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SYSTEM OF PRE-TRIAL INVESTIGATION BODIES: CONCEPT OF STRUCTURE AND IMPROVEMENT

Abstract. Purpose. The purpose of the article is to determine the most efficient system of pre-trial investigation bodies, their subordination and structure. **Results.** At the current stage of development of criminal justice, the issues of an effective and optimal national model of pre-trial investigation, search for options for organising and institutionalising the law enforcement system that would meet modern challenges, practice needs and international standards remain relevant. The author studies the issues of the optimal national model of pre-trial investigation, options for organisation and institutional structure of the law enforcement system. The necessity of "vertical" subordination of pre-trial investigation bodies is substantiated. The author suggests ways to reform the system of pre-trial investigation bodies.

Conclusions. It is concluded that the transformation of the pre-trial investigation bodies of Ukraine into the State Pre-trial Investigation Service will fully ensure the idea of "vertical" subordination of investigative units. Moreover, the status of the person who directly performs the function of managing the pre-trial investigation, the head of the pre-trial investigation body, will be brought to the same level as the heads of territorial law enforcement bodies, which is again a prerequisite for effective management of the pre-trial investigation. This reorganisation of the system of pre-trial investigation bodies (with clear subordination and structure) is required today, due to the need to functionally separate them from the activities of territorial law enforcement bodies. Ultimately, this will significantly improve the quality and efficiency of the pre-trial investigation itself. The establishment of a single pre-trial investigation body will eliminate competition between the currently disparate investigative apparatuses, eliminate conflicts in determining the investigative body, and put an end to the issue of inadmissibility of evidence due to violations of the rules of subject matter jurisdiction. In addition, the experience of criminal justice reforms has shown that changes should be comprehensive, carried out in parallel and within a certain timeframe, allowing for all transitional and adaptive periods and goals to be achieved in prospect.

Key words: pre-trial proceedings, head of a pre-trial investigation body, criminal justice reform, vertical subordination, autonomy and independence of an investigator.

1. Introduction

At the current stage of development of criminal justice, the issues of an effective and optimal national model of pre-trial investigation, search for options for organising and institutionalising the law enforcement system that would meet modern challenges, practice needs and international standards remain relevant

Only in 2014-2023, four completely new pre-trial investigation bodies were created (investigative units of the SBI, the SACC and the BESU, and a unit of NABU detectives), and the largest investigative apparatus of the Internal Affairs bodies was reorganised (into investigative units of the National Police).

Prior to that, the system of pre-trial investigation bodies had been stable for a rather long period of time (1960-2014), consisting of inves-

tigative units: Internal Affairs, security agencies, prosecutor's office and tax police (since 1998).

However, the issue of improving this system has been particularly relevant during all periods and attempts to reform the criminal justice system (Antonov, 2014; Shevchyshen, 2011; Farynyk, 2010).

The purpose of the article is to determine the most efficient system of pre-trial investigation bodies, their subordination and structure.

2. Particularities of establishing the system of pre-trial investigation bodies in Ukraine

First, the issue of depriving the prosecutor's office of the investigative function was raised. For example, in 2008, a petition was even filed with the CCU to find unconstitutional certain provisions of the Law of Ukraine "On the Prosecutor's Office" (in the version in

force at the time), in particular the provisions that determined the possibility of pre-trial investigation in criminal cases by investigators of the prosecutor's office and the availability of investigator positions in the PGO and the relevant prosecutor's offices.

With reference to Articles 121, 123 of the Constitution of Ukraine, it was noted that the above provisions of the Law establish the powers of the Prosecutor's Office of Ukraine, which are not consistent with the Basic Law. It was pointed out that the prosecutor's office, instead of coordinating, actually governs law enforcement bodies (including investigators). Under such conditions, "the prosecutor's office becomes a superpower, which is very dangerous for the development of a democratic state". The unconstitutionality of these provisions of the Law of Ukraine "On the Prosecutor's Office" was also proved by exceeding powers of the Prosecutor's Office of Ukraine granted to it by the Constitution of Ukraine "by the activities of investigative units and investigators subordinate to prosecutors and employees subordinate to the prosecutor". It was argued that "at present, the system of pre-trial investigation is formed and defined by the Criminal Procedure Code of Ukraine" and that the function of investigating criminal cases in the prosecutor's office should be eliminated. The constitutional submission also noted that "the implementation of the Transitional Provisions on the Prosecutor's Office has not been carried out, which should not be the case in a legal state".

However, the Constitutional Court of Ukraine concluded "that the process of establishing a system of pre-trial investigation and reforming the bodies of criminal investigation is incomplete". In addition, it was argued that during the transitional period, there is every reason to apply provisions of clause 9 of section XV "Transitional Provisions" of the Constitution of Ukraine, according to which the prosecutor's office continues to perform the function of pre-trial investigation in accordance with the current laws - until the pre-trial investigation system is formed and the laws regulating its functioning are enacted, as the constitutional basis for legislation regulating the activities of investigators of the prosecutor's office provided for in Article 17 of the Law of Ukraine "On the Prosecutor's Office". Moreover, sharing the concern of the people's deputies of Ukraine, attention was drawn to the need for legislative implementation of the "Transitional Provisions" of the Constitution of Ukraine (Judgment of the Constitutional Court of Ukraine in the case based on the constitutional submission of 46 People's Deputies of Ukraine regarding the conformity of the Constitution

of Ukraine (constitutionality) with the provisions of Article 1, the first part of Article 7, Articles 8, 9, 10, the fourth part of Article 14, Article 17, the first part of Article 20, part three of Article 29 of the Law of Ukraine "On the Prosecutor's Office", 2008).

Furthermore, it is precisely to implement these recommendations that most drafts and, accordingly, the 2012 CPC of Ukraine deprive the prosecutor's office of the pre-trial investigation function (Draft of the Criminal Procedure Code of Ukraine, 2007; Draft of the Criminal Procedure Code of Ukraine, 2012).

It was the need to deprive the prosecutor's office of the pre-trial investigation function, considering the requirements of clause 9 of the Transitional Provisions of the Constitution of Ukraine, that led to the creation of the SBI. After all, it is obvious that this function cannot be effective if both investigation and supervision are carried out by the same body.

According to O.Yu. Tatarov, there were unsuccessful attempts to launch the new body in 1997 and 2005. However, this negative experience did not "bury" the idea of creating a separate independent pre-trial investigation body. In one of the submissions of the Government Commissioner for the ECHR to the Cabinet of Ministers of Ukraine (hereinafter referred to as the CMU), it was stated that when considering the issue of Ukraine's implementation of the ECHR judgments, it is necessary to focus on the problems of effective investigation, including the establishment of the SBI, given the large number of judgments on Ukraine that "stated ineffective investigation". The human rights organisation Amnesty International has repeatedly called on Ukraine to speed up the establishment of the SBI to carry out independent investigations, primarily into unlawful acts committed by law enforcement officials. In its opinion on the draft CPC, the Venice Commission drew attention to the need to ensure the prompt establishment and functioning of the SBI for pre-trial investigations (Tatarov, 2010).

Experience has shown that the newly established pre-trial investigation body (SBI), which began its law enforcement activities on 27 November 2018, is increasing its importance in the state and ensuring high-quality pre-trial investigations. Moreover, the change of the SBI's status (in 2020) to a state law enforcement body provided no alternative guarantees of independence to perform its powers.

To date, professional staff has been recruited for both the Central Office and the territorial departments, with employees deployed in each region to effectively respond to crime, enabling to detect and investigate criminal offences "autonomously" from other bodies. The effec-

tive work of the State Bureau of Investigation is reflected in its performance indicators. For example, in 2022, SBI investigators conducted pre-trial investigations in 48.8 thousand criminal proceedings, investigated 22.7 thousand, of which 4.524 thousand were sent to court with indictments.

Having "inadvertently" fulfilled the next demand of society (primarily business), that is, the elimination of the tax police (section XVIII-2 "Tax Police" was excluded from the Tax Code of Ukraine by the Law of Ukraine "On Amendments to the Tax Code of Ukraine on improving the investment climate in Ukraine", which came into force on 1 January 2017), lawmakers brought the matter to an end only 4 years later. Despite a number of draft laws submitted to the parliament that provided for the creation of a separate pre-trial investigation body to replace the tax police with different names (National Financial Security Bureau, Financial Police), the Bureau of Economic Security of Ukraine was established in January 2021.

Moreover, practice shows that not all "experiments" on the creation of new pre-trial investigation bodies or reform of existing ones have been successful. For example, the Law of Ukraine "On the High Council of Justice," adopted on 21 December 2016, supplemented Article 216 of the CPC of Ukraine with a new part ("Investigators of the SPS of Ukraine shall conduct pre-trial investigation of crimes committed on the territory or in the premises of the SPS of Ukraine"), in attempts to solve the most pressing problems of the penitentiary system related to the prompt response to criminal offences by both the administration of penitentiary institutions and convicts, by objective investigation of cases and punishment of perpetrators.

As noted above, this part of the reform of the penitentiary system is a priority, as the inclusion of investigative units of the SES into the system of pre-trial investigation bodies will primarily allow for discipline and order in prisons, significantly reduce the number of crimes and increase the level of responsibility for criminal offences committed in penal institutions and pre-trial detention centres (Yahunov, 2017).

We share the opinion of scholars, human rights activists and practitioners that the creation of the institution of investigators of the Ministry of Justice of Ukraine is unacceptable and contrary to the logic of the procedural law. The Ukrainian Parliament Commissioner for Human Rights showed special and much-needed integrity on this issue, calling on the Ministry of Justice of Ukraine to do what is obviously necessary to eliminate this unnatural initiative in the context of the "penitentiary reform": 1) as soon as possible to revoke

the legislative changes concerning the granting of investigative powers to the SPS; 2) immediately stop the creation of investigative units of the SPS (Yahunov, 2017).

3. ECHR Judgements as a basis for reforming pre-trial investigation bodies in Ukraine

According to the ECHR, a law enforcement system established in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall ensure an independent and impartial investigation; the competent authorities shall act with exemplary diligence and promptness, and shall initiate an investigation that is able to, firstly, establish the circumstances in which the incident occurred, and any shortcomings in the functioning of the regulatory system; secondly, to identify the officials or public authorities involved (paragraph 187 of the judgment in the case of "Salakhov and Islyamova v. Ukraine" of 14 March 2013); as a general rule, it is considered necessary that persons responsible for and carrying out the investigation are independent of those involved in the relevant events (paragraph 42 of the judgment in the case of "Mykhalkova and others v. Ukraine" of 13 January 2011).

In April 2018, allowing for the above criteria of independence and impartiality of the investigation, the CCU declared unconstitutional the creation of the institution of investigators in the system of the Ministry of Justice of Ukraine, which subsequently led to the liquidation of the established pre-trial investigation bodies.

The issues of optimal options for organising the system of pre-trial investigation bodies and structuring the investigative apparatus of the State are inextricably linked to improving the concept of control and supervision, since today certain pre-trial investigation bodies (National Police and security agencies) are directly subordinated to the heads of territorial law enforcement bodies (heads of the General Directorate of the National Police, the Security Service of Ukraine), and their employees are actually "under the direction of" and dependent on the heads of these bodies. As a result, investigators and inquirers are distracted from investigating criminal offences by performing functions that are not typical for them (they are often involved in the protection of public safety, appointed as duty officers and responsible for the body, etc.)

The current system of subordination of pre-trial investigation bodies, which has been in place since Soviet times, cannot guarantee the independence and autonomy of investigators in the course of criminal investigations. Although the heads of the territorial bodies of the National Police and security agencies are

not entitled to interfere with the procedural activities in accordance with Ukrainian law and their functional responsibilities, they are entitled to appoint and dismiss investigators/inquiry officers, impose disciplinary sanctions on them, set the level of their remuneration, assign special ranks and determine the frequency of their leave, etc.

The subordination of investigators in the administrative aspect and the existing criteria for performance evaluation lead to the fact that heads of territorial law enforcement bodies, in order to improve statistical performance indicators, using their powers to organise the work of investigators, directly or indirectly try to influence the conduct of pre-trial investigations ("manage" the activities of investigators).

As a result, this provokes bias in the investigation, and mistakes made by operatives (sometimes direct falsifications) are not always detected. Cases of arbitrary apprehensions with clearly insufficient evidence have become widespread. Moreover, in accordance with departmental acts, the heads of territorial law enforcement bodies are responsible for ensuring the independence of the investigator in procedural activities and preventing interference in their activities by officials who are not authorised to do so by the legislation of Ukraine.

Therefore, the imperfection of the current structure of subordination of investigators not only violates the basic principle of pre-trial investigation bodies, procedural autonomy and independence, but also negatively affects the effectiveness of combating crime and cannot fully guarantee the protection of the rights and freedoms of citizens and the observance of the legality. This results in a low level of public trust in the investigative apparatus and critical assessments of its activities by international experts.

Nowadays, a qualitatively new approach to the organisation of the work of pre-trial investigation bodies is particularly relevant and necessary. The subordination structure should ensure real procedural independence of investigators. This will not only meet the purpose and spirit of the reforms but will also help to avoid a punitive bias in the investigation, mistakes and human rights violations.

There are different opinions in the scientific community regarding the organisational change of the "outdated" structure of subordination of investigators, in particular: 1) transfer of all investigative apparatus to the prosecutor's office or the National Police; 2) concentration of the actors of investigation in a single apparatus (committee, bureau) or through the establishment of the Personal Investigation Agency (PIA), the Ukrainian State Investigation Agency (UDAR), the National Bureau of Inves-

tigation (NBI); 3) establishment of an investigative apparatus in the judiciary or entrusting pre-trial investigation to the judiciary, etc. (Antonov, 2014; Shevchyshen, 2011; Farynnyk, 2010).

However, it should be objectively recognised that at the professional and personnel level, and even more so mentally, the implementation of these positions is practically unrealistic, as the state and society are not yet ready to introduce a different pre-trial investigation organisation than the one that is currently in place (Tatarov, 2010). A striking example of this is the hasty liquidation of the investigative apparatus of the Ministry of Justice of Ukraine.

It should be considered that the best system of pre-trial investigation bodies is the existing one, but it needs significant improvement and scientific development (Pohoretskyi, 2002).

It is also worth agreeing that given the considerable experience of investigative units in the National Police (until 2015, the Ministry of Internal Affairs), as well as the material, technical and organisational and legal basis for the SBI's activities created in recent years, the pre-trial investigation bodies of the relevant agencies should be the basis for reforming the investigative apparatus of the State, as they "bear the brunt" of the fight against crime. In addition, it is extremely risky to recklessly break the existing interaction between pre-trial investigation bodies and operational units, this will lead to uncontrolled processes, seriously weaken the fight against crime, and negate the positive experience gained in recent years of the existence of investigative units.

If an Investigative Committee is created under the Ministry of Internal Affairs or the National Police of Ukraine, the heads of investigative units will continue to be heads of structural units of the National Police and will not actually receive any additional powers (e.g., to appoint/dismiss investigators, etc.). The autonomy of the investigative apparatus within the structure of the MIA or the National Police will not be able to fully resolve the problem of procedural independence of the investigator. Operational and administrative intra-departmental interests will manifest themselves in one way or another and subjectively influence the investigation. The same applies to security agencies.

After all, an investigation is considered effective if the principle is observed: the persons conducting the investigation shall be independent hierarchically and institutionally from anyone (paragraph 260 of the judgment of the European Court of Human Rights in the case of "Karabet and Others v. Ukraine" of 17 January 2013).

That is why, in our opinion, it is necessary to completely remove the investigative units of the NP,

the SS of Ukraine and the BES from departmental subordination and separate them into a single investigative body created on the basis of the investigative units of the State Bureau of Investigation – the State Pre-trial Investigation Service (hereinafter referred to as the SPIS).

The status of this body should be defined as central executive bodies (hereinafter referred to as the CEB) in the form of a "service" (and not a "bureau", which from the perspective of constitutionality does not correspond to the legal status of the CEB). The Constitution of Ukraine does not provide for the existence of executive bodies with a special status in the state mechanism, which would perform relevant functions outside the system of executive bodies. Moreover, any law enforcement body should be created only by the CMU and be part of its CEB system, since the creation, reorganisation and liquidation of the CEB are within the scope of the CMU's powers, and the fight against crime is one of its functions.

Therefore, the SPIS should become a central executive body whose activities are directed and coordinated by the CMU. In addition, the CMU, upon the proposal of the SPIS Director, should determine the maximum number of the central office and territorial departments of the SPIS. The organisational structure of the SPIS should be approved by the Director of the SPIS in consent with the CMU.

The structure of the SPIS should include specialised units for investigating crimes in the field of state security (based on the SBU investigative apparatus), in the field of economic security (based on the BESU investigative apparatus, economic units of the National Police and the SBI), in the field of investigating "top corruption" (based on the NABU investigative apparatus, which should be terminated). Territorial units of the SPIS should be established in each oblast and the city of Kyiv (25 territorial departments of the SPIS in total) and district ones (136 district units of the SPIS).

On the one hand, it is necessary to preserve the interaction between investigative and operational units in the investigation of criminal offences that has been established over decades, and on the other hand, to overcome the departmental dependence of investigators on the heads of territorial law enforcement bodies that will in no way contradict the legislation of Ukraine (primarily the Law of Ukraine "On Central Executive Bodies"), which will fully apply to the activities of the relevant investigative apparatus.

4. Conclusions

Thus, the transformation of the pre-trial investigation bodies of Ukraine into the SPIS will fully ensure the idea of "vertical" subordination of investigative units. Moreover, the status of the person who directly performs the function of managing the pre-trial investigation, the head of the pre-trial investigation body, will be brought to the same level as the heads of territorial law enforcement bodies, which is again a prerequisite for effective management of the pre-trial investigation. This reorganisation of the system of pre-trial investigation bodies (with clear subordination and structure) is required today, due to the need to functionally separate them from the activities of territorial law enforcement bodies. Ultimately, this will significantly improve the quality and efficiency of the pre-trial investigation itself.

The establishment of a single pre-trial investigation body (SPIS) will eliminate competition (sometimes even "unhealthy" competition) between the currently disparate investigative apparatuses, eliminate conflicts in determining the investigative body, and put an end to the issue of inadmissibility of evidence due to violations of the rules of subject matter jurisdiction.

In addition, the experience of criminal justice reforms has shown that changes should be comprehensive, carried out in parallel and within a certain timeframe, allowing for all transitional and adaptive periods and goals to be achieved in prospect.

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СИСТЕМА ОРГАНІВ ДОСУДОВОГО РОЗСЛІДУВАННЯ: КОНЦЕПЦІЯ ПОБУДОВИ ТА ВДОСКОНАЛЕННЯ

Анотація. Мета. Метою статті є визначення найбільш ефективної системи органів досудового розслідування, їх підпорядкування та структури. **Результати.** На сучасному етапі розвитку кримінальної юстиції залишаються актуальними питання дієвої та оптимальної національної моделі досудового розслідування, пошуку варіантів організації та інституційної побудови системи органів правопорядку, які відповідатимуть сучасним викликам, потребам практики й міжнародним стандартам. Досліджено питання оптимальної національної моделі досудового розслідування, варіантів організації та інституційної побудови системи органів правопорядку. Обґрунтовано необхідність «вертикального» підпорядкування органів досудового розслідування. Запропоновано шляхи реформування системи органів досудового розслідування. **Висновки.** Зроблено висновок, що завдяки трансформації органів досудового розслідування України в Державну службу досудових розслідувань повною мірою буде забезпечено ідею щодо «вертикального» підпорядкування слідчих підрозділів. При цьому статус особи, яка безпосередньо реалізує функцію керівництва досудовим слідством – керівника органу досудового розслідування, буде виведено на один рівень із керівниками територіальних правоохоронних органів, що знову-таки є необхідною умовою ефективного керівництва досудовим розслідуванням. Така реорганізація системи органів досудового розслідування (із чітким підпорядкуванням і структурою) на сьогодні вкрай потрібна, що зумовлено необхідністю функціонального відмежування їх від діяльності територіальних правоохоронних органів. У підсумку це дасть змогу суттєво підвищити якість та ефективність самого досудового розслідування. У разі створення єдиного органу досудового розслідування буде ліквідовано конкуренцію між розрізненнями на сьогодні слідчими апаратами, усунуто конфліктні ситуації під час визначення органу розслідування та назавжди поставлено крапку в питанні визнання доказів недопустимими через порушення правил предметної підслідності. Своєю чергою досвід реформ у сфері кримінальної юстиції засвідчив, що зміни мають бути комплексними, проводитися паралельно та у визначені часові межі з урахуванням усіх перехідних та адаптивних періодів і цілей, які необхідно досягти в перспективі.

Ключові слова: досудове провадження, керівник органу досудового розслідування, реформування кримінальної юстиції, вертикальне підпорядкування, самостійність і незалежність слідчого.

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