

Realization of the discretionary powers of the prosecutor at the preparation to the stage of the preparatory court proceedings

Реалізація дискреційних повноважень прокурора при підготовці до стадії підготовчого судового провадження

Solomiya Kakhnovets

Key words:

discretionary powers of prosecutor, prosecutor's discretion, preparatory court proceedings, indictment act.

Ключові слова:

дискреційні повноваження прокурора, угляд прокурора, підготовче судове провадження, обвинувальний акт.

Formulation of the problem. After the end of the pre-trial investigation the prosecutor is obliged to resolve certain issues, the results of which substantially affect the essence of the stage of the preparatory court proceedings. For this purpose, the prosecutor applies discretionary powers. Given the special nature and character of the prosecutor's discretion, the performance of the discretionary powers of the prosecutor in preparation for the stage of preparatory court proceedings requires a detailed examination.

The relevance of the research topic is confirmed by the lack of scientific developments in this area of legal science. The discretionary powers of the prosecutor have not been sufficiently studied in Ukraine and the stage of preparatory court proceedings there is relatively new. The subject of this study is at the intersection of these issues.

State of the research. Such scientists as Dyachuk S., Zavertyaylo I., Hryniuk V., Titko I. have studied the subject of preparatory court proceedings and its constituent parts, and Karkach P., Marchuk F., Kolodchyn V., Tumanyants A. investigated the role of the prosecutor in the preparatory court proceedings, however, they all studied discretionary powers of the prosecutor in a very general form. This study has been prepared to extend my previous studies devoted to the study of the concept, nature and limits of discretionary powers of the prosecutor in criminal proceedings.

The purpose of the article consists in the research, studying and systematization of knowledge and information about the discretionary powers of the prosecutor in preparation for the stage of preparatory court proceedings, the procedure of applying these powers and the possible consequences of the prosecutor's procedural decisions based on the prosecutor's discretion.

The Ukrainian Constitution has put the prosecutor in charge of maintaining a public prosecution in court with respect to criminal offences, using the rights and performing the duties provided by Criminal Procedure Code of Ukraine ("CPC of Ukraine")¹. At the same time, one of the main principles of the court proceedings provided by the Constitution of Ukraine is to ensure that the guilt is proven. Article 283 CPC of Ukraine establishes that a person shall have the right to have charges brought against him reviewed by a court as early as possible, or to dismissal of such charges through closure of the proceedings². In order to improve the situation of the participants of the criminal process and ensure the effective implementation of the basic principles of criminal justice, the legislator has foreseen the stage of preparatory court proceedings described in Section 27 of the CPC of Ukraine. At this stage, the court, in the absence of grounds for a simplified trial in a court session with the participation of the parties of the proceedings, is obliged, within a reasonable timeframe, the criteria of which are determined by Article 28 of the CPC of Ukraine, on the basis of a thorough examination of the procedural acts concerning the termination of the pre-trial investigation and the documents attached thereto, to verify

¹ Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>

² Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>

whether there are sufficient grounds for appointing such a court trial in a concrete court composition, to close the proceedings or to resolve the case by approving the relevant agreement and decreeing the sentence³. In preparation for the preparatory court proceedings, at the stage of the pre-trial investigation, the prosecutor is given discretionary powers to choose the form of the termination of the pre-trial investigation. As I have pointed out while studying the concept of discretion powers of prosecutor in criminal proceedings, the discretionary powers of the prosecutor are defined as the duty of the prosecutor, in cases clearly stipulated by law, to make a decision in a criminal proceeding based on the circumstances of the case, the principles of law, internal convictions and personal experience, with the purpose of ensuring the protection of the rights of participants in the criminal process and ensuring the rule of law⁴.

In view of the fact that the prosecutor exercises his powers in criminal proceedings from the beginning to the end, he has the opportunity to independently assess the circumstances and materials of the case and to make the most optimal solution in a particular situation. The prosecutor has a duty to comprehensively, fully and impartially investigate the circumstances of the criminal proceedings, to reveal both circumstances that expose or acquit the suspect, the accused, as well as the circumstances that mitigate or aggravate his penalty, to provide them with a proper legal assessment and to ensure the adoption of lawful and impartial procedural decisions.

Control over observance of terms in criminal proceedings is also part of the discretionary powers of the prosecutor⁵. After notifying the person about the suspicion the prosecutor is obliged to do one of the following actions as soon as possible: 1) close the criminal proceedings; 2) submit a motion on releasing the person from criminal liability to court; 3) submit an indictment to court as well as motion to impose compulsory medical or educational measures. The prosecutor has the right to take a decision on the closure of a criminal proceeding against a suspect, if, while studying the case, he discovers the existence of the grounds foreseen in paragraph 1 of Article 284 of the CPC of Ukraine⁶.

If at the stage of the pre-trial investigation there are established grounds for exemption from criminal liability and obtaining consent to such a dismissal, the prosecutor makes a request for release from criminal responsibility and without complete pre-trial investigation, he sends it to court. Before submitting a request to a court, the prosecutor is obliged to familiarize the victim with it and to find out his opinion about the possibility of release of the suspect from criminal responsibility. Although legal reasons and the procedure for exemption from criminal liability are clearly stipulated by law, they contain appraisal concepts that require the use of a prosecutor's discretion to decide on the presence or absence of certain circumstances. In particular, the Criminal Code of Ukraine contains the following grounds for the release of a person from criminal responsibility, such as: "sincere repentance" and "active assistance in the disclosure of a crime"⁷.

The Plenary Assembly of the Supreme Court of Ukraine has resolved that "sincere repentance" characterizes the subjective attitude of the perpetrator to the committed crime, which is manifested in the fact that person admits his guilt, expresses regret over the committed act and has a desire to improve his behaviour; "active assistance of the disclosure of a crime" should be considered as the provision to the authorities of inquiry or the pre-trial investigation of any assistance in establishing unknown circumstances of the case⁸. Depending on the prosecutor's assessment of the behaviour of the suspect in the presence of other grounds for dismissing a person from criminal responsibility, he will prepare an appropriate procedural document. The time and resources spent on making the final decision by the court depend on the correctness of the assessment of these circumstances. Often, due to the unwillingness of the prosecutor to take into account the circumstances absolving a person from criminal responsibility, the criminal process is delayed, violating the rights of its participants and complicates the implementation of justice by the court. Thus, the proper perfor-

³ Дячук С.І. Стадія підготовчого провадження та її особливості. Слово Національної Школи Суддів України. 2013. № 4. С. 131–138.

⁴ Кахновець С.О. Поняття, суть та значення угляду прокурора у кримінальному провадженні. Науковий вісник Ужгородського національного університету. 2016. № 41. Том 2. С. 158–161.

⁵ Кахновець С.О. Реалізація дискреційних повноважень прокурора при здійсненні процесуального керівництва досудовим розслідуванням. Підприємництво, господарство і право. 2017. № 10. С. 220–222.

⁶ Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>.

⁷ Кримінальний кодекс України. Голос України. 2001. № 107. URL: <http://zakon3.rada.gov.ua/laws/show/2341-14>

⁸ Про практику застосування судами України законодавства про звільнення особи від кримінальної відповідальності: Постанова ПВСУ від 23.12.2005 р., № 12. URL: <http://zakon2.rada.gov.ua/laws/show/v0012700-05/conv>

mance of prosecutor's functions is one of the necessary guarantees to prevent the violation of the rights of participants in criminal proceedings.

After the end of the pre-trial investigation, the investigator prepares an indictment act, which is approved by the prosecutor and sent to the court. The prosecutor sends the indictment act to court, to which, according to paragraph 4 Article 291 CPC of Ukraine, the following points should be added: 1) register of materials of pre-trial investigation; 2) the civil claim, if it was presented during a pre-trial investigation; 3) a receipt of a suspect to receive a copy of the indictment act, a copy of the civil claim, if it was presented during the pre-trial investigation and a register of pre-trial investigation materials; 4) a receipt or other document confirming the reception by the civil defendant of a copy of a civil claim, if it was presented during a pre-trial investigation, not to a suspect; 5) certificate of the legal entity against which a proceeding is conducted, which determines the name of the legal entity, its legal address, settlement account, identification code, date and place of state registration⁹.

An indictment act may be drawn up by the prosecutor, in particular, if he does not agree with the indictment act made by the investigator. In this situation, the prosecutor uses his discretionary powers in order to assess the correctness of the formulation of the information made by the investigator in the indictment act, and if it is necessary, to make a new document on his own. The full list of information needed to be included in the indictment act is foreseen in CPC of Ukraine, paragraph 2 of Article 291. That is why the accuracy of the disclosure of information in the indictment act plays an important role. The prosecutor, carrying out the function of monitoring the pre-trial investigation, verifies the accuracy of the indictment act. On the basis of i. 3 paragraph 3 of Article 314 CPC of Ukraine, in the preparatory court proceedings, the court has the right to return the indictment act if it does not meet the requirements of CPC of Ukraine, in particular, if this document contains contradictory provisions; an inadmissible naturalization of the description of the crime; it is not signed by the investigator (except the cases when the prosecutor makes this act on his own) or it is not approved by the prosecutor; it has no additions, needed by law¹⁰. An analysis of judicial practice shows that courts frequently return the indictment act to the prosecutors for elimination disadvantages, made by a violation of the principle of presumption of innocence, which is enshrined in the Constitution of Ukraine and the CPC of Ukraine¹¹. At the same time, practitioners point out that in the indictment act there are often no circumstances that indicate the presence of proven data about event (time, place, method) of a criminal offence, the form of guilt, the motive and purpose of its commitment, circumstances that affect the severity of a criminal offence etc. explaining it by the fact that the prosecutors themselves admit the transferring of indictment acts to court, in which the accusation has not been formulated, and instead there is only a suspicion, as well as some actual facts of the criminal offense, in the commitment of which the person is suspected and the legal qualification of the criminal offense, without specifying which action had been committed by the accused, and which he had not done. The absence in the indictment act of the formulation of the accusation and lack of the legal qualification of a person's actions makes it impossible to qualitatively and fully protect the defendant from the charge, which undoubtedly violates the person's right to defence¹². The legal qualification of a person's actions in the indictment act must include not only the reference to a separate article and part of this article of the criminal law but also the exact formulation, including the objective side and qualifying features of a particular criminal offence.

The legislator sets the limits on the prosecutor's discretion in Article 94 CPC of Ukraine: the prosecutor evaluates each evidence in condition of relevance, admissibility, authenticity based in his internal conviction on a comprehensive, complete and impartial investigation of all circumstances of the criminal proceedings, guided by law, and a set of collected evidences – from the point of view of sufficiency and interconnection for the adoption of the appropriate procedural decision. The prosecutor personally estimates which factual circumstances of a criminal offence are established and whether the legal qualification of a criminal offence has been properly conducted, which particular circumstances of the case will be considered as mitigating or aggravating the punishment. The prosecutor must check whether the circumstances that mitigate or aggravate punishments were

⁹ Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>.

¹⁰ Про порядок здійснення підготовчого судового провадження відповідно до Кримінального процесуального кодексу України: Інформаційний лист ВССУ з розгляду цивільних і кримінальних справ від 03.10.2012 № 223-1430/0/4-12. URL: <http://zakon0.rada.gov.ua/laws/show/v1430740-12>

¹¹ Завертайло І.О. Процесуальні порушення під час складання обвинувального акта і підстави повернення його судом для усунення недоліків, у тому числі з угодою (погляд практичного працівника). Вісник Академії митної служби України. Серія : Право. 2015. № 1. С. 127–132. URL: http://nbuv.gov.ua/UJRN/vamsup_2015_1_22

¹² Пономаренко Д. Повернення обвинувального акту. Підстави та процесуальне значення / Ліга. Блоги. 2016. URL: <http://blog.liga.net/user/ponomarenko/article/21285>.

taken into account in the right way while qualifying a crime. Taking these circumstances into consideration requires special attention since some of them contain appraisal concepts such as “committing a crime as a result of a coincidence of serious personal, family or other circumstances”¹³. Of course, the ultimate authority that decides the correctness of consideration of certain circumstances of the case is the court, however, in my opinion, the legislator gives the prosecutor discretionary powers, giving him the opportunity to make decisions based on his own assessment of the situation, in order to individualize each individual case in the criminal process and to ensure the rule of law at the stages when the criminal case was not received by court.

Unlike the CPC of Ukraine as amended in 1960, which obliged prosecutor to send to the court whole criminal case together with the findings¹⁴, at present the prosecutor cannot submit to the court other documents except the findings¹⁵.

Such an approach completely changes the point of the preliminary case hearing as long as a judge deprived of an opportunity to examine all the files of the case cannot form his own opinion about the prospect of trial on this basis.

This legislator’s approach as well as requirements to the content of the findings, which do not provide all evidence on which the accusations are based, create the real conditions for adversary character of the judicial process conducted by an impartial court for the parties to exercise all advantages of the principle of free discretion¹⁶.

This approach allows the prosecutor to conduct more detailed preparation for the preparatory court proceedings, as well as to develop strategies of behaviour in various circumstances.

In particular, P.M. Karkach believes that before the preliminary case hearing, the prosecutor should:

a) examine and note the files of the case together with the analysis of the evidence; b) conduct a plan of the speech and substantiate its positions on matters at issue; c) examine all the files of the case: documents, complaints, requests submitted directly to the court after the prosecution of the case; d) examine the position of the other participants of the process, their possible requests, taking into account that the judge’s ruling on the appointment of the hearing of the case is not a subject of the appeal, except the return of the indictment, a request for the compulsory measures of medical or educational nature.

Therefore, at the preliminary case hearing, the prosecutor’s information concerning the possibility of appointing the hearing of the case for investigation and his opinion about requests of the other participants in the process should be objective, based on the files of the case and the rules of law.

This list of the possible actions of the prosecutor at the stage of the preliminary case hearing is recommendatory and not exhaustive.

However, given that the prosecutor has the function aimed at protection of humans rights and freedoms, the general interests of society and the state, and the proper execution of his functions which is a necessary guarantee of a just, impartial and effective implementation of criminal proceedings, he is obliged to make an optimal procedural decision which will transmit the spirit of the law and the principles of law in those situations in the course of the criminal process, while the legislator has not settled all the courses of the case because of the impossibility of taking into account all nuances, but has provided the prosecutor’s duty to regulate these issues on the basis of law, personal experience and inner conviction.

A special procedure for the preliminary hearings of the case provides for the need for the prosecutor to immediately make certain procedural decisions.

According to the Article 468 of the CPC of Ukraine, in the criminal proceedings the following types of deals and agreements may be concluded:

¹³ Про прокуратуру» Закон України. Відомості Верховної Ради України. 2015. № 2-3, Стаття 12. URL: <http://zakon4.rada.gov.ua/laws/show/1697-18/>

¹⁴ Кримінально-процесуальний кодекс України. Відомості Верховної Ради УРСР. 1961. № 2. Ст. 15

¹⁵ Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>

¹⁶ Дячук С.І. Стадія підготовчого провадження та її особливості. Слово Національної Школи Суддів України. 2013. № 4. С. 131–138.

- 1) conciliation agreement between victims, suspects or accused;
- 2) plea deal between the prosecutor, suspects or accused. The prosecutor cannot be an initiator of the deal – it is concluded on the initiative of the victim, suspects or accused. At the same time, it is considered that prosecutor should not give an assessment about legibility of such deals, but must conduct an indictment and submit the deal to the court so that the court could decide to refuse the approving of the deal and to return the proceedings to complete the investigation in the usual mode¹⁷. His discretionary powers are limited to the right to express his opinion on the possibility of approval of such a deal by a court.

Discretionary powers of the prosecutor are wider in a framework of the plea deal. According to the paragraph 2 of the Article 469 of the Criminal Code, plea deal could be conducted by an initiative of the prosecutor, the suspects or the accused.

At the stage of initiating the deal, the prosecutor must provide an assessment of the credibility of the prosecution, the sufficiency of evidence to prove the guilt of the suspect in court as well as the circumstances considered under Article 470 of the Criminal Code, the result of which can be formalized in the form of an deal between the prosecutor, the suspect and the accused.

At the same time, while implementing these powers, the prosecutor must not establish only one condition for a suspect – to unconditionally admit his guilt in the court – since there is no public interest in exposing a bigger amount of criminal offenses, preventing, detecting or terminating more criminal offenses or other more serious criminal offenses¹⁸. Taking into account that the conclusion of the plea deal contains the elements of a contractual (compromise) prosecution, such a compromise provides for certain concessions to a suspect or accused. However, such a compromise is not allowed in the qualification of a criminal offence, but it is possible upon reaching the parties' agreement on the punishment type or terms or releasing from serving punishment with the probationary period. There is an explanation by Plenary Assembly of the Supreme Court of Ukraine¹⁹ about the order of agreement of these issues, which provide a clear understanding of the application of the criminal law for establishment acceptable limits for the agreement about punishment terms, where it is necessary to take into account the identity of the suspect, the accused and circumstances that mitigate and significantly reduce the severity of the crime. For their assessment, the prosecutor will use his own discretion, which will be based on his consciousness, views, personal convictions, traditions, upbringing, and the power of public opinion of the whole society or a particular social group. This is the nature of discretionary powers.

Conclusion. Summing up all the above, we can conclude that in preparation for the stage of preparatory court proceedings, the prosecutor has a wide range of discretionary powers, the correct application of which will ensure the achievement of the purpose for which the legislator gave the prosecutor these powers, namely: ensuring the implementation of criminal proceedings within its principles, as well as reducing the length of the criminal process in general.

Summary

The article investigates the discretionary powers of the prosecutor at the stage of completing the pre-trial investigation stage and preparing for the preparatory court proceedings. The main opportunities of the prosecutor for making decisions at their own discretion have been established. Various options of decisions making by the prosecutor at the stage of a pre-trial investigation, their consequences at the stage of preparatory court proceedings are analysed. The requirements of the indictment act and the specificity of concluding a reconciliation transaction between the victim and the suspect, as well as the concluding a transaction between the prosecutor and the suspect about guilty plea (plea bargain), were studied.

¹⁷ Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI. URL: <http://zakon2.rada.gov.ua/laws/show/4651-17>.

¹⁸ Гринюк В. Особливості реалізації функції обвинувачення у кримінальному провадженні на підставі угод. Національний юридичний журнал: Теорія і практика. 2016. № 5. С. 176–180.

¹⁹ Про практику здійснення судами кримінального провадження на підставі угод: Постанова ПВСУ від 11 грудня 2015 р. URL: <http://zakon0.rada.gov.ua/laws/show/v0013740-15/>

Анотація

У статті проаналізовано угляд прокурора при прийнятті рішень прокурором на стадії досудового слідства, їх наслідки на етапі підготовчого судового провадження. Вивчено вимоги обвинувального акта та специфіку укладання угоди на стадії підготовчого судового провадження.

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Solomiya Kakhnovets,

Judge's associate in the Lviv Region Court of Appeals, the postgraduate student of the Department of Criminal Procedure and Criminology of the Ivan Franko National University of Lviv