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CHANGE OF SUSPICION OR NEW SUSPICION: GROUNDS FOR A PROPER DECISION

Abstract. The ***purpose of the article*** is to distinguish the concept of a change of suspicion previously notified from a notification of a new suspicion under article 279 of the Criminal Procedure Code of Ukraine, determine the grounds for the investigator, the inquiry officer or the prosecutor to take one of these decisions; as well as the effects of failure to comply with the provisions of the legislation in force in the event of a groundless procedural decision to change suspicion previously notified or to notify a new one.

Results. The article analyses one of the main procedural decisions of the investigator and the prosecutor at the pre-trial investigation stage – a notification of suspicion, which is a special form of procedural notification in criminal proceedings. The decision-making regarding notification of a person is considered as a result of the intellectual activity of authorised officials, which may have legal effects for all participants in criminal proceedings, provided that requirements for the time of, procedure for and parties to its serving are met. A reasoned analysis of the distinction of the concepts of "new suspicion" from the "change of previously notified suspicion" has been carried out from the perspective of the legal nature and the essence of these concepts, based on the practice of their application in the practice of pre-trial investigation bodies, prosecution and trial.

Conclusions. Suspicion is primarily based on the assumption that a person is involved in the commission of an offence, and the preparation of a notification of suspicion is only a conclusion that is not final and will be further verified during the pre-trial investigation. As the pre-trial investigation is not completed after notification of the suspect, the proving continues and provides for appropriate actions to verify the suspicion, confirm or refute it. This study focuses on this issue of the possibility to establish new facts and circumstances of the commission of a criminal offence, on the ground thereof the competent authority decides to notify a new suspicion or to change the previously notified suspicion. In order to notify a new suspicion, the investigator, the inquiry officer or the prosecutor shall establish new evidence or circumstances that lead to a different view of the circumstances of the commission of the criminal offence and enable to interpret them in the light of another definition according to the Criminal Code of Ukraine. At the same time, the new suspicion may be a completely separate document, which does not repeat the preliminary suspicion. A change of the definition of an act attributable to a suspect in fact involves a refusal by the investigator, an inquiry officer or the prosecutor of previously notified suspicions and a further pre-trial investigation to define the commission of a new criminal offence.

Key words: notification of suspicion, new suspicion, change of previously notified suspicion, investigator, prosecutor, court.

1. Introduction

The notification of suspicion is the starting point for the process of bringing a person to justice, and thus the main stage of the pre-trial investigation, providing for the collection of evidence against a suspect for a criminal offence.

P. Bilenchuk, Y. Hroshevyi, O. Mykhaylenko, O. Tatarov, V. Tertyshnyk, L. Udalova, O. Faraon, O. Khablo, V. Shybiko, O. Shylo, and others made a significant contribution to the study of the concept of notification of suspicion and criminal liability of a person.

The purpose of the article is to distinguish between the concept of a change of suspicion previously notified and a notification of a new suspicion under article 279 of the Criminal Procedure Code of Ukraine, determine the grounds for the investigator, the inquiry officer or the prosecutor to take one of these decisions; as well as the effects of failure to comply with the provisions of the legislation in force in

the event of a groundless procedural decision to change suspicion previously notified or to notify a new one.

2. Specificities of notification of suspicion to a person

The Criminal Procedure Code of Ukraine (hereinafter – CPC) clearly defines the moment at which a person acquires the status of a suspect, namely, who has been notified of suspicion under articles 276–279 of the CPC, detained on suspicion of having committed a criminal offence and in respect of whom a notification of suspicion has been drawn up but it has not been not served due to failure to establish the whereabouts of the person, however, provided all means have been used as specified by the CPC to serve a notification (art. 42 of the CPC). Therefore, suspicion is a procedural decision of a prosecutor or investigator approved by the prosecutor, which shall be based on evidence gathered during the pre-trial investigation and meet the requirements of belonging, sufficiency and credibility (Criminal Procedure Code of Ukraine, 2012).

The law establishes a specific time limit for the service of a notification of suspicion to a person apprehended at the scene of a criminal offence or immediately after it has been committed, which is 24 hours from the moment of apprehension. It is clear that this period is short enough to permit a full and complete examination of evidence and to establish all the circumstances of the criminal offence committed, which may affect the accuracy of the criminal offence classification. This is why, as a rule, a prior legal classification of an offence is made, which may be further modified (art. 214 of the CPC) (Criminal Procedure Code of Ukraine, 2012).

The decision to notify a person of suspicion, although based on the assumption that a person is involved in the commission of an offence and is made not according to the final outcome of the investigation. In turn, this may also include the change of the notification of suspicion or the notification of a new suspicion in view of circumstances that have been revealed in the course of further investigation. Therefore, during the pre-trial investigation, the investigator, inquiry officer or the prosecutor may not confine themselves to notifying suspicion only once, since it is certain that circumstances will be established requiring a change of suspicion or the notification of a new suspicion.

In practice, there is an opinion that, in order to avoid presumptions and changes in the classification of a criminal offence, it is appropriate to proceed with the notification of suspicion at the end of the pre-trial investigation immediately prior to the filing of the indictment. However, this postulate does not meet modern requirements and directly violates the Constitution of Ukraine, the principles of criminal procedure and the international legal instruments ratified by Ukraine, especially in the cases provided for in article 276, part 1, para. 1, 2 of the CPC (Kaplina, 2017, pp. 73–80).

Obviously, during the pre-trial investigation a great deal of evidence relevant to the criminal proceedings has been found. However, an investigation by collecting evidence of guilt against a particular person effectively deprives the latter of the fundamental constitutional right to a defence, since a person in respect of whom a number of procedural acts are being carried out does not acquire the necessary status. Therefore, the notification of suspicion is in the context of article 276 of the CPC is a sound and correct procedural act that fully respects the principles of criminal procedure, such as legality and the right to a defence, the adversarial nature of parties and their freedom to present to the court their evidence and to prove their credibility before the court, etc.

Therefore, an effective pre-trial investigation, resulting into a reasonable, incontrovertible, objective and fair suspicion, will be conducted only if changed circumstances, relevant to a criminal offence, or of the detection of new ones, will be taken into account accordingly and the notification of suspicion adjusted on a reasoned basis (Faraon, 2014, pp. 402–403).

In view of this, the legislature has provided for in article 279 of the CPC the possibility of notifying new suspicions or of changing previously notified suspicions on reasonable grounds. However, neither selection of one of the options of nor the exhaustive grounds for the new suspicion are explained and in general distinguished by the CPC.

For example, the change of suspicion notification may be due both to a worsening of the suspect's situation and to an improvement in his or her situation, and considering that once a person has been notified of a suspicion, the function of protection is exercised and the grounds for the notification of suspicion are conducted in an adversarial manner. This is why the defence's rebuttal of the factual circumstances that have been grounds for the preliminary suspicion may be another reason to correct suspicion (Kaplina, 2017, pp. 73–80).

According to the explanatory dictionary of the modern Ukrainian language, the concept of "change" implies a transition, transformation of something into something qualitatively different, and the concept of "new" means one that has occurred, developed, did not exist before, has been recently created (Busel, 2005, p. 851). On the basis of these concepts, it is clear that the change of the notification of suspicion is

possible only in the case of a pre-existing preliminary suspicion, which requires modification, and that a new suspicion can only arise if no suspicion has been notified at all. For example, in his ruling of 6 September 2019 in the case of the appeal against the notification of suspicion, the judge of the Ternopil City District Court of the Ternopil Region explained that the change is an amendment that alters anything previous. The change of the notification of suspicion in the broad meaning of the term implies: not corroborating part of the notification of suspicion; supplementing the notification of suspicion; changing the notification of suspicion (Decision of the Ternopil City District Court of the Ternopil Region, 2019).

Therefore, the grounds for changing the notification of suspicion are:

– the unestablished event of the crime alleged against the suspect;

– the absence of elements of a crime in the acts of a person;

– the unproved participation of a suspect in one or more of the offences of which he or she is accused in suspicion notification;

– unestablished aggravating circumstances;

– established mitigating circumstances;

– established circumstances that change the classification of the act (attempt, completed offence, repetition, continuing offence);

– established circumstances leading to a change of the assessment of the degree of complicity of the suspect, including the termination of criminal proceedings on rehabilitative grounds against other persons (Sukhov, 2020).

3. Changing of previously notified suspicion

In the absence of corroboration of certain facts stated in the notification of suspicion, such as the commission of an episode or separate act, qualifying element or an over-classification of cumulative offences, two situations are possible: the change of classification or no change is required. This is the main criterion for deciding whether to give effect to a notification of the change of suspicion previously notified or to notify a new suspicion. In evaluating the available evidence obtained during the pre-trial investigation from the moment the person is notified of suspicion, it may be necessary to change the classification, which in turn implies not supplementing or clarifying the previous facts, but notifying new suspicion notification, which is generalised in place of the earlier one.

Therefore, the application of these definitions regarding the concept of "suspicion" in criminal proceedings reveals that the difference between the concept of "change of previously notified suspicion" and "new suspicion" is that "change of previously notified suspicion" takes place only if there is a prior suspicion and if it is necessary to change it, and a "new suspicion" is drawn up only if, on a separate fact, the person has not yet been notified of suspicion at all.

It should be noted, however, that as a result of the change of a previously notified suspicion, the investigator, prosecutor and other participants in the proceedings will already have to deal with the existence of a new suspicion in the criminal proceedings, which has arisen as a result of the changes of a previous suspicion.

In the presence of the grounds provided for in article 279 of the CPC of Ukraine, the investigator or prosecutor shall decide on: what name the document shall have if changes in the criminal proceeding entail the change of the previously notified suspicion and the occurrence of new criminal offences, which require a "new suspicion notification" and termination of parts of the previously notified suspicion?

In such case, at first glance, the previously notified suspicion changes, as part of the change concerns the clarification of previously known circumstances of criminal offences, but in presence of new facts, other criminal offences, composing one criminal proceeding, the prosecutor shall notify a person of new suspicion. Logically, in this case, the question arises as to what procedural action should be taken: to change suspicion or to notify a new one. Whether it is necessary to take two procedural actions at once: to notify a change of suspicion previously notified and separately to notify a new suspicion, even if it is not appropriate, but the law does not give a clear interpretation on this matter.

It is clear that, in situations of dispute, not clearly regulated by the Criminal Procedure Code, investigators and prosecutors, on the basis of their own experience and practice, in some regions, notify new suspicions and in others, combine criminal proceedings after the notification of a new suspicion or the change of previously notified one (Faraon, 2014, p. 405).

However, as a result of this sequence of actions in criminal proceedings, a number of other problematic issues arise, such as several notifications of suspicion in one criminal proceeding and the absence of one generalised suspicion, which may cause some confusion and disorientation on the part of the defence and consequently complicate the work of the pre-trial investigation, the prosecution and the court.

Therefore, the purpose of a pre-trial investigation in the form of an objective, proven, incontrovertible and fair suspicion can only be achieved if the notification of suspicion is clearly corrected and substantiated. Bearing in mind that the pre-trial investigation does not end at the stage of notifying the person

of suspicion, but rather takes off, as a result, new evidence may be discovered or taken together with the existing evidence, a new assessment is provided, prompting the investigator, the public prosecutor to reconsider suspicion already existing and decide whether it should be changed, left unchanged or the new suspicion should be notified.

Grounds for another evaluation of evidence may require the change of classification, which clearly involves notification of a new suspicion, since a change of the definition indicates that another criminal offence has been committed or that the elements of an incriminated criminal offence have been changed. In this case, the re-drafted notification of suspicion should be consolidated on the basis of available evidence and not in addition to the existing notification, but in lieu of the earlier one. This means that the prior notification of suspicion, while remaining in the records of the criminal proceedings, is no longer valid (Sukhov, 2020).

It should be noted that, in this situation, a different decision, without taking into account the legal effects and without notifying the person of the new suspicion, and only by modifying the existing notification of the investigator, the prosecutor knowingly supplements the previous suspicion, which has actually ceased to exist. As a consequence, such a decision by an investigator or a prosecutor may be appealed, a notification of suspicion can be cancelled by the courts.

The most difficult question is always whether the change of previously notified suspicions is, in essence, the notification of a new suspicion. Considering provisions in article 279 of the CPC, which clearly provide for not only the possibility of changing existing suspicion, but also for the notification of a new one, the answer to the question will be negative. However, the law in force does not set an unambiguous limit separating a new suspicion from a change of suspicion previously notified (Criminal Procedure Code of Ukraine, 2012).

If during the pre-trial investigation no new evidence contradicting or refuting the earlier classification but giving grounds for clarifying the factual circumstances of the criminal offence (place, time, means, etc.) is established, the investigator or prosecutor shall notify a change of suspicion previously notified. The grounds for the change shall be indicated in the notification of the change of suspicion previously notified. At the same time, absolute duplication of the text of the notification of suspicion in respect of the same legal regulations and the same circumstances of the criminal offence committed is inadmissible. The "change" implies the indication of new evidence or the result of another assessment of existing evidence, to which reference should be made in the text of the document, rather than reciting already existing evidence at random. It should be borne in mind that the change of suspicion previously notified is not a standalone document unrelated to previous suspicion, as it is the fundamental basis of the notification and is the basis for its amendment (Decision of the Ternopil City District Court of the Ternopil Region, 2019).

4. Conclusions

To sum up, in order to notify a new suspicion, the investigator, the inquiry officer or the prosecutor shall establish new evidence or circumstances that lead to a different view of the circumstances of the commission of the criminal offence and enable to interpret them in the light of another classification according to the Criminal Code of Ukraine. At the same time, the new suspicion may be a completely separate document, which does not repeat the preliminary suspicion. A change of the definition of an act attributable to a suspect in fact involves a refusal by the investigator, an inquiry officer or the prosecutor of previously notified suspicions and a further pre-trial investigation to define the commission of a new criminal offence.

References:

Busel, V. (ed.) (2005). *Velykyi tlumachnyi slovnyk suchasnoi ukrainskoi movy [Great explanatory dictionary of the modern Ukrainian language]*. Irpin: Perun (in Ukrainian).

Faraon, O. (2014). Zmina povidomlennia pro pidozru v aspekti st. 279 Kryminalnoho protsesualnoho kodeksu Ukrainy [Change of the notification of suspicion in the aspect of art. 279 of the Criminal Procedure Code of Ukraine]. *Yurydychnyi visnyk – Legal Bulletin*, no. 6, pp. 402–406 (in Ukrainian).

Kaplina, O. (2017). Povidomlennia pro pidozru: protystoiannia pravovykh pozytsii storin obvynuvachennia ta zakhystu [Suspicion: confrontation between the legal positions of the prosecution and the defense]. *Pravo Ukrainy – Law of Ukraine*, no. 12, pp. 74–81 (in Ukrainian).

Kryminalnyi protsesualnyi kodeks Ukrainy vid 13 kvitnia 2012 r. № 4651-VI [Criminal Procedure Code of Ukraine from April 13, 2012 № 4651-VI]. (2012). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/4651-17#Text (in Ukrainian).

Sukhov, Yu. (2020). Povidomlennia pro pidozru osobi: analiz okremykh aspektiv pozytsii Velykoi Palaty Verkhovnoho Sudu shchodo spetsialnykh subiektiv [Suspicion notify: analysis of certain aspects of the position

of the Grand Chamber of the Supreme Court on special subjects]. *Sudebno-yurydycheskaia hazeta – Judicial-legal newspaper*. Retrieved from: https://sud.ua/ru/news/blog/172318-povidomlennya-pro-pidozru-osobi-analiz-okremikh-aspektiv-pozitsiyi-velikoyi-palati-verkhovnogo-sudu-schodo-spetsialnikh-subyektiv (in Ukrainian).

Ukhvala Ternopilskoho miskraionnoho sudu Ternopilskoi oblasti vid 6 veresnia 2019 r. № 607/19668/19 [Decision of the Ternopil City District Court of the Ternopil Region from September 6 2019, № 607/19668/19]. (2019). *court.gov.ua*. Retrieved from: https://tem.te.court.gov.ua/sud1915/ (in Ukrainian).

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ЗМІНА ПІДОЗРИ ЧИ НОВА ПІДОЗРА: ПІДСТАВИ ПРИЙНЯТТЯ ПРАВИЛЬНОГО РІШЕННЯ

Анотація. ***Метою статті*** є розмежування понять зміни раніше повідомленої підозри та повідомлення про нову підозру, передбачених у ст. 279 Кримінального процесуального кодексу України; визначення підстав для прийняття слідчим, дізнавачем, прокурором одного з вказаних рішень, а також наслідків недотримання норм чинного законодавства в разі прийняття необґрунтованого процесуального рішення щодо зміни раніше повідомленої підозри або повідомлення про нову.

Результати. Статтю присвячено аналізу одного з основних процесуальних рішень слідчого, прокурора на стадії досудового розслідування – повідомлення про підозру, яке є особливим видом процесуального повідомлення у кримінальному провадженні. Досліджено прийняття рішення про повідомлення особі як результат інтелектуальної діяльності уповноважених службових осіб, що може спричинити юридичні наслідки для всіх учасників кримінального провадження за умови дотримання вимоги щодо строків, процедури та суб'єктного складу осіб, які залучаються до його вручення. Здійснено ґрунтовний аналіз щодо розмежування понять «нова підозра» та «зміна раніше повідомленої підозри» з позиції правової природи й сутності цих понять та з огляду на практику їх застосування у практичній діяльності органів досудового розслідування, прокуратури та суду.

Висновки. Підозра насамперед ґрунтується на припущенні про причетність особи до скоєння злочину, а підготовка повідомлення про підозру – це лише висновок, який не є остаточним і буде додатково перевірений під час досудового розслідування, оскільки після повідомлення особи про підозру досудове розслідування не завершується, а процес доказування триває та передбачає відповідні дії для перевірки підозри, її підтвердження чи спростування. Саме питанню щодо можливості встановлення нових фактів та обставин вчинення кримінального правопорушення, на підставі яких спеціальний уповноважений орган вирішує питання про повідомлення нової підозри або зміну попередньо повідомленої підозри, присвячена ця робота. Для повідомлення про нову підозру слідчому, дізнавачеві, прокуророві необхідно встановити нові докази чи обставини, які спонукають поглянути на обставини вчинення кримінального правопорушення з іншого ракурсу, що дає змогу трактувати їх у світлі іншої кваліфікації з позиції Кримінального кодексу України. При цьому нова підозра може бути абсолютно самостійним документом, який не повторює попередню підозру. Зміна кваліфікації діяння, яке інкримінується особі підозрюваного, фактично передбачає відмову слідчим, дізнавачем, прокурором від раніше повідомленої підозри та продовження здійснення надалі досудового розслідування за фактом вчинення кримінального правопорушення за новою кваліфікацією.

Ключові слова: повідомлення про підозру, нова підозра, зміна раніше повідомленої підозри, слідчий, прокурор, суд.

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