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DOI <https://doi.org/10.32849/2663-5313/2023.3.08>**Dmytro Mirkovets,***Doctor of Law, Associate Professor, Professor at the Department of Criminology and Forensic Medicine, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, DmytroMirkovets@ukr.net***ORCID:** [orcid.org/0000-0003-2539-2824](https://orcid.org/0000-0003-2539-2824)Mirkovets, Dmytro (2023). Forms of exercising powers by the head of a pre-trial investigation body. *Entrepreneurship, Economy and Law*, 3, 50–55, doi <https://doi.org/10.32849/2663-5313/2023.3.08>

## FORMS OF EXERCISING POWERS BY THE HEAD OF A PRE-TRIAL INVESTIGATION BODY

**Abstract. Purpose.** The purpose of the article is to define and classify the main forms of exercising the powers of the head of a pre-trial investigation body. **Results.** The article identifies and classifies the main forms of exercising powers by the head of a pre-trial investigation body. It is proved that the head of a pre-trial investigation body organises pre-trial investigation and controls the pre-trial investigation. The procedural powers of the head of a pre-trial investigation body to entrust an investigator with the pre-trial investigation can only have the expected positive effect if the head of a pre-trial investigation body allows for the situation in the investigative unit headed by him/her: staffing, workload of investigators, their specialisation, qualifications, experience, leave schedule, upcoming business trips, etc. Prompt and efficient execution of the instructions of the head of a pre-trial investigation body by the investigator is possible only with well-established cooperation, which requires the head of a pre-trial investigation body to use his/her administrative powers, including as one of the heads of the territorial body. The organisational powers of the head of a pre-trial investigation body are sometimes so closely linked to procedural powers that it is difficult to distinguish between them. The distribution of criminal proceedings and materials is organisational work, while the assignment of pre-trial investigation is procedural side. In this case, the adoption of a procedural decision is preceded by organisational work, in particular, to assess whether the decision to entrust procedural activities to the investigator is optimal. The author proves the connection between the organisational and procedural powers of the head of a pre-trial investigation body. **Conclusions.** The author concludes that since the entry into force of the Criminal Procedure Code of Ukraine in 2012, the scope of procedural powers of the head of a pre-trial investigation body has not been changed even though this need has been reasonably emphasised by scholars and practitioners. Therefore, despite the positive experience of implementing the provisions of the CPC of Ukraine, certain issues of the regulatory framework for powers of the head of a pre-trial investigation body remain unresolved and require the development of legislative provisions with due regard to the need to increase the efficiency of pre-trial investigation.

**Key words:** organisation of pre-trial investigation, procedural control, head of a pre-trial investigation body, full powers, procedural guidance.

### 1. Introduction

The head of a pre-trial investigation body is responsible for resolving fundamental issues related to ensuring the legality, timeliness and efficiency of the procedural activities of investigators, for the implementation of which he or she is vested with the relevant powers. Moreover, the head of a pre-trial investigation body has procedural and organisational powers (Order of the Ministry of Internal Affairs of Ukraine on the organization of the activities of investigative units of the National Police of Ukraine, 2017), that are much broader than those defined in the CPC of Ukraine. Despite the fact that the procedural figure of the head of a pre-trial investigation body is of particular

importance in the science of criminal procedure and law enforcement, important issues remain unresolved that complicate or reduce the effectiveness of his/her control activities.

The issues of the regulatory framework for and practical implementation of procedural and organisational powers of the head of a pre-trial investigation body have been under focus by scholars, which indicates their relevance. These issues have been studied in the works by V.P. Ashytko, E.I. Voronin, Yu.V. Derishev, V.V. Kalnytskyi, H.M. Mamka, P.I. Miniukov, M.A. Pohoretskyi, V.A. Sementsov, O.Yu. Tatarov, L.D. Udalova, V.I. Farynnyk, M.M. Cherniakov, H.P. Khimicheva and other scientists, which contributed to the forma-

tion of a number of significant theoretical approaches and practical recommendations that are currently the basis for further research.

The purpose of the article is to define and classify the main forms of exercising the powers of the head of a pre-trial investigation body.

## 2. Legislative consolidation of the status of the head of a pre-trial investigation body

In the current version of Article 39 of the CPC of Ukraine, the legislator has abandoned the use of the term "control", which, despite the actual correspondence of the powers of the head of a pre-trial investigation body to the content of control activities, is perceived differently by scholars and practitioners, because for example, Article 114-1 of the CPC of 1960 stipulated that the head of the investigative department shall control the timeliness of actions of investigators to solve crimes and prevent them, take measures to ensure the most complete, comprehensive and objective conduct of pre-trial investigation in criminal cases.

This problem can and should be solved by supplementing the CPC of Ukraine, Article 39, part 1, with a provision stating that the head of a pre-trial investigation body shall organise the pre-trial investigation and control the pre-trial investigation. This will facilitate uniform application of the law and eliminate the inconsistency of the CPC of Ukraine, Article 39, parts 1 and 2.

The head of a pre-trial investigation body as an actor of control and supervision is an official who heads the relevant pre-trial investigation body, is empowered to organise pre-trial investigation and control the legality of pre-trial investigation and is identified in the URPI in a specific criminal proceeding.

Furthermore, scholars propose a different regulatory construction. For example, I.V. Hloviuk argues that procedural guidance is characterised by an organisational and controlling element. In order to distinguish this function from the form of exercising the function of prosecutorial supervision in pre-trial proceedings and the function of the head of a pre-trial investigation body to organise the activities of the pre-trial investigation body, the author makes a proposal to call it departmental procedural guidance of pre-trial investigation, which consists in taking managerial and control measures to ensure a lawful, impartial and effective investigation of criminal offences by pre-trial investigation bodies (Hloviuk, 2015).

While generally agreeing with the need to distinguish between these concepts and to provide for their respective regulatory consolidation, we believe that the concept of "control"

is more appropriate in this case. The interpretation of the term "procedural guidance" has many interpretations and is not defined by law. Therefore, the introduction of the similarly undefined concept of "departmental procedural guidance" will complicate the formation of a unified approach to its understanding.

Indisputably, the control of the pre-trial investigation body by the head of a pre-trial investigation body is an important factor in the effective solution of the tasks assigned to investigators. According to O. Tatarov, control is needed in all "human communities", and especially in large-scale organisations with numerous functions, such as the investigative apparatus (Tatarov, 2012).

Inadequate procedural control is often a prerequisite for investigators to violate the law and reasonable investigation timeframes. The situation is objectively complicated by a significant decline in the level of professionalism of investigative units' staff (Miniukov, Miniukov, 1999).

Scientific approaches to understanding the role of the head of a pre-trial investigation body in criminal proceedings vary from the thesis that the heads of the pre-trial investigation body should act as organisers of the work of investigators and perform purely organisational, managerial, resource and material support for the pre-trial investigation (Mirkovets, 2012) to definition of the control function of the head of a pre-trial investigation body as exclusively procedural with the justification of the need to expand the procedural powers of the head of a pre-trial investigation body (Mykhailenko, Yurchyshyn, 2006).

The legal status of the head of a pre-trial investigation body is characterised by a combination of administrative and procedural powers. Their imbalance can affect the procedural independence of the investigator, the resolution of procedural issues through the use of administrative levers, which is unacceptable. On the contrary, the balance of powers of different legal nature has a positive impact on the effectiveness of the investigator's procedural activities.

The head of a pre-trial investigation body, on the one hand, manages the activities of the investigative unit in general, providing it with resources and methodology, and, on the other hand, organises the work of a particular investigator. The organisational capabilities of the head of a pre-trial investigation body are aimed at ensuring the effectiveness of criminal investigations.

The correct organisation of the pre-trial investigation, the means of its implementation, their optimal set and sequence of realisation

allow the head of a pre-trial investigation body to ensure that all the circumstances of the offence are established. However, it is objectively impossible to ensure the organisational procedure for each criminal offence at the regulatory level in a proper and complete manner, so even in bylaws the organisational and managerial process is defined in general terms. General, typical elements of the organisational and managerial activities of the head of a pre-trial investigation body are: selection, placement, training of personnel and ensuring their professional development; timely and correct assignment of tasks to subordinates; effective control over timely and high-quality investigation of criminal offences; material, technical, methodological and legal support for investigative activities; proper information and analytical activities, accounting and reporting. The organisation as a function of management of pre-trial investigation bodies is aimed at coordinating the activities of personnel of investigative units, creating a system of information, selection, placement, training and education of investigators (Sychoy, Yukhno, 2018).

The organisational powers of the head of a pre-trial investigation agency can be effectively linked to procedural powers but should not replace them. Moreover, some procedural powers are exercised only in combination with the organisational capabilities of the head of an investigative unit.

For example, the procedural powers of the head of a pre-trial investigation body to entrust an investigator with the pre-trial investigation can only have the expected positive effect if the head of a pre-trial investigation body allows for the situation in the investigative unit headed by him/her: staffing, workload of investigators, their specialisation, qualifications, experience, leave schedule, upcoming business trips, etc. Prompt and efficient execution of the instructions of the head of a pre-trial investigation body by the investigator is possible only with well-established cooperation, which requires the head of a pre-trial investigation body to use his/her administrative powers, including as one of the heads of the territorial body.

The organisational powers of the head of a pre-trial investigation body are sometimes so closely linked to procedural powers that it is difficult to distinguish between them. The distribution of criminal proceedings and materials is organisational work, while the assignment of pre-trial investigation is procedural side. In this case, the adoption of a procedural decision is preceded by organisational work, in particular, to assess whether the decision to entrust procedural activities to the investigator is optimal.

### 3. Main forms of exercising the full powers of the head of a pre-trial investigation body

Relying on the analysis of the CPC of Ukraine and other legal regulations [1], we have identified and classified the main forms of exercising the powers of the head of a pre-trial investigation body:

#### I. Procedural:

##### a) Organisational:

- To determine the investigator(s) who will conduct the pre-trial investigation (Article 214, part 1, Article 39, part 2, para 1 of the CPC of Ukraine);

- To create an investigative team and appoint a senior investigator who will supervise the actions of other investigators (the CPC of Ukraine, Article 39, part 2, para 1);

- To remove the investigator from the pre-trial investigation and appoint another investigator: a) on the initiative of the prosecutor; b) on his/her own initiative (the CPC of Ukraine, Article 39, part 2, para. 2);

- To appoint another investigator if there are grounds: a) for his/her recusal; b) in case of ineffective pre-trial investigation (the CPC of Ukraine, Article 39, part 2, para. 2);

- To initiate consideration of the issues raised in the investigator's motion to the investigating judge to apply measures to ensure criminal proceedings, conduct investigative (search) actions or covert investigative (search) actions before a superior public prosecutor, in cases where the prosecutor refuses to approve it (the CPC of Ukraine, Article 40, part 3);

- To authorise investigators to carry out investigations in criminal proceedings: a) in respect of a juvenile, in particular, if criminal proceedings are carried out in respect of several persons, at least one of whom is a juvenile, b) in respect of the application of compulsory educational measures (the CPC of Ukraine, Article 484, part 2, Article 499, part 2);

- To grant access to specific secret information and its material carriers (the CPC of Ukraine, Article 517, part 4);

##### b) Controlling:

- To familiarise with the materials of the pre-trial investigation (the CPC of Ukraine, Article 39, part 2, para. 3), including by studying the materials of criminal proceedings, holding hearings, and requesting certain procedural documents;

- To provide the investigator with written instructions (the CPC of Ukraine, Article 39, part 2, para. 3);

- To take measures to eliminate violations of the requirements of the criminal procedure legislation (the CPC of Ukraine, Article 39, part 2, para. 4);

c) Those related to personal participation in the pre-trial investigation:

- To conduct a pre-trial investigation, using the powers of an investigator (the CPC of Ukraine, Article 39, part 2, para. 6);

- To approve investigative (search) actions and to extend the term of their conduct (the CPC of Ukraine, Article 39, part 2, para. 5, part 5 of Article 246, part 2 of Article 272 of the CPC of Ukraine);

- To make a decision on the use of pre-identified (marked) or bogus (imitation) means during covert investigative (search) actions (the CPC of Ukraine, Article 273, part 1);

- To make a decision on disclosing true information about a person acting without disclosing reliable information about him or her, the circumstances of the production of things or documents or the special formation of an enterprise, institution or organisation (the CPC of Ukraine, Article 273, part 3);

- To submit motions to extend the pre-trial investigation period by the appropriate prosecutor, as well as motions to send criminal proceedings to law enforcement agencies of other countries in accordance with international treaties of Ukraine.

II. Administrative and representative:

a) Managerial:

- To organise the work of investigators at the scene, including personal visits. For example, in the National Police the head of a pre-trial investigation body of the regional level shall personally visit the scene of pre-meditated murders, other exceptionally grave crime, as well as criminal offences that cause a significant public outcry, to supervise the work of the investigative team during the inspection of the scene, and, if necessary, to make a decision to involve a specialised mobile forensic laboratory in the examination of the scene of the incident, and sends a written request to the management of the relevant unit of the MIA Expert Service (as an exception, to orally approve the issue with further submission of a written request);

- To coordinate the activities of the pre-trial investigation body and the operational and technical units and the operational service in relation to the conduct of covert investigative (search) actions by operational units;

- To organise the interaction of investigators with operational units, forensic bodies, prosecutors and courts;

- To apply to the appropriate prosecutor to determine the jurisdiction of the criminal offence (including to a higher or lower pre-trial investigation body);

- To organise the planning of investigations into specific proceedings;

- To provide methodological and practical assistance in the pre-trial investigation of complex, multi-episodic criminal offences;

b) Staffing and logistics:

- To initiate, approve or make a decision to conduct an internal investigation into violations of the law by investigators;

- To initiate, approve or make a decision on the appointment or dismissal of subordinate employees;

- To initiate, approve or make a decision on rewarding investigators and imposing disciplinary sanctions on them, assigning special ranks, class ranks, granting leave, setting salaries;

- To organise an audit of the storage of material evidence and conducting an inventory of criminal proceedings;

c) Representative and managerial:

- To perform general management of the pre-trial investigation body;

- To define the functional responsibilities of employees of the pre-trial investigation body and establish the specialisation of investigators in the investigation of certain categories of criminal offences;

- To organise the consideration of citizens' appeals;

- To organise planning and reporting on the activities of the pre-trial investigation body;

- To organise control and supervisory proceedings;

- To ensure that investigators (investigative teams) are on duty to visit the scene of the crime, and in case of deficiencies in the inspection of the scene, to organise its re-conduct;

- To organise the activities of forensic inspectors (forensic technicians) to ensure proper technical and forensic support of criminal proceedings.

#### 4. Conclusions

Since the entry into force of the Criminal Procedure Code of Ukraine in 2012, the scope of procedural powers of the head of a pre-trial investigation body has not been changed even though this need has been reasonably emphasised by scholars and practitioners. Therefore, despite the positive experience of implementing the provisions of the CPC of Ukraine, certain issues of the regulatory framework for powers of the head of a pre-trial investigation body remain unresolved and require the development of legislative provisions with due regard to the need to increase the efficiency of pre-trial investigation.

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## ФОРМИ РЕАЛІЗАЦІЇ ПОВНОВАЖЕНЬ КЕРІВНИКОМ ОРГАНУ ДОСУДОВОГО РОЗСЛІДУВАННЯ

**Анотація. Мета.** Метою статті є визначення та класифікація основних форм реалізації повноважень керівника органу досудового розслідування. **Результати.** Визначено та класифіковано основні форми реалізації повноважень керівником органу досудового розслідування. Обґрунтовано, що керівник органу досудового розслідування здійснює організацію досудового розслідування і контроль за досудовим розслідуванням. Процесуальне повноваження керівника органу досудового розслідування щодо доручення слідчому провадження досудового розслідування може принести очікуваний позитивний ефект тільки в разі, якщо керівник органу досудового розслідування урахує ситуацію в очолюваному слідчому підрозділі: укомплектованість, навантаження слідчих, їхні спеціалізацію, кваліфікацію, досвід, графік відпусток, майбутні відраження тощо. Швидко та ефективно виконання доручень керівника органу досудового розслідування слідчим можливо тільки за налагодженої взаємодії, для чого необхідне використання керівником органу досудового розслідування його адміністративних повноважень, зокрема і як одного з керівників територіального органу. Організаційні повноваження керівника органу досудового розслідування іноді настільки тісно пов'язані з процесуальними, що їх складно розмежувати. Розподіл кримінальних проваджень і матеріалів – організаційна робота, а доручення здійснення досудового розслідування – процесуальна. У цьому разі прийняттю процесуального рішення передують організаційна робота, зокрема за оцінкою оптимальності рішення про доручення процесуальної діяльності слідчому. Доведено зв'язок організаційних та процесуальних повноважень керівника органу досудового розслідування. **Висновки.** Зроблено висновок, що з набранням чинності Кримінального процесуального кодексу України 2012 р. обсяг процесуальних повноважень керівника органу досудового розслідування не змінювався жодного разу, хоча про таку потребу обґрунтовано наголошувалося науковцями й практиками. Таким чином, незважаючи на позитивний досвід реалізації норм КПК України, окремі питання правової регламентації повноважень керівника органу досудового розслідування залишаються не до

кінця вирішеними і потребують розроблення законодавчих норм з урахуванням необхідності підвищення ефективності досудового розслідування.

**Ключові слова:** організація досудового розслідування, процесуальний контроль, керівник органу досудового розслідування, повноваження, процесуальне керівництво.

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