

## ВІДКРИТТЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ І ПОЧАТОК РОЗСЛІДУВАННЯ ПЕРЕВИЩЕННЯ ВЛАДИ АБО СЛУЖБОВИХ ПОВНОВАЖЕНЬ СПІВРОБІТНИКАМИ ПРАВООХОРОННИХ ОРГАНІВ

**Анотація.** У статті розглянуто особливості відкриття кримінального провадження і початок досудового розслідування перевищення влади або службових повноважень співробітниками правоохоронних органів. Зазначено, що успішному вирішенню організаційно-тактичних завдань розслідування, оптимальному визначенню напрямів діяльності слідчого сприяє чітко побудована модель періодизації етапів досудового розслідування, на визначення якої впливають слідчі ситуації та відповідні процесуальні рішення, які приймають учасники кримінального провадження. Показана відмінність процедури відкриття кримінального провадження передбаченої чинним Кримінальним процесуальним кодексом України у порівнянні із КПК 1960 року. Доведена доцільність виокремлення відкриття кримінального провадження в окремий етап досудового розслідування. Запропоновані алгоритми дій слідчого на початку досудового розслідування зазначеної категорії кримінальних правопорушень залежно від вихідних ситуацій, що виникають.

**Ключові слова:** досудове розслідування, відкриття кримінального провадження, вихідні слідчі ситуації, алгоритми дій слідчого.

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## OPENING OF CRIMINAL PROCEEDINGS AND BEGINNING AN INVESTIGATION OF EXCESS OF POWER OR PERSONAL AUTHORITY BY LAW ENFORCEMENT OFFICERS

**Abstract.** The article deals with the features of the opening of criminal proceedings and the beginning of an investigation of excess of power or official authority by law enforcement officers. It is noted that a well-structured model of the periodization of pre-trial investigation stages, the determination of which is influenced by the investigation situations and the corresponding procedural decisions taken by the participants in the criminal proceedings, facilitates the successful solution of the organizational and tactical tasks of the investigation and the optimal determination of the directions of the investigator's activity. It is shown that the procedure for opening criminal proceedings provided for by the current Criminal Procedural Code of Ukraine is different from the CPC of 1960. The expediency of distinguishing the opening of criminal

*proceedings in a separate stage of pre-trial investigation has been proved. The algorithms of actions of the investigator at the beginning of pre-trial investigation of the specified category of criminal offenses are proposed depending on the starting situations that arise.*

**Key words:** pre-trial investigation, opening of criminal proceedings, beginning a pre-trial investigation, initial investigation situations, algorithms of investigator's actions.

## INTRODUCTION

Refusal of local legislators from pre-trial criminal proceedings as a whole and the stage of opening of criminal proceedings, particularly, made essential changed in organization of the beginning a pre-trial investigation of criminal offences. It goes about different understanding as compared with provisions of the CPC of 1960, reasons and grounds for opening of criminal proceedings (initiation of a criminal case), and, consequently, the necessity of carrying out inspections to detect essential elements of an offence (Art. 97 of the CPC of 1960), the possibility of appealing against opening of criminal proceedings and beginning of criminal prosecution of a specific person and other. It is noteworthy that certain scholars are very critical of abolishment of the practice of opening of criminal proceedings as a certain guarantee of justification of criminal prosecution. Thus, A. F. Volobuyev sees it as destruction of not theoretical structures alone, but also of a certain algorithm of actions of pre-trial investigation authorities and intelligence squads, which had been forming within many decades, and in which verification of statements of offense and notices was a certain “filter” for false and mistaken statements [1, p. 237].

New provisions in the Criminal Procedural Code of Ukraine of 2012 changed the procedure for arranging a pre-trial investigation [2; 3], including determination of the periodization of carrying out criminal proceedings.

The problem of optimization of pre-trial investigation has always been of interest for forensic scientists. Such distinguished scholars, both local and foreign, as V. P. Bakhin, R. S. Belkin, O. M. Vasilyev, A. F. Volobuyev, V. G. Goncharenko, V. A. Zhuravel, V. O. Konovalova, V. Ye. Kornoukhov, I. M. Luzgin, G. A. Matusovskiy, V. O. Obratsov, M. V. Saltevskiy, M. O. Selivanov, V. V. Tischenko, V. Yu. Shepitko, M. P. Yablokov and others dedicated their works to this problem. Since the Criminal Procedural Code of Ukraine of 2012 came into effect, the need in rethinking of separate provisions, changing the scientific paradigm in respect to determination of the periodization of pre-trial investigation arose. In forensic literature appeared works of V. D. Bernaz, V. V. Vapnarchuk, G. V. Moskalenko, I. I. Stativa, O. Yu. Tatarov, V. M. Shevchuk and many other scholars dedicated to resolving the problem of the periodization of pre-trial investigation stages, defining specific features of opening of criminal proceedings as compared with initiating a criminal case, which was envisaged by the CPC of 1960. Along with that, works of the above-mentioned and other scholars dealt with general issues of this complex problem only, not taking into account investigation of a specific category of criminal offences. That is why the

goal of this Article is to study specific features of opening of criminal proceedings and arranging the beginning a pre-trial investigation of excess of powers by officers of law-enforcement authorities.

## 1. MATERIALS AND METHODS

To achieve the above-mentioned goal of study, the author used a set of general scientific and special methods of scientific knowledge. So, the use of dialectical and historical methods of cognition allowed studying development and changes of the regulatory framework of carrying out pre-trial investigation in the domestic criminal procedure. The comparative method provided the possibility to study norms of the current Criminal Procedural Code of Ukraine and norms of the CPC of 1960, show their differences and specific aspects of application.

To make own conclusions, statistical method was applied, which helped to generalize criminal proceedings (cases) with investigation of excess of powers by officers of law-enforcement authorities and develop on this basis the author's classification of grounds for opening of criminal proceedings in respect to such category of criminal offences. The method of system analysis allowed spotting the initial stage among other stages of pre-trial investigation, defining its tasks and means of achieving them. The use of the formal logical method allowed developing the algorithms of investigator's actions depending on starting situations that arise.

Materials of this Article are component parts of a separate forensic methodology of investigation of excess of powers by officers of law-enforcement authorities and they can be used both for performing theoretical studies and practical activity of investigators, prosecutors related to investigation of this category of crimes.

## 2. RESULTS AND DISCUSSION

Current domestic criminal procedural laws include pre-trial investigation to a separate stage of criminal proceedings, within which separate stages can be distinguished, which reflect a certain landmark in the course of criminal proceedings, have their distinctive features and a circle of problems to resolve. In other words, a stage of investigation means such element of it, which represents the interconnected system of actions with common tasks, conditions of achieving them, and specific features of forensic techniques [4, p. 86].

At the time when the CPC of Ukraine 1960 was effective, forensic scientists advanced proposals as regards the periodization of investigation depending on making certain procedural decisions. Specifically, M. P. Yablokov suggested to differentiate the initial, the follow-up and final stages [5, p. 488], A. F. Volobuyev [6, p. 171–182] and G. Yu. Zhyrnyi [7, p. 165] suggest just two stages – the initial and the follow-up stage. To justify their position, the latter state that procedural actions related to completion of criminal proceedings not directed at investigation of crimes, gathering and verification of evidences.

Since the CPC of Ukraine of 2012 came into effect, discrimination of stages of pre-trial investigation became much more complicated, and suggestions as for their determination advanced in scientific sources are discussible. For instance, V. V. Vapnarchuk distinguishes three stages of pre-trial investigation. “The first stage, in his opinion, – is the stage of investigation carried out based on the fact of detecting an event with elements of a criminal offense in respect to an undefined circle of persons (when the person committed the crime is not identified yet (the suspect). The primary goal of this stage of pre-trial investigation is establishing the presence or absence of a criminal offense, identifying and exposure of the criminal. The second stage of pre-trial investigation takes place when, based on analysis (evaluation) if the aggregate of evidences gathered in the course of proceedings, in the investigator’s or the prosecutor’s opinion, the identified person involved into committing a criminal offense and he/she shall be brought to criminal responsibility. The goal of this stage if to notify about suspicion the person, who, in the opinion of subjects of the prosecution, is involved into committing a criminal offense, that means this stage, in essence, is congruent with the procedure of sending a written notice of suspicion. The third stage of pre-trial investigation refers to a certain person (the suspect). It starts after the respective person received a written notice of suspicion and ends with drawing up a bill of indictment and further submitting it to court”. [8, p. 344].

As it seems, the drawback of the suggested model of the periodization of stages of pre-trial investigation is non-envisaging the situation when criminal proceedings are opened on the grounds of arrest of the person involved into committing a criminal offense (Art. 207, 208 of the CPC of Ukraine).

A more complex periodization of stages of pre-trial investigation taking into account specific features of making certain procedural decisions was suggested by V. M. Shevchuk. He distinguishes two models of periodization named conventionally as differentiated model and synthesizing one. The first one includes the initial and the follow-up stages of investigation in their traditional understanding, i.e. the initial stage starts from the moment of entering a statement or notice of a criminal offense into the Unified register of pre-trial investigations (Art. 214 of the CPC of Ukraine) and ends with sending a notice of suspicion (Art. 276 of the CPC of Ukraine). The primary goal of this stage is finding good evidences to notify the person about suspicion in committing a crime. Tactical operations shall be directed at achieving this goal. The follow-up stage in the contemplated model of periodization starts with dispatching the suspected person a written notice of suspicion (Art. 278 of the CPC of Ukraine) and lasts until pre-trial investigation is completed and the prosecutor entered the required data into the Unified register of pre-trial investigations. This stage in its essence is the final one aimed at formation of the adequate evidential basis proving the prosecutor with the grounds for performing one of the following actions as soon as possible after delivering a notice of suspicion to the respective person: 1) close criminal proceedings; 2) submit a motion on releasing a person from

criminal responsibility to court; 3) submit to court a bill of indictment, motion on applying enforcement measures of medical or educational nature (Art. 283 of the CPC of Ukraine). Formation of the adequate evidential basis implies the need of resolving various tasks of investigation, including tactical ones, which can be resolved by means of the respective tactical operations.

In the opinion of V. M. Shevchuk, there can be another model of the periodization of stages of investigation, which can be conventionally called as synthesizing model. In this model the two above-mentioned separate stages are combined into one as criminal proceedings start with notifying the respective person of suspicion in case if his/her arrest at the place of committing a criminal offense or immediately after committing it, or when applying one of preventive measures envisaged by law (Art. 276 of the CPC of Ukraine), and they end with completion of pre-trial investigation and entering the required data into the Unified Register of pre-trial investigations by the prosecutor. Such synthesizing, integrative stage combines the totality of problems that shall be resolved at the time of pre-trial investigation, as well as recommendations regarding optimal methods and means of resolving them [9, p. 252, 253].

In her turn, G. V. Moskalenko connects the periodicity of investigation and defining the limits of its respective stages not with making various procedural decisions, but with the investigator's situation, nature of problems and actual possibility of finding and recording evidences. Taking into account the said above, she distinguishes such stages and sub-stages of crime investigation: the initial and the follow-up stage, and the latter as the more complicated and longer lasting one she divides into three sub-stages: the sub-stage of analytical work of the investigator, the working and the final one [10, p. 8–15].

As regards suggestions of G. V. Moskalenko, one should agree with critical comments of V. A. Zhuravel that they are discussible and do not resolve fully the problem of the periodization of pre-trial investigation. Particularly, refusal from considering certain procedural decisions for discrimination of periods of investigation is objected, for instance, such as notices of suspicion, suspension or renewal of proceedings, applying a measure of restraint and other. These procedural decisions are fundamental and have impact on the course of criminal proceedings, the procedure of gathering evidences. Dividing the process of investigation to sub-stages also looks quite artificial. Particularly, analytical work of the investigator takes place at each stage of investigation, that is why limiting it to one single sub-stage is illogic [11, p. 140].

It is worth mentioning that there are opposite opinions as regards defining the opening of criminal proceedings as a separate stage of pre-trial investigation in the specialized literature. For instance, V. V. Vapnarchuk states that “activity related to the beginning of pre-trial investigation (acceptance and registration of information on criminal offenses) considering a short period envisaged by law for it and a small scope of actions to be performed is not sufficient to distinguish it as a separate stage of the course of criminal proceedings. Besides, this stage does not end with making

final procedural decision in terms of Part 3 Art. 110 of the CPC (entering or not entering data to the URPTI is not recorded in the ordinance of the investigator or prosecutor)” [8, p. 334]. Then the author makes quite a controversial conclusion, from which it is hard to understand the final position of the author as regards the contemplated issue. “Hence, – summarizes V. V. Vapnarchuk – activity related to the beginning of pre-trial investigation, in our opinion, is not the *stage* (italics supplied by us – *S. M.*) of criminal proceedings. However, it meets criteria of separate proceedings as it represents the system procedural actions within the limits of the criminal procedural form of pre-trial investigation, which precondition arising a certain cluster of procedural relationships and aimed at fulfilling a common task, so, understanding and studying this activity as separate proceedings is completely justifiable” [8, p. 334, 335]. As seems, the above-mentioned scholar brings forward unobjectionable arguments in favour of the opening of criminal proceedings being a separate stage of pre-trial investigation.

Thus, the opening of criminal proceedings shall be deemed as a separate stage of pre-trial investigation, which shall also be seen as a separate element of the structure if specific forensic methodology. The above-mentioned is conditioned by specific features of procedural actions, which pre-trial investigation starts from, a circle of subjects taking part in performing such actions (the investigator, prosecutor, claimant and other), the nature of top-priority tasks to be resolved, the need to define strategic lines of the investigator’s activity.

Pre-trial investigation of excess of powers by officers of law-enforcement authorities starts from the moment of entering respective data to the Unified Register of pre-trial investigations (URPTI) [12; 13; 14; 15]. As V. D. Bernaz and N. V. Neledva state, “decision on the beginning of pre-trial investigation is actually equal to entering into the register respective data that may testify of committing a criminal offense” [16, p. 63]. Sources for such data are as follows:

- statements of the persons, who suffered from unlawful actions of officers of law-enforcement authorities (the injured) (this source takes 89.43% of the total number of generalized criminal proceedings (cases);
- statements of offense (notices) of claimants (Art. 60 of the CPC of Ukraine), i.e. the informed persons (relatives, acquaintances, colleagues of the injured, paramedics or medical workers of emergency rooms of hospitals, common citizens, who became witnesses of unlawful actions of officers of law-enforcement authorities) (2.57%);
- notices (reports, protocols) of officials, who arrested the subject / the suspect (Art. 208 of the CPC of Ukraine) (0.58%);
- information on the fact of excess of powers by officers of law-enforcement authorities made public in mass media or documentaries, video records or the Internet (1.14%);

- reports of prosecutors occupied with procedural management of the investigation (0.86%);
- reports of officers of the National Security Department of the National Police of Ukraine regarding revealing facts of unlawful actions of officers of law-enforcement authorities (4.00%);
- reports of investigators on detecting signs of excess of powers by officers of law-enforcement authorities in the course of carrying out another pre-trial investigation, i.e. prejudicial evidences (1.43%).

From the said above it follows that the most wide-spread sources of data becoming the basis for the opening of criminal proceedings are statements of offense from the persons who suffered directly from unlawful actions of officers of law-enforcement authorities (the injured). These statements of offense (notices) can be submitted both in oral form with drawing up a protocol with notifying the person about criminal responsibility entailing providing untruthful information against signature, and in written form (by post, or submitted personally by an individual to the respective authority / institution). Should the fact of excess of powers of officers of law-enforcement authorities be established in the course of investigation of another crime or performing respective operational procedures, the report shall be drawn up containing information representing the essence of data entered into URPTI. This report shall be forwarded to the head of the pre-trial investigation authority, who shall determine the preliminary legal assessment and commission the investigator with carrying out pre-trial investigation. The investigator, in his turn, shall forthwith notify the prosecutor in written form about the beginning of pre-trial investigation, the grounds for the beginning of pre-trial investigation and other information (Part 6 Art. 214 of the CPC of Ukraine).

To confirm the trustworthiness of information set forth in statements of offense (notices) of individuals, chief managers of mass media or reports of the respective officials, it can be accompanied with certain attachments as confirmation of the fact or circumstances testifying the fact of excess of powers by officers of law-enforcement authorities. Particularly, such attachments can be certificates issued by medical institutions certifying hospitalization of the injured, video records from outdoor surveillance cameras and other. Reports of officers of criminal intelligence units can be accompanied by data received in the course of performing intelligence operations [17, p. 43–51].

It is noteworthy that a certain specific feature of obtaining information (statements of offense, notices) about the facts of excess of powers by officers of law-enforcement authorities is anonymity of such information, for example, when transmitting oral information by phone and in written notices people often don't state their true names, or state fictitious data as they are worried about their life/safety. And these fears are justified as claimants understand whom they are going to deal with, they are aware

of “cover-up” among officers of law-enforcement authorities. That is why we find it expedient in case of receiving anonymous statement or notice of a criminal offense by internal affairs bodies and subdivisions, the prosecutor, the judge, to register them in compliance with Cl. 13 Section III of the Guidelines on single record procedure (SR). If an anonymous statement (notice) of offense contains information about a socially dangerous act, then such statement (notice) of offense shall be registered only with document support subdivisions and, upon resolution of the head of a police body or the person acting as such head, shall be submitted to structural subdivisions for use for detection of crime, particularly through verification by intelligence means. And only after such verification is completed, and if elements of a criminal offense are confirmed and officers of the criminal intelligence unit sent a respective report to the investigator/prosecutor, its results can serve as the grounds for entering the received information into URPTI as if such elements of a criminal offense were discovered by the investigator / prosecutor himself.

## CONCLUSIONS

In summary, a well-structured model of the periodization of pre-trial investigation stages is the guarantee of successful resolving organizational and tactical problems of the investigation, as well as optimal determination of lines of the investigator’s activity, as each stage of the investigation, each phase of criminal proceedings has tasks and ways/means of resolving them of its own.

Taking into account the said above, we believe it possible to affirm that determination of the periodization of investigation of criminal offences is influenced by the investigation situations and the corresponding procedural decisions taken by the participants in the criminal proceedings. This means that when defining stages of investigation it is necessary to take into account these two factors. Therefore, among stages of pre-trial investigation of excess of powers by officers of law-enforcement authorities we distinguish the following ones: 1) the opening of criminal proceedings; 2) the beginning of criminal proceedings (the initial stage); 3) continuation of criminal proceedings (the follow-up stage); 4) completion of criminal proceedings (the final stage). With that, depending on whether the suspect is arrested or not, the top-priority tasks of the initial stage of investigation change to some extent, and consequently the means of resolving them change, too. So, in case of arresting the suspect and notifying him/her of suspicion within twenty four hours from the moment of arrest, the primary task of the investigator/ prosecutor is to prove involvement of this person into committing a criminal offense and confirm justification of notifying of suspicion. And if the person is not arrested, then the prosecution efforts shall be focused on gathering evidences for delivering a notice of suspicion. After making this procedural decision and resolving primary tasks, the following stage of investigation begins related to gathering the required evidences of committing a crime by the respective person and completion of pre-trial investigation.

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