

Terms of Pre-trial Investigation of Criminal Misdemeanors: Gaps in Legislation and Case Law

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The purpose of the article is to analyze the positive judicial practice that has developed in the field of applying the terms of pre-trial investigation of criminal misdemeanors, highlight gaps in legislation, as well as develop proposals for improving the current Criminal Procedure Code of Ukraine.

Keywords: terms of pre-trial investigation, criminal offenses.

Ikiteisminio baudžiamojo proceso tyrimo nusizengimai: teisės aktų ir precedentinė teisė

Straipsnio tikslas – išanalizuoti teigiamą teisinę praktiką, nusistovėjusią ikiteisminio baudžiamojo proceso normų taikymo srityje, pabrėžti teisės aktų spragas, taip pat parengti dabartinio Ukrainos baudžiamojo proceso kodekso tobulinimo pasiūlymus.

Pagrindiniai žodžiai: ikiteisminio tyrimo sąlygos, nusikalstamos veikos.

Introduction

Important in ensuring the protection of human rights and freedoms in a democratic society is Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone has the right to a fair and public hearing of his or her case within a reasonable time by an independent court established by Law, which will decide a dispute concerning his or her civil rights and obligations or establish the validity of any criminal charge brought against him or her (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950).

The right of a person to a fair and public hearing of a case within a reasonable time implies obtaining a lawful, justified decision within a reasonable time frame and is an indicator of the proper administration of justice and the effectiveness of the judiciary.

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The scientific and theoretical basis of this article is the conceptual approaches to the issue of the terms of criminal proceedings of such Ukrainian scientists as A. Kuchynska (Kuchynska, 2015, p. 44), A. Yeni (Yeni, 2016, p. 85), Yu. Alenin, A. Malakhova (Alenin, Malakhova, 2018, p. 60), A. Yanovska (Yanovska, 2013, p. 10).

It should be noted that in the field of research on the terms of criminal proceedings, as one of the guarantees of fair proceedings, scientists have ignored the issue of the terms of pre-trial investigation of criminal misdemeanors.

The relevance of the topic of the article is also due to the fact that on 01.07.2020 the Law «On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses» No. 2617-VIII came into force (Law of Ukraine, 2018 № 2617-VIII), which implemented the mechanism of pre-trial investigation of criminal misdemeanors, but the issue of regulating the terms of pre-trial investigation of criminal misdemeanors is not defined by the legislator.

The purpose of the article is to analyze the positive judicial practice that has developed in the field of applying the terms of pre-trial investigation of criminal misdemeanors, highlight gaps in legislation, as well as develop proposals for improving the current Criminal Procedure Code of Ukraine.

1. Terms of Pre-trial Investigation in Ukrainian Legislation

The terms of pre-trial investigation established by the Criminal Procedure Law are essentially a type of criminal procedural guarantees, consisting in limiting the time for performing certain procedural actions.

Setting the time frame for a pre-trial investigation, on the one hand, encourages investigators to finish the investigation as soon as possible, and on the other hand, guarantees participants in the criminal process that the restriction of their rights related to the investigation will not be unreasonably prolonged.

Criminal proceedings must be investigated within the time limit that is really (really) necessary to establish all the circumstances to be proved, in order to prepare the consideration of the case in the main court session, which decides the main issue of the criminal case on the guilt or innocence of a person. A reasoned request from an investigator to extend the investigation period cannot be regarded as a decision that entails negative consequences.

According to Part 1 of Article 219 of the Criminal Procedure Code, the term of pre-trial investigation is calculated from the moment of entering information about a criminal offense in the Unified Register of pre-trial investigations until the day of applying to the court with an indictment, a request for the application of compulsory measures of a medical or educational nature, a request to release a person from criminal liability, or until the day of making a decision to close criminal proceedings (Code of Ukraine, 2012, № 4651-VI05).

According to Part 2 of Article 219 of the Criminal Procedure Code, the term of pre-trial investigation from the moment of entering information in the unified state register of legal entities until the day of notification of suspicion to a person is: 12 months – in proceedings for a minor crime; 18 months – in proceedings for a serious or particularly serious crime (Code of Ukraine, 2012, № 4651-VI05).

Article 12 of the Criminal Code of Ukraine provides for the classification of criminal offenses, dividing them into criminal misdemeanors and crimes. Part 2 of Article 12 of the Criminal Code of Ukraine defines that a criminal misdemeanor is an act (action or omission) provided for in the Criminal Code of Ukraine, for the commission of which the main penalty is provided in the form of a fine in the amount of no more than three thousand nontaxable minimum incomes of citizens or other punishment not related to imprisonment (Code of Ukraine, 2001, № 2341).

It should be noted that Article 219 of the Criminal Procedure Code does not contain any norms that would regulate the period of pre-trial investigation from the moment of entering information in the unified state register of legal entities until the day when a person is notified of suspicion of criminal misdemeanors. At the same time, there is no legislative consolidation of the obligation of an investigator, inquirer or prosecutor to close proceedings on a criminal misdemeanor in which no person has been informed of suspicion. Such a gap in the law creates the possibility of abuse of the procedural rights of an investigator, inquirer or prosecutor, and in practice leads to a violation of such general principles of criminal proceedings as the rule of law and equality before the law and the court.

2. Analysis of Judicial Practice of Ukraine in the Sphere of Application of Legislation on the Terms of Criminal Misdemeanors

Thus, in criminal case No. 137/374/21 on charges of PERSON_1 in committing a criminal misdemeanors under Part 4 of Article 358 of the Criminal Code of Ukraine (criminal misdemeanor), the defense lawyer of the accused sent a petition to the court to close the criminal proceedings motivated by the fact that the information was entered in the unified state register of legal entities on 01.10.2019, and a written notice of suspicion was served to PERSON_1 on 30.03.2021, that is, after the end of the pre-trial investigation period in this criminal proceeding, according to Part 1 of Article 284 of the Criminal Procedure Code of Ukraine, and therefore considers that there are grounds for closing criminal proceedings. The prosecutor asked to reject the request due to the fact that the criminal offense incriminated by PERSON_1 is a criminal misdemeanor. At the same time, the Criminal Procedure legislation does not set a time limit for conducting a pre-trial investigation of criminal misdemeanors before notifying a person of suspicion of committing a criminal offense (Vinicos srities Lityn rajono teismas, 2021).

In the reasoning part of the resolution under study, it is stated that according to Paragraph 1 of Part 2 of Article 219 of the Criminal Procedure Code of Ukraine (as amended on 25.09.2019, that is, as of 01.10.2019), the term of pre-trial investigation from the moment of entering information about a criminal offense in the Unified Register of pre-trial investigations until the day of notification of suspicion to a person is twelve months in criminal proceedings regarding a minor crime. But Part 1 of Article 12 of the Criminal Code of Ukraine (as amended on 25.09.2019, that is, as of 01.10.2019) provides that crimes are divided into crimes of minor gravity, medium gravity, serious and especially serious. After the entry into force (on 01.07.2020) of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses» dated 22.11.2018 No. 2617-VIII, the criminal offense under Part 4 of Article 358 of the Criminal Code of Ukraine was classified as a criminal misdemeanor. In turn, until 01.07.2020, the incriminated PERSON_1 criminal offense was classified under Part 1 of Article 358 of the Criminal Code of Ukraine, that is, as a crime of minor gravity. Paragraph 10 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine provides that criminal proceedings are closed if, after notifying a person of suspicion, the pre-trial investigation period defined in Article 219 of the Criminal Procedure Code has expired, except for the case of notifying a person of suspicion of committing a serious or particularly serious crime against the life and health of a person. Since in this case, after the person was notified of suspicion, the pre-trial investigation period expired, this period was not extended or stopped, and PERSON_1 was not suspected of committing a serious or particularly serious crime against the life and health of a person, criminal proceedings under Paragraph 10 of Part 1 of Article 284 of the Criminal Procedure Code were subject to closure. Article 5 of the code of Criminal Procedure of Ukraine defines the operation of the Criminal Procedure Law in time, in particular, it states that the procedural

action is carried out, and the procedural decision is made in accordance with the provisions of the code of criminal procedure in force at the time of the beginning of the execution of such an action or the adoption of such a decision. The court considers that after the expiration of the pre-trial investigation period, the prosecutor did not have the right to apply to the court with an indictment, since the criminal proceedings were subject to closure. The court emphasizes that the term of the pre-trial investigation is not a mere formality. The obligation of the prosecutor provided for by the procedural law to apply to the court with an indictment or close criminal proceedings as soon as possible, but not later than the procedural period determined by law after notifying a person of suspicion, is a guarantee of the fundamental right of a person to consider his case within a reasonable time, stipulated in Paragraph 1 of Article 6 of the convention, provided for in Article 7 and Part 1 of Article 21 of the Criminal Procedure Code (Vinicos srities Lityn rajono teismas, 2021).

It should be noted that if a public accusation, for any reason, is not possible to form an indictment and send the case to court, then the person cannot be in the state of a suspect indefinitely. This creates an opportunity for public accusations of abuse of the right. The law should clearly define the time period within which the prosecution is obliged to draw up an indictment and send the case to the court. Otherwise, the person must be released from suspicion. The procedural term of a pre-trial investigation is one of the most important manifestations of the rule of law, which requires proper legal certainty in such a particularly vulnerable status of a person as a suspect. The application of the consequences of missing the pre-trial investigation period provided for by law in practice should comply with the principle of the rule of law.

In the final part of the decision under study, the court granted the request of the defense lawyer on charges of PERSON_1 committing a criminal misdemeanor under Part 4 of Article 358 of the Criminal Code of Ukraine and closed the criminal proceedings on the basis of Paragraph 10 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine (Vinicos srities Lityn rajono teismas, 2021).

It should be noted that according to Part 2 of Article 298 of the Criminal Procedure Code, pre-trial investigation of criminal misdemeanors (inquiry) is carried out in accordance with the general rules of pre-trial investigation provided for in the Criminal Procedure Code of Ukraine. The second paragraph of Paragraph 10 of Part 1 of Article 284 of the code of Criminal Procedure provides not for the right, but for the obligation of the investigator, prosecutor and inquirer to close the proceedings if the period of pre-trial investigation defined in Article 219 of the code of Criminal Procedure has expired and no person has been notified of suspicion (Code of Ukraine, 2012 № 4651-VI05).

In accordance with these norms, it is necessary to pay attention to the indirect consolidation of the duty of an investigator, prosecutor or inquirer, when conducting a pre-trial investigation of criminal misdemeanors, to close criminal proceedings in accordance with the general rules of pre-trial investigation.

Analyzing the judicial practice on the application of the terms of pre-trial investigation of criminal misdemeanors, you should refer to the decision of the Kyiv Court of Appeal in case No. 11-SS/824/4598/2020 from 30.09.2020.

In this case, on appeal, the complaint of the victim PERSON_1 was considered against the decision of the investigating judge of the Shevchenko District Court of Kyiv dated August 18, 2020 to close the criminal proceedings under Part 1 of Article 125 of the Criminal Code of Ukraine (criminal misdemeanor), due to the expiration of the pre-trial investigation (Kijevo apeliacinis teismas, 2020).

Explaining the decision, the investigating judge pointed out that the investigator's decision was made in compliance with the requirements of Article 284 of the Criminal Procedure Code of Ukraine, since as of 11.04.2020 the terms of pre-trial investigation have expired, the criminal proceedings on this basis are closed correctly, and there are no grounds for satisfying the complaint and canceling the

investigator's decision. Given that the provisions of Paragraph 10 of Part 1 of Art. 284 of Criminal Procedure Code of Ukraine, which guided the investigator when making a decision to close criminal proceedings, are imperative, the investigating judge came to a reasonable conclusion that the cancellation of the decision to close criminal proceedings lies outside the limits of his powers defined by the Criminal Procedure Law. Thus, the requirements of the Criminal Procedure Law were not violated when making a procedural decision to close criminal proceedings by the investigator, and its conclusions correspond to the actual circumstances established during the pre-trial investigation and are properly motivated, as the investigating judge noted in his decision, with which the panel of judges agrees (Kijevio apeliacinis teismas, 2020).

In the final part of the decision under study, the court dismissed the appeal of the victim PERSON_1, and the decision of the investigating judge of the Shevchenko District Court of Kyiv dated August 18, 2020 was left unchanged (Kijevio apeliacinis teismas, 2020).

3. Proposals for Improving the Legislation of Ukraine Regarding the Terms of Pre-trial Investigation of Criminal Misdemeanors

Consequently, judicial practice confirms that criminal misdemeanors are equated with minor crimes in order to recognize the expiration of the 12-month period of pre-trial investigation and are the basis that establishes the obligation of an investigator, prosecutor or inquirer to close criminal proceedings.

Analysis of legislation and judicial practice makes it possible to conclude that the terms of pre-trial investigation of criminal misdemeanors provide for the same rules at the level of crimes, as well as the obligation of the prosecution to close criminal proceedings is fixed.

At the same time, the absence of a clearly defined period of pre-trial investigation of criminal misdemeanors in Part 2 of Article 219 of the Code of Criminal Procedure allows inquirers, investigators or prosecutors to not close such proceedings, which is a violation of the guaranteed fundamental right of a person to consider his case within a reasonable time stipulated in Paragraph 1 of Article 6 of the Convention and provided for in Articles 7 and Part 1 of Article 21 of the Code of Criminal Procedure.

Conclusions

In order to increase the effectiveness of the implementation of the right of a person to a fair and public hearing of his case within a reasonable time and eliminate existing violations of the rule of law, one of the most important manifestations of which is the procedural term of pre-trial investigation, as well as in order to strengthen its guarantee, it is necessary to amend the legislation and set out paragraph 2 of Article 29 of the code of Criminal Procedure of Ukraine in the following wording "the term of pre-trial investigation from the moment of entering information about a criminal offense in the Unified Register of pre-trial investigations until the day of notification of suspicion to a person is:

- 1) twelve months – in criminal proceedings concerning a criminal misdemeanor or a minor crime;
- 2) eighteen months – in criminal proceedings concerning a serious or particularly serious crime».

References

Legal acts

Konventsia pro zakhyst prav i osnovopolozhnykh svobod liudyny vid 04.11.1950 (Convention for the Protection of Human Rights and Fundamental Freedoms 04.11.1950) Official web portal of the Parliament of Ukraine [online]. Available at: http://zakon4.rada.gov.ua/laws/show/995_004/print1389988659002889 [in Ukrainian].

- Kryminalnyi kodeks Ukrainy vid 05.04.2001 № 2341(Criminal Code of Ukraine of April 5, 2001 № 2341) [online]. Available at: <http://zakon3.rada.gov.ua/laws>
- Criminal Procedure Code of Ukraine: Law of Ukraine of 13.04.2012 № 4651-VI05. (Criminal Procedure Code of Ukraine: Law of Ukraine of 13.04.2012 № 4651-VI05 [online]. Available at: <http://zakon3.rada.gov.ua/laws/show/4651-17/page18> [in Ukrainian].
- Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo sproshchennia dosudovoho rozsliduvannia okremykh katehorii kryminalnykh pravoporushen: Zakon Ukrainy vid 22.11.2018 № 2617- VIII (On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses: Law of Ukraine of November 22, 2018 № 2617-VIII) [online]. Available at: <http://zakon.rada.gov.ua/laws/show/2617-19> [in Ukrainian].

Special legal literature

- Alenin, Yu., Malakhova, O. (2018). Problemni pytannia prodovzhennia stroku dosudovoho rozsliduvannia slidchym suddeiu (Problematic issues of extension of the pre-trial investigation by the investigating judge). *Law of Ukraine*, 8, 60–71 [in Ukrainian].
- Kuchynska O. (2015). Rozumni stroky kryminalnoho provadzhennia (Reasonable terms of criminal proceedings). *Bulletin of criminal proceedings*, 2, 44–49 [online]. Available at: http://vkslaw.knu.ua/images/verstka/2_2015_Kuchynska.pdf [in Ukrainian].
- Yanovska, O.(2013) Instytut oskarzhennia na stadii dosudovoho rozsliduvannia (Institute of Appeals at the stage of pre-trial investigation). *Lawyer*, 1(148), 10–13 [online]. Available at: http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=adv_2013_1_3 [in Ukrainian].
- Yeni, O. (2016). Diialnist prokurora shchodo zabezpechennia rozumnykh stroktiv kryminalnoho provadzhennia (Activities of the prosecutor to ensure reasonable time for criminal proceedings). *Bulletin of the National Academy of the Prosecutor's Office of Ukraine*, 4, 85–90 [online]. Available at: [http://www.visnyknapu.gp.gov.ua/ua/arhiv-номерiv/2016/04/\[85-90/](http://www.visnyknapu.gp.gov.ua/ua/arhiv-номерiv/2016/04/[85-90/) [in Ukrainian].

Jurisprudence

- Ukhvala Kyivskoho apeliatsiinoho sudu u spravi № 11-ss/824/4598/2020 vid 30.09.2020 (Decision of the Kyiv Court of Appeal in the case № 11-ss / 824/4598/2020 of 30.09.2020) [online]. Available at: <http://verdictum.ligazakon.net/document/92214734> [in Ukrainian].
- Ukhvala Kyivskoho apeliatsiinoho sudu u spravi № 760/14576/21 vid 25.08.2021(Decision of the Kyiv Court of Appeal in case № 760/14576/21 of 25.08.2021) [online]. Available at: <http://verdictum.ligazakon.net/document/92214734> (дата звернення 20.11.2021) [in Ukrainian].
- Ukhvala Litynskoho raionnoho sudu Vinnytskoi oblasti smt. Lityn vid 30.06.2021 u spravi № 137/374/21 (Decision of the Lityn District Court of Vinnytsia Region Litin dated 30.06.2021 in the case № 137/374/21). [online]. Available at: <https://reyestr.court.gov.ua/Review/97962722> [in Ukrainian].

Terms of Pre-trial Investigation of Criminal Misdemeanors: Gaps in Legislation and Case Law

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S u m m a r y

It is proved that the absence in Part 2 of Article 219 of the Criminal Procedure Code of Ukraine clearly prescribed period of pre-trial investigation of criminal offenses allows investigators, investigators or prosecutors to not close such proceedings, which is a violation of paragraph 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 7, part 1 of Art. 21 of the Criminal Procedure Code of Ukraine guaranteeing the fundamental human right to have his case considered within a reasonable time.

It is proposed to increase the effectiveness of the right of a person to a fair and public hearing within a reasonable time and eliminate existing violations of the rule of law, one of the most important manifestations of which is the procedural period of pre-trial investigation. 2 Article 219 of the Code of Criminal Procedure of Ukraine in the following wording:

- 1) twelve months – in criminal proceedings for a criminal offense or a felony;
- 2) eighteen months – in criminal proceedings for a serious or particularly serious crime.

Ikiteisminio baudžiamojo proceso tyrimo nusižengimai: teisės aktų ir precedentinė teisė

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S a n t r a u k a

Įrodyta, kad tai, jog Ukrainos baudžiamojo proceso kodekso 219 straipsnio 2 dalyje nėra aiškiai nustatyto ikiteisminio nusikalstamų veikų tyrimo termino, leidžia tyrėjams ar prokurorams vilkinti tokius procesus ar netgi jų nebaigti, o tai – žmogaus teisių pažeidimas. Remiantis Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos 6 str. 1 d., 7 str., 21 str. 1 d. bei Ukrainos baudžiamojo proceso kodekso 21 straipsniu garantuojama pagrindinė žmogaus teisė – kad jo byla būtų išnagrinėta per protingą laiką.

Siekiant padidinti asmens teisės į teisingą ir viešą bylos išnagrinėjimą per protingą terminą veiksmingumą ir pašalinti esamus teisinės valstybės principus, kurių viena iš svarbiausių apraiškų yra ikiteisminio tyrimo procesinis laikotarpis, siūloma pakeisti Ukrainos baudžiamojo proceso kodekso 219 straipsnį tokia formuluote:

- 1) dvylika mėnesių – baudžiamajame procese dėl apysunkio nusikaltimo;
- 2) aštuoniolika mėnesių – baudžiamajame procese už sunkų ar ypač sunkų nusikaltimą.

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Gal pašalinti teisinės valstybės principų pažeidimus, neleisti principų pažeidimų?