

WRITTEN INSTRUCTIONS OF A PROSECUTOR AS A SPECIAL FORM OF HIS PROCEDURAL DECISION IN CRIMINAL PROCEEDINGS



Serhii Shulhin

*PhD Student,
Academician Stepan Demianchuk
International University of Economics
and Humanities, Rivne, Ukraine*

Abstract. The article analyzes the national and foreign legislation regulating the right of the prosecutor to provide written instructions, its legal form and structure are examined, the author's definition is represented for written instructions by the prosecutor meaning the mandatory procedural decision, issued by separate instructions or instructions enshrined in the reasoning part of the order overturning the procedural decision of the investigator by which the prosecutor instructs the investigator to conduct investigative (search) actions in criminal proceedings, both exposing and acquitting the suspect, to assess, investigate and analyze the evidence, eliminate law violations, perform other necessary procedural actions.

The article also analyzes the provisions of the Criminal Procedure Codes of Georgia, the Republic of Belarus and the Russian Federation, as they envisage the most similar powers of the prosecutor in regards to providing instructions in comparison with national law.

According to the results of researching more than 30 criminal proceedings, it is proved that written instructions of the prosecutor consist of two parts, narrative and operative one.

The opinion is substantiated that prosecutors provide instructions contained in their orders particularly on the repeal of the investigator's decision to close the criminal proceedings. The prosecutor indicates the grounds for his decision and lists the procedural actions that he believes the investigator has not performed in such orders. The prosecutor cancels the investigator's decision and provides a list of investigative and other procedural actions that should be performed during the pre-trial investigation in the reasoning part of the order.

Analyzing the above scientific views and legal regulations, it is considered appropriate to highlight the following features specific to written instructions of the prosecutor, namely, specificity, consistency, timeliness and mandatory application.

Keywords: *procedural decisions in criminal proceedings, instructions of the prosecutor, powers of the prosecutor, pre-trial investigation, procedural guidance.*

Introduction

The dynamic development of Ukrainian statehood has determined the need to reform its various state and legal institutions, improve the mechanisms of its activities. This trend is due to radical changes in national legislation, including in the area of criminal justice.

Adoption of the Criminal Procedure Code of Ukraine by Verkhovna Rada on April 13, 2012, changed not only the criminal justice system, but also the functions of law enforcement agencies, in particular, prosecutorial authorities.

The prosecutor is endowed with significant powers in criminal proceedings, and its vital part is given to the provision of written instructions.

Literature review. Alpert S., Bazhanov M., Hlynska N., Hryniv O., Lupinska P., Marochkin O., Smokov S. and others focused their works on the research of the prosecutor's procedural decisions at the pre-trial investigation, however such procedural

decision of the prosecutor as written instructions (hereinafter referred to as instructions) were only studied in general terms. Comprehensive research of written instructions as a procedural decision was not given any consideration at all.

Research methodology. To achieve the objective and the scientific objectivity of the research results, it was selected a dialectical method of learning about social phenomena and processes, real phenomena, as well as their links with the practical activities of law enforcement agencies, according to which the issues addressed in the article are considered in the unity of its social content and legal form. Other research methods were also used during the study, namely, the *systemic and structural* one was used to define the concept and structure of instructions; the *comparative legal* method was used to compare the mechanism regulating the provision of instructions by the prosecutor under domestic and foreign criminal procedure legislation; the *statistical* method was used during the study of the prosecutor's powers in providing instructions in specific criminal proceedings; it was possible to consistently bring individual facts together and draw sound conclusions aimed at improving the legal regulation of the researched issues and overcoming its conflicts and gaps by means of the *generalization* method.

Research results. The research objective is a scientific study of the legal nature of the prosecutor's written instructions at the pre-trial investigation, its procedural form, formulation of the author's definition of procedural instructions of the prosecutor, research of its place and significance in the system of procedural decisions of the prosecutor at the pre-trial investigation.

In accordance with Article 36 of the CPC of Ukraine, Section 2, Paragraph 4, the prosecutor monitoring compliance with the law during the pre-trial investigation in the form of procedural guidance over the pre-trial investigation is authorized to instruct the investigator, the pre-trial investigation body, to conduct investigative (search) actions within the prescribed time limit, covert investigative (search) actions and other procedural actions, or give instructions concerning its execution.

Similar powers of the prosecutor are set out in the procedural codes of other countries including the CPC of the Republic of Belarus (Article 34, Section 5, Paragraph 6) of the Criminal Procedure Code of the Republic of Belarus No. 295-Z of 16.07.1999; the CPC of the Russian Federation (Article 37, Section 2, Paragraph 4) of the Criminal Procedure Code of the Russian Federation No. 174-FZ of

18.12.2001; and the CPC of Georgia (Article 33, Section 5) of the Law of Georgia Criminal Procedure Code of Georgia No. 1772-IIc of 09.10.2009.

At the same time, these regulations do not define the instructions, but only indicate his right to make a relevant decision, however scholars tried to do it, in particular, O. Hryniv considers the prosecutor's written instructions as his procedural decision ruled within the procedural guidance over the investigation of the case in order to achieve comprehensiveness, completeness and objectivity of the pre-trial investigation, aimed at eliminating gaps and incompleteness of the investigation admitted by the body of inquiry and pre-trial investigation, endowed with signs of imperativeness and mandatory except as provided by law. (Hryniv, 2011, p. 272; Hryniv, 2016, p. 211). According to P. Lupinska, the prosecutor's instructions are one of the types of procedural decisions made during the criminal proceedings. The author substantiates his opinion by the fact that it as procedural decisions is ruled by authorized state bodies and officials within their powers expressing government orders, confirming, changing, or terminating criminal proceedings, confirming the existence or establishing the lack of substantive law relations, accepted in due course and fixed in a certain form (Lupinskaya P. ed., 2003, p. 51). H. Pichkalo and Y. Radutna (1986, p. 91), in turn, consider the instructions of the prosecutor as one of documents of the prosecutorial action.

The procedural form and structure of the prosecutor's written instructions are also not defined in the legislation. The prosecutorial and investigative practice has formed a specific position on this challenge. Thus, written instructions are issued in the form of a separate document, instructions, created on the official letterhead of the prosecuting authority. The written instructions of the prosecutor analyzed by us in about 30 criminal proceedings of the National Police and the Security Service of Ukraine give grounds to divide its structure into two parts, narrative and operative one. The narrative part indicates the pre-trial investigation body that conducting the pre-trial investigation of criminal proceedings, its number and registration date in the Unified Register of Pre-trial Investigations, a fact of incomplete pre-trial investigation (other procedural shortcomings), and the operative part

contains instructions (requirements) of the prosecutor, which should be performed within criminal proceedings. This opinion is shared by V. Hrechukha (1982, p. 41), who points out that the following constituent elements of this document have been developed in practice, namely, addressee, title, place and date of drafting, article of the law under which instructions are given, justification of the decision, specific requirement and signature.

There is not also a single approach to the procedural form of the prosecutor's written instructions in the science of criminal process. Thus, A. Slivchikov (2006, p. 57) notes that instructions of the prosecutor should take the form of a separate written instruction or order. O. Kozhevnikov (2006, p. 104) holds a similar opinion pointing out that the prosecutor's instructions can be both an independent document and part of such an act as an order. It is worth noting that prosecutors often provide instructions contained in their orders, such as cancelation the investigator's decision to close criminal proceedings. As a rule, the prosecutor indicates the grounds for his decision and lists the procedural actions that he believes the investigator has not performed in such orders. The prosecutor cancels the investigator's decision and provides a list of investigative and other procedural actions that should be performed during the pre-trial investigation in the reasoning part of the order.

We agree with the opinion of V. Lutsyk and T. Kordiiaka (2016, p. 88-89), who note that the instructions should be issued on the official letterhead of the prosecuting authority signed by the procedural manager and contained three parts: introductory, reasoning and operative. The introductory part should indicate the place and time of issuance of written instructions, entity instructions are addressed, number of criminal proceedings and legal qualification.

As for the reasoning part of the written instructions, from our point of view, it is similar for all written instructions and its content follows from the tasks of the prosecutor as a procedural manager and the tasks of criminal proceedings in general. The operative part of the prosecutor's instructions is actually the substance of the procedural decision taken including the list of specific actions to be performed by the addressee. It is significant to specify a reasonable time to follow the instructions (Lutsyk & Kordiiaka, 2016, p. 88-89).

It should be noted that the right to provide instructions to the investigator is vested in the head of the inquiry and pre-trial investigation body besides the prosecutor. Therefore, we should agree with the opinion of A. Spirin, who notes that the prosecutor's instructions should not become an investigation plan, since the prosecutor should not cover the head of the body of inquiry and pre-trial investigation (Spirin, 2014, p. 156).

Given that the prosecutor has the right to provide instructions on the conduct of investigative (search) actions, such instructions are considered incompetent as "take additional measures to identify persons guilty of a criminal offense", "intensify the pre-trial investigation", etc. As A. Stolitnii rightly points out in this regard, when giving instructions on conducting investigative actions aimed at obtaining evidence, the prosecutor should be guided by his own experience of using evidence during the trial in addition to the requirements of legislation and judicial practice of a certain category of criminal proceedings (Stolitnii, 2015, p. 127). At the same time, the prosecutor providing instructions to the investigator should not lose sight of his procedural independence (Shimanovskiy, 1989, p. 144).

Analyzing the above scientific views and legal regulations, it is considered appropriate to highlight the following features specific to written instructions of the prosecutor, namely, specificity, consistency, timeliness and mandatory application.

Specificity means that the instructions should contain specific investigative (search) actions to be performed and eliminate vague language (take measures, intensify, etc.). Consistency in written instructions of the prosecutor should be understood as the logical ordering of procedural actions to be carried out in criminal proceedings for the purpose of achieving maximum results. Timeliness is based on the requirements of the law regarding the observance of reasonable timeframe of pre-trial investigation and need to conduct an investigative (search) action in a timely manner, which delay could lead to the loss of evidence. The mandatory application for the prosecutor's written instructions is determined by the law's obligation to comply with them. Failure to obey the instructions affects the completeness of the pre-trial investigation, the legality and validity of procedural decisions.

The jurisprudence is beginning to emerge on cancellation of decisions to close criminal proceedings by investigative judges in Ukraine in which the prosecutor provided written instructions that had not been fully or partially implemented.

Hence, the decision of the investigating judge of the Dzerzhinskii district court of Kharkiv dated June 26, 2017 canceled the order to close the criminal proceedings since the investigators had not followed the written instructions of the prosecutor (The investigating judge's decision of the Dzerzhinskii

district court of Kharkiv of 26.06.2017 (case No. 638/8926/17). A similar position is expressed in the decision of the investigating judge of the Obolonskii district court of Kyiv dated February 23, 2017, which revoked the decision of the investigator to close the criminal proceedings, because the investigator had not fully implemented the prosecutor's instructions (The investigating judge's decision of the Obolonskii district court of Kyiv of 23.02.2017 (case № 756/1632/17).

Conclusions

According to the results of the research, we believe that the written instructions of the prosecutor should be interpreted as a binding procedural decision issued by separate instructions or instructions enshrined in the reasoning part of the order canceling the procedural decision of the investigator, by which the prosecutor instructs the investigator to conduct investigative (search) actions in criminal proceedings, both exposing and acquitting the suspect, to assess the evidence, eliminate law violations, perform other necessary procedural actions.

The prosecutor's instructions must be provided exclusively in written form and aimed at achieving the objectives of criminal court proceedings, it is therefore necessary to supplement Article 110 of the CPC of Ukraine by the provision that the instructions are a special procedural decision of the prosecutor provided to the investigator and enshrined in the instructions itself or contained in the operative part of the prosecutor's order, which overturns the procedural decision of the investigator.

The obtained results will contribute to more thorough further research of the prosecutor's instructions.

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