

## IAP Information Note No. 2

### DOMESTIC LAW ON PROCEDURE FOR PRE-TRIAL INVESTIGATIONS

#### A. Commencement of pre-trial investigations

Pre-trial investigation is the initial stage of criminal proceedings, which commences, as a rule, with the entry of information into the Unified Register of Pre-Trial Investigations (“Unified Register”, “Register”).

Under Article 214 § 1 of the Criminal Procedure Code (“CPC”), within no more than twenty-four hours after a prosecutor or investigator receives notice of a crime or discovers circumstances that may evidence occurrence of a crime<sup>1</sup>, the prosecutor or investigator shall enter the information into the Register and commence the investigations. A prosecutor or investigator is under an obligation to accept and register notice of a crime. A refusal to accept and register a claim or notice of a crime is prohibited. A failure to introduce information into the Register may be challenged during the pre-trial investigations by, among others, the person who lodged the notice or the victim of the crime (Chapter 26 of the CPC).

The investigator shall immediately inform the prosecutor in writing about the commencement of pre-trial investigations. If the information is entered into the Register by a prosecutor, the prosecutor shall immediately, and in any case not later than the following day, transfer the available materials to the investigating authority and order the conduct of pre-trial investigations, in accordance with the rules of the investigative jurisdiction.

#### B. Organs authorised to conduct pre-trial investigations.

According to Article 38 of the CPC the investigative departments of the following bodies are entitled to carry out pre-trial investigations:

- 1) Law enforcement authorities;
- 2) The Security Service of Ukraine;
- 3) The authorities supervising compliance with tax law;
- 4) The State Bureau of Investigations<sup>2</sup> (pending establishment of the Bureau, its function is performed by the public prosecution service).

##### *1. Investigative jurisdiction*

Pre-trial investigations are carried out by an investigator of the authority within whose jurisdiction the place of commission of the crime is located (Article 218 § 1 of the CPC). Any disputes as to jurisdiction are settled by the head of the prosecution office at a higher level (Article 218 § 5 of the CPC).

Article 216 of the CPC regulates the allocation of investigative jurisdiction. Paragraph 1 of Article 216 provides that the investigative bodies of the law enforcement authorities (bodies

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<sup>1</sup> According to commentaries, information about a crime should be introduced into the Unified Register of Pre-Trial Investigations regardless of the source of such information, among which sources are individual persons, legal entities, communities, information and mass media etc. In the latter case, the information should be introduced into the Unified Register by the prosecutor in whose jurisdiction the mass media is located.

<sup>2</sup> The State Bureau of Investigations has not yet been established; the CPC provides for its establishment at latest by 2017.

of the Ministry of the Interior) carry out pre-trial investigations of offences that, according to the legislation of Ukraine, entail criminal responsibility, with the exception of those in respect of which the investigative jurisdiction is allocated to other investigation bodies.

The investigators of the security service investigate crimes against national security, peace, humanity and international order, cases concerning trafficking, terrorist acts and such crimes as treason, spying, divulgence of state secrets and various crimes related to the creation and use of weapons of mass destruction. The authorities that supervise compliance with tax legislation are empowered to investigate cases concerning tax evasion and tax-related crimes.

According to Article 216 § 4 of the CPC, the State Bureau of Investigations shall carry out investigations of crimes committed by officials who occupy a particularly important post in the state service<sup>3</sup> as well as by judges and officials of law enforcement authorities. At the moment, the function of investigating crimes falling within the investigating jurisdiction of the Bureau remains with the public prosecution service, as envisaged by the Transitional Provisions (section one) of the CPC. In addition, paragraph 9 of the Transitional Provisions of the Constitution of Ukraine empowers the public prosecution service to conduct preliminary investigations pending creation of the new pre-trial investigations system and the adoption of appropriate legislation.<sup>4</sup>

The investigative jurisdiction of military prosecution offices, which form part of the public prosecution service of Ukraine,<sup>5</sup> is outlined in the Decree of the Prosecutor General Office ‘On peculiarities of the functioning of military prosecutions’ dated 29 August 2014.<sup>6</sup> According to Section 7 of the Decree, investigators of military prosecutions carry out pre-trial investigations in cases concerning military crimes and certain war crimes (Articles 402-421, 425-435 of the Criminal Code of Ukraine), as well as crimes committed by the military servicemen of law enforcement bodies.

As to the peculiarities of investigating crimes committed by law enforcement officials, Article 154 of the CPC allows for the suspension of law enforcement officials who are under investigation, regardless of the gravity of the crime of which they are suspected, for a period of two months, with a possible extension. At the stage of pre-trial investigations, the investigating judge takes a decision on suspension; during court proceedings, such a decision is taken by a court.

## 2. *Role of investigators*

Pre-trial investigations are carried out by the investigative departments of the respective investigating body. Investigations may be conducted by a single investigator or by a group of investigators, the latter being created, for example, in complex cases.

Investigating authorities should use all the means envisaged by the law to carry out an effective investigation. An investigator is obliged to conduct a prompt and objective investigation without breaching the rights and freedoms or encroaching upon the interests of the parties to the proceedings. An investigator may be made the subject of disciplinary

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<sup>3</sup> The list of such officials is contained in Article 9 of the Law of Ukraine on State Service.

<sup>4</sup> The provision of the Constitution concerning the pre-trial investigation function of the public prosecution service and Article 17 of the Law on Prosecution Service concerning the presence of investigators in the structure of the public prosecution service, were the subject of examination by the Constitutional Court in its decision of 10 September 2008. The Constitutional Court concluded that, since the establishment of the system of pre-trial investigations was not complete, the pre-trial investigation function of the prosecution service was justified and in compliance with the Constitution of Ukraine. Decision of the Constitutional Court of 10 September 2008 available in Ukrainian at <http://zakon2.rada.gov.ua/laws/show/v015p710-08> (in Ukrainian).

<sup>5</sup> Article 13 of the Law of Ukraine “On Public Prosecution Service”.

<sup>6</sup> [Decree](#) of the PGO of 29 August 2014 (in Ukrainian).

proceedings for failure to comply with his/her obligations. For certain breaches of the CPC, an investigator may be held criminally responsible (for instance for breach of a person's right to defend himself, for knowingly carrying out an unlawful arrest or knowingly attaching criminal responsibility to an innocent person; Articles 371-374 of the Criminal Code of Ukraine).

Pre-trial investigations are organised by the head of the investigating body. The head of such authority appoints a specific investigator or a senior investigator in the event that the pre-trial investigation is carried out by a group of investigators.

The head of the investigating body is authorised to remove an investigator from a case either on his/her own initiative or on the proposal of a prosecutor; to study the case-file and to give written instructions to an investigator; to take measures to remedy breaches committed by an investigator; to approve investigative actions and to carry out pre-trial investigations. The head of the investigative authority is obliged to comply with instructions given by the prosecutor.

The following actions fall within the competence of an investigator:

- to commence pre-trial investigations;
- to conduct investigative actions and to instruct respective operative department to carry out such actions;
- to order inspections;
- to petition, with the prosecutor's consent, an investigating judge for measures to secure criminal proceedings, for the conduct of investigative actions;
- to issue, with a prosecutor's consent, notices of suspicion;
- to draw up, as a result of investigations, an indictment, a petition for application of forcible medical or educational measures and to submit them for the prosecutor's approval;
- to adopt various procedural decisions when authorised to do so by the CPC.

According to Article 40 of the CPC, an investigator in charge of a particular pre-trial investigation is to act independently when taking a procedural decision. Certain actions may be taken by an investigator only with a prosecutor's approval. Among the actions and decisions that are to be agreed by an investigator with a prosecutor in the course of pre-trial investigations are petitions for attachment of property and requests to allow the detention of a person, to apply measures of restraint, to extend pre-trial detention time-limits, to conduct searches, and to lodge requests for approval of interferences with private communications. A prosecutor's instructions are mandatory for an investigator.

Other provisions of the CPC that provide for guarantees of the independence of an investigator, especially in his or her relationship with a prosecutor. Thus, the prosecutor does not have power to dismiss a specific investigator; he or she may only place the matter before the head of the investigative authority (Article 36 § 2 (8)). In addition, if the prosecutor refuses to approve the investigator's request for measures to be adopted in the course of criminal proceedings or for the conduct of operational acts, the investigator may address the head of the investigative authority who shall submit the question for consideration to a prosecutor at a higher level, if deemed necessary. This guarantee is weakened by the fact that the investigator concerned is not able to address a higher prosecutor directly in such cases; in addition, the question whether to submit the issue for consideration to a higher prosecutor rests within the discretionary power of the head of the investigative authority.

At the same time, the CPC allows an investigator to challenge directly the decisions, actions or inactivity of a prosecutor before a higher prosecutor (Articles 311-313). The lodging of a complaint against a prosecutor by an investigator does not suspend the

prosecutor's decision. Upon such a complaint, the prosecutor at a higher level may decide to uphold the impugned decision or to declare the actions or lack of action lawful; to change the impugned decision in part; to quash the decision and adopt a new decision; or to declare the actions or inactivity of the prosecutor unlawful. The decision of the higher prosecutor is final and not subject to appeal before a court.

A prosecutor may issue instructions as to the conduct of investigations and investigative acts and an investigator is obliged to comply with the written instructions of a prosecutor. A prosecutor is also authorised to quash unlawful and unsubstantiated decisions of an investigator. In addition, a prosecutor may decide to transfer the case to another investigative department in the event of a lack of effectiveness of a pre-trial investigation.

The CPC also provides guarantees aimed at ensuring the impartiality of an investigator or prosecutor (Article 77). Thus, an investigator or prosecutor may not participate in criminal proceedings:

- if he or she has lodged a notice of the crime, or is the victim, civil claimant or respondent, or next-of-kin of a party to the proceedings;
- if he or she has participated in the same proceedings as investigating judge, a judge, defence counsel, witness, expert, specialist or interpreter/translator;
- if he or she personally, or his or her next-of-kin, is interested in the outcome of the criminal proceedings or there exist any other circumstances that cast doubt on his or her impartiality.

### 3. *Operative units*

In the course of pre-trial investigations investigators and prosecutors are assisted by operative units. They carry out investigative acts upon written instructions of an investigator or prosecutor. When carrying out such instructions an officer of an operational unit enjoys the same competencies as an investigator. Operative units may not undertake any procedural actions on their own initiatives or address an investigator or prosecutor with respective requests. Instructions given by an investigator or prosecutor are obligatory for them.

According to Article 41 of the CPC, operative units of law enforcement authorities, the Security Service, tax and customs authorities, the State Penitentiary Service and the State Border Guard Service are entitled to carry out (covert) investigative (detective) actions. The Law on Operative and Detective Actions of 1992 defines specific departments which carry out investigative actions (Article 5).<sup>7</sup> Within the Ministry of Interior such units are the criminal, transport and special police, the special departments on fighting organised crimes, the departments of internal security and the court police.

Within the Security Service of Ukraine ("SSU") these are the secret service, the military secret service, the department on protection of national statehood, the special department on fighting corruption and organised crime, the operational and technical departments, the internal security department, the operative documenting, anti-terrorist department and the department on protection of participants of criminal proceedings and law enforcement officials.

Under Article 41 § 3 of the CPC, instructions of an investigator or prosecutor as to investigative acts are mandatory for operative units. In addition, the public prosecution service carries out supervision of the compliance of an operative unit with the law.

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<sup>7</sup> The text of the Law available in Ukrainian at: <http://zakon2.rada.gov.ua/laws/show/2135-12>

### C. Supervisory role of prosecutor in pre-trial investigations

According to Article 121 of the Constitution of Ukraine, the prosecution service carries out, among other functions, the function of leading the prosecution of a case before a court and supervising compliance with the law of authorities charged with carrying out pre-trial investigations and operative/investigative acts. This function of the public prosecution service is fulfilled through the supervision of the pre-trial investigations. In this regard, Article 36 of the CPC specifies some of the following powers of a prosecutor:

- to institute pre-trial investigations;
- to have full access to materials, documents and other information related to pre-trial investigations;
- to instruct a pre-trial investigation authority to carry out pre-trial investigations, operational actions or other procedural actions;
- to quash unlawful and ill-founded resolutions of investigators;
- to initiate before the head of an investigating authority measures for the removal of an investigator and appointment of a new investigator in case of lack of effective investigations;
- to take decisions concerning the termination of an investigation or an extension of its time-limits;
- to approve, refuse to approve or introduce changes into an indictment or a petition for the application of forcible measures of a medical or educational character;
- to submit to the court an indictment, a request for application of forcible measures of a medical or educational character or a request to release a person from criminal responsibility;
- to lead the prosecution of a case before a court or to drop the prosecution, to amend the charges or to bring additional charges.

According to Article 36 § 5 of the CPC, the Prosecutor General, his deputies, regional prosecutors or prosecutors of the same level are entitled to transfer the investigation of a criminal case to another investigating authority in the event of a lack of effective pre-trial investigations.

According to Article 37 of the CPC, a prosecutor responsible for carrying out prosecutorial supervision in each specific criminal case is appointed by the relevant prosecution office after a pre-trial investigation has been initiated. In certain cases, if the need arises, a group of prosecutors may be appointed together with a senior prosecutor who leads such a group. As a rule, the appointed prosecutor carries out the supervision of the pre-trial investigation from the start until its completion.

Articles 6 and 7 of the Law Ukraine ‘On the Public Prosecution Service’ contain guarantees of the independence of the prosecution service in carrying out its activity: any interference by state authorities or state officials with the activity of the public prosecution service is prohibited.<sup>8</sup> Any submissions by state authorities addressed to the public prosecution service concerning a specific case may not contain any instructions or demand a specific result. The CPC contains a separate provision aimed at ensuring the independence of the public prosecution service during the fulfillment of its function of supervision of pre-trial investigations (Article 36 of the CPC).

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<sup>8</sup> In its [decision](#) of 11 April 2000 the Constitutional Court confirmed the independence of the prosecution from the legislative body and the prohibition of interference by members of parliament with the activities of the prosecution.

**D. Further stages of pre-trial investigations: notice of suspicion, suspension/renewal of proceedings, joining/separation of cases**

*1. Notice to a suspect (Articles 276-279 of the CPC)*

When an investigating authority possesses sufficient evidence to regard a person as a suspect in a criminal case, notice to the suspect (notification of suspicion) is given. Such written notice is given to the suspected person in the event of his or her detention at the place of commission of the crime or immediately after the crime was committed, in the event that the person is subjected to one of the measures of restraint envisaged by the Code and in the event of the existence of sufficient evidence to suspect the involvement of the person in the commission of the crime.

*2. Suspension/renewal of pre-trial investigations (Articles 280-282 of the CPC)*

The provisions of the CPC allow for the suspension of pre-trial investigations in certain circumstances.

Pre-trial investigations may be suspended if the suspect becomes seriously ill (provided the fact of such illness is supported by appropriate medical evidence), if the suspect is hiding from the investigative authorities and the court with the purpose of evading criminal responsibility and his location is unknown, and if there is a need to carry out procedural acts within the framework of international co-operation (for example, extradition).

Before deciding on the suspension of pre-trial investigations, the investigator is under an obligation to carry out all possible and necessary investigative and other procedural acts as well to take all the measures directed at establishing the location of the absconding person if such person is in hiding.

If there are two or more suspects in the case and the grounds for suspension concern only one of them, the prosecutor is entitled to separate and suspend the case with regard to one suspect only.

Investigations are to be renewed if the above-mentioned circumstances cease to exist or if there is a need to carry out further investigative actions or if a judge has quashed the decision on suspension of the investigations.

A decision to suspend, as well as a decision to renew, an investigation is taken by a prosecutor or by an investigator by agreement with a prosecutor. A copy of suspension/renewal decision is sent to the defendant and victim in the case and the information is entered into the Unified Register of Pre-Trial Investigations.

A decision on suspension of pre-trial investigations has the following consequences:

- no investigative acts (either overt or covert) may be carried out after the pre-trial investigation is suspended, except for those aimed at locating the suspect;
- the time-limit for pre-trial investigations, as well as the period of pre-trial detention of the absconding person, are interrupted;
- the limitation period for criminal responsibility is interrupted.

*3. Joining/separation of case-files (Article 217 of the CPC)*

The CPC allows for the joining into one case-file of materials in the pre-trial investigations concerning different cases where:

- the materials in the pre-trial investigations concern several persons suspected of committing the same crime;
- the materials relate to the same person who is suspected of committing several crimes;

- the materials are in pre-trial investigations in which no suspects have been identified but where there are reasons to believe that the crimes were committed by the same person(s).

The CPC also allows for the separation of materials of a crime or several crimes into separate case-files if one person is suspected of committing several crimes or two or more persons are suspected of committing one or more crimes.

The CPC prohibits the separation of materials if this might negatively affect the completeness of the pre-trial investigations and court proceedings. Decisions on joining or separating case- files shall be taken by a prosecutor and are not subject to appeal.

### **E. Termination of pre-trial investigations**

A pre-trial investigation is completed when criminal proceedings are terminated or when one of the following documents is submitted to the court – an indictment, a request for application of compulsory measures of a medical or educational character, or a request for release of person from criminal responsibility.

#### *1. Termination of criminal proceedings (Articles 283-293 of the CPC). Release from criminal responsibility*

Article 283 of the CCP provides that every person is entitled to an examination by a court of the charges against them within the shortest time possible or to have the criminal proceedings terminated. To this effect a prosecutor is obliged to carry out one of the following actions within the shortest possible time-limits:

- To terminate the criminal proceedings;
- To request the court to release the person from criminal responsibility;
- To submit to the court the indictment, or a request for the application of forcible measures of a medical nature or educational character.

The following grounds may serve as a basis for termination of criminal proceedings:

- Absence of occurrence of a crime;
- Absence of a criminal act;
- Absence of sufficient evidence to prove the culpability of the person in court when the means to obtain such evidence have been exhausted;
- Decriminalisation of the act;
- Death of the suspect/accused;
- Existence of a prior decision convicting the accused, or releasing him from criminal responsibility, in the same case;
- Refusal of the victim to support charges where criminal proceedings have been initiated by a private person;
- Refusal of the extraditing party, in the case of the extradition of the accused, to consent to the prosecution for the crime in question.

A copy of the decision of a prosecutor or investigator decision to terminate criminal proceedings is sent to the parties to the proceedings, including the victim, the suspect and the defence counsel.

In addition, a court terminates criminal proceedings if the person is released from criminal responsibility or the prosecutor has refused to support the charges. It is noted that in the course of proceedings concerning the release of a person from criminal responsibility (on

grounds, for instance, of the expiry of the limitation period, or the remorse of the accused or reconciliation between parties) both the prosecutor in charge of lodging a request for such release, and the court examining the request, shall clarify the position of the victim with regard to the release of the suspect/accused from criminal responsibility for the crime committed.

2. *Submission of indictment or request for application of forcible measures of medical nature or educational influence to the court*

Having established that the evidence collected during pre-trial investigations is sufficient for the preparation of an indictment or request for application of forcible measures of a medical nature or educational nature, the prosecutor or investigator (on the prosecutor's instruction) informs the defence accordingly. The prosecutor or investigator is required to give access to the materials of the pre-trial investigations to the defence as well as to the victim, which includes the possibility to make copies of the materials. If the materials contain any information which is not subject to disclosure and has been removed, this should be clearly indicated. A party to criminal proceedings may petition the court to have access to information which has been removed.

Parties to criminal proceedings are to be granted sufficient time to study the materials. In case of delays, the investigative judge may establish a time frame for the parties to study the materials.

The indictment itself may be drawn up by the investigator (in which case it is subject to approval by the prosecutor) or by the prosecutor himself if he disagrees with the indictment prepared by the investigator.

**F. Time-limits of pre-trial investigations**

Pre-trial investigations of a crime should be completed within two months from the moment when a person is notified of suspicion of committing a crime. Depending on the gravity and complexity of the crime, such time-limit may be extended to six or twelve months (Article 219, Articles 294-297 of the CPC)

Every procedural step or decision is to be taken within a reasonable time, which cannot exceed the time-limits established by the Code of Criminal Procedure. The prosecutor and investigative judge shall ensure that the reasonable time requirement is complied with at the pre-trial investigations stage; the court itself is to ensure compliance with the requirement during the trial proceedings. The criteria for determining what a reasonable time is are the complexity of the case, the conduct of the parties to the criminal proceedings and the manner in which the investigator, prosecutor and the court have carried out their functions.