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Competence of Investigators of the State Bureau of Investigation and Problems of its Implementation in Ukraine

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ABSTRACT

The purpose of the research: The research the conflicts arising from the implementation by the State Bureau of Investigation investigators of their competence and the performance by the prosecutor of the functions assigned to him. Main content: The problems of improving the legislation and the practice of its application in relation to the activities of investigators of the State Bureau of Investigation are revealed. Taking into account the decisions of the European Court of Human Rights, in particular, in the 2011 case "Mikhalkova and Others v. Ukraine", a system of measures is proposed to strengthen the independence and procedural status of the State Bureau of Investigation investigator. Methodology: The methodological basis of the research is presented as comparative-legal and systematic analysis, formal-legal method, interpretation method, hermeneutic method as well as methods of analysis and synthesis. Conclusions: A proposal is being made to give the right to investigators of the State Bureau of Investigation, by its own resolution, to carry out a number of investigative actions: establishing the location of radio equipment; taking readings of technical devices and technical means (Article 245-1 of the Criminal Procedure Code of Ukraine).

KEY WORDS: Crime, criminal law, judiciary, law, penal sanctions.

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Competencia de los investigadores de la Oficina Estatal de Investigación y problemas para su implementación en Ucrania

RESUMEN

El objeto de la investigación. La investigación de los conflictos derivados de la aplicación por parte de los investigadores de la Oficina Estatal de Investigación de su competencia y el desempeño por parte del fiscal de las funciones que le han sido asignadas. Contenido principal. Se revelan los problemas de mejorar la legislación y la práctica de su aplicación en relación con las actividades de los investigadores de la Oficina Estatal de Investigación. Teniendo en cuenta las decisiones del Tribunal Europeo de Derechos Humanos, en particular, en el caso de 2011 "Mikhalkova y otros c. Ucrania", se propone un sistema de medidas para fortalecer la independencia y el estado procesal del investigador de la Oficina Estatal de Investigación. Metodología: La base metodológica de la investigación se presenta como análisis comparativo-legal y sistemático, método formal-legal, método de interpretación, método hermenéutico, así como métodos de análisis y síntesis. Conclusiones: Se propone dar derecho a los investigadores del Negociado Estatal de Investigaciones, por resolución propia, a realizar una serie de acciones investigativas: establecer la ubicación de los equipos de radio; tomar lecturas de dispositivos técnicos y medios técnicos (artículo 245-1 del Código de Procedimiento Penal de Ucrania).

PALABRAS CLAVE: Delito, Derecho penal, poder judicial, Derecho, sanciones penales.

Introduction

The competence of investigators of the State Bureau of Investigation includes the investigation of criminal offenses committed by prosecutors and judges. At the same time, the latter perform the functions of prosecutorial supervision and procedural control over the legality of the investigators' activities. This situation does not exclude the possibility of conflict of interests of various institutions and officials in the field of criminal proceedings and their abuse of procedural rights.

The issues of improving the status of investigators received some attention in the scientific literature. But the analysis of the practice of investigating corruption offenses shows the need to improve the legislation and a more systematic study of the problems of investigative activity.

The purpose of the research - the research the conflicts arising from the implementation by the SBI investigators of their competence and the performance by the prosecutor of the functions assigned to him.

1. Literature review

The analysis of recent scientific research shows considerable attention of legal scholars to the problem of combating crime and the activities of investigative bodies. In particular, considerable attention of researchers is paid to the problems of combating corruption (Topchii & Shkelebei, 2016). The issues of guarantees of the investigators' activity are disclosed in the works of O. V. Baulin, V. P. Boyko, Y. M. Groshivoy, D. M. Mirkovets, V. M. Tertyshnik, L. D. Udalova and other researchers (Tertyshnyk, 2009). Halaburda Nadiia, Leheza Yevhen, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna and others who devoted their works to research of this topic (Halaburda et al., 2021).

Some attention of the professionalisms is paid to the functions of the prosecutor in the criminal process and the exercise of judicial control over the legality of the pre-trial investigation. (Shumylo, 2021). However, the problem of effective investigation of criminal offenses committed by prosecutors and judges, under existing systems of prosecutorial supervision and procedural control, remains poorly investigated.

2. Materials and methods

The study is based on the work of foreign and Ukrainian researchers regarding the competence of investigators of the State Bureau of Investigation and the problem of its implementation, etc.

With the help of the epistemological method, the peculiarities of the competence of the investigators of the State Bureau of Investigations and the problems of its implementation, etc., were clarified, thanks to the logical-semantic method, the conceptual apparatus was deepened, the peculiarities of the competence of the investigators of the State Bureau of Investigations and the problems of its implementation, etc., were determined. Thanks to the existing methods of law, we managed to analyze the peculiarities of the competence of the investigators of the State Bureau of Investigations and the problems of its implementation, etc.

3. Results and discussion

The State Bureau of Investigation is a law enforcement agency with investigative and operational competence that prevents, detects, stops, solves and investigates corruption,

war and other crimes committed by civil servants, judges, prosecutors and other law enforcement officers.

The independence of the State Bureau of Investigation is determined by the special status of the State Bureau of Investigation as a law enforcement state body, which, unlike other investigative bodies, is not part of the system of executive bodies. This concept of his organization is a certain positive.

A certain step forward in strengthening the status and guarantees of the activities of SBI investigators was the provision of the law that the Director of the SBI is appointed to the post for a term of seven years and dismissed from office by the President of Ukraine with the consent of the Parliament. This approach contributes to greater independence of the SBI from the executive branch.

The State Bureau of Investigation, in the implementation of the competence defined in the law, must coordinate its work and interact with the prosecutor's office and investigating judges, while such officials may become defendants in the investigated cases. In accordance with Art. 5 of the Law of Ukraine "On the State Bureau of Investigation", SBI investigators solve the tasks of preventing, detecting, stopping, solving and investigating crimes committed, in particular, by officials who occupy a particularly responsible position, or whose positions are assigned to the first - third categories of civil service positions, as well as judges and law enforcement officers, except for cases when these crimes are under the jurisdiction of detectives of the National Anti-Corruption Bureau of Ukraine; Crimes (Leheza *et al.*, 2022).

They also investigate criminal offenses committed by officials of the National Anti-Corruption Bureau of Ukraine, Deputy Prosecutor General - Head of the Specialized Anti-Corruption Prosecutor's Office or other prosecutors of the Specialized Anti-Corruption Prosecutor's Office, unless the pre-trial investigation of these crimes is under the jurisdiction of detectives of the internal control unit of the National Anti-Corruption Bureau of Ukraine; crimes against the established procedure for military service (war crimes). The relevant provisions are also enshrined in Part 4 of Art. 216 CPC of Ukraine.

The peculiarities of the subject component of the crimes under investigation by the State Bureau of Investigation in accordance with Article 216 of the Criminal Procedure Code of Ukraine determine the specifics of the procedural activity of the investigator of the State Bureau of Investigation in criminal proceedings. This is primarily due to the presence

of a real opportunity for these subjects to counteract the investigation, using not only legal methods and mechanisms, but also their influence on other parts of the law enforcement, supervisory and expert system.

At the same time, in accordance with Art. 131-1 of the Constitution of Ukraine, the prosecutor's office carries out: "organization and procedural management of pre-trial investigation, resolution of other issues during criminal proceedings in accordance with the law, supervision over covert and other investigative and investigative actions of law enforcement agencies". Here, as V. M. Tertyshnik emphasizes, the prosecutor is "a shoemaker, a reaper, and a thunderbolt on a pipe", and investigators see them as skilled dancers who must "beat off hopak" under the guise of a prosecutor. (Tertyshnyk, 2009: 104).

Performing a complex function of counteracting official crimes and criminal misconduct requires proper provision of the status of independence and procedural independence of investigators.

With the adoption of the CPC of Ukraine in 2012, the guarantees of independence and procedural independence of the investigator have significantly narrowed as a whole. In particular, according to Art. 40 of the Criminal Procedure Code of Ukraine, the investigator must "apply in agreement with the prosecutor to the investigating magistrate with petitions for the application of measures to ensure criminal proceedings, conduct investigative (inquiry) actions and covert investigative (inquiry) actions", as well as "is obliged to comply with the instructions and instructions of the prosecutor, which are provided in writing. Failure of the investigator to comply with the lawful instructions and instructions of the prosecutor provided in the manner prescribed by this Code entails liability provided for by law."

Given the SBI's jurisdiction of criminal offenses committed by prosecutors and judges, the issue of proper prosecutorial supervision and judicial control over the legality of the activities of SBI investigators is complicated by possible conditions of conflict of interest and abuse of procedural rights. The issues of performing the functions of procedural management of the investigation, procedural supervision and judicial control on the basis of the territorial principle of distribution of such powers, subject to criminal proceedings against the prosecutor or judge and the relevant territory, still remain legally uncertain.

Under such a system of investigation management and prosecutorial supervision and judicial control in cases investigated by SBI investigators against judges or prosecutors or their close relatives, there are risks of abuse of procedural rights by prosecutors or investigative judges. This may be manifested in the refusal to approve the decision to conduct certain investigative or covert investigative (inquiry) actions, in particular: permission to conduct a search, taking readings of technical devices and technical means that have the functions of photography, filming, video recording, or means of photography, filming, video recording (Article 245-1 of the Criminal Procedure Code of Ukraine), removing information from electronic communication networks, removing information from electronic information systems, monitoring of bank accounts; election of preventive measures, removal from office, etc.

The authors of the latest textbook on criminal procedure law note that "the investigator is obliged to conduct a pre-trial investigation quickly, fully, comprehensively and objectively, without violating the rights and legitimate interests of the participants in the process." At the same time, the same authors note that, taking into account the existing legislation, "the investigator immediately informs the prosecutor in writing about the start of the pre-trial investigation", "the investigator is independent and independent during the pre-trial investigation, but he is obliged to coordinate certain investigative and procedural actions with the prosecutor". (Nor, 2021).

These provisions are the general rules of investigation. But SBI investigators occasionally face investigations into official crimes committed by prosecutors or their close relatives. And here there are certain conflicts with the application of the provisions of the norms that define the rules of prosecutorial supervision and judicial control, which do not determine how to avoid conflicts of interest, do not eliminate the possibilities of corruption risks, pressure on investigators, abuse of procedural rights by the persons themselves who are authorized to exercise

In accordance with the requirements of Art. 247 of the Criminal Procedure Code of Ukraine, consideration of petitions for the conduct of covert investigative (inquiry) actions, which is attributed to the powers of the investigating magistrate, is carried out by the investigating judge of the appellate court, within the territorial jurisdiction of which the pre-trial investigation body is located, and accordingly supervision over compliance with the laws is carried out by the relevant regional or specialized (military) prosecutor's office,

which, as it turns out, may themselves be subjects of crimes under investigation by the investigator of the State Bureau investigations, which will be forced in the event of crimes committed by these officials, to apply for permission from the relevant institutions where they work. This is one of the conflicts of the current legislation, which cannot prevent a conflict of interest, and therefore requires urgent changes in the norms of the CPC of Ukraine and other laws (Matviichuk *et al.*, 2022)..

In the cases "Mikhalkova and Others v. Ukraine" (decision of January 13, 2011), the ECtHR expressed the legal position that the minimum requirement for the investigation system is that the persons responsible for conducting the investigation should be independent of those involved in the events under investigation. Investigations will be considered effective if the following general principle is followed: individuals both those who carry out inspections and those who carry out investigations must be independent hierarchically and institutionally from anyone involved in the events in the case.

In the right opinion of V.M. Tertyshnyk, it is necessary to radically strengthen the guarantees of the investigator's activity by establishing the following rules in the law: the investigator of any agency should be appointed and dismissed only by the President of Ukraine on the proposal of the Prosecutor General and in agreement with the Parliaments Commissioner for Human Rights; the investigator is inviolable, a criminal case against the investigator can be initiated only by a court at the request of the regional prosecutor or a prosecutor of the relevant or higher level; The investigator is considered to be acting in a state of risk and is not subject to criminal, civil or other liability in connection with the court's recognition of his decisions as illegal, unless the investigator committed abuses of power that caused serious consequences. (Tertyshnyk, 2022).

When adopting the Law of Ukraine "On the State Bureau of Investigation", the legislator laid down important guarantees of the independence of the SBI investigator during his procedural activities in criminal proceedings. However, these guarantees are somewhat declarative in nature and the practice of investigating criminal offenses under the jurisdiction of the SBI indicates the need to make additional changes and additions to the Criminal Procedure Code of Ukraine, as well as legislative reformatting of the activities and structure of the supervisory authority – the prosecutor's office, designed to supervise compliance with laws during the pre-trial investigation (Horbalinskiy *et al.*, 2023).

At the same time, the modern institution of approval by the prosecutor of decisions on the conduct of certain investigative actions in the realities of investigative practice is too bureaucratic procedure, which is not entirely consistent with the function of supervision over the legality of such actions by the same prosecutor, and often creates artificial obstacles to the investigation. Often, the investigator's requests to apply measures to ensure criminal proceedings by the prosecutor do not agree, which stops and makes it impossible to collect important evidence even before it can be evaluated by the court. The prosecutor must perform the traditional function of supervision of legality in the activities of investigators, but should not at the same time perform those functions of procedural management of the investigation, because the latter also needs independent and impartial supervision, which can hardly be provided by the same person who performed the function of leading the investigation (Leheza *et al.*, 2022).

In our opinion, the following organizational, legal and legislative changes are needed in this aspect: Firstly, taking into account the peculiarities of the SBI's jurisdiction of criminal cases (including crimes committed by prosecutors), it is necessary to ensure the creation of a separate independent and independent attorney service for supervision of legality in the activities of SBI investigators, which would not be subordinated to the Prosecutor General's Office. It is worth noting that, for example, in the United States and Canada, the position of General Attorney is combined with the post of Minister of Justice. Our proposal is to introduce an independent and independent institution of the attorney service. It is the independent aid of the attorney prosecutor's office that should oversee the legality of the investigation of criminal offenses under the jurisdiction of the SBI.

Secondly, to expand the jurisdiction of the SBI investigators, in particular, to include the investigation of crimes committed by an official whose position belongs to both category "A" and category "B", as well as committed corruption or other official crimes committed by close relatives of such persons. Of course, except for cases when the pre-trial investigation of these criminal offenses is under the jurisdiction of the National Anti-Corruption Bureau of Ukraine (Villasmil Espinoza *et al.*, 2022).

Thirdly, to ensure a reduction in the amount of judicial control and prosecutorial supervision at the stage of urgent investigative actions and to maintain its implementation at the stage of pre-trial investigation after notification of suspicion (Leheza *et al.*, 2022).

In particular, it is legal to provide the investigator with opportunities under his own resolution (with the subsequent notification of the investigating magistrate about the fact and the results of such an action), to carry out such investigative and covert (investigative actions as: establishing the location of radio equipment (Article 268 of the Criminal Procedure Code of Ukraine); to carry out, as before the start of the investigation and in the course of its proceedings by an independent decision, such a new investigative action as "taking readings of technical devices and technical means, having the functions of photography, filming, video recording, or means of photography, filming, video recording" (Article 245-1 of the Criminal Procedure Code of Ukraine); get access to things and documents that are in the possession of other persons; without the consent of the prosecutor, apply to the investigating magistrate with petitions for the application of measures to ensure criminal proceedings (temporary access, search, inspection, pretext, etc.) (Darahan *et al.*, 2021).

Fourthly, to eliminate the contradiction between part 7 of Art. 236 of the Criminal Procedure Code of Ukraine ("Execution of a decision on permission to search a person's home or other possession") according to the instructions of which if objects that are prohibited by law are seized in circulation, they are considered temporarily seized property) and part 1 of Art. 100 of the Criminal Procedure Code of Ukraine ("Storage of material evidence and documents and resolution of the issue of special confiscation"), according to which the material evidence that was seized must be returned to the owner as soon as possible, or the investigator is obliged, in accordance with part 5 of Art. 171 of the Criminal Procedure Code of Ukraine, within the next day to apply to the investigating magistrate with a request for his arrest. A petition before the investigating judge to seize property that has already been seized by the investigator during the search is an excessive bureaucratic procedure. The seizure of such property is already provided for by the decision to search and seize (Zhukova *et al.*, 2023).

According to V.M. Tertysnyk, the extent to which the analyzed provisions of the law are correlated in content, logic and form with other means of coercion (for example, in accordance with Part 5 of Article 170 of the Criminal Procedure Code of Ukraine, by decision of the Director of the National Anti-Corruption Bureau of Ukraine (or his deputy), agreed by the prosecutor, a preliminary seizure of property or funds in the accounts of

individuals or legal entities in financial institutions may be imposed for up to 48 hours, And a more radical restriction of human rights – the detention of a person in general – can continue without the decision of the investigating magistrate for 72 hours), and why shouldn't the legislator establish a rule according to which the seized property could be kept by the investigator at least for this time, and what will eventually happen to him if the investigator does not timely file a petition to arrest him. Allowing the detention of a person without a court decision for up to 72 hours and obliging him to immediately and no later than 24 hours to apply for arrest on the property already seized, does the legislator show that property is more valuable to him than human freedom? What are the meaning and motives of such formal rules and what task do they solve? The question is rhetorical, and the answer is unequivocal – part five of Article 171 of the Criminal Procedure Code of Ukraine is subject to cancellation, because, as the people say, "everyone who does not know where to go will go further." (Tertyshnyk, 2022).

Fifthly, in order to eliminate the possibility of abuse of procedural rights by the prosecutor and the investigating judge in criminal proceedings against prosecutors or judges, to provide in the Criminal Procedure Code the possibility of the SBI investigator to apply for permission to conduct investigative (inquiry) actions and measures to ensure criminal proceedings to another local court not at the location of the pre-trial investigation body, but to another territorial judicial body with justification for this decision (Kobrusieva *et al.*, 2021).

Sixthly, the supervision of compliance with the laws by the SBI investigators, in our opinion, should not be combined with the function of managing the investigation, in the implementation of which immanent dissonances, competition and conflicts of interest may arise. Therefore, it is advisable to supervise the legality not through comprehensive petitions from the investigator to the prosecutor (attorney) for permission to conduct investigative actions, but by simply notifying the prosecutor of all decisions made in criminal proceedings and on the investigative actions performed related to the restriction of human rights and freedoms, in respect of which the law requires a decision of the investigating magistrate for their proceedings (Tylchyk *et al.*, 2022).

Conclusions

To ensure impartial and effective supervision over the legality of the activities of investigators of the State Bureau of Investigation in cases of crimes committed by judicial and law enforcement officers, it is advisable to create a separate independent and independent attorney service for supervision of legality in the work of SBI investigators, which would not be subordinated to the Prosecutor General's Office. The provisions on the functions of the prosecutor's office and the attorney service should be delimited and defined in the Constitution of Ukraine.

The prosecutor should not combine the function of guiding the investigation with the function of overseeing the legality of the investigation. Ch. 4 art. 40 of the Criminal Procedure Code of Ukraine should be abolished. At the legislative level, it is necessary to determine the main guarantees of procedural independence and independence of investigators.

SBI investigators should be given the right, by their own resolution (with subsequent notification of the investigating magistrate about the fact and results), to carry out such covert investigative actions as: establishing the location of radio equipment (Article 268 of the Criminal Procedure Code of Ukraine), as well as to carry out such a new investigative action as "taking readings of technical devices and technical means, as before the start of the investigation and in the course of its proceedings by an independent decision, that have the functions of photography, filming, video recording, or means of photo, filming, video recording" (Article 245-1 of the Criminal Procedure Code of Ukraine). Prior to the introduction of the institute of attorney service in criminal proceedings against employees of the prosecutor's office, directly apply for permission to conduct investigative and covert investigative (inquiry) actions to the investigating judge of the High Anti-Corruption Court of Ukraine.

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