексу Украины. Исследуются характер такого взаимодействия и его основные формы и способы. Выявляются проблемы в данной сфере, предлагаются пути их устранения. Аргументируется вывод о необходимости дальнейшего расширения полномочий прокурора в досудебном расследовании.

Ключевые слова: прокурор, органы досудебного расследования, следователь, указание прокурора, процессуальное руководство, уголовное производство.

Introduction. Due to the current Criminal procedural code of Ukraine the mechanism of pre-judicial investigation was reformed. In this mechanism the key role belongs to preliminary investigation bodies and the prosecutor. Thereof, the problem of cooperation between these subjects needs studying. This research will be useful for scientists and practicing lawyers of not only Ukraine, but also other states.

These matters directly or indirectly were a subject of scientific research of many scientists, in particular O. Ya. Bayev, P.M. Karkach, O.A. Kozhevnikov, M.V. Kosyuta, V.F. Kryukov, V.A. Lazareva, N.V. Marchuk, A.A. Tushev, V.M. Yurchishin, etc. However, not all aspects of this issue found sufficient lighting in their works. Therefore, there is a need of further scientific research of the problem mentioned above.

The purpose of the scientific article is solving of the most problematic questions of prosecutors and preliminary investigation bodies cooperation in criminal proceedings by providing scientifically reasonable propositions about improvement of the legislation and law-enforcement practice.

Statement of the main material. Acceptance of the new Criminal Procedure Code of Ukraine on April 13, 2012 was a result of long-term discussions and searches of optimum model of a criminal proceeding which corresponds to international legal standards of human rights protection in this sphere. Its provisions were based on ideas of the Concept of reforming of criminal justice in Ukraine from April 8, 2008 which provided that pre-judicial investigation should be carried out without excessive formalization and duplication of functions. The prosecutor should estimate and direct a course of investigation [14]. In this context legislator provided that the procedural management of investigation will be carried out by the prosecutor who is allocated with the right to give instructions to investigators and will accept or coordinate key procedural decisions (the message to the person about suspicion, the address with the petition to the investigatory judge, drawing up of the indictment, etc.) [13].

The abovementioned concept was fixed in p. 2 Art. 36 of the Criminal Procedure Code of Ukraine which formalized wide reference of the prosecutor on laws enforcement in the form of the procedural management during carrying out pre-judicial investigation. The term “procedural management” is not defined in the law. On the basis of theoretical works [12, c. 19] and subject matter of the abovementioned article, it is possible to make a conclusion that it is understood as imperious and administrative influence of the prosecutor on bodies of inquiry and preliminary investigation for the purpose of the direction and coordination of pre-judicial investigation process. In our opinion, this term is imperfect for specifying the prosecutor’s function in pre-judicial investigation. At the same time, it correctly designates nature of cooperation between the prosecutor and preliminary investigation bodies. Thus the prosecutor acts as a superior body in relation to preliminary investigation bodies.

As objects of the procedural management act preliminary investigation bodies which are investigatory divisions of law-enforcement bodies, security services of Ukraine, the body which is carrying out control on observance of the tax legislation, the State bureau of investigations, and also divisions of detectives and division of internal control of National anti-corruption bureau of Ukraine are, their officials – investigators, and also heads of preliminary investigation bodies. Also the prosecutor carries out the procedural management upon operative divisions of law-enforcement bodies, security service, National anti-corruption bureau of Ukraine, the State bureau of investigations, the bodies, carrying out control of observance of the tax and customs legislation, bodies of the Public penitentiary service of Ukraine, bodies of the Public border service of Ukraine. It occurs during carrying out of investigatory (search) public and private actions in criminal proceedings by the abovementioned bodies.

The abovementioned objects of the procedural management can be divided into the main and facultative. The main

objects are preliminary investigation bodies and facultative are operative divisions because they carry out investigatory (search) public and private actions in criminal proceedings not according to «the general rule», but only on the basis of a written order of the investigator, the prosecutor. Thus, operative divisions play a supporting role in the mechanism of pre-judicial investigation, although they perform the main work on finding of crimes traces and persons who committed them.

If earlier the prosecutor acted as an impartial guarantor of the rule of law compliance and human rights protection in the sphere of criminal proceedings [2, c. 185], according to the new model he is an active participant of criminal trial. Activity of the prosecutor is a mover of criminal proceedings which directs them. As both the prosecutor and the investigator are the charge party according to the law, the goal of their activity in criminal proceedings is formation, promotion and asserting of a statement about commission the act, which provides criminal liability under the law, by a certain person. On the basis thereof, prosecutor's supervision on legal order in the investigator's activity is carried out not for abstract "respecting the rule of law" Its aim is to supervise that the investigator without breaking the law accused the guilty person of commission the crime. Violation of law by the investigator during formation of evidential base involves prosecutor's impossibility to prosecute an indictment in court [10, c. 69]. For this reason, the prosecutor is interested in lawful acting of the investigator, as well as in justness of all his procedural decisions. Only while meeting this condition the prosecutor's evidential base for pressing the charge in court would be due, eligible and full.

Thus the investigator is procedurally subordinated to the prosecutor as to the procedural head of pre-judicial investigation. Level of his procedural independence is considerably narrowed. On the one hand, p. 5 Art. 40 of the Criminal Procedure Code of Ukraine forbids intervention in investigator's activity of the persons, who do not have statutory powers for it. It is understood as "external" procedural independence of the investigator: from extraneous persons as well as other participants of process – the suspected of committing a crime, the defender, the victim and others. At the same time, the investigator is not procedurally independent in relation to the prosecutor. The prosecutor has not only the right, but also a duty to intervene into procedural activity of the investigator in the cases as provided for in the law. Moreover, the majority of prosecutors consider the investigator as the technical figure whose activity is aimed at collecting and registration of evidences under the prosecutor's control. The prosecutor points the general direction and judicial prospect of pre-judicial investigation. Thus, the prosecutor is responsible for result of pre-judicial investigation. It is possible to present this model like this: "the prosecutor thinks, and the investigator works".

In many respects such changes are caused by the fact that the prosecutor is really empowered with essential leverage over the investigator, namely: the right to give the investigator instructions and assignments obligatory for execution; right to abrogate illegal or unreasonable decisions of the investigator. Besides, there is a need of receiving by the investigator the prosecutor's approval on certain procedural actions, etc. In other words, the prosecutor influences the investigator towards: supervising his actions; directing these actions; coordinating investigator's decisions.

Thus powers of the prosecutor are partially duplicated with powers of the head of preliminary investigation body. In practice it leads to the conflict between the prosecutor and the head of preliminary investigation body. Thus the prosecutor has more procedural powers, the head of preliminary investigation body is closer to the investigator, being his direct head. Such "dualism" of the management is undesirable and should be

legislatively settled in favor of one of these subjects. In our opinion, the priority should be given to the prosecutor and so his powers should be expanded and powers of the head of preliminary investigation body narrowed.

The difference between their powers is that the prosecutor carries out the procedural management of pre-judicial investigation, and the head of preliminary investigation body organizes pre-judicial investigation. The head of preliminary investigation body is given special powers which the prosecutor earlier possessed: to discharge the investigator of carrying out pre-judicial investigation through the motivated resolution, and also to carry out pre-judicial investigation, using thus powers of the investigator. As well as the prosecutor, the head of preliminary investigation body has the right to study materials of pre-judicial investigation and to give written instructions to the investigator. However, these instructions cannot contradict with decisions and instructions of the prosecutor. In his turn, the prosecutor can give his written instructions directly to the head of preliminary investigation body. Thus, the prosecutor is procedurally higher in relation to the head of preliminary investigation body.

V.M. Yurchishin argues that the head of preliminary investigation body is deprived of powers on procedural response to the violations of law by his subordinate investigators, revealed by him. So he has no right to abrogate the decisions of investigators on his sole discretion. In case of detection of the illegal or unreasonable decision of the investigator, the head of preliminary investigation body is obliged to address to the prosecutor a request for its abrogation [16, c. 210]. In our opinion, this statement is only partially correct. According to clause 4 p. 2 Art. 39 of the Criminal Procedure Code of Ukraine, the head of preliminary investigation body should take measures to eliminate violations of law in case of their commission by the investigator. The law does not concretize in which way the head of preliminary investigation body should take such measures. It is possible to assume that besides organizational levers on the investigator (for example, by attraction him to disciplinary responsibility), the head of preliminary investigation body can also abrogate his illegal decisions by way of departmental control. Thus, this question should be concretized in the legislation.

In case of detection of illegal or unreasonable decisions of the investigator the prosecutor has the right to abrogate them. As the majority of procedural decisions of the investigator are made out in the form of resolutions, the prosecutor reacts by the way of issuing a decree on abrogation of the investigator's resolution. Most often prosecutors abrogate illegal resolutions of investigators on the termination of criminal proceedings. So, during the year 2015 prosecutors took out 37 918 resolutions on abrogation of resolutions on the termination of criminal proceedings [8]. After pronouncement of such a prosecutor's resolution the pre-judicial investigation renews.

At carrying out by the prosecutor of the procedural management of pre-judicial investigation one of the most effective powers is the right of the prosecutor to instruct the investigator and preliminary investigation body to perform in the set term investigatory (search) public and private actions, other procedural actions or to instruct concerning their carrying out (point 4 p. 2 Art. 36 of the Criminal Procedure Code of Ukraine). Thus the comparative analysis shows that in the conditions of action of the new Criminal Procedure Code of Ukraine activity of the prosecutor considerably increased in this direction. So, according to statistical data of the Prosecutor's General Office of Ukraine in 2011 by prosecutors were given 92 110, for 2012 – 103 306, for 2013 – 234 420, for 2014 – 196 509, for 2015 – 174 450 written instructions [3–8]. Thus, during implementation of the procedural management prosecutors give investigators instructions approximately 2

times more often than at implementation of supervision of pre-judicial investigation. However, in these latter days' activity of prosecutors in a giving directions to investigators decreased a little. It is connected with both reduction of quantity of criminal proceedings, as well as with reduction of number of prosecutors, which occurred recently. Besides, indirectly such a tendency shows improvement of investigators' overall effectiveness and their independence in carrying out investigation. That is, the less violations in the work of the investigator occur, the less grounds are for prosecutors to give them instructions and so investigators become more independent.

The law does not establish the list of procedural actions on which prosecutors can instruct, so the scope of the aforementioned power of the prosecutor is practically not limited. An exception is the fact that issues, which instructions and an assignments concern, cannot fall outside the limits of the criminal procedural law and also procedural competence of the body or the person to whom they are given [11, c. 117]. That is, the prosecutor cannot give the investigator an instruction on the criminal proceeding which the investigator does not investigate. The prosecutor cannot also give the instruction on carrying out procedural action which can be carried out only on permission of the investigating judge. Also direction of illegitimate instructions to the investigator is not allowed (for example, on use of force to a suspect). If the prosecutor fell outside the limits of powers, it leads to his responsibility provided by the law. The most severe responsibility in this sphere is criminal liability of the prosecutor (for example, on the basis of article 365 Criminal code of Ukraine "Excess of the power or office powers").

The law demands registration of instructions of the prosecutor in writing, but it does not exclude providing oral instructions and instructions which are rather widespread on practice. However it is necessary to consider that absence of written form complicates implementation of the subsequent control of the prosecutor behind implementation of such instructions. Also there is a threat of the wrong perception of oral instructions by persons to whom they are given. Therefore, at departmental level accurate requirements to these documents should be fixed.

It is necessary to emphasize, that according to p. 3 Art. 39, p. 4 Art. 40 of the Criminal Procedure Code of Ukraine and Art. 25 of the Law of Ukraine "On prosecutor's office" preliminary investigation bodies are obliged to follow written instructions of the prosecutor. Nonfulfillment by these persons of lawful instructions of the prosecutor, which have been taken out in an order, the provided Criminal Procedure Code of Ukraine, involves responsibility provided by the law. First of all, it is disciplinary responsibility under the relevant disciplinary statutes of preliminary investigation bodies. Administrative responsibility is also provided. So, according to Art. 185-8 of the Code of Ukraine on administrative offenses, responsibility for nonfulfillment of legal requirements of the prosecutor in the form of is a fine from 20 to 40 tax-free minima of the income of citizens. In 2012–2014 criminal liability for deliberate systematic nonfulfillment of lawful instructions of the prosecutor by the investigator at implementation of criminal proceedings was provided (Art. 381-1 of the Criminal code of Ukraine). But now the given norm is excluded from the legislation and investigators are not subjects to criminal liability for nonfulfillment of prosecutor's instructions anymore.

There are certain problems in prosecutors' response to illegal actions of investigators, including the facts of nonfulfillment by them instructions of prosecutors. It is connected with the fact that current Law of Ukraine "On prosecutor's office" does not provide acts of reaction of the prosecutor on such violations. For example, in the Law "On prosecutor's office" of the year 1991 such acts were provided: resolution, representation. In the

new Law "On prosecutor's office" such acts are not mentioned at all [9, c. 213]. In case of discovery by the prosecutor in actions of the investigator features of the administrative offence provided by Art. 185-8 the Code of Ukraine on administrative offenses "Nonfulfillment of legal requirements of the prosecutor", the prosecutor is authorized to make the protocol on an administrative offence (item 11 of Art. 255 the Code of Ukraine on administrative offenses). In the conditions of force of the norm considering criminal liability of the investigator for nonfulfillment of prosecutor's instructions, prosecutor reacted to it by initiation of pre-judicial investigation.

However, the question of initiation by the prosecutor bringing the investigator to a disciplinary responsibility legislatively is not solved. In practice in case of discovery by the prosecutor the violation the functions by the investigator, prosecutors address to the head of the investigator, to bring them to a disciplinary responsibility, with the corresponding instruction, representation or the letter. In them the violations of the investigator are mentioned, and the attention to the question of initiation of disciplinary production concerning the investigator is brought. However, in certain cases to prosecutors receive refuse on consideration of such documents as their form legislatively is not defined. Therefore, the abovementioned gap in the legislation should be corrected.

According to statistical data, for the year 2015 prosecutors introduced 5 751 acts of reaction concerning the staff of law-enforcement bodies, 153 – concerning the staff of the Public fiscal service and 33 – concerning the staff of Security service of Ukraine. 7 883 employees of law-enforcement bodies, 269 staff of the Public fiscal service and 54 employees of Security service of Ukraine are brought to a disciplinary responsibility on the basis of documents of the prosecutor. 364 employees of law-enforcement bodies and 48 staff of the Public fiscal service received notices of suspicion in commission of criminal offenses [8]. Thus, prosecutors actively react on committed violations of the law by the staff of preliminary investigation bodies, even despite problems in legislative regulation which were mentioned above.

Existence of responsibility of the investigator for nonfulfillment of instructions of the prosecutor is proved by important procedural value of such instructions and need of their exact and unconditional execution by investigators. Thus, it is completely justifiable. However, the majority of investigators consider so severe sanctions as means of pressure or coercion from the prosecutor. This situation is also aggravated with the fact, that the law does not demand validity or motivation of instructions of the prosecutor. Thereof considerable part of them is formal, inconcrete, leaning on estimated concepts. Such concepts of understanding of the investigator and the prosecutor can be interpreted differently (for example, "to take effective measures", "to increase quality of pre-judicial investigation", "not to be limited to these instructions" etc). Some instructions of the prosecutor may be inexecutable at all or in the limited terms set by the prosecutor (for example, the prosecutor instructs to interrogate several witnesses living in the different cities in 3-day term). The negative tendency arising in practical activities in this regard, is the formalistic approach of prosecutors to making directions (which sometimes reach the point where investigators write themselves instructions instead of the prosecutor, who is inactive). Or abuse by prosecutors of such a right which can essentially complicate work of the investigator (when prosecutors give petty instructions on minor, little significant questions and demand their performance in a short time, distracting the investigator from real investigation of a crime).

The law provides guarantees from such negative situations. For example, the right of the investigator to appeal against any decisions, actions or divergence of the prosecutor, accepted or

made in the corresponding pre-judicial production (Art. 311 of the Criminal Procedure Code of Ukraine). Such complaint should be fixed in writing in prosecutor's office of the highest level concerning prosecutor's office in which the prosecutor holds a position, the decision, action or which divergence will be appealed. Complaints are considered in three days and by results of their consideration the following decisions can be made: 1) to uphold the decision, to recognize actions or a divergence as lawful; 2) to change the decision in a part; 3) to abrogate the decision and to make the new decision, to recognize actions or a divergence as illegal and to oblige to make new action (the Art. of Art. 312–313 of the Criminal Procedure Code of Ukraine).

It is necessary to consider that the investigator's appeal of the decisions, actions or divergences of the prosecutor is the abnormal situation that shows an existence of the conflict between them. Modeling a legal construction of this conflict permission, the Ukrainian legislator took a side of the prosecutor as, firstly, the appeal by the investigator of decisions, actions or a divergence of the prosecutor does not stop their execution (p. 3 Art. 312 of the Criminal Procedure Code of Ukraine). Thus, the investigator is obliged to execute such an instruction given to him even if is not agree with it and tries to appeal against it. Secondly, the right to resolve the conflict is provided to the official of prosecutor's office of the highest level, whose decision is final and is not a subject to the appeal in court (p. 4 Art. 313 of the Criminal Procedure Code of Ukraine). It is obvious that in this case on the party of the prosecutor, whose actions will be appealed, also corporate solidarity acts.

If the decision, actions or a divergence of the prosecutor are recognized illegal, such prosecutor may be replaced with another from among officials of bodies of prosecutor's office of that level (p. 3 Art. 313 of the Criminal Procedure Code of Ukraine). However, it is the right, instead of a duty of the official of prosecutor's office of the highest level, and in practice meets extremely seldom. Cases of abrogation of decisions of the prosecutor by the prosecutor of the highest level are also exclusively rare.

Other option of investigator's influence on a procedural position of the prosecutor is the address to the head of preliminary investigation body. Differently from the appeal of actions of the prosecutor, such option is special. It is allowed only in cases of refusal of the prosecutor to coordinate the petition of the investigator to the investigatory judge about application of measures on providing criminal proceedings, carrying out investigatory (search) actions or private investigatory (search) actions. In such cases the investigator has the right to address to the head of preliminary investigation body who after studying the petition if necessary initiates consideration of the questions stated in it before the prosecutor of the highest level. Such prosecutor in a term of three days coordinates the corresponding petition or refuses its coordination (p. 3 Art. 40 of the Criminal Procedure Code of Ukraine).

Thus, the abovementioned order is applied only in cases of refusal of the prosecutor in coordination of the petition submitted by the investigator. However, it does not consider cases when the prosecutor does not accept any actions according to the petition declared by the investigator. In such cases the divergence of the prosecutor takes place, however it, according to the law, is not the ground for investigator's addressing to the head of preliminary investigation body. However, the divergence of prosecutors which appears in temporizing with consideration of the petition, is most widespread on practice. For example, concerning choosing to the suspect a measure of restraint when delay with the solution of this question can lead to that the suspect will disappear from preliminary investigation body.

The solution of this problem, in our opinion, is the following. Firstly, it is necessary to establish accurate terms for

coordination by the prosecutor of petitions of the investigator. For today, concerning terms of criminal proceedings such terms are not defined. If the prosecutor did not coordinate the petition in the term established by the law, it is considered to be refused. Secondly, the investigator shall also have the right to address to the head of preliminary investigation body in case of divergence of the prosecutor.

In case the abovementioned problems occurred, investigators, as a rule, do not exercise the right to appeal the decisions or actions (divergence) of the prosecutor, or to address to the head of preliminary investigation body. However, it does not proof absence of conflicts between them. So, the force the Criminal Procedure Code of Ukraine of the year 1960, 37,6% of investigators had divergences with the prosecutor, in favor of the prosecutor were solved – 68,9% of them, in favor of the investigator – 31,1%. Thus it is noted, that in some cases, receding before authority of the prosecutor and his powers, investigators do not decide to direct the objections to the higher prosecutors. As a result, serious harm to investigation is done. To witness objections of the investigator on instructions of the prosecutor is almost impossible. The reasons are totally different (for example, authority of the prosecutor, unwillingness of deterioration of business relations with the prosecutor, the decision through the prosecutor of various household questions etc). As a result, researchers come to a conclusion that the mechanism of regulation of controversial questions' regulation between the investigator and the prosecutor does not always work. One of the reasons of this is inadequate ensuring of procedural independence of the investigator [15, c. 101–102]. However, it is impossible to agree with the previous conclusion, because, as it was specified before, discussion does not go about procedural independence of the investigator in relation to the prosecutor.

In the conditions of the new Criminal Procedure Code of Ukraine, where public prosecutor's supervision in the form of the procedural management on pre-judicial investigation gained systematic and even total character, and possibilities of influence on the prosecutor by investigators considerably increased, this mechanism still gives big failures. So, by results of the rerquisition of 120 investigators of law-enforcement bodies and Security service of Ukraine, more than 70% faced unreasonable or illegal actions, more often – a divergence of prosecutors. At the same time, nobody of them appealed against such actions or decisions, and only 10% of respondents allow such possibility at all. As the result, negative attitude of investigators to prosecutors is observed. In their opinion, prosecutors carry out supervision inefficiently and this is one of the factors which generates legal nihilism of investigators and leads to procedural mistakes and violations [1, c. 21].

Preconditions for formation of such an opinion are obvious: the investigator bears responsibility for results of pre-judicial investigation, but these results depend on him only partially. A number of key procedural decisions are accepted only by the prosecutor. The prosecutor should direct the investigator, but in most cases he does this formally, without penetrating into the main point and without rendering the investigator necessary help. The investigator cannot influence the prosecutor. At the same time, responsibility for results of pre-judicial investigation is assigned completely on the investigator.

Such model is half and half, inefficient. Therefore, it is necessary to bring an attention to the question of expediency of giving the right to the appeal of actions and decisions of the prosecutor to the investigator which in practice remains unrealized. The prosecutor as the procedural head, directs a course and defines prospects of pre-judicial investigation. Therefore, the investigator has no right to estimate his instructions, furthermore to react to divergence of the prosecutor in criminal proceedings. But

thus it is the prosecutor, instead of the investigator, who should bear responsibility for completeness, timeliness and legality of pre-judicial investigation and its results. Thus, the need of investigator's appeal of actions or decisions of the prosecutor disappears, except cases when they are obviously illegal.

Such an approach leads to forming of the model "public prosecutor's inquiry", when the investigator is considered as an auxiliary figure behind the prosecutor. Thus the tasks of investigator become simpler and are shorten to collecting and appropriate registration of proofs whereas their legal assessment is given by the prosecutor. The initiative of the investigator is limited to carrying out necessary investigatory actions, and key procedural decisions in criminal proceedings are accepted by the prosecutor. So, the responsibility for results of pre-judicial investigation should lay down completely on the prosecutor. The investigator is responsible for them only within his competence and also in the volume of the instructions, provided by the prosecutor. Such model will certainly eliminate existing contradictions between investigators and prosecutors and will give the chance to increase efficiency of pre-judicial investigation.

Conclusions. As a result, it should be noted, that the majority of problems in the sphere of interaction of the prosecutor and preliminary investigation bodies in Ukrainian criminal proceedings results not only from shortcomings of the new Criminal Procedure Code of Ukraine, but from insufficient experience of its practical application. Slow shifts in sense of justice of investigators and prosecutors are also a problem. In some cases, they continue to be guided by the conceptual ideas of the former legislation which have lost urgency. These problems can be resolved without intervention of the legislator, but by accumulation of law-enforcement practice and positive experience.

At the same time, the main problem of cooperation between prosecutors' and preliminary investigation bodies' in criminal proceedings is considered to be half and half nature of pre-judicial investigation reform. Prosecutors received expanded powers, however all the responsibility for the results of pre-judicial investigation is not put on them. Formally, investigators are considered independent and bear responsibility for quality of investigation, but actually they obey to prosecutors and heads of preliminary investigation bodies. So, further improvement of the legislation and law-enforcement practice in this sphere should move in the direction of expansion of both powers and responsibility of prosecutors in preliminary investigation system.

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