



большого количества факторов, влияющих на ДПП, обуславливает ее наименование как ситуационной (ситуалогической). Поэтому, как правило, из всех названных экспертиз она проводится последней, поскольку должна опираться на фактические данные, установленные различными следственными действиями, в т. ч. другими экспертизами. Безусловно, необходимость ее проведения на заключительном этапе досудебного расследования ставит ее в особое положение, когда все предыдущие следственные действия должны быть направлены на ее обеспечение исходными данными, которые являются обязательными для анализа обстоятельств ДПП.

Поэтому, суммируя изложенное, следует констатировать, что экспертизы выступают системообразующим фактором в расследовании преступлений, связанных с ДПП.

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## PRE-JUDICIAL INVESTIGATION IN SYSTEM OF FUNCTIONS OF PROSECUTOR'S OFFICE IN UKRAINE

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#### Summary

Questions of function of pre-judicial investigation in system of functions of prosecutor's office are researched. History of development of bodies of pre-judicial investigation in Ukraine is considered. The problems arising in connection with elimination of function of pre-judicial investigation of prosecutor's office are analyzed.

**Key words:** prosecutor's office, pre-judicial investigation, investigator, judicial and legal reform, functions of prosecutor's office.

#### Аннотация

В статье исследуются вопросы функции досудебного расследования в системе функций прокуратуры. Рассматривается история развития органов досудебного расследования в Украине. Анализируются проблемы, возникающие в связи с ликвидацией функции досудебного расследования прокуратуры.

**Ключевые слова:** прокуратура, досудебное расследование, следователь, судебно-правовая реформа, функции прокуратуры.

**Statement of a problem.** In the context of reforming of functions of prosecutor's office one of the most acute issues is refusal of implementation of function of a pretrial investigation by prosecutor's office of Ukraine. This point holds boundary position between three branches of law and legal science: criminal process (as pre-judicial investigation is carried out in criminal proceedings), public prosecutor's activity (as is one of functions of prosecutor's office of Ukraine) and a constitutional right (as it is regulated at the level of the Constitution of Ukraine and was a subject of consideration of the Constitutional Court of Ukraine).

**Condition of research.** The research conducted in this article is based on theoretical works of the Ukrainian and foreign scientists concerning as in general problems of functions of prosecutor's office, and implementation of pre-judicial investigation by prosecutor's office. In particular it is such scientists as: P.M.Karkach, M.V.Kosyuta, V.V.Sukhnos, V.M.Yurchishin and others.

The purpose and task of the scientific article is justification of the place and a role of function of pre-judicial investigation in system of functions of prosecutor's office and the

analysis of expediency of refusal of its implementation.

**Statement of the main material of research.** Addressing to history of considering point, it should be noted that in Ukraine the prosecutor's office carries out function of pre-judicial investigation since 1928 when according to the changes made to the Provision of judicial system investigators have been taken out from submission of courts and completely subordinated to prosecutor's office though at the same time the prosecutor's office was a part of the system of judicial bodies. In 1936 all investigating authorities have been allocated from system of judicial authorities and placed under authority of the Prosecutor of the Union of the Soviet Socialist Republics. In the Criminal Procedure Code of USSR of 1960 the right of production of preliminary investigation has originally given only to investigators of bodies of prosecutor's office and the state security agencies. However, already on April 6, 1963 the right of production of preliminary investigation has been granted by the decree of Presidium of the Supreme Council of the USSR also to law-enforcement bodies [1, p. 273–274]. Such system of bodies of preliminary investigation has existed



up to declaration of independence by Ukraine in 1991.

During the subsequent period the key document defining reforming of law-enforcement system including and bodies of preliminary investigation became the Concept of judicial and legal reform in Ukraine of April 28, 1992. According to section V of this document was provided creation of the uniform investigative device [2]. The specified conceptual model has been enshrined also in item 9 of Transitional provisions of the Constitution of Ukraine that provided formation of system of a pretrial investigation and enactment of the laws regulating its functioning.

Thus, on the agenda the question concerning unification of system of preliminary investigation, creation of uniform investigative body that would carry out investigation of crimes of all categories has been raised. It was considered that merging of bodies of pretrial investigation would eliminate overlapping in their work, would create prerequisites for improvement of their hardware and competence of investigators, and as a result would increase efficiency of pre-judicial investigation. However, the term of combination of investigative devices legislatively hasn't been determined and has actually been put into dependence on rates of realization of judicial and legal reform.

However, in the subsequent the Ukrainian legislator has departed from realization of the proclaimed tasks and continued to follow on the way of differentiation of bodies of pre-judicial investigation. So, in 1998 in Ukraine one more investigative body – tax police – was created. Thus, since that time function of preliminary (since 2001 – pre-judicial) investigation has been allocated through four departments: law-enforcement bodies, bodies of Security service of Ukraine, bodies of tax police and bodies of prosecutor's office. On the normative level specified tendency has been issued in the Concept of reforming of criminal justice in Ukraine of April 8, 2008 No. 311/2008. According to its item 4 it was provided that as a result of reforming of system of bodies of criminal justice the pretrial investigation had to be assigned to the: 1) national police; 2) financial police;

3) military police; 4) investigative division of Security service of Ukraine; 5) specially created body of pre-judicial investigation of corruption offenses (anti-corruption body). Also the attention was focused that competence of the bodies carrying out a pretrial investigation had to be differentiated by the law taking into account subject, personal, territorial and on connection of cases of competence [3].

As we see, preservation of investigative divisions of prosecutor's office wasn't provided in this document. However, the legislator hasn't decided to liquidate completely a pretrial investigation in prosecutor's office. Instead he has gone on the way of its gradual restriction: so, the previous year (in 2007) competence of prosecutor's office has significantly been limited, in particular from its maintaining have been withdrawn and transferred to competence of law-enforcement bodies crimes against the personality, sexual freedom and inviolability and some others.

This is explained by the fact that concerning prosecutor's office function of pretrial investigation is temporary. It is caused by the norms of item 9 of Transitional provisions of the Constitution of Ukraine according to which the prosecutor's office continues to execute according to current laws function of preliminary investigation – before creation of system of a pretrial investigation and enactment of the laws regulating its functioning. The specified provisions haven't been provided in Art. 121 of the Constitution of Ukraine that defines the exhaustive list of functions of prosecutor's office of Ukraine. As it is noted in scientific legal literature today item 9 of Transitional provisions is one of unrealized up to the end that is connected with the fact that deprivation of prosecutor's office of the specified powers at this stage would have negative consequences for law and order and legality in Ukraine. At the same time implementation of this point shouldn't be considered "overdue" because of lack of accurate temporal parameters of reforming of prosecutor's office [4, p. 1106–1107].

Preservation the specified function for prosecutor's office of Ukraine was impugned by many researchers.

The main argument which is adduced by opponents is inadmissibility of combination in one body of functions of pretrial investigation and supervision of its legality that are carried out by prosecutor's office. At the same time in scientific law literature essential arguments in support of this position aren't adduced, or they can be disproved. For example, the "corporate solidarity" which is allegedly taking place between the investigator of prosecutor's office and the prosecutor is also far-fetched because special attention is paid to legality and quality of a consequence in bodies of prosecutor's office. For instance, proceeding from provisions of the item 3 of industry order of the Attorney-General of Ukraine № 4 gn of December 19, 2012 "About the organization of activity of prosecutors in criminal proceedings" [5], it is possible to conclude about assignment of supervision of investigation of the criminal offenses carried to competence of prosecutor's office to higher prosecutors. Thus, in the organizational point functions of pretrial investigation and supervision of pre-judicial investigation in bodies of prosecutor's office are strictly differentiated. Investigators hold independent established posts separated from positions of prosecutors.

In the procedural point the legislator doesn't see a contradiction in implementation of function of pre-judicial investigation by prosecutor's office too. This results from the fact that according to the criminal procedure law both an investigator and a prosecutor in criminal process treat to one party – charges, therefore there are no essential divergences in their legal position and can't be. Not only fixing of public prosecutor's competence in the Criminal Procedure Code of Ukraine, but also lack of the bases for removal of the prosecutor in the form of his participation in production as the investigator and vice versa testifies to it. The bases for removal of the investigator and the prosecutor are uniform and are defined by Art. 77 of the Criminal Procedure Code of Ukraine. That is even if an investigator, who conducted investigation of a concrete offense, in the subsequent has been transferred to the prosecutor's position and has



been appointed the procedural head in the same criminal proceeding, formal obstacles for this purpose, as well as the bases for his offset, don't exist.

Besides, for more objective research of the specified question it is obviously necessary to analyze international legal standards of public prosecutor's activity. So, according to such standards stated in the Guidelines UN on the Role of Prosecutors, Recommendations R (2000) 19 about the role of public prosecution in the criminal justice system, the prosecutor is the body authorized to put forward and hold charge of criminal cases on behalf of the state. At the same time, in accordance with subitems 2, 3 of the Recommendation R (2000) 19 about the role of public prosecution in the criminal justice system, in all criminal justice systems, public prosecutors: decide whether to initiate or continue prosecutions; conduct prosecutions before the courts; may appeal or conduct appeals concerning all or some court decisions. In certain criminal justice systems, public prosecutors also: implement national crime policy while adapting it, where appropriate, to regional and local circumstances; conduct, direct or supervise investigations; ensure that victims are effectively assisted; decide on alternatives to prosecution; supervise the execution of court decisions; etc.

Thus, implementation of pre-judicial investigation by prosecutor's office in general doesn't contradict international legal standards of public prosecutor's activity, and can be considered as one of the directions of participation of prosecutor's office in criminal proceedings. Therefore, the argument about principled impossibility of such model in foreign practice is insolvent. Also it doesn't contradict to the current national legislation of Ukraine, as far as implementation of pretrial investigation by prosecutor's office doesn't cancel at all and doesn't limit the rights and freedom of the person and the citizen consolidated by the Constitution and laws of Ukraine.

In 2008 the question of implementation by prosecutor's office of function of a pretrial investigation was considered by the Constitutional Court of Ukraine on the constitutional representation of group of people's

deputies of Ukraine. The essence of representation consisted in justification of illegality of provisions of Art. 17 of the Law of Ukraine "About prosecutor's office". According to it was provided function of preliminary investigation in bodies of prosecutor's office and existence of investigative part in the prosecutor's office. In this connection the prosecutor's office of Ukraine exceeded powers conferred to it by the Constitution of Ukraine. People's Deputies also specified that at present the system of pretrial investigation in Ukraine is created and defined by the Criminal Procedure Code of Ukraine. Solving a question of constitutionality of implementation by prosecutor's office of function of pretrial investigation the Constitutional Court of Ukraine has decided to recognize that the legislative provisions concerning continuation of execution by prosecutor's office of Ukraine of this function before creation of system of pretrial investigation and entry in force the laws regulating its functioning is corresponding to the Constitution of Ukraine [6].

Thus, the specified Decision of the Constitutional Court of Ukraine has confirmed the current situation about a possibility of implementation by prosecutor's office of pre-judicial investigation. In spite of the fact that in separate opinions of two judges of the Constitutional Court of Ukraine that were applied to this Decision attention to insufficiency of the legal argument of a position of Court in solving of this point was paid, however, in general it has allowed to remove for a while discussions and speculation concerning preservation for prosecutor's office of function of pre-judicial investigation.

Specified question has risen again at adoption of the new Criminal Procedure Code of Ukraine. It should be noted that in the conditions of action of the Criminal Procedure Code of Ukraine 1960 the European structures strictured the existing procedures of criminal legal proceedings of Ukraine. In particular, in conclusions of Parliamentary Assembly of the Council of Europe of September 26, 1995 No. 190 on the application by Ukraine for membership of the Council of Europe, and also recommendations and resolutions concerning fulfillment of duties and obligations of Ukraine

(the recommendation No. 1416 (1999), the resolution No. 1194 (1999), the recommendation No. 1513 (2001), the resolution No. 1244 (2001), the resolution No. 1262 (2001), the resolution No. 1346 (2003), the resolution No. 1466 (2005)) repeatedly paid attention to need of adoption of qualitatively new Criminal procedural code by Ukraine. Therefore, developers of the new Criminal Procedure Code of Ukraine were faced by a task to consider the corresponding wishes and recommendations of the European and international institutions.

As a result the new Criminal Procedure Code of Ukraine has been accepted on April 13, 2012. As researchers and experts of the Council of Europe in the corresponding conclusion of the Venetian Commission note, the new Criminal Procedure Code of Ukraine conforms to high international legal standards of ensuring the rights of the personality in the sphere of criminal proceedings.

Considering the decision in the new Criminal Procedure Code of Ukraine of a question of preservation for prosecutor's office of function of pre-judicial investigation that is of the greatest interest in the context of our research it should be noted that among bodies of pre-judicial investigation (the bodies carrying out inquiry and a pretrial investigation) investigative divisions are enshrined in Art. 38 of the Criminal Procedure Code of Ukraine: 1) law-enforcement bodies; 2) security service; 3) the bodies exercising control of observance of the tax law; 4) bodies of the state bureau of investigations. Later, according to the Law No. 1698-VII from October 14, 2014 divisions of detectives, divisions of internal control of National anti-corruption bureau of Ukraine have been carried to number of bodies of pre-judicial investigation.

Thus, reforming of system of bodies of pre-judicial investigation directly concerned of prosecutor's office. Though it hasn't been provided in Art. 38, however, according to Transitional provisions for investigators of prosecutor's office has been kept competence of some categories of criminal offenses that it was engaged and earlier, before creation of the State bureau of investigations, however, no



later than till November 20, 2017 (five years from the date of the entry in force the new Criminal Procedure Code of Ukraine). After this crime in which investigation the prosecutor's office is engaged have to be transferred to investigators of appropriate authorities of pre-judicial investigation.

In system of pre-judicial investigation of Ukraine it is possible to refer introduction of essentially new investigative body to number of the most significant organizational innovations – the State bureau of investigations. The idea of independent body of pre-judicial investigation that would be independent of corporate interests of various departments, often subordinated to influence of officials in whose investigation of crimes they are engaged, is the cornerstone of its creation. In conditions when many high-ranking officials remain actually unpunished for commission of criminal offenses, emergence of such structure as the State bureau of investigations would allow to concentrate investigation of all similar crimes within one body, to provide their legality, transparency and efficiency.

Defining competence of the State bureau of investigations, the p. 4 of Art. 216 of the Criminal Procedure Code of Ukraine provides that investigators of the state bureau of investigations carry out pre-judicial investigation of criminal offenses: (1) made by officials who hold especially responsible position, persons whose positions are referred to the first– third category of positions of public service, judges and employees of law enforcement agencies (except cases of competence of National anti-corruption bureau of Ukraine); (2) made by officials of National anti-corruption bureau of Ukraine, prosecutors of Specialized anti-corruption prosecutor's office (except cases when pre-judicial investigation of these crimes is referred to competence of National anti-corruption bureau of Ukraine); (3) against an established order of execution of military service (war crimes), except the crimes provided by Art. 422 of the Criminal Code of Ukraine. Thus, the tendency of allocation of separate body of the pre-judicial investigation that is engaged in investigation of criminal offenses of accurately certain

category of persons according to their official status (personal competence) and subject competence (concerning military crimes) takes place.

In spite of the fact that creation of the State bureau of investigations was planned by 2017, the Ukrainian legislator has resolved this issue earlier, and November, 11 2015 has adopted the Law of Ukraine “About the State bureau of investigations” [7]. According to its provisions that bureau is the central executive authority implementing law-enforcement activity for the purpose of prevention, detection, termination, disclosure and investigation of the crimes carried to its competence. The state bureau of investigations as the central executive authority which activity forward and coordinated by the Cabinet of Ministers of Ukraine has been created by the Resolution of the Cabinet of Ministers of Ukraine of February 29, 2016 [8].

It would seem the problem of implementation by prosecutor's office of Ukraine of function of pre-judicial investigation has been resolved with adoption of the specified normative acts finally. However, elimination of this function causes a number of essential difficulties. The part of them belongs to procedural destiny of the criminal proceedings that are under authority of investigators of prosecutor's office. So, in practice there is a set of the conflict situations connected with the fact that with creation of the State bureau of investigations investigators of prosecutor's office have lost the right for implementation of pre-judicial investigation. For this reason, for example, after March 1, 2016 courts refuse to investigators of prosecutor's office permissions to execution of separate procedural actions (election of measures of restraint, searches, etc.) and the evidential base collected by them on the corresponding criminal proceedings can be challenged further by advocacy and admit inadmissible. Thus, the criminal proceedings made by investigators of prosecutor's office actually are paralyzed.

For today the legislation regulates these procedural questions of a transition period only partially. So, Transitional provisions of the Law of Ukraine “About the State bureau

of investigations” establish that materials of criminal proceedings that on the date of entry into force of this Law are in other body of pre-judicial investigation at a stage of pre-judicial investigation, but according to this Law are under competence the State bureau of investigations, in three-month's time after the beginning of implementation by the State bureau functions of pre-judicial investigation are transferred in the relevant division (body) of the State bureau of investigations for continuation of proceeding. However, in this regard there is a question from what moment to make counting of the specified 3-month term: since March 1, 2016, when the State bureau of investigations has been formally created, or considering that actually State bureau of investigations hasn't begun the work yet, and his investigators haven't started implementation of the duties yet, and thus, can't accept from prosecutor's office the corresponding criminal proceedings – since that moment when it actually begins to carry out function of pre-judicial investigation?

In our opinion, it is necessary to talk about the actual beginning of work of the State bureau of investigations. This point of view is confirmed also by an explanation of the High Specialized Court of Ukraine for Civil and Criminal cases of March 02, 2016. According to its the beginning of operation of provisions of the p. 4 of the Art. of 216 of the Criminal Procedure Code of Ukraine is connected not with the moment of entry into force of the law that will regulate activity of the State bureau of investigations of Ukraine as government body, but with the moment of the beginning of implementation by the bureau of functions of body of pre-judicial investigation. Till that time according to paragraphs 1 and 2 of item 1 of Section XI “Transitional provisions” of the Criminal Procedure Code of Ukraine powers of pre-judicial investigation are carried out by investigators of bodies of prosecutor's office [9].

Also there is an obscured question what to do with the criminal proceedings under authority of investigators of prosecutor's office that are in competence of other bodies



of pre-judicial investigation as the legislator doesn't regulate terms of their transfer. Besides, in the law there are no instructions concerning an opportunity or need of proceeding in such cases of investigative and other procedural actions, the end of pre-judicial investigation in such cases after March 1, 2016 and answers to other important procedural questions.

Problems are observed also in future of the investigative part of prosecutor's office. Pursuant to Transitional provisions of the Law of Ukraine "About the state bureau of investigations", the Cabinet of Ministers of Ukraine is recommended to create the State bureau of investigations through the number of staff of investigative divisions of the Prosecutor General's Office of Ukraine according to the established quotas providing that formation of investigative divisions of the State bureau of investigations is ensured by means of persons who within the last year held posts of investigators of prosecutor's office no more than for 30%. According to the p. 2 of Art. 9 of the Law of Ukraine "About the State bureau of investigations" the boundary number of staff and territorial administrations of the State bureau of investigations makes 1500 people. At the same time in its structure except investigative also operational and other divisions are functioning. That is the number of investigators of prosecutor's office which will be able to pass to service into the State bureau of investigations work, makes less than 500 people. Besides, it is necessary to consider that elimination of function of pre-judicial investigation in prosecutor's office will affect not only hits investigators, but also the prosecutors performing procedural management of pre-judicial investigations of prosecutor's office. Thus, considerable number of prosecutors and investigators are subject to reduction.

**Conclusions.** Summing up the result, it is possible to draw a conclusion that pre-judicial investigation was historically developed and effectively implemented function of prosecutor's office of Ukraine. The bases for it elimination provided in the Constitution of Ukraine consisted in creation of uniform system of pre-judicial

investigation instead of what the legislator has gone on the way of increase of number of investigative bodies. Thus, elimination of function of pre-judicial investigation of prosecutor's office has no sufficient actual reasons. This radical step involves considerable problems of procedural destiny of the criminal proceedings that are under authority of investigators of prosecutor's office, and also reduction of all staff of the pre-judicial investigation in prosecutor's office including both investigators, and the prosecutors who were their procedural heads.

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