

## **Role of the prosecutor at closing of criminal proceedings by the criminal procedural legislation of Ukraine**

### **Роль прокурора у закритті кримінального провадження за кримінальним процесуальним законодавством України**

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#### Key words:

*prosecutor, criminal proceedings, closing of criminal proceedings, completion of pre-judicial investigation, criminal prosecution.*

#### Ключові слова:

*прокурор, кримінальне провадження, закриття кримінального провадження, закінчення досудового розслідування, кримінальне переслідування.*

According to the Criminal Procedural Code of Ukraine the prosecutor is the key participant of criminal proceedings who is carrying out the procedural management of pre-judicial investigation. His activity in criminal proceedings has many aspects. One of the most important of them is provision of legality of procedural decisions. In this regard it is necessary to consider a role of the prosecutor at adoption of the most widespread decisions in criminal procedure of Ukraine that include decisions of closing of criminal proceedings.

According to statistical data, in 2014 it was stopped 614 456, and in 2015 – 532 227 criminal proceedings. According to the Criminal Procedure Code, check of legality and validity of each decision of closing of criminal proceedings is assigned to the prosecutor, and in the cases defined by the law the relevant decision should be accepted by the prosecutor. In these conditions research of questions of definition of a role of the prosecutor at closing of criminal proceedings becomes actual.

These problems were researched by many scientists, in particular S.M. Blagodir, A.Ya. Dubinsky, V.V. Litvinov, R.I. Matyushenko, A.N. Mironov, V.A. Mikhaylov, A.A. Torbas and others. However, questions of a role of the prosecutor in making decision of closing of criminal proceedings were not studied fully and comprehensively.

In this regard, the purpose of this scientific article is definition of a role of the prosecutor in closing of criminal proceedings. It is also necessary to establish the list of those questions that the prosecutor is obliged to resolve at making a decision of closing of criminal proceedings.

According to item 1 p. 2 of the Art. 283 of the Criminal Procedure Code of Ukraine closing of criminal proceedings are one of forms of the completion of pre-judicial investigation. Researchers define it as a final decision of a stage of pre-judicial investigation that the body of pre-judicial investigation on the basis of the analysis of set of the actual data collected during a pretrial investigation, sums up carried out activity in the case. By closing of criminal prosecution it ascertains the compulsory solution of the criminal law conflict, or considers its voluntary decision by the parties of the conflict<sup>1</sup>. Thus the completion of pre-judicial investigation occurs by virtue of existence of the circumstances excluding criminal proceedings. Procedural activity completely stops, further production is impossible<sup>2</sup>.

In our opinion, the specified definitions are incomplete as do not consider possibility of continuation of pre-judicial investigation in cases of closing of criminal proceedings against the suspect of what it will be discussed below. Besides, in most cases of closing of criminal proceedings the solution of the criminal law conflict does not occur, as its absence is ascertained (for example, in case of lack of an event of a crime), or impossibility

<sup>1</sup> Литвинов В.В. Закриття кримінальної справи на стадії досудового розслідування / В.В. Литвинов // Науковий вісник Дніпропетровського державного університету внутрішніх справ. – 2011. – № 4 (56). – С. 482.

<sup>2</sup> Кримінальний процесуальний кодекс України. Науково-практичний коментар : у 2 т. / [О.М. Бандурка, Є.М. Блажівський, Є.П. Бурдоль та ін.] ; за заг. ред. В.Я. Тація, В.П. Пшонки, А.В. Портнова. – Х. : Право, 2012. – Т. 1. – 2012. – С. 707.

of its permission (for example, in case of death of the suspect). Thus, the peculiarity defining the legal nature of closing of criminal proceedings is termination of accusatory activity against the person who has committed a criminal offense. Differently, that is termination of criminal prosecution<sup>3</sup>.

However, the prosecutor also stops accusatory activity in case of reference to the court of the petition for release of the person from criminal liability. There is no it and in cases of reference to the court with petitions for motion to enforce compulsory medical or educational measures as in these cases there is no offender or the subjective side of a criminal offense. Therefore, not only the specified peculiarity distinguishes closing of criminal proceedings from other forms of the completion of pre-judicial investigation.

It is possible to consider that the main feature of closing of criminal proceedings in comparison with other forms of the completion of pre-judicial investigation is that it does not provide a further adjudication in court. As scientists specify, the originality of closing of criminal case is that it comes to the end with its decision in essence without further movement if there will be no appeal and cancellation of the resolution of closing of criminal case<sup>4</sup>. Drawing up of the indictment, of motion to enforce compulsory medical or educational measures, of motion to relieve the person from criminal liability provides consideration of these documents and their permission in essence by a court. However, the decision of closing of criminal proceedings on a pretrial investigation is accepted by the investigator and/or the prosecutor without court participation.

At the same time in certain cases the decision of closing of criminal proceedings is accepted only by a court. To such cases refer: release of the person from criminal liability, refusal of the prosecutor of the state charge and achievement of a tax compromise (p. 2 of the Art. 284 of the Criminal Procedure Code of Ukraine). However, these exceptions do not contradict to the general rule. So, the direction in court of the motion to relieve the person from criminal liability is an independent form of the completion of pre-judicial investigation, and does not refers to the bases of its closing at a pre-judicial stage. Refusal of the prosecutor of the state charge by the nature is possible only in judicial stages of process. Closing of criminal proceedings in connection with achievement of a tax compromise is possible both during pre-judicial investigation, and in judicial stages of process. In this case the subject of adoption of the relevant decision is alternative and depends on a stage of pre-judicial investigation as in judicial stages as such subject can be only the court. However, in any case, as it will be specified further, the prosecutor takes direct part in the solution of this question.

Making decision of closing of criminal proceedings directly corresponds with observance of a rule about terms of pre-judicial investigation. In turn, this rule is a guarantee of ensuring the rights of the suspect of criminal procedure. To this connection directly points p. 1 of the Art. 283 of the Criminal Procedure Code of Ukraine according to which a person shall have the right to have charges brought against him be reviewed by a court. Also it is emphasized in p. 2 of the Art. 283 of the Criminal Procedure Code of Ukraine that obliges the prosecutor to make one of the actions directed on the completion of pre-judicial investigation including to close criminal proceedings, in the shortest possible time after a person has been notified of being a suspect.

On the other hand, closing of criminal proceedings is alternative to its further carrying out that cannot exceed the terms established by the law. So, according to p. 1 of the Art. 219 of the Criminal Procedure Code of Ukraine, by the general rule pre-trial investigation is required to be completed within one month from the date the person concerned is notified of suspicion in committing a criminal misdemeanor and within two month from the date the person concerned is notified of suspicion in committing a crime. Thus the law allows continuation of terms of pre-judicial investigation within boundary terms defined in p. 2 of the Art. 219 of the Criminal Procedure Code of Ukraine. However, continuation of terms of pre-judicial investigation occurs not automatically, and according to the decision of higher prosecutors in defined by paragraph 4 of chapter 24 of the Criminal Procedure Code of Ukraine an order. Thus, in each case of the expiration of the corresponding terms the prosecutor should solve an alternative question of extension of terms of pre-judicial investigation, of the completion of pre-judicial investigation (including in the form of its closing), or about suspension of pre-judicial investigation. Thus the prosecutor is obliged by principle of reasonable terms of criminal proceedings and to observe concrete requirements of the Criminal Procedure Code of Ukraine concerning terms of pre-judicial investigation. As a whole the law focuses on that if by the time of expiration of terms of pre-judicial investigation of collected accusatory proofs is not enough, the criminal proceeding is subject to closing.

<sup>3</sup> Лапкін А.В. Кримінальне переслідування – перспективна функція прокуратури / А.В. Лапкін // Вісник Національної академії прокуратури України. – 2011. – № 1. – С. 53.

<sup>4</sup> Барабаш А.С. Прекращение уголовных дел по нереабилитирующим основаниям в стадии предварительного расследования / А.С. Барабаш, Л.М. Володина. – Томск, 1986. – С. 48.

Feature of closing of criminal proceedings as a form of the completion of pre-judicial investigation is also that fact that the Art. 284 of the Criminal Procedure Code of Ukraine provides two subjects of adoption of the relevant decision: investigator and prosecutor. However, only the prosecutor is allocated with such competence of election of other forms of the completion of pre-judicial investigation. Granting to the investigator of the right to stop criminal proceedings contradicts the norms of p. 2 of the Art. 283 of the Criminal Procedure Code of Ukraine that provide the right of only prosecutor to make the decision on the completion of pre-judicial investigation. The last logically proceed from implementation by the prosecutor of accusatory activity concerning the suspect. In its framework only the prosecutor can make the decision on the beginning, continuation or closing of criminal prosecution. It is one of international standards of public prosecutor's activity. According to the item 2 of Recommendation No. R (2000) 19 of Committee of Ministers to member states of the Council of Europe on the role of public prosecution in the criminal justice system system from October 6, 2000, in all criminal justice systems public prosecutors decide whether to initiate or continue prosecutions<sup>5</sup>. Thus, power to close criminal prosecution it is necessary to assign only to the prosecutor.

However, from the point of view of expediency such option conducts to overload of prosecutors which physically cannot independently close one hundreds of thousands criminal proceedings. These can explain that fact that investigators are allocated with some powers in this sphere. The law provides that the investigator can close criminal proceedings on the bases provided by points 1, 2, 4 p. 1 of the Art. 284 of the Criminal Procedure Code of Ukraine if in these criminal proceedings it was reported to nobody about suspicion. Thus it is necessary to pay attention to the next moments. First, the bases on which investigators close criminal proceedings. That are: lack of an event of a criminal offense, absence of its corpus delicti, coming into force of the law canceling criminal liability for act made by the person. The first two bases are the most widespread on the initial stage of pre-judicial investigation, and the third - obvious and indisputable. Secondly, investigators make the decision on closing of criminal proceedings on the fact of commission of criminal offence, and not against the person. That is they do not dispose of results of criminal prosecution, as it has not personified yet (the suspect of process has not appear). Thirdly, in use of the power conferred to them they do not compete to prosecutors. Thus, the investigator is the facultative subject of decision-making on closing of criminal proceedings, and his powers in this point have auxiliary character in relation to the prosecutor. Their existence is reasonable by need of reduction of procedural load of the prosecutor.

According to paragraph 3 p. 4 of the Art. 284 of the Criminal Procedure Code of Ukraine, public prosecutor renders a decision to close criminal proceedings against the suspect based on grounds referred to in part one of the Art. 284 of the Criminal Procedure Code of Ukraine. The instruction that the prosecutor makes such decision "concerning the suspect" brings an attention to the question of possibility of the prosecutor to close criminal proceedings in cases when it was not reported to anybody about suspicion in it. At the solution of this question it is necessary to recognize that competence of the prosecutor to close criminal proceedings is wider than competence of the investigator. The prosecutor as the procedural head of pre-judicial investigation is allocated by the law powers to close criminal proceedings on any basis for this purpose, except cases when it is exclusive competence of court. It should be accurately defined in the Art. 284 of the Criminal Procedure Code of Ukraine by the instruction that the prosecutor takes out the resolution on closing of criminal proceedings on all bases for this purpose, provided by p.1 of the Art. 284 of the Criminal Procedure Code of Ukraine irrespective of presence of the suspect. At the same time only the prosecutor can stop criminal proceedings concerning the suspect as such decision means not simply closing of procedural actions on the fact of commission of criminal offence, and closing of criminal prosecution of the particular person.

Concerning the decisions accepted by investigators on closing of criminal proceedings the prosecutor carries out function of their control. According to p. 6 of the Art. 284 of the Criminal Procedure Code of Ukraine, a copy of the investigator's decision to close criminal proceedings is forwarded to the applicant, victim, and public prosecutor. Prosecutors carry out as the general check of legality and validity of the specified decisions within a period of 20 days from the date of receipt of the decision copy, and consider complaints to them submitted by the applicant, victim within a period of 10 days from the date of receipt of the decision copy by them. Based on the results of testing the prosecutor has the right to overturn the resolution of the investigator on grounds of illegitimacy or groundlessness thereof. Practice shows that in this sphere prosecutors reveal considerable num-

<sup>5</sup> Про роль державного обвинувачення в системі кримінального правосуддя : Рекомендація R (2000) 19 Комітету Міністрів державам-членам Ради Європи, прийнята 06 жовт. 2000 р. // Лапкін А.В. Правові основи прокурорської діяльності : [наук.-практ. посіб.] / А.В. Лапкін ; за ред. П.М. Каркача. – 2-ге вид., змінене і допов. – Х. : Право, 2013. – С. 55–64.

ber of violations. So, in 2014 prosecutors cancelled 42 077 resolutions on closing of criminal proceedings<sup>6</sup>, and in 2015 – 37 918 such resolutions<sup>7</sup> that makes about 7 % from their total. It should be noted that the unreasonable closing of criminal proceedings harms to fight against crime, allows to guilty persons to avoid criminal liability, breaks the rights of victims<sup>8</sup>. In this regard, public prosecutor's supervision of legality of closing of criminal proceedings is essential.

Estimating nature of activity of the prosecutor in the sphere of closing of criminal proceedings, it is possible to draw a conclusion that his powers are realized in three aspects. First, the prosecutor is allocated with universal power to close criminal proceedings on any basis for this purpose, irrespective of presence of the suspect in that proceeding. Secondly, the prosecutor has special powers to close criminal proceedings concerning the suspect. Thirdly, the prosecutor carries out supervision of decisions of investigators about closing of criminal proceedings by verification of the relevant resolutions about their legality and validity. Therefore, to call this activity as a whole "public prosecutor's supervision"<sup>9</sup> is not absolutely correct. The role of the prosecutor in closing of criminal proceedings is supervising only in aspect of check of that part of resolutions on closing of criminal proceedings that are accepted by investigators. In other cases the prosecutor is the authorized subject of adoption of the relevant decision of closing of criminal proceedings.

Making decisions on closing of criminal proceedings occupies a considerable component in the general array of final procedural decisions. So, for example, in 2014 in Ukraine it was registered 529 139 criminal proceedings, and it was closed – 614 456<sup>10</sup>; in 2015 – 565 182 and 532 227 respectively<sup>11</sup>. Comparing indicators of the stopped criminal proceedings with total of the registered criminal proceedings, it is possible to draw a conclusion that in 2014 more criminal proceedings were stopped, than registered, and in 2015 – it was more than 94%. At the same time, in 2014 prosecutors sent to court 173 311 criminal proceedings with indictments, in 2015 such productions was 163 795. Therefore, the specified conclusion is erroneous and is connected with shortcomings of the statistical account. It can this be explained, firstly, that the specified data do not consider quantity of the criminal proceedings that have remained without the decision since the previous period. So, for January 1, 2015 such productions that were not ended or suspended in previous years, remained 401 602. Secondly, by the legislation of Ukraine the criminal proceedings can be stopped as as a whole, and concerning the person to whom it is reported about suspicion. In the latter case, according to p. 5 of the Art. 284 of the Criminal Procedure Code of Ukraine, decision made by public prosecutor to close criminal proceedings against the suspect does not preclude the continuation of pre-trial investigation in respect of the criminal offence concerned. However, the official statistics does not consider quantity of the criminal proceedings closed concerning the person in the general array of decisions on closing of criminal proceedings. Thus, the decision on closing can be accepted several times in the same criminal proceedings. However, in any case closing of criminal proceedings is the most widespread form of completion of pre-judicial investigation.

It is possible to consider that the significant number of closed criminal proceedings is caused by that: in the Uniform register of pre-judicial investigations data on criminal offenses are brought without appropriate check and an assessment. During further pre-judicial investigation lack of signs of a criminal offense is setting that causes closing of criminal proceedings due to the lack of an event or corpus delicti of a criminal offense. Before, in the conditions of action of the Criminal Procedure Code of Ukraine 1960, cases when outlined in statements about criminal offenses data did not confirmed, was the basis to refusal in initiation of legal proceedings. Now they involve pronouncement of resolutions of closing of criminal proceedings.

Thus, in modern conditions, when the legislator refused practice of pronouncement of resolutions on refusal in initiation of legal proceedings (as well as about its excitement), similar function is carried out by resolutions on closing of criminal proceedings. Such situation leads to that the prosecutor and the investigator actually work «for a basket», being engaged in investigation of obviously unpromising criminal proceedings and the

<sup>6</sup> Звіт про роботу прокурора за 12 місяців 2014 р. [Електронний ресурс]. – Режим доступу : <http://www.gp.gov.ua/ua/stat.html>.

<sup>7</sup> Звіт про роботу прокурора за 12 місяців 2015 р. [Електронний ресурс]. – Режим доступу : <http://www.gp.gov.ua/ua/stat.html>.

<sup>8</sup> Кримінальний процес України : [підруч.] / [М.М. Михеєнко, В.Т. Нор, В.П. Шибіко]. – 2-ге вид., перероб. і доповн. – К. : Либідь, 1999. – С. 528.

<sup>9</sup> Миронов А.М. Прокурорський нагляд за законністю закриття кримінального провадження / А.М. Миронов // Право і суспільство. – 2016. – № 1. – С. 159–164.

<sup>10</sup> Єдиний звіт про кримінальні правопорушення за січень-грудень 2014 р. [Електронний ресурс]. – Режим доступу : <http://www.gp.gov.ua/ua/stat.html>.

<sup>11</sup> Єдиний звіт про кримінальні правопорушення за січень-грудень 2015 р. [Електронний ресурс]. – Режим доступу : <http://www.gp.gov.ua/ua/stat.html>.

subsequent their closing. In this array the criminal proceedings closed illegally and unreasonably are lost, as prosecutors cannot reveal them in due time.

In this regard the double task is assigned to the prosecutor: on the one hand, in due time to stop the criminal proceedings not having judicial prospect and distracting efforts of bodies of pre-judicial investigation and the prosecutor; on the other hand, not to allow the illegal and unreasonable closing of criminal proceedings with purpose that the persons who have made criminal offenses, were instituted to criminal liability.

The official statistics does not show quantity of the criminal proceedings closed at the initial stage of criminal proceedings (till the moment when the person is notified of suspicion). However, it is possible to consider that exactly they make the majority in an array of decisions of closing of criminal proceedings, and respectively in structure of public prosecutor's supervision of legality of closing of criminal proceedings. It is obvious that verification of the relevant resolutions assigns considerable additional load for prosecutors. On the one hand, the problem can be solved by fixing in the law of possibility of pronouncement of resolutions on refusal at the beginning of pre-judicial investigation. On the other hand, such option means partial return to model of the beginning of the pre-judicial investigation, existing till 2012. Besides, resolutions on refusal at the beginning of pre-judicial investigation too should be checked by the prosecutor too.

Other option of changes in the law is pronouncement of resolutions on cancellation of suspicion instead of resolutions of closing of criminal proceedings concerning the person. Thus it would be possible to solve a problem of double accounting of similar resolutions when the decision of closing of criminal proceedings can be accepted in one case several times.

It is indicative that since the beginning of 2016 the quantity of the stopped criminal proceedings was considerably reduced in comparison with the similar periods of 2014 and 2015 years. The explanation of this situation consists in a position of the governance of National police of Ukraine which advises to the subordinates to approach more selectively to closing of criminal proceedings for the purpose to increase detection of crimes. However, such approach is formal as does not provide automatic increase of efficiency of pre-judicial investigation. Besides, in due time not closing criminal proceedings negatively influence on the work of bodies of pre-judicial investigation, increasing and without that high load of their employees.

Summing up, it should be noted that the prosecutor plays a key role at closing of the criminal proceedings, caused by implementation of criminal prosecution by them. Thus the prosecutor acts as the active and independent subject of decision-making of closing of criminal proceedings, and the subject checking legality and validity of the relevant decisions of the investigator. Taking into account considerable distribution of practice of closing of criminal proceedings, provision of legality and validity of the relevant decisions depends on improvement of tactics and a methods of public prosecutor's activity in this sphere.

### **Summary**

The article is devoted to the question of a role of the prosecutor at closing of criminal proceedings. Powers of the prosecutor at making decision to close of criminal proceedings are analyzed. It is made the conclusion that the prosecutor is the independent initiative subject of closing of criminal proceedings, and also carries out supervision of adoption of the relevant decisions by the investigator.

### **Анотація**

Стаття присвячена питанню ролі прокурора у закритті кримінального провадження. Аналізуються повноваження прокурора під час прийняття рішення про закриття кримінального провадження. Зроблено висновок про те, що прокурор є самостійним ініціативним суб'єктом закриття кримінального провадження, а також здійснює нагляд за прийняттям відповідних рішень слідчим.

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