GENESIS OF JUDICIAL PRACTICE IN THE MATTER OF PROCEDURAL REGISTRATION AUTHORIZED PROSECUTOR AND INVESTIGATOR IN CRIMINAL PROCEEDINGS

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Abstract. The Article deals with the one of the evidentiary problems formulated at the practical level during the judicial interpretation of the provisions of the criminal procedural law on documenting the powers of the investigator and prosecutor in criminal proceedings. The relevance of this question stems from its correlation with the evaluation of the evidence, namely its admissibility taking into account whether it is collected by an authorized person. The research found that the primary question of the judicial community's interpretation of the provisions of Articles 36, 37 and 110 of the CPCU of Ukraine was set out in a decision of the Joint Chamber of the Cassation Criminal Court of the Supreme Court whose legal conclusion is binding on all national courts taking into account the way in which the law establishes the unity of judicial practice. It was noted that the proposed way of harmonizing the jurisprudence on this matter could not be achieved since subsequent examples of the jurisprudence of the same court have drawn conflicting legal conclusions as well as attempts to depart from the suggested vector of understanding the proper discharge of powers of the prosecutor and investigator in criminal proceedings by decree. Also in the Article the author notes that the outlined local legal problem is evidence of the need for conceptual rethinking of the conservative understanding of the procedural form of the reformed domestic criminal process.

Keywords: *prosecutor, investigator, decree, assignment, judicial practice, authority, evaluation of evidence, admissibility of evidence.*

Introduction

Prooving is the main type of procedural activity of subjects in criminal proceedings. Its content consists of three main functions: collection, verification and evaluation of evidence. It is on the basis of the evidence that the question of guilt or innocence of a person is decided in the future criminal proceedings, and therefore they are the substance of the right to a fair trial. It is clear that each of these three stages of evidence is a State activity and is therefore clearly and unambiguously regulated by procedural legislation. The mandatory method of regulating criminal procedural legal relations is questionable, but has proved to be effective and to achieve maximum results in balancing and streamlining legal relations in the field of criminal procedure.

Pursuant to art. 92 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPCU) imposes the burden of proof on the investigator, the procurator and the victim in the cases established by this Code. Consequently, in the course of criminal proceedings the investigator and the prosecutor collect data which subject to their qualitative characteristics – membership and admissibility, acquire the status of evidence and are grounds for establishing the existence or absence of legally significant facts. In turn, the affiliation of the evidence determines their ability to confirm or refute circumstances relevant to the case whereas the admissibility of the evidence is their characterization in terms of obtaining data in accordance with the procedure established by the CPCU. The procedure established by the CPCU for obtaining evidence provides that data will be given the status of evidence when they are collected, namely: by a person authorized to do so by the source provided by law and in the manner prescribed by criminal procedural law.

The question of authorized subjects for the collection of evidence has always been of interest to doctrinal and practical research. The adoption of the CPCU in 2012 fundamentally transformed the initial stage of criminal proceedings. In accordance with preliminary procedural regulations, the reformed modern criminal procedure initiation of criminal proceedings has been modified to entering information on the commission of a criminal offence in the URPTI (hereinafter referred to as URPTI). Article 214 of the CPCU provides that an investigator namely a person conducting an initial inquiry or a procurator shall, notify him of the commission of a criminal offence without delay, but not later than 24 hours after the submission of an application or after he has himself identified the circumstances from any source; persons who may testify that a criminal offence has been committed must enter the relevant information in the URPTI, initiate an investigation and provide the applicant with an extract from the URPTI within 24 hours of the entry of such information. The investigator conducting the pre-trial investigation is determined by the head of the pre-trial investigation body and the investigator is determined by the head of the body conducting the initial inquiry in the absence of a unit of inquiry by the head of the pre-trial investigation body. With regard to the designation of a prosecutor exercising the powers of a prosecutor in a specific criminal proceeding under Article it is determined by the head of the relevant procuratorial body after the commencement of pre-trial investigations.

This shows that the pre-trial investigation begins when the relevant information is entered into the URPTI but the evidence may be collected during the investigation (and in practical terms it happens in the vast majority of proceedings) by the prosecutor and the investigator. This process is entrusted to the heads of the respective structures. In such circumstances the question of documenting the determination of the powers of a prosecutor and investigator in criminal proceedings entrusted with the conduct of a pre-trial investigation is relevant. In fact, the CPCU in force binds it to a legally significant fact – the entry of information into the URPTI as evidenced by the extract from this register. There is no regulation on the execution of other procedural documents. Thus, the question of the competence of the particular prosecutor and the investigator who collects the evidence is correlated with the subsequent determination of the admissibility of the evidence from the point of view of the relevant evidentiary subject.

Analysis of recent studies and publications. Of course, in 2012 the updating of the criminal procedure legislation has stimulated a scientific and practical search for the vast majority of institutions, categories and concepts of criminal procedure as they all need a fundamental rethinking in view of the significant changes in the regulation of criminal proceedings in particular the new paradigm of the criminal procedural law. Many procedural specialists in their analytical studies have turned to the powers of the procurator and investigator in criminal proceedings when such activities are regulated by the new CPCU.

So, V. Popeliushko (Popeliushko, 2013, p. 4), Yu. Spuskaniuk (Spuskaniuk, 2012, pp. 89-92), M. Chornousko (Chornousko, 2016), O. Popovych (Popovych, 2015), M. Pohoretskyi (Pohoretskyi, pp. 86-95) devoted their work to questions of procedural powers of the prosecutor in modern criminal proceedings.

As an analyst with practical experience O. Babikov addressed problematic issues in determining the powers of the prosecutor in supervising the observance of the law during the pre-trial investigation (Babikov, 2015).

Scientist I. Hloviuk dedicated her monographic work "Criminal procedural functions: theory, methodology and practice of implementation on the basis of the provisions of the Criminal Procedure Code of Ukraine 2012" to these problems which included the implementation of the prosecutor's functions in the exercise of the powers of evidence (Hloviuk, 2015).

At the level of the thesis study I. Rohatiuk discussed the problem of the theoretical, legal and practical nature of the criminal procedural activity of the prosecutor in pre-trial investigation (Rohatiuk, 2018).

A. Tumaniants, V. Kolodchyn in a general monograph analyzed the issues of the prosecutor's powers in the court of first instance (Kolodchyn, Tumaniants, 2016).

Despite this question about the procedural formality of the investigator's and prosecutor's powers in criminal proceedings in order to collect admissible evidence court practice has

shown. This therefore requires scientific reflection and doctrinal formulation of the legal problem in this respect.

Methodology of the research. In the course of this study to generalize and analyze information, arguments and statements, as well as to form conclusions two methods were used, namely: formal-logical (dogmatic) – to establish the scope and content of concepts "prosecutor", "investigator", "evidence", "admissibility of evidence", "decree", "order" and other definitions within the scope of the research subject; system-structural – during the considering the procedural status of the prosecutor and investigator in criminal proceedings.

The empirical basis of the study was the decisions of the Cassation Criminal Court of the Supreme Court (hereinafter – the CCCtSC); the practice of this court, as well as the author's own experience during the period of practical work in the apparatus and scientific advisor to the Supreme Court.

Presentation of the main research material. For the first time the question of the procedural formalization of the powers of the prosecutor and the investigator in criminal proceedings in judicial practice was initiated by the judicial board of the CCCtSC in the ruling of the judicial board of 17 June 2020 on the transfer of criminal proceedings No 754/7061/15 to review of the United Chamber of CCCtSC (Decision on June 17, 2020; No 754/7061/15). Reference was made to the need for unity of jurisprudence on this issue as there were different legal positions on the issue of vesting powers in the prosecutor (a group of prosecutors) in a particular criminal proceeding. In particular, by a decision of the judicial board of the Second Judicial Chamber of the CCCtSC of 19 April 2018, it was noted that based on the provisions of the Criminal Procedure Law the decision on the appointment of a prosecutor is given to a specific prosecutor (group of prosecutors) powers provided for in art. 36 of the CPCU, in criminal proceedings, is mandatory as is the signature of the person who issued it (Judgment on 19, 2018; No 754/7062/15-k).

At the same time, in a decision of 19 May 2020, the judicial board of the First Chamber of the CCCtSC came to a different legal position on the application of the provisions of art. 36 of the CPCU (Judgment on May, 19, 2020; No 490/10025/17). Specifically, the judicial board did not accept that the absence of a determination of the investigator or prosecutor in itself meant that the investigator or prosecutor did not have the appropriate powers. The judicial board concluded that the CPCU does not require that every decision taken in connection with the investigation of a criminal case be in the form of a ruling.

As a result of the consideration of this issue by the Joint Chamber of the CCCtSC formulated a legal opinion in a decision dated 22 February 2021 according to which the content of Articles 36, 37, 110 of the CPCU the decision on appointment (determination) of the prosecutor who will exercise the powers of the prosecutor in criminal proceedings and, if necessary, the teams of prosecutors who will exercise the powers of the prosecutors in a specific criminal proceeding must necessarily take the form of a ruling which should be included in the pre-trial investigation file to confirm the existence of authority. Such a decision must meet the requirements of the CPCU for a procedural decision in the form of a decision including the signature of the official who issued it. The absence of the said decision in the pre-trial investigation file or its failure to be signed by the head of the relevant prosecutor's office makes inadmissible the evidence gathered during the pre-trial investigation as assembled under the supervision and procedural guidance of the prosecutor (prosecutors) who had no legal authority to do so (Decree on February 22, 2021, 754/7061/15).

This is evidence that the said judicial decision has established a basis and a vector for further development of the question of the admissibility of evidence, taking into account the proper procedural discharge of the powers of the procurator and investigator in criminal proceedings.

Furthermore, in view of the following jurisprudence of the Joint Chamber of the CCCtSC it was reasonable to assert the continuity and permanence of jurisprudence in this field. Thus, on 24 May 2021 the criminal proceeding No 640/5023/19 formulated the legal conclusion on the observance of the rules of competence and the influence of their violations during the pre-trial investigation on the admissibility of evidence. In that judgement on a case-by-case basis the court found that the Prosecutor General, the Head of the Regional Prosecutor's Office, their first deputies and deputies had exercised the powers provided for in art. 36, Section 5. of

the CPCU, the existence of grounds must be substantiated in a corresponding procedural decision - a decision by the Prosecutor General and the head of the regional Prosecutor's office; their first deputies and deputies to assign to the pre-trial investigation of a criminal offence another body of pre-trial investigation, which must meet the requirements of art. 110 of the CCCtSC (Judgment on May, 24, 2021; No 640/5023/19).

Further, there have been attempts in the judicial practice to derogate from the opinion set out in the decision of the Joint Chamber of the CCCtSC on February 22, 2021, and expressing the idea that an authorized investigator could be identified on the basis of an assignment from the Chief of Investigations. At the same time the similarity of legal relations in these criminal proceedings was substantiated despite the different procedural subjects (prosecutor and investigator) claiming that the legislative technique of regulating the powers of the investigator and the prosecutor are identical. In particular, criminal proceeding No 663/267/19 was referred to the Joint Chamber of the CCCtSC on May, 12, 2021 which provides arguments for the opposite interpretation of the relevant provisions of the Criminal Procedure Law on the procedural confirmation of the powers of the prosecutor and the investigator to carry out the pre-trial investigation (Decision on May 12, 2021; No 663/267/19). Specifically, it was alleged that in order for the head of the pre-trial investigation body to determine a specific investigator (investigators) in the form of a letter of instruction containing the same details as the order, in particular: the position of the head of the pre-trial investigation body, the time and place of drawing up the order, the reasons for its issuance (Articles 39 and 214 of the CPCU), the number of the criminal proceedings entered in the URPTI, preliminary legal qualification, and instructions on conducting quality, an effective and expeditious pre-trial investigation (as in this case) is sufficient to empower such an investigator to conduct pre-trial investigation in a specific criminal proceeding. So that is the written form of decision (not in the form of an order) does not show that the pre-trial investigation was carried out by an unauthorized person and that the evidence obtained during such an investigation is inadmissible on these grounds.

The Joint Chamber of the CCCtSC returned criminal proceedings to the judicial board by decision of 10 June 2021. They having found unconvincing the arguments of the judicial board in the decision to transfer criminal proceedings for consideration by the Joint Chamber on the similarity of the rules governing the determination of the prosecutor and the investigator. Whereas the use of the same legal technique in the text of the law is only a way of establishing regulations governing different legal relationships. Therefore, the way of legal regulation is not evidence of uniformity of procedural statuses and powers (Decision on June 10, 2021; No 663/267/19).

The final decision in this criminal proceeding was made by a judicial board on 25 August 2021 which stated that the authority of the head of the pre-trial investigation body to determine the investigator (investigators) conducting the pre-trial investigation, in the form of a written «instruction» containing the same details as the decision, in particular: the position of the head of the pre-trial investigation body, the time and place of drawing up the order, the grounds for its issuance (Articles 39, 214 CPCU), the number of criminal proceedings, preliminary legal qualification and instructions for conducting a high-quality, efficient and expeditious pre-trial investigation (as in this case) which does not contradict the requirements of the Article. The CPCU provides such an investigator with sufficient authority to conduct pre-trial investigations in specific criminal proceedings. It is this written form of decision (not an order) that does not show that the pre-trial investigation was carried out by an unauthorized person and that the evidence obtained during the investigation is inadmissible on these grounds (Judgment on August, 25, 2021; No 663/267/19).

This shows that despite the existence of a legal opinion on the proper form of the procedural decision regarding the powers of the prosecutor and the investigator in criminal proceedings the judicial board presented the opposite legal position on the matter subsequently in fact during the cassation proceedings.

However, there were no attempts to depart from the initial legal opinion in the decision of

the Joint Chamber of the CCCtSC on 22 February 2021. In order to consider exactly such a similar issue, on 12 October 2021 the judicial board referred the next criminal proceedings No 344/2995/15 to the Joint Chamber of the CCCtSC for consideration which in turn by resolution on 24 December 2021, returned it to the College of Judges on the grounds of lack of grounds for derogation from the stated legal position (Decision on October, 12, 2022, decision on Decemder, 24, 2021; No 344/2995/15-k).

The final issue in this criminal proceedings was resolved in the decision of the judicial board of 1 November 2021 which found that the absence of a decision on the appointment of prosecutors in charge of the pre-trial investigation did not violate the rights and freedoms of the convicted person in any way and did not affect the fairness of the trial in general (Judgment on November, 01, 2021; No 344/2995/15-k).

Discussion of the research results. In analysing such facts of jurisprudence it is understood that the initial legal opinion on due process powers of the prosecutor and the investigator in criminal proceedings is formulated in the decision of the Joint Chamber of the CCCtSC on 22 February 2021. It was noted that such a form is explicitly referred to as an order, and not an instruction from the head of the investigation which did not ensure the unity of the jurisprudence in the said matter. In the event that the CCCtSC returned the relevant criminal proceedings and did not resort to a mechanism of derogation from the legal opinion, the judicial board formulated their legal position on each specific criminal proceeding independently. At the same time the method of ensuring the unity of jurisprudence by the Supreme Court through the mechanism of formation of legal conclusions by the Joint Chamber of the CCCtSC taking into account the formation of competing legal conclusions by the judicial board of the CCCtSC has been found to be ineffective. This legal situation should be considered evidence of an imbalance in the evaluation of evidence in terms of the rules of admissibility as well as the lack of a balanced answer to the question of the proper procedural form of powers of the prosecutor and investigator in criminal proceedings. The reasons why the judicial community allows different interpretations of the legislative structures of the CPCU with regard to the powers of the prosecutor and investigator should be recognized the application of different methods of interpretation: from literal, conservative focusing on formal compliance with the «letter of the law» to expansive which in some cases takes into account the mandatory method is unacceptable.

Conclusions

The conducted analytical intelligence convinces that the conceptual changes of the CPCU on the initial stage of pre-trial investigation have influenced the substance in understanding the discharge of powers of the prosecutor and investigator in criminal proceedings which has an inescapable impact on the admissibility of evidence. The arguments put forward by judicial practitioners in specific legal positions in court decisions in favour of the mandatory determination of the powers of the prosecutor and the investigator by decree are also to be criticized exclusively and should equally be considered valid. It is impossible to authorize the prosecutor and the investigator to collect evidence by proxy. An important outcome of this research was the highlighting and coverage of the existing legal collapse of a local practical issue, which may be evidence of either a rethinking of the evidentiary activities of the prosecutor and investigator in domestic criminal proceedings or to provide the jurisprudence with doctrinally motivated ideas for the selection of effective ways of evaluating evidence.

This Article convinces in prospect of further researches of the given issue which is due to absence of doctrinal basis in certain formulated jurisprudence of the problem: the decision vs task. It is obvious that this decision focuses a more in-depth aspect of the conflicting understanding of the procedural form of the procurator’s and investigator’s powers under the new procedural format of the CPCU.

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