PUBLIC PROSECUTOR

Directs?

Coordinates?

Supervises?

Investigates

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2016—2017

STUDY REPORT

THE ROLE OF THE PUBLIC PROSECUTOR AT THE PRE-TRIAL STAGE OF CRIMINAL PROCEEDINGS

The following institutions contributed to the study conduct:
Prosecutor General's Office
Coordination Centre for Legal Aid Provision

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CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

CoE	Council of Europe
CPC	Criminal Procedure Code
ECtHR	European Court of Human Rights
FSLA	Free Secondary Legal Aid
HSCU	High Specialized Court of Ukraine for civil and criminal cases
PACE	Parliamentary Assembly of the Council of Europe
PGO	Prosecutor General's Office
QDC	Qualifications and Disciplinary Commission of Public Prosecutors
UN	United Nations
URPI	Unified Register of Pre-trial Investigations

ACRONYMS IN QUOTATIONS

Lawyer	a lawyer who took part in a focus group with lawyers
Prosecutor	a prosecutor who took part in a focus group with prosecutors-procedural supervisors
Investigator	an investigator who took part in a focus group with investigators
Investigating judge	an investigating judge who took part in a focus group with investigating judges

Summary

KEY FINDINGS AND RECOMMENDATIONS

The study titled "The role of the public prosecutor at the pre-trial stage of criminal proceedings" took place during 2016-2017.

The study was conducted by an initiative research team of the Human Rights and Justice Program Initiative of the International Renaissance Foundation with the support of the Prosecutor General's Office and the Coordination Centre for Legal Aid Provision.

The initial study design was developed by the Open Society Justice Initiative and adapted by the research team. The methodology was developed by the research team.

The key aim of the study was to conduct comprehensive evaluation of procedural guidance in pre-trial investigation as one of the core functions of public prosecutor's office. The study included analysis of different aspects of the work of prosecutors – procedural supervisors and the factors that affect their decisions and actions during pre-trial investigation, as well as its individual stages.

The study focused on:

- the function of procedural guidance and its relation to other functions of the prosecutor's office,
- the role of the public prosecutor at the stages of apprehension of a suspect, notification of suspicion, selection of measures of restraint and measures to ensure criminal proceedings,
- activities of the public prosecutor at the stage of evidence collection and finalization of pre-trial investigation,
- the role of the public prosecutor in ensuring rights and freedoms of a suspect.

The study was comprised of two key stages:

a) desk research and

b) field research.

Desk research was conducted with the purpose of analyzing domestic legislation on the exercise of procedural guidance by prosecutors at the pre-trial stage of criminal proceedings, as well as relevant international standards.

Field research was dedicated to collecting empirical data from different sources. Empirical data was directly collected in 6 regions of Ukraine:

Dnipropetrovsk, Lviv, Sumy, Kherson, Khmelnytsky, and city of Kyiv.

These observations took place in local (departments and directorates) bodies of internal affairs.

The following qualitative and quantitative data collection methods were used in the field research:

- Interviews
- Focus groups
- Content analysis
- Analysis of statistical data
- Questionnaires

The field study included 3 *interviews* and 7 *focus groups with different actors in the criminal justice system*:

- 2 interviews with the head of a structural unit of the Prosecutor General's Office and his deputy (the unit conducts procedural guidance in criminal cases),
- 1 interview with the deputy head of the regional prosecutor's office,
- 3 focus groups with prosecutors – procedural supervisors,
- 2 focus groups with lawyers,
- 1 focus group with investigating judges,
- 1 focus group with the heads of investigation units of district departments of the National Police.

Field researchers conducted *content analysis* of the following data:

- 629 cases of regional free secondary legal aid centers (apprehension reports, notices of suspicion, motions for measures of restraint and measures to ensure criminal proceedings, and relevant rulings by investigating judges),
- 306 proceedings of investigating judges and 296 completed criminal proceedings in local courts,
- 310 supervisory proceedings of prosecutors conducting procedural guidance during pre-trial stage of criminal proceedings.

STUDY REPORT
The role of the public prosecutor at the pre-trial stage of criminal proceedings

comprehensive evaluation of procedural guidance in pre-trial investigation

- the function of procedural guidance and its relation to other functions of the prosecutor's office
- the role of the public prosecutor at the stages of apprehension of a suspect, notification of suspicion, selection of measures of restraint and measures to ensure criminal proceedings
- activities of the public prosecutor at the stage of evidence collection and finalization of pre-trial investigation
- the role of the public prosecutor in ensuring rights and freedoms of a suspect

key stages

desk research

- analysis of the national legislation
- analysis of international standards

field research

interviews	2 with the head of a structural unit of the Prosecutor General's Office and his deputy 1 with the deputy head of the regional prosecutor's office
focus groups	3 with prosecutors – procedural supervisors 2 with lawyers 1 with investigating judges 1 with the heads of investigation units of district departments of the National Police
content analysis	629 cases of regional FSLA centers 306 proceedings of investigating judges 296 completed criminal proceedings in local courts 310 supervisory proceedings of prosecutors conducting procedural guidance
analyzed statistical data	Official statistics of the PGO 2013—2016
questionnaire filled	503 prosecutors – procedural supervisors of the local and regional prosecutor's offices

During the field research stage, researchers analyzed *statistical data* from the official statistics of the Prosecutor General's Office for the period that the new Criminal Procedure Code has been in effect (2013 – 2016)[1].

To ensure maximum understanding of the view of procedural supervisors, in addition to three focus groups, the study include *a questionnaire filled out by* 503 prosecutors of the local and regional prosecutor's offices that exercise procedural guidance in criminal proceedings.

Key findings of the study:

Analysis of the organizational structure and functions of the prosecutor's offices in Ukraine

1. There is an artificial distribution of the procedural guidance function within the Prosecutor General's Office between different deputies of the Prosecutor General. It results in disruption of internal management processes and, in some cases, ineffective cooperation between different structural units, as well as excessive bureaucracy related to reaching agreement on procedural decisions.

2. The bulk of the workload of prosecutors at the units of supervision in criminal proceedings within the PGO and regional prosecutor's offices is the so-called 'area-based control' over the prosecutors at lower levels. Often, it constitutes interference with the work of procedural supervisors in specific proceedings, which is in direct violation of the current criminal procedure law.

3. The prosecutor's offices lack a well-reasoned approach to determining the number of prosecutors at each level (local and regional) or ensuring balance in distribution of the workload between them. Moreover, there is no unified set of criteria for the workload of an individual prosecutor conducting procedural guidance.

4. The study demonstrated development of differing local approaches to the exercise of procedural guidance.

5. The existing system of statistics and analysis of prosecutor's office performance in criminal proceedings is based on "manual" shaping of the data and mechanical compilation. The data is incomplete and fragmented, and electronic reporting tools are rarely used.

1 Analysis of statistics included information for the year 2013. However, we should take into account the emergence of the temporarily occupied territories and the annexed territory in 2014 when comparing any nationwide data.

Procedural guidance in the public prosecution system

1. In practice, there are different views among prosecutors concerning the function of procedural guidance, its meaning and forms. In the legislation, the term 'procedural guidance' is used in different contexts, which does not support a unified understanding of the meaning and role of this function of the prosecutor's offices.

2. According to the Constitution of Ukraine, organization of pre-trial investigation is one of the functions of the public prosecutor's office whereas the Criminal Procedure Code assigns the role to the head of a pre-trial investigation agency. As a result, in practice, functions of these two positions have significant overlap, which prevents effective cooperation between these institutions. On the local level, cooperation between the investigation agency and prosecutor's office is often based on personal contacts of their heads, accompanied by 'informal' agreement process for joint activities and decision.

3. Despite rather clear legislative safeguards for the procedural supervisors' independence, in practice, they are fully dependent on their immediate superiors and the prosecutors of higher-level prosecutor's offices exercising 'area-based control'. The scope of possible interference with the procedural activities of the prosecutor is quite broad – from access to the materials of criminal proceedings through the Unified register of pre-trial investigations to reduction of bonuses and transfer of the case to another prosecutor only based on reporting at various operational meetings attended by the management.

4. Disqualification for bonuses (cancellation) is widespread at all levels of public prosecutor's offices. According to prosecutors, since the bonus constitutes a significant part of the prosecutor's salary, disqualification is an effective tool for putting pressure on prosecutors by their superiors to convince them to make a certain decision. Failure to observe provisions of article 81 of the Law of Ukraine "On the Public Prosecutor's Office", which defines the components of the public prosecutor's salary, including the official wages.

5. The principle of unchangeability of a prosecutor is not always observed in practice. There are widespread instances when prosecutors are replaced at different stages of pre-trial investigation. In practice, groups of prosecutors are not an exceptional instrument; they are created almost in every case. As a rule, only the senior prosecutor in charge of the group is familiar with case files while the rest of prosecutors are engaged mostly on ad hoc basis.

6. The existing practice of negative consequences for public prosecutors for acquittals and other lawful actions alleviating the situation for the suspect (release without a notice of suspicion, initiating a less severe restraint measure) is one of the reasons behind violations of the principles of objectivity and impartiality in criminal proceedings and de facto denials to collect exculpatory evidence.

Exercise of procedural guidance at different stages of pre-trial investigation

The role of a prosecutor at the stage of apprehension and notification of suspicion

1. Practice continues to show that despite the new CPC that clearly defines the term "actual apprehension", there is a difference between actual and procedural apprehension. Similar to the old CPC, all time periods start from the point when the apprehension report is drawn up.

2. There is no unified procedure for informing a public prosecutor about apprehension of a person and appointing a procedural supervisor in criminal proceedings. Prosecutors learn about this from different sources either by looking at the Unified register of pre-trial investigation, receiving a notice from the investigator or the head of the prosecutor's office, or even by receiving a copy of the order.

3. Practice shows that there are informal agreements on apprehension of a suspect with the prosecutor and, often, with the investigating judge concerning the possibility of imposing a custodial measure of restraint. In the absence of prosecutor's approval, the apprehension report is not drawn up and the time of actual apprehension is not recorded.

4. In most cases, investigators prepare the notice of suspicion. In many instances, the prosecutor is absent when the notice of suspicion is served. In practice, key parties to the process lack understanding of the nature of notice of suspicion whereby the latter becomes analogous to the indictment. As a result, law enforcement officials often omit registration of apprehension to avoid the 24-hour time limit for the notice of suspicion; the notice of suspicion is prepared at the end of pre-trial investigation. In part, this practice is caused by a similar understanding of the notice of suspicion by individual judges who return indictments to the prosecutors because the text thereof does not match the notice of suspicion.

5. In many cases, the procedure for approving the notice of suspicion is a complicated bureaucratic process requiring significant time resources from investigators and prosecutors. Practice shows that prosecutors approve the notice of suspicion only upon approval from the head of the prosecutor's office.

6. There are significant issues in cooperation between investigators and procedural supervisors in different regions. These issues are related to the following: there is a lack of understanding of their role in pre-trial investigation; there are no effective ways to influence the investigator who fails to follow the prosecutor's instructions; the work of investigators and field officers is not geared towards result in the form of a court

decision; and prosecutors and heads of the investigation units compete in assigning workload for the investigator (overlap of their duties). Effectiveness of cooperation between investigators and procedural supervisors often depends on personal contacts between the heads of these institutions.

The role of the prosecutor in collection of evidence

1. Prosecutors have different understanding of their role and level of engagement in the evidence collection process. The prosecutor's role in collection of evidence varies significantly in different criminal proceedings. It is in part due to the lack of minimum requirements (standards) on the public prosecutor's work in criminal proceedings that would establish specific criteria for engagement in collection of evidence.

2. The number of plea agreements has been decreasing steadily in 2013-2016. Instead, there is a growing practice of fast track court proceedings under article 349(3) of the CPC of Ukraine. Unlike cases resolved through plea agreements, most of fast track proceedings take place in the absence of a lawyer.

3. Official statistics includes data on written instructions, which are considered one of the main effectiveness criteria for the prosecutor's performance in criminal proceedings. At the same time, prosecutors see written instructions as a purely formal tool that does not contribute to the effectiveness of investigation.

The prosecutor's role in application of measures to ensure criminal proceedings

1. The prosecutor as a special subject initiating/approving the motions for application of measures to ensure criminal proceedings and conducting procedural guidance in their application does not always comply with the CPC requirements, such as submitting proof of circumstances to the investigating judge or court, as well as the general rules on the use of measures to ensure criminal proceedings (concerning the need to justify application of these measures).

2. Practice reveals that prosecutors not only almost never prepare motions for application of measures to ensure criminal proceedings, but also fail to carefully review the motions prepared by investigators

3. The passive, sometime purely formal position (participation) of the prosecutor during consideration of motions for application of measures to ensure criminal proceedings in court is often reduced to reciting the CPC in criminal proceedings. In addition, some prosecutors even think that investigator's presence is sufficient to support a motion for measures to ensure criminal proceedings in court.

4. There is a widespread practice of considering motion to ensure criminal proceedings in court in the absence of the defense party and the person concerned. Moreover, according to individual prosecutors, the prosecutor does not have to be present, and the presence of investigator is sufficient.

The prosecutor's role in the assignment/extension/ termination of the measures of restraint

1. As practice shows, investigators and prosecutors often initiate measures of restraint without relevant grounds, i.e. a reasonable suspicion of the person having committed a criminal offence, as well as the existence of risks prescribed by the CPC. Motions are prepared according to the same template with slight changes concerning personal data of the individual concerned. There is a widespread practice when investigators and prosecutors fail to prove that there are sufficient grounds to conclude that at least one of the risks under article 177 of the CPC exists. When preparing the motion, investigators and prosecutors often simply copy the list of possible risks from the Criminal Procedure Code.

2. In many cases, investigators and prosecutors submit motions to enforce measures of restraint in the absence of necessary attached documents used to substantiate the facts and circumstances in the motion, as well as fail to provide a copy of materials in substantiation of the necessity to enforce the measure of restraint on the suspect/accused no later than three hours before the consideration of the motion begins.

3. Cases when investigators support the motion during court proceedings without relevant procedural status are widespread; the prosecutor's participation is purely formal and limited to "I support".

The prosecutor's role at the stage of completion of investigation in criminal proceedings

1. The study revealed a widespread practice of artificial adjustment of statistical indicators related to closing criminal proceedings used by the prosecution authorities on different levels. As a rule, these adjustments take place during reporting periods (quarterly, semi-annually, at the end of the year).

2. The available official statistics does not reflect the number of proceedings recorded during the reporting year; instead, it shows the number of "registered criminal offences', excluding proceedings closed under paragraphs 1, 2, 4, and 6 of article 284(1) of the CPC of Ukraine.

3. In most cases, the investigator prepares the indictment and tries to use as much of the notice of suspicion as possible. There are individual cases when the prosecutor prepares an indictment.

4. There are varying approaches to sending the indictment and the register of pre-trial investigation materials. In some instances, prosecutors continue to send virtually all available materials of pre-trial investigation, which used to be the practice under the 1960 CPC.

The prosecutor's role in ensuring the rights and freedoms of a suspect

1. The study showed that prosecutors do not fully understand their role in ensuring the rights and freedoms of a suspect.

2. The majority of respondents in this study consider that there are almost no violations of human rights during pre-trial investigations. In addition, procedural supervisors think that in most cases, suspects complain that their rights are violated to avoid responsibility for the offence. Every fourth respondent considers that it is possible to disregard certain violations of the suspect's rights if it helps obtain evidence of his involvement in the offence.

3. Human rights violations often constitute criminal acts. Therefore, they should be investigated in the same way as other categories of crimes except for certain specific aspects. Unfortunately, there is virtually no practice among prosecutors on recording information about violations of suspect's rights into the Unified register of pre-trial investigators with the purpose of conducting investigation.

4. There is a widespread practice among investigators and prosecutors to delay notifying the actual suspect of suspicion in cases when the person has not been arrested officially. As a result, there is full pre-trial investigation concerning the actual suspect without recognizing the suspect's status, which prevents the person from exercising his/her right to defense from prosecution, as well as all relevant rights.

5. Due to potential negative consequences following acquittals or any other action mitigating the situation of a person, public prosecutors avoid collecting exculpatory evidence and can "turn a blind eye" to certain human rights violations if they resulted in collecting valuable evidence for the prosecution.

KEY RECOMMENDATIONS OF THE STUDY

1 On the nature of the role of procedural guidance

1. To exclude the elements of supervision inconsistent with procedural guidance through legislative amendments and leave procedural guidance as a single function of the prosecutor's office during pre-trial stage of criminal proceedings.

2. To separate the functions of the head of pre-trial investigation agency and procedural supervisor concerning organization of pre-trial investigation by distinguishing organizational and procedural functions and assigning organizational functions to the head of pre-trial investigation agency.

3. To develop algorithms of possible action for prosecutors to ensure effective procedural guidance at different stages of proceedings.

4. To develop indicators of effectiveness of prosecutor's exercise of procedural guidance and introduce a system of regular evaluation.

5. To develop a quality management system for prosecutor's performance based on minimum requirements for exercise of procedural guidance, regular internal peer review by most experienced colleagues, needs assessment concerning training and professional development of prosecutors – procedural supervisors, as well as regular training activities.

2 On the structure of the prosecution system and effective exercise of procedural guidance

1. To harmonize the structure and key functions of the prosecutor's offices ensuring consistency of the exercise of each function, in particular, by eliminating overlaps of functions and tasks between structural units.

2. To eliminate the function of area-based control performed by high-level prosecutor's offices and redistribute human and financial resources to support local prosecutor's offices.

3. To develop reasonable criteria for determining workload for prosecutors – procedural supervisors and the optimal number of procedural supervisors for different levels of prosecution authorities.

4. Taking into account the international practice of using dossiers of public prosecutors, to analyze the feasibility of using the outdated instrument of supervisory proceedings. To consider the possibility of integrating the dossier into the electronic criminal case system in the future.

5. To ensure proper compliance with the provisions of article 81 of the Law of Ukraine "On Public Prosecutor's Office" on the structure of prosecutor's salary by decreasing the proportion of bonuses in the overall structure of remuneration for prosecutors and increasing the share of required payments.

6. To take action to ensure proper procedural independence of prosecutors including, in particular:

- To discontinue the practice of reporting on the progress of investigation at operational or other meetings;
- To ban heads of prosecutor's offices from giving written and verbal instructions on the investigation process;
- To discontinue the practice of 'informal punishment' of prosecutors for taking lawful action that mitigates the situation of the suspect or apprehended/accused individual;
- To ban approvals for procedural documents from the superiors.

7. To review relevant internal regulations on the exercise of procedural guidance and restrict the regulatory powers to the matters of organizing the work of prosecutor's offices and managing, without interference with procedural activities of prosecutors.

3 On substantive and high-quality performance of a procedural supervisor

1. The following aspects should be given due consideration during development of training programs for prosecutors – procedural supervisors:

- procedural supervisors exercising control over the time and date of actual;
- means to identify illegal pressure on an individual, the use torture or other ill-treatment;
- the role and meaning of notice of suspicion in criminal proceedings;
- constructive and effective communication between the investigator and public prosecutor's office, forms of cooperation and joint action relevant to procedural guidance;
- the need to enter all information about crime into the Unified registry of pre-trial investigation, in particular those concerning gross violations of human rights.

2. For the High Specialized Court of Ukraine, to produce a review of jurisprudence on analysis and assessment of the reasonability of the term for serving the notice of suspicion during evaluation of evidence in consideration of the case on merits.

3. To amend the list of gross human rights violations (part 2 of article 87 of the CPC) by adding, "deliberate postponement of the time for serving the notice of suspicion".

4. To transfer the function of challenging reasonability of the length of pre-trial investigation from prosecutors to investigating judges; to establish a procedure for determining just satisfaction in monetary form should the investigating judge find violation of reasonable terms.

5. In the CPC, to provide for mandatory participation of a defense counsel; the use of 'fast-track procedure' for evaluation of evidence as described in article 349(3) of the CPC.

Foreword

Substantial reform of the criminal procedure legislation in Ukraine that took place 5 years ago has put the issue of institutional capacity to implement new functions by the criminal justice system actors on the current agenda. There has been a significant increase in the role of the court at the pre-trial stage (judicial control over observance of human rights) and the role of prosecutor's office with their new extended function of procedural guidance.

While the powers of prosecutor's office in other areas of competence have narrowed over the recent years, the role of public prosecutor as a procedural supervisor has grown notably. Public prosecutors in the capacity of procedural supervisors were supposed to become central figures in the framework of cooperation with pre-trial investigation agencies (primarily investigation units of the National Police) and the courts concerning effective investigation and observance of procedural norms. This role requires adequate professional training, procedural independence, effective cooperation with the investigation authorities and the court.

Authors of the Criminal Procedure Code have studied international experience closely. Authors of this study have put a great deal of effort to understand the 5-year long experience of exercising procedural guidance by the prosecutor's offices. Has the necessary institutional transformation taken place following the change in procedural legislation? How do other parties to the process view the new role of the public prosecutor? Is it possible to assess the impact of the new procedural role of the public prosecutor? What are the challenges in achieving proper exercise of procedural guidance and how can they be overcome?

I am confident that answers to the questions put forward by the authors of this study will be of significant help to all who are intending, planning or already implementing reform of the public prosecution service. It is important that balance of ad hoc interests or purely subjective assessments do not become the basis and justification of reform efforts. Instead, reform should become a practice of consistent evidence-based decisions.

Roman Romanov
Human Rights and Justice Program Initiative Director
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Study methodology

Study aims and objectives, how it was organized and conducted, data sources, research methods, sample size etc.

The key *aim of the study* was to conduct comprehensive evaluation of procedural guidance in pre-trial investigation as one of the core functions of public prosecutor's office. The study included analysis of different aspects of the work of prosecutors – procedural supervisors and the factors that affect their decisions and actions during pre-trial investigation, as well as its individual stages.

The study focused on:

- the function of procedural guidance and its relation to other functions of the prosecutor's office;
- the role of the public prosecutor at the stages of apprehension of a suspect, notification of suspicion, selection of measures of restraint and measures to ensure criminal proceedings;
- activities of the public prosecutor at the stage of evidence collection and finalization of pre-trial investigation;
- the role of the public prosecutor in ensuring rights and freedoms of a suspect.

The study was comprised of two key stages:

a) desk research and

b) field research.

Desk research

Desk research was conducted with the purpose of analyzing domestic legislation on the exercise of procedural guidance by prosecutors at the pre-trial stage of criminal proceedings, as well as relevant international standards

Moreover, the desk research included analysis of the general structure and functions of the prosecutor's office, appointment and dismissal of prosecutors, specifics of disciplinary liability of public prosecutors, statistical records etc.

Findings of the desk research provided researchers with insights on legislative regulation of the work of public prosecutors as procedural supervisors at different stages of pre-trial investigation and allowed to prepare for the field stage with the aim of evaluating the exercise of their functions by prosecutors.

Field research

Field research was dedicated to collecting empirical data from different sources.

Empirical data was directly collected in 6 regions of Ukraine (Dnipropetrovsk, Lviv, Sumy, Kherson, Khmelnytsky, and city of Kyiv).

The field research was organized in consecutive stages:

stage one — developing methodology and tools for data collection; developing a field research schedule,

stage two — selection and training of field researches for subsequent collection of empirical data,

stage three — receiving approval from relevant state authorities (Prosecutor General's Office and regional prosecutor's offices, Coordination Centre for Legal Aid Provision and its regional branches, heads of local courts) for the procedure of access, selection and analysis of materials containing data relevant to the role of the public prosecutor at the stage of pre-trial investigation of criminal offences,

stage four — operational stage of field research where researchers collected empirical data using the specifically designed tools.

Field research methodology

The following qualitative and quantitative data collection methods were used in the field research:

- Interviews,
- Focus groups,
- Content analysis,
- Analysis of statistical data,
- Questionnaires.

Focus groups and interviews

For an in-depth review of the activities of procedural supervisors at different stages of pre-trial investigation, analysis of the reasons and conditions defining their actions and

decision, as well as refinement of the field study tools, researchers held 3 interviews 7 focus groups with different actors in the criminal justice system:

- 2 interviews with the head of a structural unit of the Prosecutor General's Office and his deputy (the unit conducts procedural guidance in criminal cases),
- 1 interview with the deputy head of the regional prosecutor's office,
- 3 focus groups with prosecutors – procedural supervisors,
- 2 focus groups with lawyers,
- 1 focus group with investigating judges,
- 1 focus group with the heads of investigation units of district departments of the National Police.

Content analysis

Content analysis of procedural documents and pre-trial investigation case files was one of the key methods of empirical data collection during the field research.

Using a tailored set of tools, field researchers conducted content analysis of the following data:

- 629 ccases of regional free secondary legal aid centers (apprehension reports, notices of suspicion, motions for measures of restraint and measures to ensure criminal proceedings, and relevant rulings by investigating judges),
- 306 proceedings of investigating judges and 296 completed criminal proceedings in local courts,
- 310 supervisory proceedings of prosecutors conducting procedural guidance during pre-trial stage of criminal proceedings.

To ensure maximum impartiality and objectivity of the data collection and analysis and avoid any subjective assessment or external influence, field researchers computed the samples independently taking into account the characteristics of total population for each research subject (cases handled by lawyers, criminal proceedings, proceedings reviewed by investigating judges, supervisory proceedings conducted by prosecutors). Sampling intervals were calculated depending on the total number of subjects registered with the relevant state authority during a defined period. Only the research subjects within the samples were selected for analysis.

Only the field researchers filled out the questionnaires for content analysis for each research subject.

Analysis of statistical data

During the field research stage, researchers analyzed statistical data from the official statistics of the Prosecutor General's Office (Uniform Crime Reports and Reports on activities of pre-trial investigation authorities) and the State Judicial Administration (Reports of the first-instance courts on consideration of criminal case files and Reports of appeal courts on consideration of criminal case files) for the period that the new Criminal Procedure Code has been in effect (2013 – 2016)[2].

Questionnaires

To ensure maximum understanding of the view of procedural supervisors, in addition to three focus groups, the study included a questionnaire filled out by 503 prosecutors of the local and regional prosecutor's offices that exercise procedural guidance in criminal proceedings.

To ensure maximum objectivity of received data, the questionnaires were designed to prevent any possibility of identifying the respondents. In addition, representatives of the management of the relevant prosecutor's offices or high-level prosecutor's offices were not present when the questionnaires were being filled out.

Data analysis

Study methodology allowed for obtaining qualitative and quantitative data.

Quantitative data

Content analysis and questionnaire data was recorded in formalized questionnaire forms. As mentioned above, the following questionnaires were filled out during the study:

- 629 questionnaires based on analysis of case files of regional free secondary legal aid centers,
- 306 questionnaires based on analysis of proceedings of investigating judges and 296 questionnaires on criminal proceedings in local courts,
- 310 questionnaires based on analysis of supervisory proceedings by procedural supervisor,
- 503 questionnaires for procedural supervisors.

2 Analysis of statistics included information for the year 2013. However, we should take into account the emergence of the temporarily occupied territories and the annexed territory in 2014 when comparing any nationwide data.

All filled out forms were first digitized through Google Forms and then processed with Microsoft Excel tools.

For further analysis, researches selected only univariate distribution data represented in the study in graphic form.

Qualitative data

Qualitative data collected during this study was recorded in transcripts of focus groups. Professional stenographers were involved to record the process. On the one hand, this approach allowed for relatively high level of participant engagement since audio and video records often create barriers in communication. On the other hand, it led to receiving detailed transcripts with accurate verbatim reflection of discussions.

The information went through a preliminary analysis and classification according to the forms developed by researchers.

The report includes most characteristic quotes[3], to better illustrate the outcomes of quantitative analysis.

Confidentiality and personal data

Information collected during this study was processed in full confidentiality and compliance with the current legislation (no personal data was recorded during analysis of materials). The publication contains no specific references to locations of the field study or names of individuals contacted by researchers.

3 The quotes are translated from original interview transcripts accurately reflecting the words of the author.

Chapter 1

The structure and functions of the public prosecutor's offices in Ukraine

1.1 Key functions of the prosecution service

In this chapter, we examine the functions of the national prosecution service from a perspective of current international standards on the role of the public prosecutor's office in a democratic society.

International standards

PACE Recommendation (2000) 19 on the role of public prosecution in the criminal justice system

"Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

In all criminal justice systems, public prosecutors:

- *decide whether to initiate or continue prosecutions;*
- *conduct prosecutions before the courts;*
- *may appeal or conduct appeals concerning all or some court decisions.*

In certain criminal justice systems, public prosecutors also:

- *implement national crime policy while adapting it, where appropriate, to regional and local circumstances;*
- *conduct, direct or supervise investigations;*
- *ensure that victims are effectively assisted;*

- *decide on alternatives to prosecution;*
- *supervise the execution of court decisions;*
- *etc.*

National legislation

Since 1995, when Ukraine joined the Council of Europe, the CoE Parliamentary Assembly has repeatedly drawn attention of the state authorities to the need to change the role and functions of the Prosecutor General's Office (PGO), particularly with regard *to the exercise of a general control of legality*, transforming this institution into a body which is in accordance with Council of Europe standards[4].

In its opinions on the draft laws on the Public Prosecutor's Office, the Venice Commission has repeatedly stated that the *functions of this Office considerably exceed the scope of functions that a prosecution service should have in a democratic society*. The Commission has also reminded Ukrainian authorities, on several occasions, that they should fulfil their commitment to change the role of the Public Prosecutor's Office in order to bring it into line with European standards[5].

On 14 October 2014, the Parliament of Ukraine adopted the new Law of Ukraine "On the Public Prosecutor's Office"[6]. The Venice Commission considered that the provisions of the draft Law on the Public Prosecutor's Office of Ukraine constituted a very significant advance on previous proposals to replace the existing law. According to the Commission's experts, *the provisions have laid some very firm foundations for a public prosecution service in compliance with European standards and that will meet the needs of a modern criminal justice system*[7].

The general oversight function was abolished from the new Law of Ukraine "On the Public Prosecutor's Office", and the Transitional provisions introduced restrictions on using the general oversight provision that exists in the current Constitution of Ukraine (following the restoration of the 1996 Constitution). In particular, the Transitional provisions state that the P*ublic prosecutor's offices shall oversee the compliance with the rights and freedoms of a human being and a citizen and the corresponding laws by the executive authorities, local*

4 Opinion of the Parliamentary Assembly 190 (1995) dated 26 September 1995, PACE Resolution "Honouring of obligations and commitments by Ukraine", 27 September 2001, PACE Recommendations № 1622 (2003), 29 September 2003, Resolution 1466 (2005), 5 October 2005, Resolution 1862 (2012), 26 January 2013.

5 See the Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (CDL-AD (2009)048), paragraphs 28-30); Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (CDL-AD (2009)048, paragraphs 5-6.

6 The Law of Ukraine "On Public Prosecutor's Office" no. 1697-VII, 14 October 2014.

7 Opinion CDL-AD (2013) 025, 14 October 2013, p.193.

authorities and their officials and officers exclusively by representing the interests of a citizen or the state in court (paragraph 1 of Transitional Provisions).

At the same time, the Venice Commission drew the Ukrainian government's attention to a range of key issues of concern, which remain particularly serious obstacles to full compliance with European standards, which can be settled by amending the Draft Law. In particular, among other issues, the Commission is concerned with the prosecution service functions outside the criminal justice system, in particular, *related to the ability to represent the interests of citizens in court*. For instance, according to Article 23 of the Law "On the Public Prosecutor's Office", *"a prosecutor represents the interests of citizens (citizens of Ukraine, foreigners or stateless persons) in court in the cases when such a person is incapable of independently protecting his/her infringed or contested rights or of exercising the procedural competences because of his/her minor age, incapacity or limited capacity, and the legal representatives or agencies which are legally entitled to protect the rights, freedoms and interests of such persons do not perform or improperly perform such protection"*.

Outside the scope of criminal process, a public prosecutor could represent citizen's interest in civil, administrative, or economic proceedings.

The majority of concerns were taken into account in the new Law, however, the experts of the Commission have certain doubts with regard to prosecution service's ability to defend individual's rights effectively while being mandated to act in pursuit of the state interest. Accordingly, the experts recommended that representation of person's interest against the state should be the task of institutions such as the Human Rights Commissioner and the free legal aid centers[8].

Transitional provisions of the Law "On the Public Prosecutor's Office" followed recommendations of international experts, and these powers were transferred to the Human Rights Commissioner and the free legal aid centers. However, the prosecutor's offices retained this function for a certain amount of time.

Here, we should also recall that the PACE Recommendation 1604 (2003) 11 on the role of the public prosecutor's office in a democratic society governed by the rule of law, recommended, in particular, that the states undertake measure to ensure that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions.

At the same time, according to paragraph 4 of the Transitional provisions of the Law, the prosecution service also has the function of conducting pre-trial investigations of criminal offences in office and war crimes, which will be later transferred to the state bureau of investigations (*until the state bureau is created but no longer than five years after the Criminal Procedure Code of Ukraine comes into effect, namely, 20 November 2017 – ed.*).

We should note here that the law "On the State Bureau of Investigations" was adopted by the Parliament on 12 November 2015 and signed by the President of Ukraine on 15 January

8 Opinion CDL-AD (2013) 025, 14 October 2013, p. 28.

2016. The law entered into force on 01 March 2016. However, the earliest expected date when the Bureau starts functioning in full mode is 2018 since, by April 2017, there was no head of the Bureau appointed. According to Transitional provisions of the Law, criminal case files that fall under the investigative jurisdiction of the State Bureau of Investigations, which are at the disposal of another pre-trial investigation body on the date of entry into force of this Law, shall be transferred to the relevant unit (body) of the Bureau within three months after the Bureau assumes the function of pre-trial investigation. Criminal cases initiated by investigators of the public prosecutor's office prior to the start of operations of the State Bureau of Investigations, which are at the pre-trial investigation stage, shall be conducted by investigators of the public prosecutor's office until the end of pre-trial investigations, but no longer than two years.

Accordingly, for approximately two years after the State Bureau of Investigations starts functioning in full, prosecution authorities will continue to perform the function of pre-trial investigation, though only in proceedings in progress at their offices. The shortcoming of the Law is that it is unclear on what happens if the pre-trial investigation is not finished in two years. It makes sense that these cases are transferred to the State Bureau of Investigations; however, the Law does not provide a clear answer to this question.

On 02 June 2016, following an initiative of the President, the Parliament adopted amendments to the Constitution in the sphere of justice concerning mostly the judiciary branch. However, functions of the prosecution service were changed. For instance, an entire chapter on the prosecution service was replaced by article 131[1], which defined the following functions of the prosecution service:

- public prosecution in the court,
- organizing and procedurally directing during pre-trial investigation, deciding other matters in criminal proceeding in accordance with the law, supervising undercover and other investigative and search activities of law enforcement agencies,
- representing interests of the State in the court in exceptional cases and under procedure prescribed by law[9].

According to the amended Constitution of Ukraine, *the prosecution service no longer has the function of* representing interests of citizens in court. As to the rest of the so-called "temporary functions", paragraph 9 of the Transitional provisions to the Constitution states, *"The prosecution service shall continue to perform the function of pre-trial investigation until the relevant bodies, to which this function shall be assigned by law, start functioning. The prosecution service shall also perform the function of supervision of observance of laws in the enforcement of court judgments delivered in criminal cases, as well as in application of other coercive measures related to restraint of individual personal liberty, until the law establishing a double system of regular penitentiary inspections enters into force"*.

As we can see, following constitutional amendments, the prosecution service no longer has the functions of representation of the interests of an individual in court, as well as

9 The Law of Ukraine "On Amendments to the Constitution of Ukraine (on justice)" no. 1401-VIII, 02 June 2016.

supervision of observance of laws in the enforcement of court judgments delivered in criminal cases, as well as in application of other coercive measures related to restraint of individual personal liberty.

Notably, the suggested amendments are in line with the relevant recommendations of the Venice Commission.

1.2 Internal structure and the number of staff members of the prosecutor's offices

According to the new Law "On Public Prosecutor's Office", the system of the Public Prosecution Service of Ukraine shall include *the Prosecutor General's Office of Ukraine, regional public prosecutor's offices, local public prosecutor's offices, military public prosecutor's offices, and the specialized anti-corruption prosecutor's office*.

The Prosecutor General's Office of Ukraine shall be the highest public prosecution authority in respect to regional and local public prosecutor's offices, while the regional public prosecutor's office shall be a senior prosecutor's office in respect of the local public prosecutor's offices located within an administrative area subject to territorial jurisdiction of the regional public prosecutor's office (article 7(4) of the Law). The PGO shall organize and coordinate operations of all public prosecutor's offices in order to ensure efficient performance of the Public Prosecution Service (article 8(1) of the Law). Departments, directorates and units shall be established in the structure of the PGO. Directorates and units can be either independent or be placed within a department (directorate)

Moreover, the Law states that Inspectorate-General with an independent status shall be established at the Prosecutor General's Office (article 8(3)). The Regulation on the Inspectorate-General was approved by the order of the Prosecutor General no. 204 on 16 June 2016.

The new Law "On Public Prosecutor's Office" created restrictions on the number of deputies of the Prosecutor General. Currently, there can be no more than six deputies (article 8(2)).

Importantly, the structure of the PGO is also undergoing transformation. The last changes in early February 2016 were related to establishing the new Department of investigations and supervision in criminal proceedings in the areas of state service and property, as well as the need to change the structure of the Inspectorate-General for internal investigations and security[10].

The PGO includes 6 departments, 16 independent directorates, 1 independent unit, and 4 subdivisions with the status of independent departments[11].

10 Orders of the Prosecutor General of Ukraine, Nos. 7 ІІІц and 8 ІІІц, 05.02.2016.

11 Order of the Acting Prosecutor General of Ukraine No. 87 "On approving the list of indexes of structural units of the PGO", 16.02.2016.

All structural units of the PGO can be divided into 3 large groups:

- Units responsible for the main functions in accordance with Article 2 of the Law of Ukraine "On Public Prosecutor's Office";
- Units responsible for the functions during the so-called "transitional period" in accordance with Chapter XIII (Transitional Provisions) of the Law of Ukraine "On Public Prosecutor's Office";
- Support units providing support for adequate exercise of the main functions (see Fig. 1.1).We should note that the order of the Prosecutor General no. 243 issued on 11 July 2016 "On allocation of duties between the management of the Office of the Prosecutor General of Ukraine" assigned each structural unit of the OPG to a specific deputy Prosecutor General. At the same time, when unit have similar or related functions, they are sometimes subordinated and led by different deputies. Clearly, this situation interferes with the management process, leads to ineffectiveness of the work in general, creates delays in decision-making and provides basis for excessive bureaucratic procedures.

For instance, the Directorate of representation of the interests of an individual or the state in court, combating crime and corruption on the temporarily occupied territory of Crimean peninsula is subordinated to one deputy Prosecutor General, whereas the Department of support of state prosecution and representation of interests of an individual or the state in court – to another deputy despite the clear partial overlap in their functions.

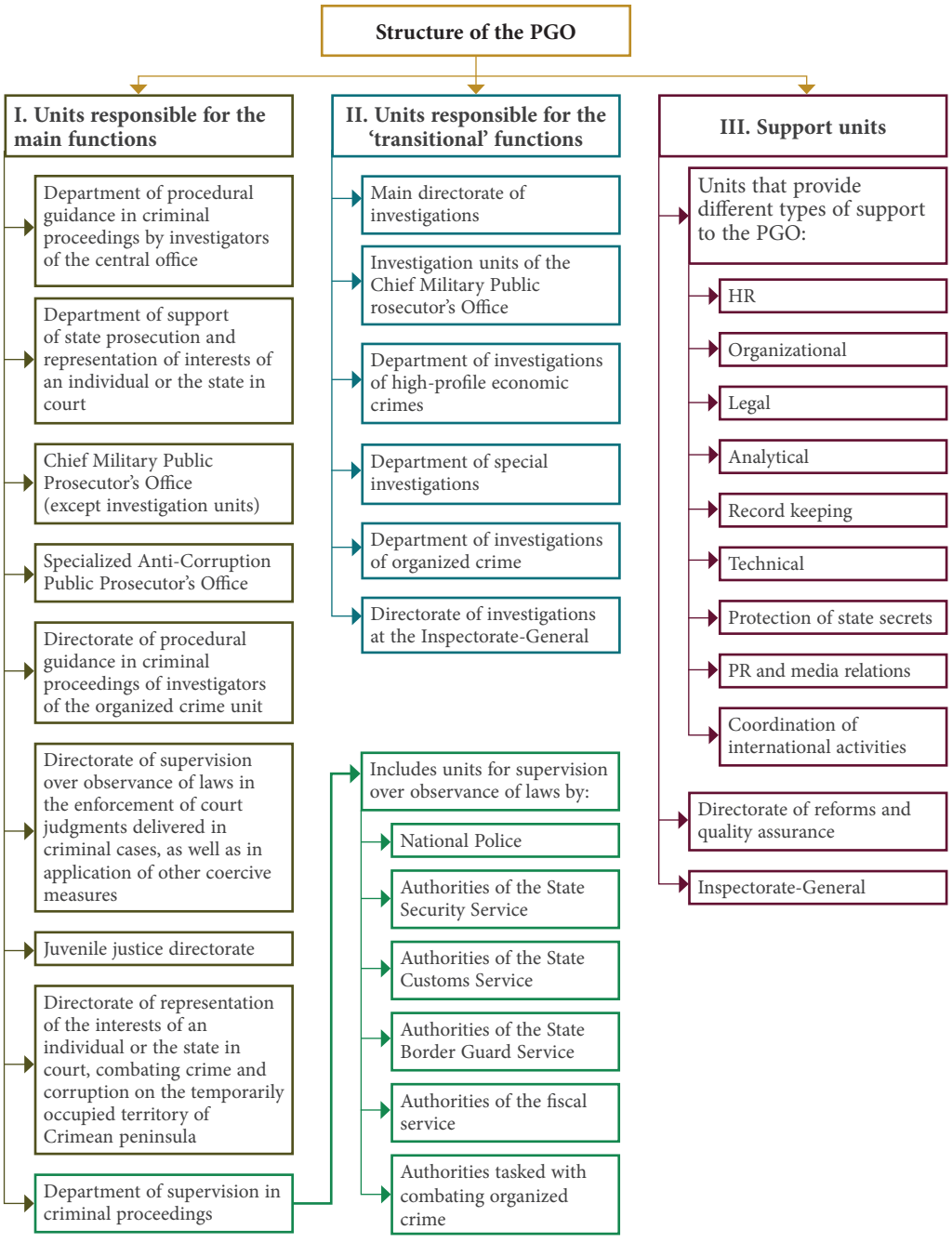
Same applies to the most relevant to our study departments – the Department of supervision over observance of laws in criminal proceedings and coordination of law enforcement activities is subordinated to one deputy, whereas the Department of procedural guidance in criminal proceedings of investigators on the central level is in the area of responsibility of another deputy who is also responsible for the Main Directorate of Investigations, and whose actions shall be controlled in terms of legality by prosecutors of the Department of procedural guidance.

There is also a problem in combining units that investigate organized crime and conduct procedural guidance in these investigations under same leadership at the Prosecutor General's Office.

In 2015, there were 638 district public prosecutor's offices reorganized into 178 local prosecutor's offices with 155 prosecutor's offices already functioning at the moment (23 local prosecutor's offices were located on the territories of Donetsk and Luhansk regions outside of control of the Ukrainian government). The reorganization process resulted in abolishing over 1800 prosecutor positions.

Unlike in the case of district prosecutor's offices, there has been no reform of oblast public prosecutor's offices. They were simply renamed into regional prosecutor's offices without any changes into their structure, powers etc.

Fig. 1.1 Structure of the PGO



The internal structure of regional prosecutor's office is a copy of the PGO structure, which copies all its structural units in the following categories:

- units responsible for the main functions;
- units responsible for transitional functions;
- support units.

The process of reorganization of the prosecution service will include a gradual decrease in the number of prosecutors. In particular, Article 14(1) of the Law of Ukraine "On Public Prosecutor's Office" directly states that the number of all employees of the Prosecution Service shall constitute 15000 persons, and the number of prosecutors will be decreased to 10000 persons from 1 January 2018

Currently, the number of employees of the General Prosecutor's Office is 1780 persons, and the number of employees of the prosecution service including regional and local prosecutor's offices is 15250 persons, including 11290 prosecutors and investigators.

The dynamics of the total number of employees of the prosecutor's offices, including the staff of the National Academy of the Prosecution Service, is presented in Figure 1.2.

Fig. 1.2

Number of employees of the prosecutor's offices (including the staff of the National Academy of the Prosecution Service)

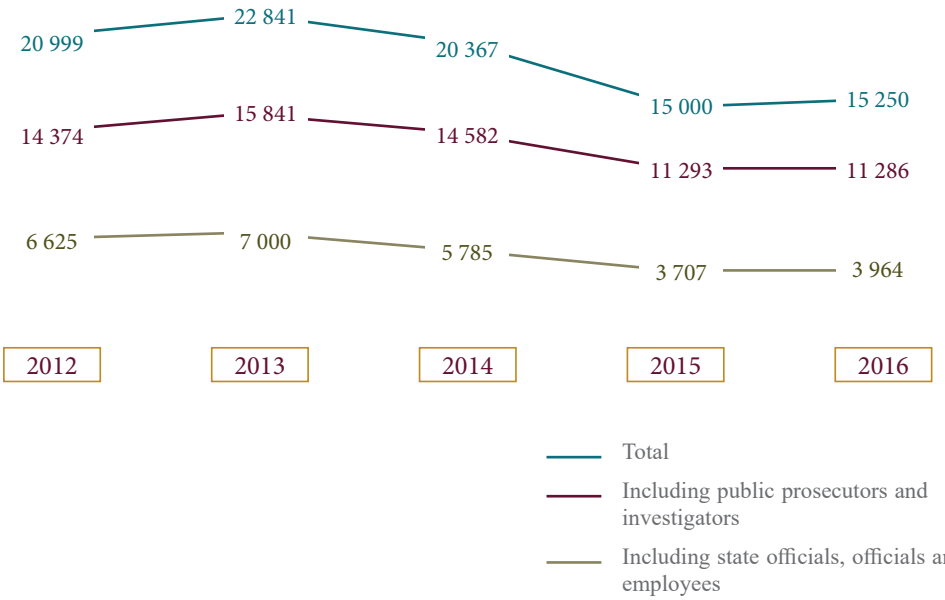


Figure 1.2 shows that the number of employees of prosecutor's office has decreased gradually since 2013 towards the figure prescribed by the legislation.

We should note, however, the PGO does not have internal regulations on the procedure for calculating the necessary number of public prosecutors for different offices and units.

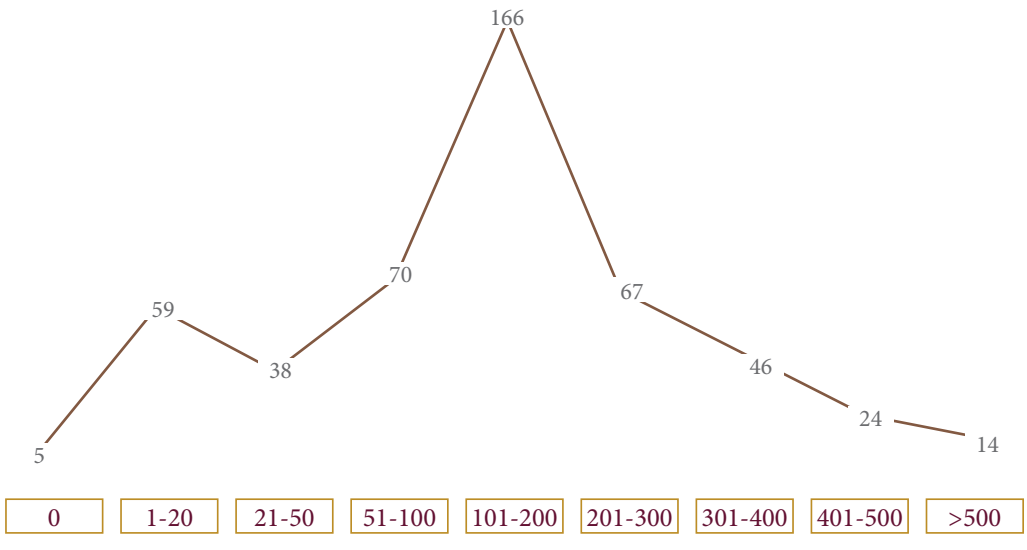
Regarding the mechanism for calculation of the number of public prosecutors in each office, they should be based on the caseload. However, the prosecution service does not have a model to assess the workload and its criteria. The study of activities of public prosecutors shows that they usually work on an excessive number of proceedings simultaneously. In addition to procedural guidance, prosecutors also conduct representation in courts, support prosecution, as well as fulfill procedural duties before the investigating judge etc. Therefore, an extensive caseload is clearly an impediment to high-quality and effective work in all directions.

Public prosecutors who conduct procedural guidance were asked about the number of criminal proceedings where they fulfilled the duties of a head of the group of prosecutors. Figure 1.3 shows the distribution of answers to this question.

As we can see, on average, one prosecutor has 100-200 criminal proceedings where s/he is the head of the group of prosecutors (34% of interviewees). At the same time, 14%

Fig. 1.3

Prosecutors' responses to the question "In how many proceedings you are the head of a group of investigators?"



of interviewees chose the number from 200 to 300 proceedings, 9 percent – 300-400 proceedings, 5% – 400-500 proceedings, and 3 percent said they performed this function in over 500 proceedings.

This level of workload is caused by several factors. First, there is insufficient number of prosecutors in comparison to the number of criminal proceedings in a prosecutor's office. The second factor is excessive waste of time for the public prosecutor who has to travel long distances to be present at the court hearing (in some districts, courts are located 100-500 kilometers away from the prosecutor's offices).

In addition to the above, we should take into account other possible factors, such as incorrect organization of prosecutor's activities; uneven distribution of cases among prosecutors; circumstances related to flaws in calculations of the workload (for instance, when one case is investigated by a group of prosecutors is counted as one full case for each of them).

Under any circumstances, the workload of prosecutors is one of the most important issues in organizing the work of the entire prosecution service. In this case, the PGO should have a strong science-based methodological approach used to develop relevant software to control and distribute proceedings among prosecutors in each office. Among the most important criteria in this approach is the size of population of the area covered by the prosecutor's office, the specifics of crime situation, functions of every prosecutor, in particular specializations, experience, record of service etc.

In this context, it is necessary to consider the need for a comprehensive audit of all structural units at all levels, assessment of their effectiveness and feasibility of operations in general.

For example, we mentioned above that regional prosecutor's office have units conducting oversight in criminal proceedings. There is a Department of supervision in criminal proceedings within the PGO. According to article 36 of the CPC, supervision of compliance with the law during pre-trial investigation takes place in the form of procedural guidance. Therefore, it makes sense to conclude that the staff of these units should perform the duties of procedural supervisors in criminal proceedings.

However, the situation is quite different in practice. This conclusion is correct for investigation of criminal proceedings by investigators of regional or central offices of relevant law enforcement bodies. However, the bulk of the workload of the Department (directorates, units) of supervision in criminal proceedings is the so-called 'area-based control' over the prosecutors at lower levels. This form of control constitutes interference with the work of procedural supervisors in specific proceedings, which is in direct violation of the current criminal procedure law. This aspect casts doubts on the feasibility of this type of 'control'.

We will examine this issue in detail in Chapter 2 from the perspective of independence of procedural supervisors in the exercise of procedural guidance in criminal proceedings.

1.3 Selection procedure, promotion and dismissal of prosecutors

International standards

UN Guidelines on the role of prosecutors

Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

States shall ensure that:

- selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, color, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
- prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Promotion of prosecutors shall be based on objective factors, in particular professional skills, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

PACE Recommendation 1604 (2003) 11 on the role of the public prosecutor's office in a democratic society governed by the rule of law

States should take measures to ensure that:

- the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which

favors the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;

- the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience.

National legislation

Appointment of prosecutors

Details of the procedure of appointment of prosecutors are covered by the entire section of the Law of Ukraine "On Public Prosecutor's Office" (Section V. Procedures for Taking Public Prosecutor's Office and Procedures For Dismissing a Public Prosecutor From an Administrative Position).

Requirements for candidate public prosecutors (art. 27) provide the following:

- a candidate for appointment to a public prosecutor's position at a local public prosecutor's office shall be a citizen of Ukraine having the higher legal education degree, at least two-year work experience in the field of law and a good command of the national language;
- a candidate for appointment to a public prosecutor's position at a regional public prosecutor's office shall be a citizen of Ukraine with at least three years of work experience at the position of a public prosecutor;
- a candidate for appointment to a public prosecutor's position at the Prosecutor General's Office of Ukraine shall be a citizen of Ukraine with at least five years of work experience at the position of a public prosecutor.

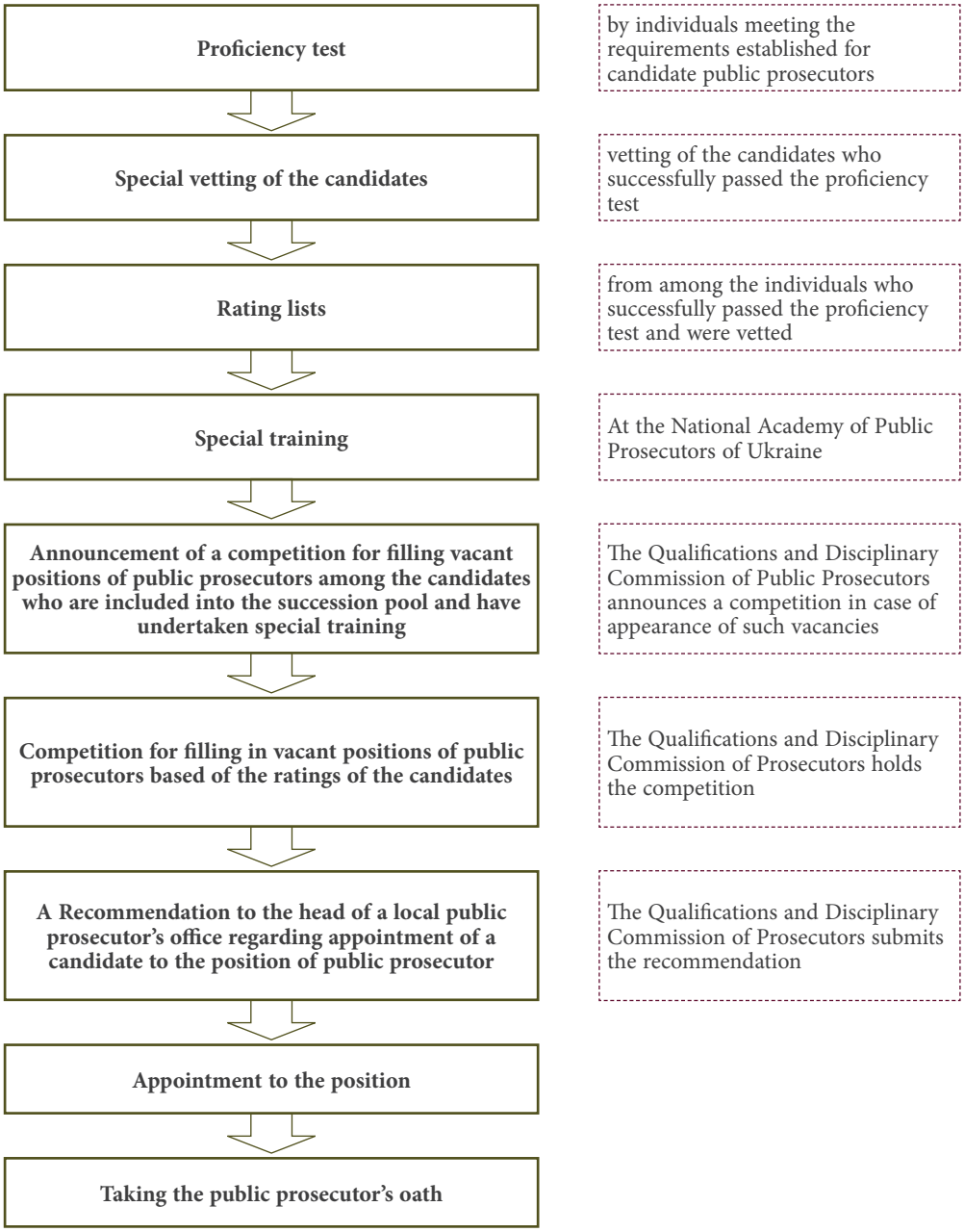
The Law "On Public Prosecutor's Office" provides for different procedures for appointing prosecutors to positions of prosecutors and administrative positions.

In particular, the Law provides for competitive selection of candidates for the position of prosecutors at the local prosecutor's offices (see Figure 1.4).

The objectivity, impartiality and transparency of the selection process should be guaranteed by the Qualifications and Disciplinary Commission of Public Prosecutors, which has only 5 representatives of the public prosecution service among its 11 members according to article 74 of the Law "On Public Prosecutor's Office".

However, paragraph 5-1 of Transitional Provisions of the Law of Ukraine "On Public Prosecutor's Office" prescribed special rules for appointment of employees of local

Fig. 1.4 **Selection of candidates for the position of prosecutors at the local**



prosecutor's offices until 15 April 2017 whereby there were no procedures involving the Qualifications and Disciplinary Commission of Public Prosecutors. For examples, the following categories of persons could be appointed prosecutors of local prosecutor's offices:

a) persons without prior experience in prosecutor's offices – following a successful test and internship for up to one year. Requirements of parts one and five of article 27 of the Law also apply to these persons, except the requirement on work experience in the field of law;

b) persons with previous experience as public prosecutors who were not working at the public prosecutor's offices at the date of entry into force of the Law – following a successful test;

c) prosecutors working at the public prosecutor's offices at the date of entry into force of the – Law – following a successful test.

We should note that, in accordance with the Law "On Public Prosecutor's Office", the head of a local public prosecutor's office does not have the authority to appoint prosecutors of the local public prosecutor's office. This power belongs to the head of the regional public prosecutor's office, a higher-level body (article 11(1)(3)). At the same time, the head of a local prosecutor's office has the power to appoint prosecutors for administrative positions of heads and deputy heads of units of a local prosecution service (article 39(4)(3)).

The head of a regional prosecutor's office has the power to appoint prosecutors to positions of prosecutors of the regional prosecutor's office and local prosecutor's offices (article 11(1)(3)), as well as administrative positions of the head of a unit at a regional public prosecutor's office, deputy head of a unit at a regional public prosecutor's office, first deputy head of a local public prosecutor's office, and deputy head of a local public prosecutor's office (article 39(4)(2)).

The Prosecutor General shall appoint public prosecutors of the Prosecutor General's Office of Ukraine (article 9(1)(5) of the Law), as well as appoint persons to administrative positions of the first Deputy of the Prosecutor General, deputy Prosecutor General, head of a regional public prosecutor's office, first deputy head of a regional prosecutor's office, deputy head of a regional prosecutor's office, as well as head of a local prosecutor's office upon recommendations of the Council of Public Prosecutors (article 39(4)). The Prosecutor General can appoint the head and deputy head of a PGO unit without a recommendation of the Council of Public Prosecutors.

The Council of Public Prosecutors of Ukraine is a collegial body which is independent from the PGO.

The Council shall consist of thirteen members including:

- two representatives (public prosecutors) of the PGO;
- four representatives (public prosecutors) of regional public prosecutor's offices;
- five representatives (public prosecutors) of local public prosecutor's offices; and

- two representatives (scholars) appointed by the congress of representatives of law universities and academic institutions (article 71(1) of the Law).

One of the main functions of the Council of Public Prosecutors is to make recommendations on appointment and dismissal of public prosecutors from administrative positions in cases established by the Law "On Public Prosecutor's Office". If the Prosecutor General of Ukraine does not agree with a candidate nominated by the Council, s/he shall nominate another candidate to be considered by the Council. Refusal of the Prosecutor General of Ukraine to appoint the public prosecutor recommended by the Council of Public Prosecutors of Ukraine to an administrative position shall be motivated in writing. A copy of the relevant decision of the Prosecutor General of Ukraine shall be sent to the Council of Public Prosecutors of Ukraine and to the public prosecutor who was refused for appointment to administrative position. A public prosecutor who was denied the appointment to an administrative position by the Prosecutor General of Ukraine may challenge the refusal in the Qualifications and Disciplinary Commission of Public Prosecutors (paragraphs 5, 6 of article 39, article 71(9)(1) of the Law).

However, according to paragraphs 5-1(4), 5-2 of Transitional Provisions of the Law of Ukraine "On Public Prosecutor's Office", before 15 April 2017, appointment to administrative positions was conducted by relevant competent officials, and the Prosecutor General made decisions on appointment to administrative positions without the Council of Public Prosecutors.

In 2016, the All-Ukrainian Conference of Public Prosecution Employees selected the members of the Council of Public Prosecutors, however, entry into force of provisions defining the Council's activities was postponed until 15 April 2017. Therefore, the Council of Public Prosecutors was not able to begin its activities to the full extent. Later, paragraph 6-1 was added to the transitional provisions through amendments to the Law "On Public Prosecutor's Office" adopted on 21 December 2016. According to paragraph 6-1:

1) the name of the highest body of prosecutorial self-governance was changed to the All-Ukrainian Conference of Public Prosecutors;
2) the first session and All-Ukrainian Conference of Public Prosecutors to select the members of the Council of Public Prosecutors and the Qualifications and Disciplinary Commission of Public Prosecutors shall assemble within two weeks from 15 April 2017.

Accordingly, the Law "On Public Prosecutor's Office" has a binding provision on assembling the all-Ukrainian conference of public prosecutors, inter alia, to select the members of the Council of Public Prosecutors and the Qualifications and Disciplinary Commission of Public Prosecutors. However, there is no provision on the status of persons elected to these positions in 2016 through the self-governance body acting at that time.

In addition, before 15 April 2015, there was a special provisional procedure for appointment to the positions of a head of a local prosecutor's office, first deputy head of a local public prosecutor's office, deputy head of a local prosecutor's office. This procedure included a

four-stage competition, the procedure for which was approved by the Prosecutor General of Ukraine. The competition was organized by five commissions, each of them including:

- four individuals appointed by the Prosecutor General;
- three individuals appointed by the Parliament of Ukraine.

Three candidates selected by the commissions were recommended to the officials authorized by the Law to decide on their appointment to the positions.

First selection and appointment of prosecutors of local prosecutor's office under the new rules prescribed by the law "On Public Prosecutor's Office" took place in 2015. On 20 July 2015, the Prosecutor General of Ukraine issued an order No. 98 approving:

- The procedure for conducting tests for the position of prosecutor of a local prosecutor's office;
- The procedure for conducting a four-tier open competition for the positions of heads of local prosecutor's offices, their first deputies and deputies;
- The list of questions for the legal framework test (proficiency test) for the position of a prosecutor of a local prosecutor's office, positions of heads of local prosecutor's offices, their first deputies and deputies.

The four-level competition included legal framework test (proficiency test), general qualifications test, personal characteristics test (psychological test), and an interview.

Based on the competition results, approximately **5 900** persons were appointed to local prosecutor's offices, including over **600** administrative appointments (heads). According to the Directorate for reform and quality assurance of the PGO, the key shortcomings in the selection procedure included the following[12]:

- The applicants for the open competition were predominantly the "old" prosecution cadres;
- Competition committees recommended former heads of prosecutor's offices for appointment (over 50%) due to a number of reasons, including corporate solidarity (the majority of committee members were prosecutors – ed.);
- Among top-three contestants the Prosecutor General usually appointed former heads or deputy heads of district prosecutor's offices (84%), and only the remaining number (16%) were promoted to the position of the head of office from an ordinary prosecutor's positions. No external candidates (those not coming from the prosecution service – ed.) were appointed to a position of the head of office.

12 Information provided upon request to the Directorate for Reforms and Quality Assurance of the PGO of Ukraine.

- In 60% of cases, regional prosecutors appointed former heads or deputy heads of district prosecutor's offices to position of first deputy or deputy head of a local prosecutor's office; 3.5% of appointees were external candidates, the rest (36.5%) were ordinary prosecutor service employees.

Another competition for positions at the local prosecutor's offices started back on 12 September 2016 and ended in January 2017. Following the competition, 627 candidates were selected for appointment to positions at local prosecutor's offices. Seventy-seven percent of persons appointed to positions had no previous experience of working as public prosecutors[13].

Dismissal of prosecutors

Similar to the appointment process, there are different procedures and grounds for dismissal for prosecutors and administrative positions.

The procedure for dismissing a prosecutor from an administrative position is covered by Article 41 of the Law of Ukraine "On Public Prosecutor's Office".

Dismissal of a prosecutor from an administrative position of the First Deputy Prosecutor General, a Deputy Prosecutor General, head of a regional public prosecutor's office, first deputy head of a regional public prosecutor's office, deputy head of a regional public prosecutor's office, as well as head of a local public prosecutor's office shall be carried out by the Prosecutor General of Ukraine upon the recommendation of the Council of Public Prosecutors for the following reasons:

1) Application for early termination of powers in the administrative position at one's own will;
2) Transfer to a position in another public prosecutor's office (except to a senior administrative position in the Specialized Anti-Corruption Prosecutor's Office);
3) Improper performance of duties prescribed for the relevant administrative position by the public prosecutor who holds the administrative position (article 41(1)).

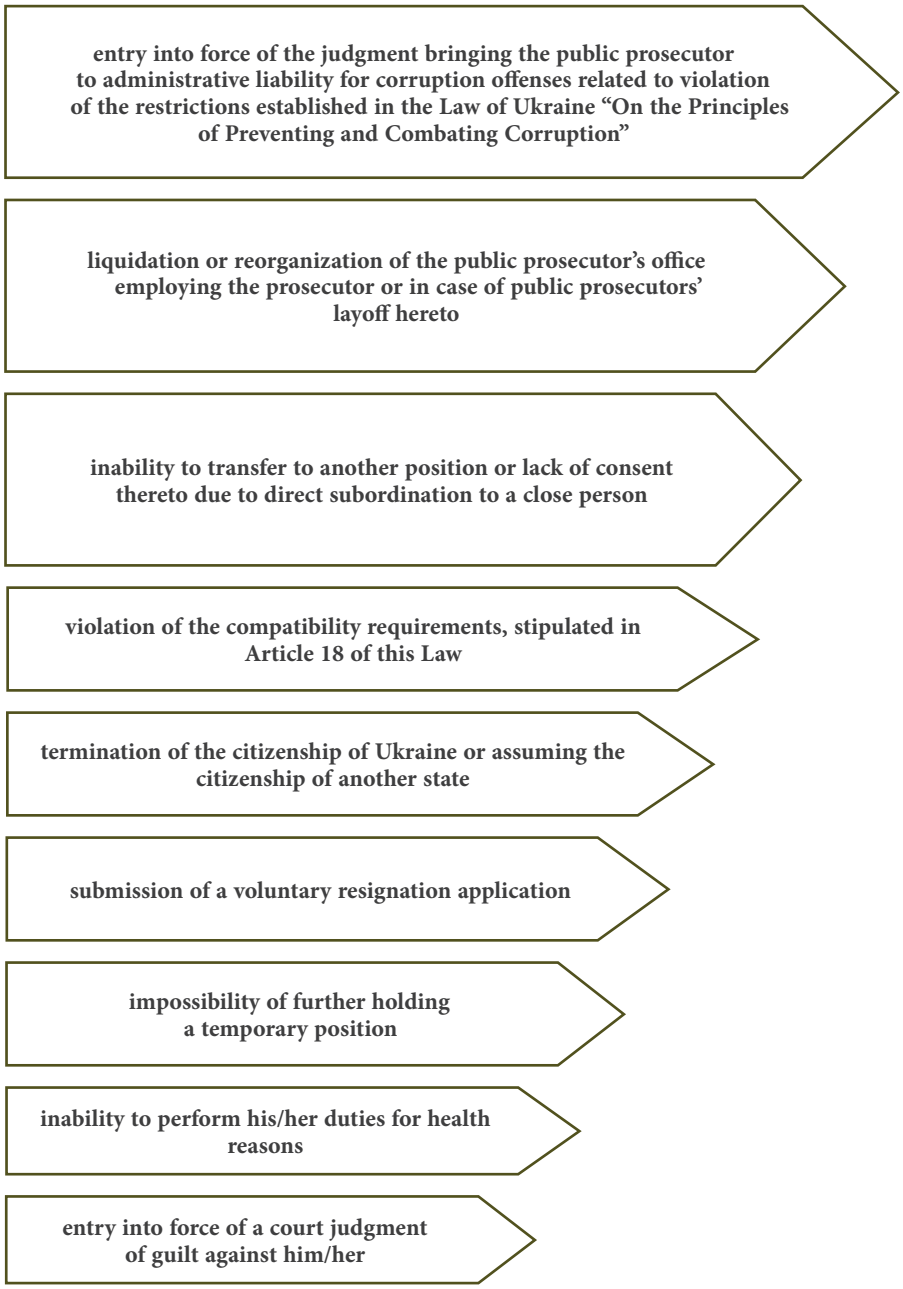
Dismissal of prosecutors from administrative positions of other categories is carried out by the same senior official who can appoint persons to these positions. At the same time, the head of a local prosecutor's office can dismiss a prosecutor from corresponding administrative position only pursuant to an application for early termination of powers in the administrative position at one's own will.

The Council of Public Prosecutors of Ukraine establishes whether there has been improper performance of duties prescribed for the relevant administrative position by the public

13 Recently appointed prosecutors, selected through a competition, started their training // http://www.gp.gov.ua/ua/reforms_gp.html?_m=publications&_t=rec&id=200105.

Fig. 1.5

The general terms of public prosecutor's dismissal and termination of public prosecutor's



prosecutor who holds the administrative position. This process shall be in compliance with the personal guarantees referred to in Article 47 of the Law relating to receiving notices, obtaining copies of documents that were the basis for the inquiry, participation in the meeting and engaging a representative, providing explanations, issuing objection statements, petitions and challenges, receiving copies of relevant decisions (article 41(3)).

The general terms of public prosecutor's dismissal and termination of public prosecutor's powers are listed in Article 51 of the Law of Ukraine "On Public Prosecutor's Office" (see Fig. 1.5).

The powers of public prosecutor shall be terminated due to the following:

1) reaching the age of sixty-five years;

2) death;

3) recognition as missing or dead;

4) a decision of the Qualifications and Disciplinary Commission of Public Prosecutors on the impossibility of further stay in the public prosecutor's position.

At the same time, according to paragraph 5-1 (4) of Transitional provisions of the Law of Ukraine "On the Public Prosecutor's Office", temporarily until 15 April 2017, prosecutors were dismissed from positions, including administrative positions, without a recommendation of the Council of Public Prosecutors or recommendations submitted to authorized officials by the Qualifications and Disciplinary Commission of Public Prosecutors.

The Law of Ukraine "On Public Prosecutor's Office" provides for an exceptional status of the Specialized Anti-Corruption Prosecutor's Office. Therefore, there is a special procedure of appointment and dismissal of its prosecutors. However, the activities of the Specialized Anti-Corruption Prosecutor's Office are outside the scope of our study.

1.4 Disciplinary proceedings against employees of the prosecution service

International standards

UN Guidelines on the role of prosecutor

Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate

procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review (Article 21).

Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines (Article 22).

PACE Recommendation 1604 (2003) 11 on the role of the public prosecutor's office in a democratic society governed by the rule of law

Disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review.

National legislation

The Law of Ukraine "On Public Prosecutor's Office" introduced a radically new system for conducting disciplinary proceedings against a prosecutor. This issue is covered by Section VI of the Law ("Disciplinary Liability of a Public Prosecutor"). The most important novelty is that it established an independent body to conduct disciplinary proceedings against prosecutors – the Qualifications and Disciplinary Commission of Public Prosecutors (QDC). Provisions on QDC entered into force on 15 April 2017.

The old system of disciplinary proceedings regulated by the Disciplinary Statute of the Public Prosecutor's Office of Ukraine have in place before QDC is introduced[14]. The model of disciplinary proceedings against prosecutor is provided by the Disciplinary Statute of the Public Prosecutor's Office of Ukraine of 1991.

Disciplinary sanctions are applied for a failure to perform or improper performance of official duties, or for actions, which discredit the public prosecutor.

Disciplinary sanctions include:

1) a reprimand;
2) demotion in class;
3) demotion in title;
4) deprivation of an award pin "Honorary employee of the prosecutor's office of Ukraine"
5) dismissal from office;

14 Decree of Verkhovna Rada of Ukraine no. 1796-XII "On Approval of the Disciplinary Statute of the Public Prosecutor's Office of Ukraine", 6 November 1991. Vidomosti Verkhovnoi Rady, official publication, vol. 4, art. 15, 28 January 1992.

6) dismissal with deprivation of service rank (article 9 of the Statute).

Disciplinary sanctions are imposed by the Prosecutor General, with exception to deprivation or demotion in class of the state advisor of justice of 1st, 2nd and 3rd class where these sanctions are imposed by the President of Ukraine upon recommendation of the Prosecutor General.

Heads of local prosecutor's offices and the prosecutor's office in Kyiv can impose the following disciplinary sanctions: reprimand, demotion in title, dismissal from office, except for officials for which the Prosecutor General imposes demotion in title and dismissal. In case they deem it necessary to impose a disciplinary sanction outside of their scope of powers, they submit a recommendation to the Prosecutor General.

A public prosecutor, who has not been subject to disciplinary sanctions during one year from the day when the previous sanction was imposed, may be deemed having no history of disciplinary sanctions. Restoration of class or title can only be conducted through accreditation process.

Disciplinary sanction can be lifted by the prosecutor who issued the order or a prosecutor of a higher rank before the end of the one-year term if the employee has demonstrated discipline and diligence in professional performance. In such case, the sanction is lifted by an order announced to everyone to whom the order of sanctions was announced.

Since the Disciplinary statute did not include a procedure for disciplinary proceedings, it took place in the framework of an internal investigation or inspection in accordance with the Instruction on the procedure for internal investigations and internal inspections at the public prosecutor's offices in Ukraine[15].

The Prosecutor General or an official performing his duties made a decision on an internal investigation and inspection by the staff of the Main directorate of human resources, the Main directorate of organizational and legal support, or other units of the central apparatus.

Deputies of the Prosecutor General, in accordance with the distribution of duties, made decisions on internal investigations or inspections by the staff of other structural units of the Prosecutor General's Office.

Heads of regional prosecutor's offices ordered the human resources units to conduct internal investigations and inspections of their subordinate prosecution and investigation employees and, if necessary, they assigned these to the staff of other units of the said prosecutor's offices.

In 2015, there were disciplinary sanctions imposed on 381 prosecutors and investigators, including 337 reprimands for improper fulfilment of duties and 44 dismissals for violations that discredit the title of a prosecutor, as well as for violations of the rules of ethics.

In 2016, there were disciplinary sanctions imposed on 329 prosecutors and investigators, including 289 reprimands for improper fulfilment of duties and 40 dismissals for violations

15 Order of the Prosecutor General No. 20 dd. 06 March 2012 (with amendments).

that discredit the title of a prosecutor, as well as for violations of the rules of public prosecutor's ethics.

According to this statistics, disciplinary sanctions are used against 3% of all public prosecutors each year.

As mentioned above, the new Law "On the Public Prosecutor's Office" introduced profound changes concerning disciplinary liability of public prosecutors.

Let us look at the provisions of the Law in detail.

Grounds for imposing disciplinary actions against a public prosecutor

Figure 1.6 illustrates the grounds for disciplinary action against a prosecutor in the framework of disciplinary proceedings.

Bringing public prosecutor to a disciplinary action does not preclude bringing him/her to an administrative or criminal liability in cases prescribed by law (article 43(2) of the Law).

The acquittal of a person or closure of criminal proceedings by the court regarding him/her shall not serve as a ground for bringing to disciplinary action the public prosecutor who has provided procedural guidance in a pre-trial investigation and/or prosecuted on behalf of the State in court in these proceedings, except for the willful breach of legislation or improper performance of duties (article 43(3) of the Law).

Qualifications and Disciplinary Commission of Public Prosecutors (QDC)

According to the new Law of Ukraine "On Public Prosecutor's Office", the only body with the power to conduct disciplinary proceedings against a prosecutor is the Qualifications and Disciplinary Commission (article 44 of the Law).

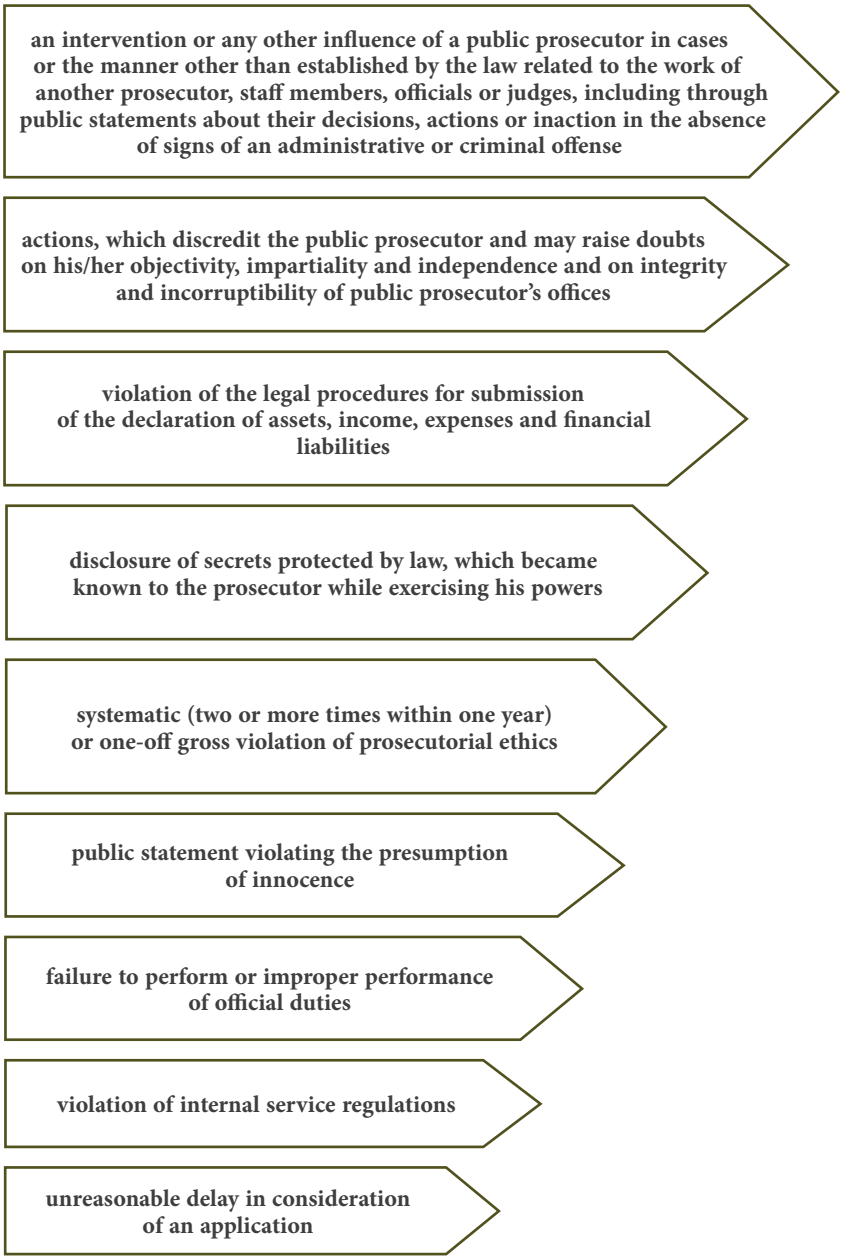
Disciplinary proceedings are a procedure of review by the Qualifications and Disciplinary Commission of Public Prosecutors of complaints (applications) containing information about a disciplinary offense committed by a public prosecutor (article 45(1)). Anyone who is aware of a disciplinary violation by a public prosecutor shall address the Qualifications and Disciplinary Commission of Public Prosecutors with a complaint (application) about this conduct (Article 45(2)).

The Qualifications and Disciplinary Commission consists of eleven members who are citizens of Ukraine, have a university degree in law and at least ten-year work experience in the field of law. The members include:

1) five public prosecutors appointed by the All-Ukrainian Conference of Public Prosecution Employees;

Fig. 1.6

Grounds for imposing disciplinary action against a prosecutor in accordance with disciplinary proceedings



2) two individuals (scholars) appointed by the congress of representatives of law universities and academic institutions;
3) one individual (attorney) appointed by the congress of defense lawyers;
4) three individuals appointed by the Parliamentary Commissioner for Human Rights of Ukraine following an approval by the Verkhovna Rada committee responsible for organization and operations of public prosecutor's offices (Article 74(1)).

A member of the QDC may not be a member of Ukrainian Parliament, representative of the Cabinet of Ministers of Ukraine, central or local government authorities, researcher or professor of the National Academy of Public Prosecutors of Ukraine, other educational institutions or academic institutions managed by the prosecution service, judge, officer of law enforcement agencies or government supervision authorities or a public prosecutor holding an administrative post. In addition, the QDC cannot include more than one academic or teaching staff member of the same educational institution or research center (Article 74(2)).

The term of office of a member of the Qualifications and Disciplinary Commission shall be three years (Article 74(4)). A member may not be re-appointed for two consecutive terms. Members of the Qualifications and Disciplinary Commission shall work on an ongoing basis and be seconded to perform their duties in the Commission (Article 74(6)).

Similar to the situation with the Council of Public Prosecutors, in 2016, the Qualifications and Disciplinary Commission members, both those elected by the prosecutorial self-governance body and also those appointed by the assembly of representatives of law schools and academic institutions, were selected. However, the QDC did not start its work because the Parliamentary Commissioner for Human Rights did not recommend their candidates. Also, entry into force of provisions defining competence of the QDC was postponed until 15 April 2017 due to amendments to the Law "On Public Prosecutor's Office". After that date, the Parliamentary Commissioner for Human Rights appointed three members of the QDC, but this authority did not begin its activities due to amendments to the Law, namely adding paragraph 6-1 to the transitional provisions through amendments to the Law "On Public Prosecutor's Office" adopted on 21 December 2016. According to paragraph 6-1: 1) the name of the highest body of prosecutorial self-governance was changed to the All-Ukrainian Conference of Public Prosecutors; 2) the first session and All-Ukrainian Conference of Public Prosecutors to select the members of the Council of Public Prosecutors and the Qualifications and Disciplinary Commission of Public Prosecutors shall assemble within two weeks from 15 April 2017.

Accordingly, as mentioned previously, the Law "On Public Prosecutor's Office" has a binding provision on assembling the All-Ukrainian Conference of Public Prosecutors, inter alia, to select the members of the Council of Public Prosecutors and the Qualifications and Disciplinary Commission of Public Prosecutors. However, there is no provision on the status of persons elected to these positions in 2016 through the self-governance body acting at that time.

Specifics of disciplinary proceedings against prosecutors

The secretariat of the QDC shall register the complaint (application) on the day of receipt. Using an automated system, it shall designate a member of the Commission who is to decide on initiation of disciplinary proceedings (Article 46(1)).

A member of the Qualifications and Disciplinary Commission shall make a reasoned decision to refuse to initiate disciplinary proceedings when:

1) the complaint (application) does not contain specific facts of an alleged misconduct of a public prosecutor;
2) the complaint (application) is anonymous;
3) the complaint (application) was filed on grounds not specified in Article 43 of this Law (a list of violations provided by the law – ed.);
4) legal relations with the public prosecutor who is a subject of a complaint (application) have been terminated under Article 51 of this Law (dismissal or termination of powers – ed.).
5) the disciplinary offence indicated in the complaint (application) has already been investigated and decided upon by the Qualifications and Disciplinary Commission of Public Prosecutors and the decision has not been revoked in the manner prescribed by law.

After the initiation of disciplinary proceedings, the member of the Qualifications and Disciplinary Commission of Public Prosecutors shall perform an inquiry of the circumstances reported in the complaint (application). If the inquiry uncovers other circumstances that may become grounds for bringing the public prosecutor to disciplinary actions, this information shall be included in the opinion of the member of the Qualifications and Disciplinary Commission of Public Prosecutors based on the inquiry results (Article 46(4)).

The member of the Qualifications and Disciplinary Commission of Public Prosecutors shall be entitled to refer to the Qualifications and Disciplinary Commission of Public Prosecutors with a motion for suspension of the public prosecutor from office until disciplinary proceedings are completed.

A motion for the public prosecutor's suspension from office shall be considered at the next meeting of the Qualifications and Disciplinary Commission of Public Prosecutors in compliance with the public prosecutor's guarantees to be notified, to participate in the meetings, to involve a representative, to submit objections, petitions and challenges as stipulated in Article 47 of the Law.

In case the Qualifications and Disciplinary Commission of Public Prosecutors adopts a decision about the existence of the grounds for public prosecutor's removal from office, the copy of this decision shall be sent to the head of the public prosecutor's office, where the public prosecutor works. If the Qualifications and Disciplinary Commission of Public

Prosecutors adopts a decision about the existence of the grounds for removal from office of the public prosecutor holding an administrative position, a copy of this decision shall be sent to the Prosecutor General of Ukraine, the head of a regional or local prosecutor's office in accordance with the powers defined by this Law.

The head of the public prosecutor's office, where the public prosecutor works, the Prosecutor General of Ukraine shall immediately consider the decision about the existence of the grounds for public prosecutor's removal from office; upon reviewing the decision an order on the public prosecutor's removal from office until the completion of disciplinary proceedings may be issued. A copy of the order shall be immediately handed to the public prosecutor, removed from office. (Article 46(5)).

During the inquiry, the member of the Qualifications and Disciplinary Commission of Public Prosecutors shall be entitled to review the documents relating to the subject matter of the inquiry, receive copies of the documents, interview prosecutors and persons familiar with the circumstances of the offense that has the elements of misconduct. Upon a written request, s/he shall be entitled to receive all the required information from the central and local government agencies, officials hereto, heads of enterprises, institutions and organizations regardless of ownership and subordination, citizens and citizens' associations. A public prosecutor who is the subject of disciplinary proceedings shall have the right to provide or refuse to provide explanations concerning himself/herself (Article 46(6)).

Verification of information about availability of grounds for bringing a public prosecutor to disciplinary liability shall be made within two months of the date of registration of the complaint (application). If the verification cannot be completed within this period, it may be extended by the Qualifications and Disciplinary Commission of Public Prosecutors but not more than for one month (Article 46(9)).

A member of the Qualifications and Disciplinary Commission of Public Prosecutors shall draft an opinion based on the results of the inquiry. The opinion should include the information on presence or absence of the offence by the prosecutor and a description of circumstances confirming this. If following the inquiry the member of the Qualifications and Disciplinary Commission of Public Prosecutors established the presence of the violation, the opinion shall further state the nature of the offense, its consequences, information about the identity of the prosecutor, the degree of his guilt and other circumstances relevant to the decision to impose a disciplinary sanction. It should also include proposals of the member of the Qualifications and Disciplinary Commission of Public Prosecutors for a specific disciplinary sanction (Article 46(10)).

The opinion and materials collected during the inquiry shall be submitted to the Qualifications and Disciplinary Commission of Public Prosecutors and received by its members no later than five days before the meeting at which the opinion is discussed (Article 46(11)).

Consideration of the opinion on the presence or absence of public prosecutor's disciplinary offence shall take place at a meeting of the Qualifications and Disciplinary Commission of Public Prosecutors. The following participants shall be invited to the meeting: the

person who filed the complaint (application), the public prosecutor subject to disciplinary proceedings, their representatives, and other persons where appropriate. The notice of the time and place of the meeting of the Qualifications and Disciplinary Commission of Public Prosecutors shall be sent no later than ten days before the meeting (Article 47(1)).

The notice of the time and place of the meeting of the Qualifications and Disciplinary Commission of Public Prosecutors to be sent to the prosecutor shall be supplemented with a copy of the complaint (application) and the opinion on the presence or absence of the prosecutor's disciplinary offence (Article 47(2)).

The opinion on the presence or absence of the prosecutor's offence shall be reviewed in his/her presence and may be reviewed without him/her only when the public prosecutor is properly notified, such as when:

1) the public prosecutor has informed about his/her consent to review the opinion in his/her absence;
2) the public prosecutor did not attend the meeting and did not disclose the reasons for absence; and
3) the public prosecutor did not attend the meeting repeatedly (Article 47(3)).

The review of the opinion of presence or absence of the public prosecutor's offense is adversarial. A meeting of the Qualifications and Disciplinary Commission of Public Prosecutors shall hear explanations of the member of the Qualifications and Disciplinary Commission of Public Prosecutors who carried out the inquiry, comments of the prosecutor who is the subject of disciplinary proceedings and/or his representative and, where appropriate, explanations of other persons (Article 47(5)).

The public prosecutor who is the subject of disciplinary proceedings and/or his/her representative shall have the right to provide comments or to refuse providing any comments, to ask questions to the participants of the proceedings, to submit objections, petitions as well as challenge the member of the Qualifications and Disciplinary Commission of Public Prosecutors when there is any doubt about his/her impartiality and objectivity (Article 47(6)).

The Qualifications and Disciplinary Commission of Public Prosecutors shall adopt a decision in disciplinary proceedings by a majority of votes of its members (Article 48(1)).

The decision to apply disciplinary actions against a public prosecutor or a decision of the impossibility of his further tenure in the prosecutor's position may be taken no later than one year from the date when the offense was committed regardless of the time of prosecutor's temporary disability or vacation (Article 48(4)).

A copy of the decision made by the Qualifications and Disciplinary Commission of Public Prosecutors shall be handed to the prosecutor in question, or it shall be sent to the prosecutor by registered mail with a return receipt within seven days. At the same time, a copy of the decision shall be sent to the head of the prosecutor's office where the public prosecutor in question is employed. (Article 48(8)).

The decision of the Qualifications and Disciplinary Commission of Public Prosecutors taken after the review of disciplinary proceedings shall be published on its website within a seven-day period (Article 48(9)).

Disciplinary sanctions

The following disciplinary sanctions may be applied against a public prosecutor:

1) a reprimand;
2) a ban for up to one year on a transfer to a higher public prosecutor's office or on appointment to a higher position in the public prosecutor's office where s/he holds the office (except for the Prosecutor General of Ukraine);
3) dismissal from office (Article 49(1)).

A public prosecutor, who has avoided the violation of the laws and has conscientiously and professionally carried out the duties, may be deemed having no history of disciplinary sanctions before the end of one year (from the date of imposition of a disciplinary sanction – ed.) subject to a decision of Qualifications and Disciplinary Commission of Public Prosecutors upon request of the head of the relevant public prosecutor's office, but no earlier than:

1) six months after the imposition of a disciplinary sanction of a reprimand;
2) after the expiration of a half of the period specified by the QDC – in case of a ban for up to one year on a transfer to a higher public prosecutor's office or on appointment to a higher position in the public prosecutor's office where s/he holds the office.

As a result of disciplinary proceedings, the Qualifications and Disciplinary Commission of Public Prosecutors may decide that the public prosecutor (except for the Prosecutor General of Ukraine) can no longer hold the office if:

1) the disciplinary offense committed by the prosecutor has the nature of a gross violation;
2) the public prosecutor committed a disciplinary offense acting in the capacity of a public prosecutor while having a record of disciplinary liability (Article 49(4)).

If the Qualifications and Disciplinary Commission of Public Prosecutors reviews the results of disciplinary proceedings against a public prosecutor, who holds an administrative position, and establishes the fact of improper performance of duties prescribed for the relevant administrative positions, it shall initiate a discussion at the Prosecutors' Council of Ukraine to recommend dismissal of the public prosecutor from the administrative position, provided that appointment to this position is done upon a recommendation from the Prosecutor's Council of Ukraine (Article 49(6)).

Appealing the decision taken as a result of disciplinary proceedings

A public prosecutor may appeal the decision taken as a result of disciplinary proceedings before the administrative court or the High Council of Justice within one month of the date when the decision was handed to him/her or receipt of a copy of the decision by mail (Article 50(1)).

An administrative lawsuit filed to the court against the decision of the Qualifications and Disciplinary Commission of Public Prosecutors to bring the public prosecutor to disciplinary liability or on the impossibility of prosecutor's further stay in office shall not suspend the effect of such a decision. With the view to secure the administrative lawsuit, the court may suspend the effect of the decision of the Qualifications and Disciplinary Commission of Public Prosecutors to impose a disciplinary sanction on the public prosecutor or a ban from holding the office (Article 50(3)).

Analysis of the above provisions of the new Law "On Public Prosecutor's Office" shows that it has significantly improved the safeguards against arbitrary disciplinary sanctions imposed on prosecutors, which should also facilitate the strengthening of safeguards for the independence of prosecutors, protection from unlawful state interference with their procedural and service-related activities.

Yet, the study results confirm that even after introduction of a new system of disciplinary liability for prosecutors, managers actively use other mechanisms that are not considered a formal disciplinary sanction, but are not less effective in practice. In addition, prosecutors who conduct procedural guidance stated that these mechanisms are often used to pressure the procedural supervisor into a certain procedural decision.

One of the most common mechanisms for pressuring public prosecutors is disqualification for bonuses, i.e. cancellation of the entire/part of the monthly bonus. This mechanism is selected at different operational meetings. We will describe this procedure in detail in Chapter 2 of this report.

1.5 Performance monitoring systems at prosecutor's offices

The mainstream approach to recording the results of the prosecution service bodies has the following characteristics:

1) only statistics and analytical data is recorded;
2) the lack of meaningful characteristics or relevant reviews of jurisprudence. At the same time, prosecutor's office do not aggregate data for most categories even for their own needs;
3) the scope of data is defined by internal PGO regulations, not by laws.

Article 6 of the Law of Ukraine "On Public Prosecutor's Office" establishes a duty for the leadership of the prosecution service of all levels to report at plenary sessions of respective councils about their performance by giving generalized statistical and analytical data. Information about operations of the public prosecutor's offices shall be published in national and local printed media and on the official websites of the public prosecutor's offices of Ukraine (article 6(4)). These norms are designed to shape accountability and transparency of the prosecutor's offices and ensure assessment of effectiveness of public prosecutors.

Proper exercise of this duty includes maintaining the systems for statistics and analysis in all areas of activities of public prosecutors.

The Statistics section of the official website of the PGO contains statistical information dating from 2011. Scope and categories of published data varies for different years. For instance, in 2011, the published data covered only three categories: "Activities of public prosecutors", "Activities of pre-trial investigation agencies", and "Combating legalization of income obtained through criminal acts". However, in 2016, the list of categories has been significantly expanded to include information about the following:

- Recorded criminal offences and outcomes of pre-trial investigations;
- Perpetrators of criminal offences;
- Criminal offences committed at enterprises, institutions, and organizations in accordance with the forms of economic activity;
- Outcomes of combating organized groups and criminal organizations.

In the framework of this study, we shall focus on the specifics of statistical data directly concerning activities of public prosecutors.

On 18 November 2015, the Prosecutor General approved the reporting procedure under the so-called form #П "On activities of a public prosecutor" and the Instruction for filling out this form, replacing the previous reporting form. The structure of the form #П report corresponds to the fields of prosecutor's activities. It aims to reflect the outcomes of such activities. The report includes eight sections:

- representation of interests of an individual or the state in court
- supervision over observance of laws by the authorities carrying out detective operations, inquiries and pre-trial investigation
- participation of public prosecutors in court hearings in criminal proceedings and review of court decisions
- international and legal cooperation in the area of criminal proceedings
- supervision over observance of laws in the enforcement of court judgments delivered in criminal cases, as well as in application of other coercive measures related to restraint of individual personal liberty
- consideration of applications

- informing about activities of prosecutor's offices
- consideration of information requests

The source of data for reporting under form #П is the primary recording system for information about prosecutors' activities and their outcomes.

Primary recording forms are electronic books and files in accordance with the area of activities in electronic format. In addition, information about prosecutor's work can be found in supervisory proceedings, indexed records, inspection reports, procedural and other documents.

Heads of regional and local prosecutor's offices are responsible for ensuring that timely, complete, and accurate data is entered to the primary recording forms, as well as for submission of reports under form #П.

A prosecution official responsible for the field of activities pursuant to assignment of duties is tasked with processing reporting data for this field of activities during a reporting period. This official is also responsible for timely and complete recording of all data in the reporting book.

The head of a local prosecutor's office personally compiles a report on prosecutor's activities under form #П on the basis of primary recording forms. The report is transferred via electronic communication channels and confirmed by a written report during a set period.

Reports in regional prosecutor's offices are compiled by heads of departments and units, who then sign them and send to the unit responsible for maintaining the Unified Register of Pre-Trial Investigations (URPI) and informational and analytical activities for subsequent compilation and consolidation of the report for the force.

Consolidated oblast (regional) reports are signed personally by heads of regional prosecutor's offices.

At the PGO level, reports are compiled by the heads of independent structural units who then sign them, receive an approval by the correspondent deputy Prosecutor General and send to the Directorate for organizational support of the URPI and informational and analytical activities in written and electronic format.

Directorate for organizational support of the URPI, informational and analytical activities of the PGO compiles a consolidated report under form № П "On Prosecutor's Activities" for Ukraine in general. The report includes reports from regional prosecutor's offices, the compiled report on activities of military prosecutor's offices received from the Main Military Prosecutor's Office, as well as indicators from the PGO report.

One copy of the consolidated report for six months and one year is sent to the State Statistics Service of Ukraine.

Considering the above, we should note that there is still no integrated database accessible to different criminal justice institutions with information about all of the results of activities.

Accordingly, there have been multiples cases of significant mismatches between different authorities.

Preliminary analysis of the system shows that there is a lack of automation in the process of preparation of statistical reports. In fact, there is a degree of mechanical compilation of indicators by different units from the regional level to the PGO level. At the same time, primary recording forms, including the electronic ones, are filled out directly by public prosecutors who have performed the recorded work. Therefore, we consider that entering data from the primary recording forms, provided there is relevant software, into an integrated database would enable automated data consolidation. As a result, this would reduce the amount of time spent on reporting.

During the study, procedural supervisors and investigators mentioned the widespread practice of "manual" adjustments to statistics on the work of prosecutors and pre-trial investigation agencies, in particular, on the number of closed criminal proceedings. This problem is discussed in detail in chapter 3.7 of this report.

Moreover, procedural supervisors in focus groups pointed out the discrepancy between other statistical data and the actual situation. In particular, they talked about the number of written instructions from public prosecutors to investigators in the criminal proceedings.

We should note that analysis of statistics has remained the only method of evaluation of individual prosecutors and prosecutor's office dating back to Soviet times. In order to solve this problem, the Prosecutor General decided to establish a working group to analyze the activities of prosecutor's offices and develop an evaluation system to assess performance of public prosecutors (order no. 402 issued on 16 December 2016). One of the working group's tasks is to develop a new evaluation system for the work of public prosecutors. This system should be based not only on quantitative data, but also on qualitative information.

URPI can also be a source of information about activities of the prosecution service in general, or its units. One of the key indicators in the Register is the number of officially recorded cases and reports on criminal offences, and this indicator (especially with a breakdown for types of crimes) is important part of assessment of crime in Ukraine.

CONCLUSIONS

1. There is an artificial distribution of the procedural guidance function within the Prosecutor General's Office between different deputies of the Prosecutor General. It results in disruption of internal management processes and, in some cases, ineffective cooperation between different structural units, as well as excessive bureaucracy related to reaching agreement on procedural decisions.

2. The bulk of the workload of prosecutors at the units of supervision in criminal proceedings within the PGO and regional prosecutor's offices is the so-called 'area-based control' over the prosecutors at lower levels. Often, it constitutes interference with the work of procedural supervisors in specific proceedings, which is in direct violation of the current criminal procedure law.

3. The prosecutor's offices lack a well-reasoned approach to determining the number of prosecutors at each level (local and regional) or ensuring balance in distribution of the workload between them. Moreover, there is no unified set of criteria for the workload of an individual prosecutor conducting procedural guidance.

4. The study demonstrated development of differing local approaches to the exercise of procedural guidance.

5. The existing system of statistics and analysis of prosecutor's office performance in criminal proceedings is based on "manual" shaping of the data and mechanical compilation. The data is incomplete and fragmented, and electronic reporting tools are rarely used.

Chapter 2

Procedural guidance in the public prosecution system

2.1 Procedural guidance in theory, legislation, and practice: the notion and its meaning

International standards on prosecutors' work in general, as well as the procedural guidance function in pre-trial criminal proceedings shall be strictly separated from judicial functions (Article 10, UN Guidelines on the Role of Prosecutors)[16]. According to these standards, prosecutors perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest (Article 11).

The Recommendation on the role of on the role of public prosecution in the criminal justice system[17] emphasizes the role of a public prosecutor as a procedural supervisor in a pre-trial investigation, namely:

First, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police (Article 21)

Second, in countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may (Article 22):

16 Translated into Ukrainian by the Center of Political and Legal Reform

17 The role of public prosecution in the criminal justice system. Recommendation Rec(2000)19. Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

Third, prosecutors (including procedural supervisors) shall perform their duties fairly, consistently and expeditiously. Prosecutors shall play an active role in criminal proceedings as follows:

a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;

c) when giving advice, they will take care to remain impartial and objective;

d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;

e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

Prosecutors shall, furthermore:

a) preserve professional confidentiality;

b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;

d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

g) seek to ensure that appropriate action is taken against those responsible for using such methods;

h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

a) co-operate with the police, the courts, the legal profession, defense counsel, public defenders and other government agencies, whether nationally or internationally.

Ukrainian legislation does not define the terms "organization and procedural guidance". The Law "On Public Prosecutor's Office" mentions this term only once in the context of prohibition on disciplinary actions against the public prosecutor who has provided procedural guidance in a pre-trial investigation in case of acquittal or termination of criminal proceedings by court (article 43).

There is one mention of the term in the Criminal Procedure Code of Ukraine, namely in article 36(2) of the CPC, which describes the powers held by a public prosecutor in supervising the observance of laws during pre-trial investigation in the form of procedural guidance in a pre-trial investigation[18].

In other words, the legislators understand "procedural guidance" as a form of supervision over observance of laws during a pre-trial investigation. Yet, the legislation of Ukraine does not elaborate on the content of this form of supervision, nor does it explains how it differs from other forms of supervision. Moreover, neither the CPC, nor the current Law "On Public Prosecutor's Office" provide detail on the meaning of prosecutorial supervision over observance of laws during a pre-trial investigation. Accordingly, this does not make the meaning of procedural guidance, which is a form of such supervision, more clear.

18 Criminal Procedure Code of Ukraine. Holos Ukrainy, vol. 90-91, 19 May 2012.

At the same time, one of the main functions of the public prosecutor's office pursuant to article 131-1 of the updated Constitution is "organization and procedural supervision during pre-trial investigation, other matters in criminal proceedings in accordance with the law, oversight in covert and other investigative and search activities of law enforcement agencies". This constitutional provision, therefore, combines two functions of a public prosecutor – "procedural supervision and organization" of pre-trial investigation, as well as distinguishes them from "oversight" over activities of law enforcement agencies in general. In our view, this does not make actual exercise of these functions more clear and unambiguous and creates additional obstacles.

Having examined the prosecutor's powers of supervision in the form of procedural guidance as defined by article 36(2) of the CPC, we suggest that the balance has shifted from supervision over legality towards immediate participation of prosecutor in criminal investigations. For instance, only 7 out of more than 20 powers of the prosecutor in this article of the CPC can be considered more or less related to oversight, including:

- Full access to materials, documents and other information relevant to the pre-trial investigation;
- Overturning unlawful and arbitrary decisions of investigators;
- Raising the issue of recusal of the investigator and appointment of another investigator with the head of the pre-trial investigations agency provided there are grounds for suspension;
- Supporting or refusing to support the motions of investigator filed with the investigating judge on the conduct of investigative (detective) actions, covert investigative (detective) actions, other procedural actions;
- Approving requests for international legal assistance or referral of criminal proceedings made by pre-trial investigation authority;
- Approving or refusing to approve the indictment, motions for coercive measures of medical or educational nature;
- Verifying the documents concerning surrendering a person (extradition) provided by a pre-trial investigation agency prior to referring them to a senior prosecutor etc.

Most of the prosecutor's powers provided by the CPC are connected with directing the course of investigation, namely instructing the investigator, pre-trial investigations agency, or field units to conduct certain investigative (detective) or procedural actions, or conduct of these actions by the prosecutor. For instance, a public prosecutor has the powers traditionally attributed to an investigator, namely:

- Initiating pre-trial investigation;
- Conducting investigative (detective) and procedural actions;
- Notifying the individual of suspicion;
- Drawing up an indictment etc.

At the same time, the prosecutor – procedural supervisor also has the rights reserved for public prosecution, in particular:

- to file a civil lawsuit in the interests of the state or citizens who are unable to defend their rights due to physical or material condition, being underage or elderly, incapacitation or partial incapacitation;
- to apply to the court with an indictment, a motion to impose coercive measures of medical or educational nature, a motion to discharge an individual from criminal liability;
- to appeal court decisions etc.

Procedural guidance in pre-trial investigation of criminal offences:

During the study, we tried to identify how the procedural supervisors see their role in criminal proceedings. Figure 2.1 shows their responses to this question.

It is interesting that more than a half of respondents (almost 60%) did not agree that the procedural supervisor is performing the same functions as a supervisory prosecutor under the previous CPC. At the same time, almost 70 percent of prosecutors agreed that the main burden of evidence collection is on the investigator, and the prosecutor is exercising control over his actions and approves the key procedural documents. The latter, in our view, reflects the role of a prosecutor at the pre-trial stage under the previous CPC.

The opinion of prosecutors regarding the role of the procedural supervisor during investigation was also divided. For instance, 42% of respondents agreed to some extent that the prosecutor organizes the entire investigation process while an investigator is only following his directions. However, 46 percent of interviewees did not share this view.

Moreover, half of respondents (51 percent) agreed that prosecutors often get involved with the investigation during the preparation of an indictment, which shows that prosecutors see their role analogous to the requirements of the previous CPC.

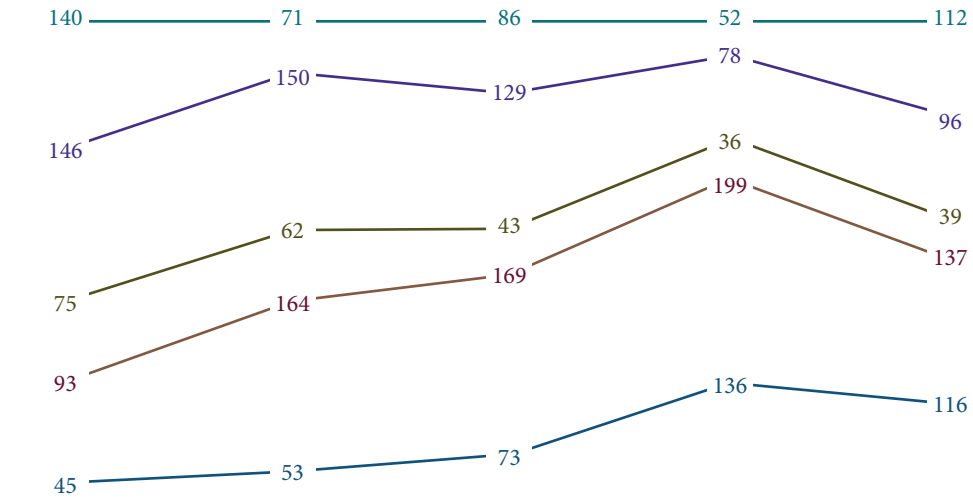
Statements of prosecutors – procedural supervisors – are a good illustration in this context.

Prosecutor

Procedural guidance is also somehow not thought through and regulated completely. I can't figure out that a procedural supervisor, on the one hand, actually leads the pre-trial investigation, i.e. bears all responsibility for its results. On the other hand, we leave out the supervision over observance of laws in the work of investigators. Therefore, prosecutor used to be independent from the investigation results; he was an objective observer aiming to prevent violations by investigation [authorities]. And he joined the process as state prosecutors. Now, it turns out, that prosecutor is like an investigator. Where is supervision? Where is objectivity? So, it is like one side,

Fig. 2.1

Prosecutor's responses to the question "To what extent do you agree with the statements below on the role of a procedural supervisor?



The procedural supervisor is performing the same functions as a supervisory prosecutor under the previous CPC.	The prosecutor organizes the entire investigation process while an investigator is only following his directions	The prosecutor organizes the entire investigation process while an investigator is only following his directions	The main burden of evidence collection is on the investigator, and the prosecutor is exercising control over his actions and approves the key procedural documents	Prosecutors often get involved with the investigation during the preparation of an indictment

Disagree
Disagree rather than agree
Difficult to say
Agree rather than disagree
Agree

procedural supervisor, is directing [the investigation], and, on the other hand, supervising himself... But he is not supervising over himself...! Well, there is a "mix" here... no clear understanding of where the separation of functions of a procedural supervisor and investigator lies..?!

Prosecutor

A prosecutor cannot take the role of supervisor while this role is unchanged in relation to investigation. Unfortunately, in my view, the problem is that many prosecutors are not ready to take that role since initiative in the prosecution service is systematically and methodically eradicated. If a prosecutor wants to be successful and effective, he has, on the contrary, to show leadership qualities, including engagement in direct confrontation with the heads of pre-trial investigation authorities, for instance, replace investigators and say, "Excuse me, this is not an investigator".

To some extent, this problem is exacerbated by the overlap of certain functions of a prosecutor and investigator in criminal proceedings. As we mentioned above, the new CPC provides the prosecutor with the functions of investigator during pre-trial investigation. This creates ambiguity in relation to investigator's role – does this official have procedural independence, or is investigator, in fact, an assistant to the prosecutor in criminal proceedings?

Prosecutor

With the adoption of the new CPC, it seriously changed not only the prosecutor's role, but also the investigator's role. However, it does not happen in practice. We tell the prosecutor, "You are the procedural supervisor, go ahead, you have many tools, you have to direct and organize". However, we do not say that the investigator's role has changed.

Prosecutor

So the investigator is taking care of everything, selecting, following orders etc. In fact, it should not be this way. When I came to the Prosecutor General's Office, I thought that prosecution investigators and procedural guidance are the same unit, they have to be one system. In fact, it is not like that. Investigator of the Prosecutor General's Office says, "We need to conduct investigation in 'one direction', and procedural supervisors point to another direction".

Prosecutor

At the Prosecutor General's Office, I had a chance to speak with an FBI agent who was on business visit. I asked him, "How does it work for you? How does the prosecutor guide?" There [in the USA] the prosecutor has significant influence, even more than out procedural supervisor. We are asking, "How does it work for you?" He said, "The prosecutor does not restrict me in investigative action and, in general, does not give orders". We said, "What if you decide that you need to move in this direction, and the prosecutor suggests another direction. Will you go there?" "No", he said. And why? Because, he said, "if I go and waste my time, resources of the state that is paying my salary, and bring this to the prosecutor, and he does not need this, I will be in trouble".

Prosecutor

These things, the changes in the role of investigator and procedural supervisor, are hard to separate in this regard. If we look at the role from a practical perspective, we will not understand fully how the new prosecutor appeared, a new role emerged. Therefore, we need to say here that we launched a new mechanism, the new CPC, with a new role, but forgot that we need to develop this part, namely explain investigators that they are now, in fact, assistant prosecutors, similar to the former role of an assistant prosecutor.

Investigator

After the new CPC was adopted, they [prosecutors] consider their role to be the main one from the point of view of responsibility, since they approve all our [investigator's] actions... They maintain the register [Unified register of pre-trial investigations] and they have to confirm all our actions.

At the same time, in certain cases, the lack of clear definition of the role of procedural supervisor, on the contrary, leads to certain self-removal of the prosecutor from pre-trial investigation. This is illustrated by the words of a participant of the focus group with police investigators:

Investigator

The prosecutor sees his role solely in bringing state prosecution in court. Very rarely, in individual cases, prosecutor takes interest in pre-trial investigation. These are rare occasions in high-profile cases.

Participants of focus groups with the heads of pre-trial investigation agencies, investigating judges and prosecutors pointed out the lack of proper cooperation between prosecutors and investigators in criminal proceedings. In particular, they raised the issue of the lack of clear assignment of investigators to a prosecutor, which precludes effective work contact and stable communication:

Prosecutor

A trivial example. There is a prosecutor. 360 proceedings, how many investigators? The entire investigation unit. How can prosecutor cooperate? In the city prosecutor's office, I have 90 percent of proceedings – that's on investigators. So, can I establish cooperation with anyone? I can state my opinion and say that I am the leader, communicate? How can you cooperate if there are 20-30 investigators for one procedural supervisor? How is it realistic to work with them in this leadership context?

Another obstacle to effective cooperation between the prosecutor and the investigator is the actual lack of definition of the role of the the head of pre-trial investigation agency in practice.

For instance, according to article 39 of the CPC, the head of the pre-trial investigation agency has the duty to organize pre-trial investigation. According to this article, the head of the pre-trial investigation agency shall have the right to, in particular:

- appoint investigator (investigators) to conduct pre-trial investigation, and where pre-trial investigation is conducted by an investigation group, to appoint the senior member of the investigation group who leads the actions of other investigators;
- suspend an investigator from the conduct of pre-trial investigation by a substantiated resolution, on the initiative of a public prosecutor, or at his discretion followed by notification of a public prosecutor, and appoint another investigator where there are grounds specified by the present Code for challenging the investigator concerned or in the case of ineffective pre-trial investigation;
- review records of pre-trial proceedings, instruct the investigator in written form without prejudice to decisions and instructions by the public prosecutor;
- to approve the conduct of investigative (search) actions and to extend the time limit for their conduct, in cases specified by the CPC.

At the same time, the updated Constitution states that organization of pre-trial investigation is one of the functions of the prosecutor's office. As a result, an investigator has two actual supervisors in criminal proceedings with procedural powers. This dual power, in practice, causes certain problems:

Prosecutor

And there is also the head of the pre-trial investigation agency, and they sit in the same office! The head is pushing [the investigator – ed.] with orders, throwing new criminal proceedings files on him.

Prosecutor

This problem is exacerbated since, first of all, there is uncertainty in jurisdiction and, second, the issue of participation of the head of pre-trial investigations agency, i.e. his powers to give orders, organize work etc. Countries with similar criminal procedure codes, there jurisdiction is not a category linked to the pre-trial investigation agency, it is linked to the prosecutor's office. Therefore, jurisdiction is up to the prosecutor. The prosecutor creates a group of investigators, experts, and acts as a prosecutor himself. Others are only acting pursuant to his orders and decisions. We don't have that since the perception of the investigation authorities of themselves, as well as the perception of investigation authorities by the prosecutors, has not changed.

2.2 Principles and safeguards relating to procedural guidance

International organizations that aim to coordinate and establish certain standards for national prosecution authorities in member states pay significant attention to formulating

the principles of prosecutor's activities in the role of a state prosecutor, as well as in the role of a procedural supervisor in pre-trial investigation of criminal offences.

Current UN *Guidelines on the Role of Prosecutors*[19] provide that States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability (Article 4).

In addition, *Recommendation on the role of on the role of public prosecution in the criminal justice system*[20] emphasizes the following:

First, States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organizational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors (Article 4).

Second, States should take measures to ensure that:

- *public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law (Article 5d);*
- *public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions (Article 5g).*

Third, all public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement (Article 10).

Fourth, States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out. (Article 11).

Fifth, in countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law. (Article 14).

Sixth, public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of

19 Translated into Ukrainian by the Center of Political and Legal Reform.

20 The role of public prosecution in the criminal justice system. Recommendation Rec(2000)19. Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

power, grave violations of human rights and other crimes recognized by international law. (Article 16).

In its turn, the national legislation of Ukraine on the public prosecutor's office also establishes a system of principles of prosecutors' activities, including their role of procedural supervisors in pre-trial investigations of criminal offences. These principles include independence, unchangeability, impartiality and objectivity.

2.2.1 Independence

When performing prosecutorial functions, a public prosecutor shall be independent of any illegitimate influence, pressure, interference, and shall be guided in their operation exclusively by the Constitution and the laws of Ukraine (art. 16(2) of the Law "On Public Prosecutor's Office").

Central and local government authorities, other public institutions, their officials and officers, as well as individuals and legal entities and their associations shall be obliged to respect independence of the public prosecutor and refrain from exercising influence of any form on a public prosecutor in order to prevent the execution of his duties or taking illegal decision (art. 16(5)).

Article 17 of the Law of Ukraine "On Public Prosecutor's Office" regulates the matters of subordination of public prosecutors and execution of orders and instructions, which is also significant for ensuring independence and impartiality of a procedural supervisor. Part 1 of this article states that public prosecutors shall exercise their powers within the limits established by law and shall be subordinated to their superiors only in respect to implementation of written administrative orders related to organizational aspects of public prosecutor's work and operations of public prosecutor's offices. Administrative subordination of public prosecutors shall not be a ground for limiting or infringing their independence in the exercise of their prosecutorial powers.

When exercising powers associated with performance of prosecutorial functions, public prosecutors shall be independent and independently make decisions on the procedure of exercising such powers in compliance with the laws and shall execute only those instructions of higher public prosecutor, which comply with this Article (Article 17(3)). Higher public prosecutors shall be entitled to instruct public prosecutors of a lower level, coordinate their certain decisions and carry out other actions directly related to this public prosecutor's implementation of prosecutorial functions exclusively within the limits and in compliance with the procedure set by law.

A public prosecutor is not obliged to follow higher public prosecutor's orders and instructions which raise doubts as to their legality unless the public prosecutor receives them in writing as well as obviously criminal orders or instructions. A public prosecutor shall be entitled to apply to the Council of Public Prosecutors of Ukraine reporting on a threat to his/her independence due to an order (instruction) issued by a higher public prosecutor (Article 17(5)). The issuance, instruction or execution of an illegal order as well

as issuance or execution of obviously criminal order or instruction shall give rise to the liability established by law (Article 17(6)).

Article 16 of the Law of Ukraine "On Public Prosecutor's Office" provides guarantees for the independence of a public prosecutor, namely:

1) special procedures for appointment to, and dismissal from, the position, and disciplinary sanctions;
2) procedures of exercise of powers stipulated in procedural and other laws;
3) prohibition of illegal influence, pressure and interference with the exercise of public prosecutor's powers;
4) statutory procedures for financing and organizational support for the public prosecutor's' offices;
5) established financial, social and pension support for public prosecutors;
6) functioning of the prosecutorial self-governance institutions;
7) statutory personal security arrangements for public prosecutors, members of their families, their property, as well as other legal safeguards.

At the same time, despite the above provisions aimed at ensuring independence of public prosecutors in criminal proceedings from any interference, current CPC contains a provision that can cause doubt and, in some cases, threaten the independence of a public prosecutor.

We should note that the most important aspects of public prosecutor's independence as a procedural supervisor in local conditions include: violations of the procedure of imposing disciplinary sanctions, unlawful influence (pressure, interference) of the heads of prosecutorial institutions and external factors (politics, officials) on the actions of prosecutors, as well as non-transparent means of calculating and executing salary payment for prosecutors.

In particular, Article 36(6) of the CPC states that the Prosecutor General of Ukraine, heads of regional prosecutor's offices, heads of local prosecutor's offices, their first deputies and deputies, when supervising over observance of laws during the pre-trial investigation may revoke illegitimate and unjustified orders issued by investigators and subordinated prosecutors within the time limits of pre-trial investigation as specified in article 219 of the CPC. The prosecutor supervising over observance of laws during the respective pre-trial investigation shall be notified of such revocation (art. 36(6)).

This wording in the CPC in practice makes the public prosecutor dependent from a higher-level prosecutor. The latter has the right to interfere with the procedural activities, which is directly prohibited by the Law "On Public Prosecutor's Office" whereby higher-level prosecutors have the right to instruct the lower-level prosecutors only in relation to administrative matters.

At the same time, these contradictory provisions of the CPC are reflected in the Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 (amended on 26 July 2013), which establishes strict internal subordination both in the internal structure of the public prosecutor's office, and also in the actions of procedural supervisors. For instance, paragraphs 3.1, 7, and 7.2 of the Order establish strict administrative control over the actions of procedural supervisors:

> *"3.1. Heads of prosecution authorities and specialization units of prosecutor's offices on all levels, who are responsible for the area of work in accordance with the distribution of duties, shall exercise control over the quality of procedural guidance during pre-trial investigation and participation in trial".*
>
> *"7. If there are grounds, the heads of prosecution authorities of all levels shall verify the grounds for the notice of suspicion, compliance with the time limits, the rights and legitimate interests of suspects.*
>
> *7.1. When taking a decision to terminate criminal proceedings where a person has been notified of suspicion, it shall be sent to the head of the prosecution authority of a higher level accompanied by justification.*
>
> *7.2. Such proceedings shall be sent to the district prosecutors in cities through the city prosecutor's office with a district division".*

Without a doubt, these provisions have negative impact on prosecutorial independence and independence of procedural supervisors, as well as the effectiveness of investigators and the entire process of pre-trial investigation.

In this context, there are deep concerns about the provisions of the Order relating to the role of prosecutors during trial, in particular paragraph 21.1 of the order stating "if there are grounds for withdrawal of state prosecution, change of indictment or additional charges established during trial, relevant documents shall be approved by the head of the prosecution authority, and if the latter is representing the state in the case – by a prosecutor of a higher level".

We asked the prosecutor whether they felt independent from external influence when exercising the duties of procedural guidance. As we can see in Figure 2.2, only 11% of respondents considered themselves fully independent, 26% – more independent than not. However, the majority of interviewed prosecutors still considered themselves dependent from external influences.

At the same time, according to prosecutors, the immediate supervisors, regional prosecutors, and the Prosecutor General's Office have varying degrees of influence on their decisions and actions as procedural supervisors (Figure 2.3).

For instance, 'the most influential' are the heads of the regional prosecutor's offices followed by the management of the local prosecutor's offices. The 'third place' is after the regional prosecutor's office unit supervising pre-trial investigations.

Fig. 2.2

Prosecutors' responses to the question "How independent do you consider yorself from any external influence as a procedural supervisor?"

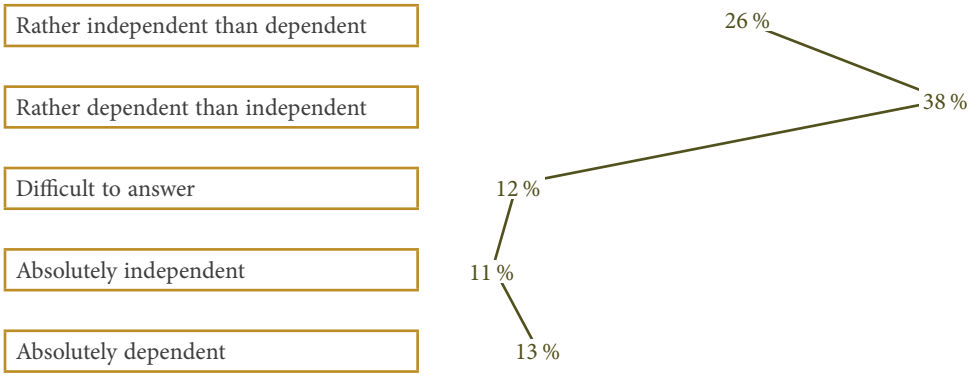
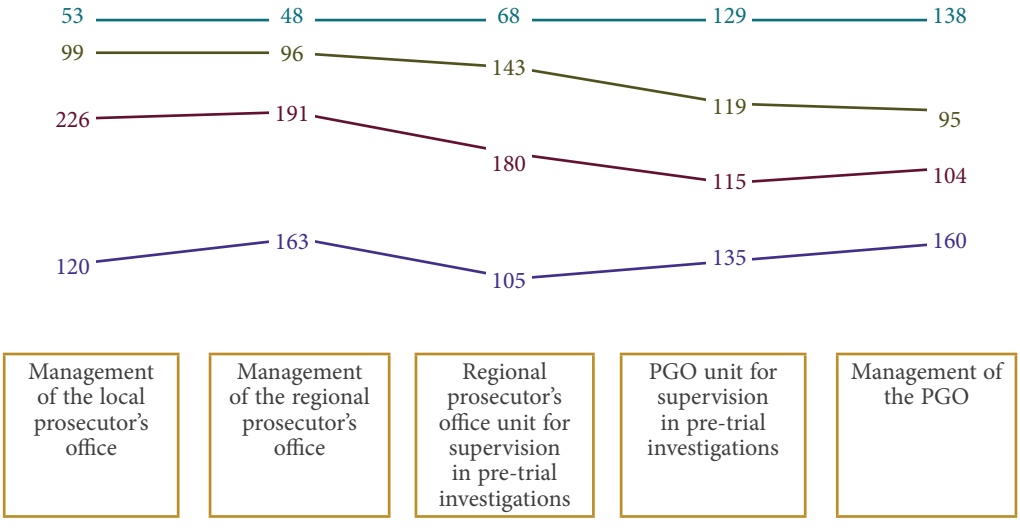


Fig. 2.3

Prosecutors' responses to the question "How significant are the channels of influence on you decisions by the following entities?"



Results of focus groups with investigating judges, investigators and prosecutors – procedural supervisors also support this conclusion. In particular, investigating judges expressed the following opinions on the independence of prosecutors during trials:

Investigating judge

Again, they follow orders from above. Often, prosecutor comes and says, "I know that we did not need to go to court, but I was told, and I come with this motion and try to support it as much as I can".

Investigating judge

No prosecutor shall make a decision, even when something is wrong during the hearing, for instance, withdrawal of prosecution or other questions, like change of qualification or inadmissible evidence, prior to consulting with the head of the prosecution agency or a supervisor: the prosecutor (state prosecutor) will quickly call the head of the unit at the regional office, deputy prosecutor's head of the unit, deputy prosecutor, and only then a decision will be made.

Investigating judge

The prosecutor's office is very strict and peculiar organization with strict vertical subordination. They are not independent.

Almost all participants of focus groups with investigators pointed out that when making important procedural decisions (procedural apprehension of the suspect, serving the notice of suspicion, or choosing a restraint measure of detention), due to the lack of independence of the procedural supervisor or possible sanctions for independent actions, prosecutors are often afraid to make these decisions independently:

Investigator

However, the procedural prosecutor will definitely not confirm the notice of suspicion without an approval from the head of the prosecutor's office.

Investigator

Let me tell you about the independence principle. I came to the first prosecutor in the group to approve the notice of suspicion. He refused and said, "You need to 'capture' him [the suspect]". I responded, "He has already been taken under 208". The day passes, we need to serve him the notice of suspicion, and nobody is even planning to sign it. One says, "I will not sign", second one says, "I will not sign". The third one references the first two, and the fourth says, "I'm sick, leave me alone".

Investigator

We come to the procedural supervisor and say, "Here are the materials, witnesses, expert assessments. We did everything, notify him of suspicion because the person will not come to us. She [the procedural supervisor] calls the prosecutor [head of the agency] in my presence and tells him, "The materials you know about are here, I am signing the notice of suspicion, right". He says, "Of course, it is a grave crime, it is even under part 3 – particularly grave, because it

is a high jacking with bodily [injuries]". Ok, so they sign the notice of suspicion, I put it into the Unified register of pre-trial investigations. She calls me the next day and says, "Write an explanation of why you put it into the Register". I said, "You approved it". She said, "Where is my [prosecutor's] signature on the notice?".

Investigator

The problem is that procedural prosecutors are very scared to sign the notice of suspicion and take that responsibility. That's why there is a big problem with approving the notices, as my colleagues have rightly stated. You go to the procedural prosecutor, he goes to the deputy head who is in charge of police, then he goes to the deputy head of the district prosecutor's office. So the investigator can spend a whole day at the prosecutor's office trying to have the notice approved.

Prosecutors – procedural supervisors also confirm investigators' opinions:

Prosecutor

Of course, every notice of suspicion, court motion, [entails] a mandatory report and notification of the supervisor or deputy head of the prosecutor's office. Even before sending a number of criminal proceedings to the court, there are weekly meetings between the supervisor and the head, deputy head of the investigation unit to decide which proceedings can be sent this month, whether there is proof, expert testimonies that can be sent to court. There is control by the head to avoid questions of the head of the regional prosecutor's office in the future.

The focus groups confirmed the results of questionnaires of procedural supervisors (see Figure 2.4).

According to the data above, in most cases (over 95%), procedural supervisors get approval from their management for the key procedural decisions and actions. Moreover, this approval is always obtained in over 60 percent of cases! More than 20 percent of interviewees indicated that they get approval in most situations.

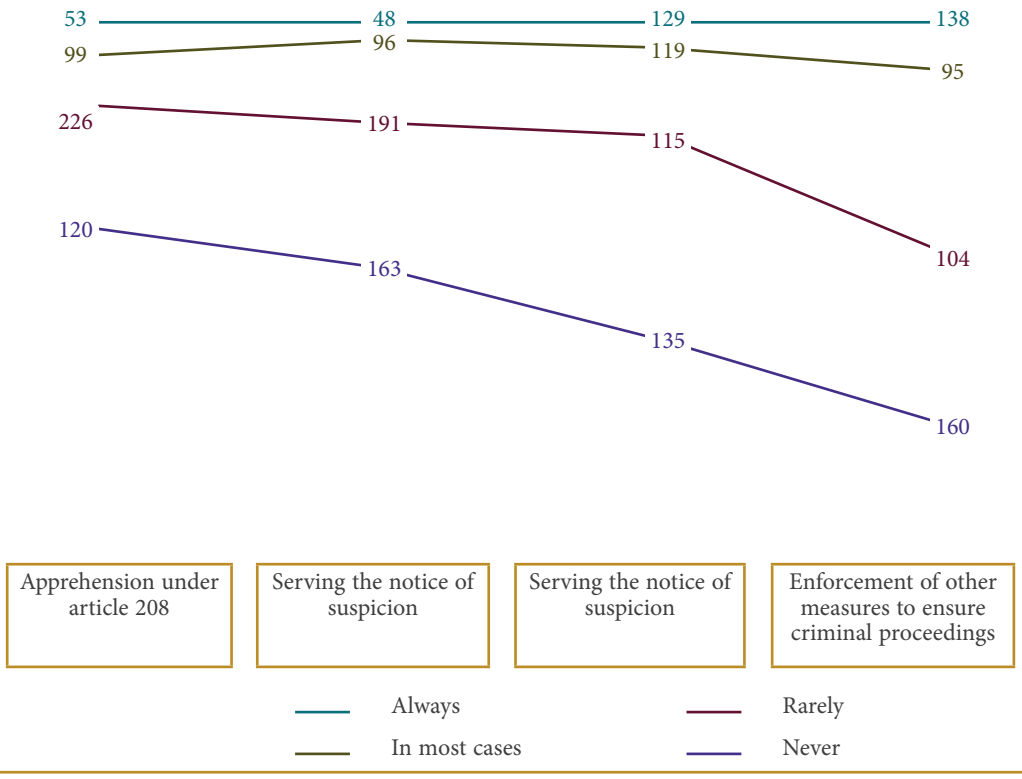
During focus groups, procedural supervisors pointed out interference with their work by prosecutors from the higher-level prosecutor's offices, in particular, by the so-called zone prosecutors of the regional prosecutor's offices:

Prosecutor

Also, you need to remove the zone prosecutors who provide unofficial orders for the subordinate prosecutors. So the prosecutor could decide whether to draw up the indictment, support prosecution or withdraw prosecution. And when he withdraws prosecution, the supervising prosecutor should not call him for a "talk" and make him give a written explanation as to why he'd decided to withdraw or change qualification.

Fig. 2.4

Prosecutors' responses to the question "Do you need to receive approval for the following decisions or actions from the management of the local prosecutor's office?"



The study also found institutional mechanisms of influence on procedural supervisors in the form of various operational meetings which can result in decisions that have direct impact on a particular procedural supervisor. This mechanism is provided for by paragraph 41 of the PGO order cited above, *"To hear at meetings the reports of prosecutors, their deputies and the heads of specialized units on the work in the field of supervision over the observance of laws by pre-trial investigation agencies, supporting public prosecution, as well as the results of inspections in subordinate prosecutor's offices"*.

For instance, there is widespread practice of operational meetings in high-level prosecution agencies with decisions taken on the effectiveness of a particular prosecutor or even investigator are made. As a possible sanction for inadequate, in the management's opinion, performance, a procedural supervisor (public prosecutor) can be deprived of bonus payments, or case files can be transferred to another prosecutor virtually without

any grounds, or the prosecutor will face disciplinary sanctions (disciplinary punishment imposed).

Procedural supervisors confirmed that the practice is very widespread:

Prosecutor — *About the prosecutor's independence. There can be no independence now. The law is the law. But we have salaries and reprimands, as well as disciplinary sanctions. How is it regulated? Our salary is 20 percent of what we receive. They rest is bonuses, extras for the length of service.*

Prosecutor — *This can lead to a reprimand accompanied by the loss of bonuses. Our region has a very strict practice. Recalling a bonus is at least 30 percent decrease, or even 100% decrease. Our head is deprived of his bonus for 50-100 percent almost every month for our mistakes. Accordingly, if he does not take away our bonuses, he will not receive one. We feel sorry for our head and we agree when he writes a report to take away 30 percent of bonuses for two-three people for any violations.*

Prosecutor — *Bonus reduction happens every month. Two, three, five people out of 27 staff prosecutors have their bonuses reduced. If the head does not reduce the bonuses, then his bonus is reduced. The same happens every month. This is the practice. We have already forgotten what bonus payments look like.*

Prosecutor — *You will not get a green light until you report to the management. There is still the grey role of the head of the prosecutor's office – he can go ahead and change the groups of prosecutors. He can hold an operational meeting and the minutes will not be included into the case file, but the decision is taken. He (district, regional prosecutor) will write that it is not effective, that he considers another qualification necessary. If the local prosecutor acts out of principle, he can draw up an indictment and send it to court. And the local prosecutor may disagree with the indictment and assign it to another prosecutor.*

Prosecutor — *To hold an operational meeting, write the minutes of this meeting and, as a result, declare effectiveness/ineffectiveness, and then – the reprimand/no reprimand, change/no change, dismiss a prosecutor or simply assign another procedural supervisor to the case.*

Prosecutor — *These powers of supervisory units of the regional prosecutor's offices of the PGO stem from the fact that we have our instruction (our internal PGO regulation) about the duty to hold operational meetings.*

Prosecutor

Only based on these operational meetings they somehow can affect me, the procedural supervisor. Also, there is bonus reduction, dismissal etc. At the same time, according to the CPC, they have no right to write any orders. They [procedural supervisors] mostly avoid the CPC provisions to change the group of prosecutors or investigation agency.

Prosecutor

For instance, the prosecutor of Kyiv region made a decision postponing the salary payments for a prosecutor who refused to do something during the operational meeting.

Prosecutor

Do you understand the importance of bonus payments for the prosecutor? There are discussions about the criminal case during operational meetings. For instance, you disagree, and they reduce your bonus by 100 percent that month, which is more than your base salary. I am ready to say that these are significant numbers in terms of percentage. As a result, you think twice whether you need it or not. They can reprimand you or simply fire you without consideration at the qualifications and discipline commission, following a decision of one person – the head of the prosecutor's office. If there is a qualifications commission, it is a whole procedure, and it is the prosecutor's court. So you can present and explain. At the same time, with all the willingness to play the penalty series, the game is one-sided.

2.2.2 Unchangeability

Article 37(2) of the CPC of Ukraine states, *"The prosecutor will perform the duties of prosecutor in a specific criminal proceeding from its commencement to the very completion. Another prosecutor may perform the duties of prosecutor in this same criminal proceeding solely in the cases stipulated for in parts four and five of article 36, part three of article 313, part two of article 341 of the CPC"*. These cases include, for instance:

- when court decisions are challenged in appeal and cassation procedures and a prosecutor from the public prosecutor's office of a higher level can be present in court proceedings
- pre-trial investigation is ineffective
- a decision is revoked or the actions or omittance of a prosecutor are recognized as illegal
- approval of a motion for recusal of a prosecutor, severe illness, dismissal from the public prosecutor's office or another serious reason that makes the prosecutor's participation in criminal proceedings impossible

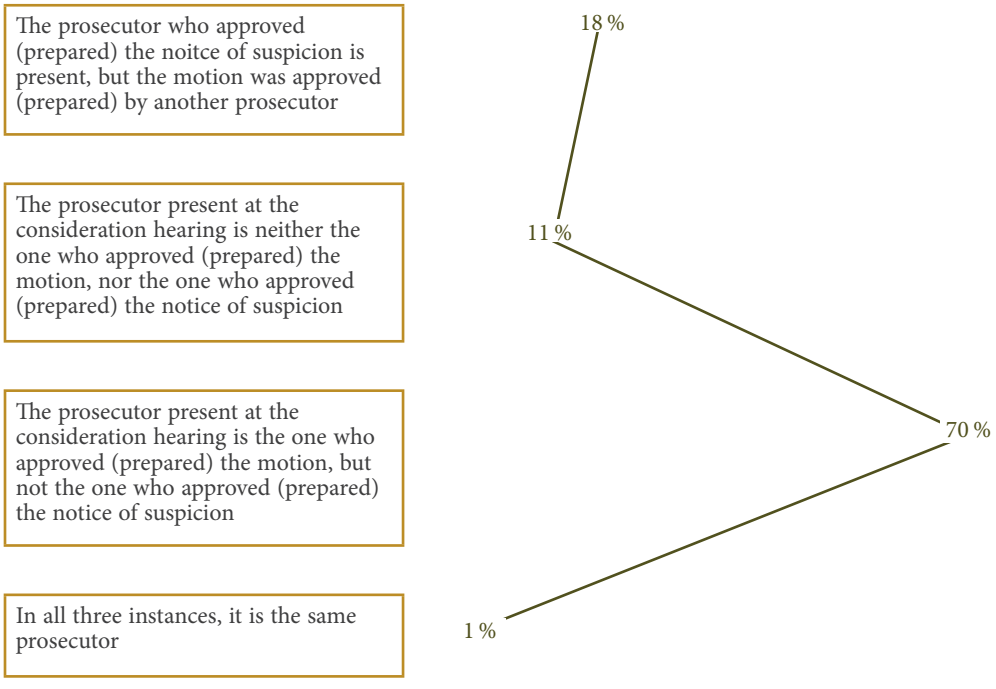
- if the head of the higher public prosecutor refuses to approve the indictment with the changed charge, a motion to bring additional charge, or a decision to drop public prosecution or initiate proceedings in respect of a legal person.

At the same time, study results show that the principle of unchangeability of a prosecutor is not always observed in practice. In most cases (70%), the same prosecutor who approves (prepares) the notice of suspicion and the motion for a restraint measure and is then present at the court hearing where the motion is considered (Figure 2.5).

At the same time, there are widespread instances when prosecutors are replaced at different stages. For instance, in 11% of cases, a prosecutor who did not approve the notice of suspicion was present in court during consideration of a motion for restraint measures. Almost in one-fifth (18%) of court hearings, the prosecutor present approved neither the notice of suspicion, nor the motion for a restraint measure.

Fig. 2.5

Prosecutors' responses to the question "Does the name of the prosecutor present at the consideration of a motion for a restraint measure match the name of the prosecutor who approved the motion and the notice of suspicion?"



The above data is supported by focus group results. For instance, investigating judges commented on this issue:

Investigating judge

[They] change very often. One person approved the notice of suspicion, another one comes to [the consideration] of a restraint measure and I guarantee that a third person can approve the indictment, and the fourth one will come to the trial to support public prosecution.

Investigating judge

[They change]. The same situation. It happens. They come, "I was changed, I don't know anything. Let's reschedule the trial. The problem is that public prosecutors are not in charge of the situation".

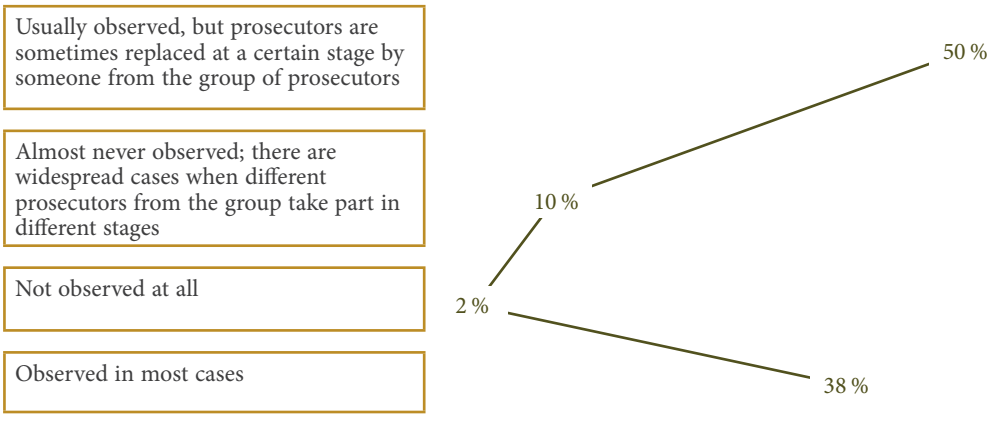
Similar data was obtained through questionnaires for procedural supervisors (see Figure 2.6). The majority of interviewees (88%) stated that the principle of unchangeability is observed.

At the same time, 50 percent confirmed that prosecutors are sometimes replaced at a certain stage by someone from the group of prosecutors. At the same time, 12% of interviewed prosecutors stated that the principle of unchangeability is either not observed or not observed in majority of cases.

One of the reasons of frequent replacements of prosecutors in criminal proceedings, according to the focus group participants, is an excessive workload of a prosecutor – procedural supervisor who often physically is unable to be present in all court hearings.

Fig. 2.6

Prosecutors' responses to the question "Based on your experience, how would you evaluate observance of the unchangeability principle in practice (from the beginning of criminal proceedings until the final court decision in the case)?"



In particular, judges had the following remarks:

Investigating judge

The excessive workload, which exists – in fact, in addition to procedural guidance, prosecutors also present cases in courts, go to the investigating judges to support motions for restraint measures, or for consideration of complaints.

Investigating judge

In a district where there are actually 800 proceedings for one procedural supervisor, he is spending the entire day in court. In the meantime, he could be simply working, but he is sitting and waiting for a witness, he loses 2-3 hours, and there are 20 investigators with indictments for signature lined up next to his office.

Prosecutors – procedural supervisors also pointed out this issue:

Prosecutor

The regional center is 180 km away. It is 4.5 hours by mini-bus. The judges schedule a hearing for 10 a.m.. For example, I have work tonight, and tomorrow I need to travel to a court a hundred kilometers away by 10 a.m.

Prosecutor

I can agree that there is a practical moment of tearing up the person (prosecutor) into two parts: here, you are going to court, and then investigators call you – we want to approve the notice of suspicion or apprehension of a person. In practice, I can't break down into several parts for everyone.

In order to ensure the principle of unchangeability, there is widespread practice of creating groups of prosecutors virtually in every criminal case since groups of procedural supervisors are foreseen in the CPC as an exemption from the general rule of individual procedural guidance in pre-trial investigation (Figure 2.7).

Fig. 2.7

Prosecutors' responses to the question "How common is the practice of creating groups of procedural supervisors in your region?"

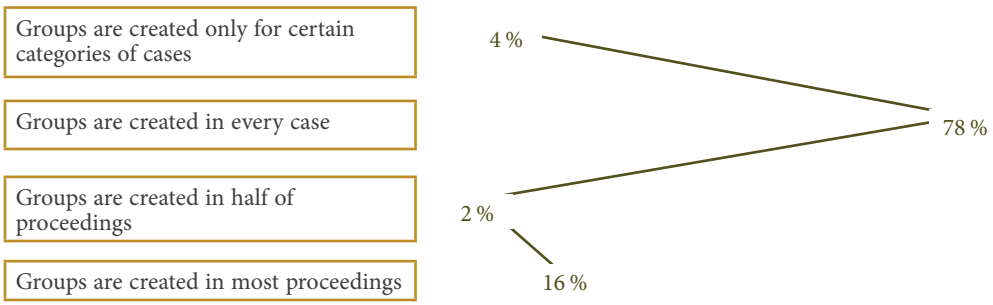
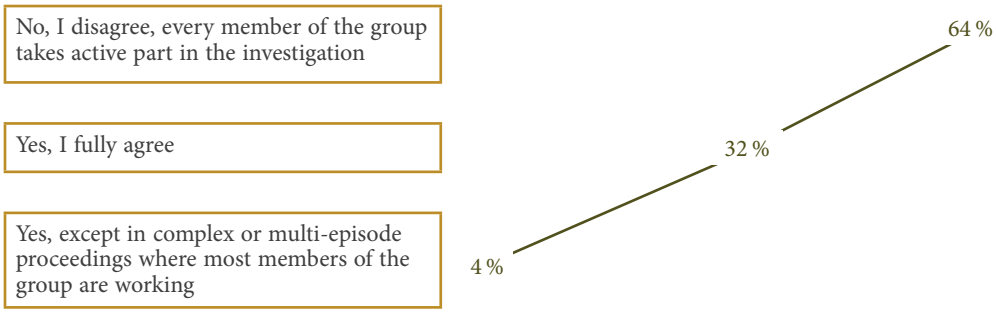


Fig. 2.8

Prosecutors' responses to the question "Do you agree that only the head of the group is conducting procedural guidance while the rest of prosecutors are in the group as 'back-up'?"



For instance, 78% of procedural supervisors stated that groups of prosecutors are created in every case; additional 16 percent said this practice was used in most proceedings.

In practice, this exceptional instrument for improving effectiveness of the prosecution authorities in criminal proceedings is used as 'back-up' for a prosecutor who cannot be present in a court hearing for certain reasons (see Figure 2.8).

However, according to the study, this mechanism is not efficient enough since, in any case, the responsibility is on the head of the group of prosecutors. Members of the groups, as a rule, turn out to not know the materials of a particular case and the progress in the trial.

Procedural supervisors also supported this position about the effectiveness of establishing groups of prosecutors in criminal proceedings:

Prosecutor

There is a notion of a group of prosecutors. The Code says that, in exceptional circumstances, a group of prosecutors can be created when they are not meeting deadlines or ineffective. Taking myself as an example, I think every prosecutor would say this. There is a question of whether I will be a procedural supervisor in this case or not. Everyone recalls who is in the group of prosecutors. They see – and the entire unit is there. They appoint me, and I haven't even seen the cover of case files, and I have no idea what the case is about. I was just included there for insurance. These are 99% [of prosecutors] who are included into this group and are not familiar with the content of the criminal proceedings.

Prosecutor

No, this is not my case, because this practice has existed in the prosecutor's office from the beginning: the senior person is responsible

for everything. A question comes up: why is this group created? There is a need for human resources, not enough people for the work, we cannot, we are not meeting the deadlines etc.

Prosecutor

There is a question about establishing the group of prosecutors: and who is signing the order to create the group? The head of the prosecutor's office signs it. He is signing up all his subordinates. And then there is a question: what is the purpose of creating the group?!

Prosecutor

There is a group of prosecutors. But if the one in charge is sick, everyone else is running worried: what are we going to do?!

Investigating judges have the same opinion as the prosecutors:

Investigating judge

To be safe. Then, the situation turns out to be this: a prosecutor is on a sick leave or is simply busy with another trial. Not to disrupt the hearing, they send a prosecutor from the group. At the same time, the prosecutor from the group answers to every question, "I'm a technical prosecutor, I will not respond to such questions and I cannot submit anything". The hearings are in vain. Why do we need a technical prosecutor? What is a technical prosecutor?

2.2.3 Impartiality and objectivity

UN Guidelines on the Role of Prosecutors[21] and the *Standards of professional responsibility and statement of the essential duties and rights of prosecutors* adopted by the International Association of Prosecutors in 1999, as well as the *Recommendation on the role of on the role of public prosecution in the criminal justice system* adopted by the Committee of Ministers of the Council of Europe in 2000, state that prosecutors shall perform their duties without fear, favour or prejudice. In particular, they shall:

- perform their duties without fear, favour or prejudice;
- carry out their functions impartially and act with objectivity;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

21 Translated into Ukrainian by the Center of Political and Legal Reform.

- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

This principle is also reflected in the national law. For instance, impartiality and objectivity are among the principles of the public prosecutor's office work in accordance with article 3 of the Law of Ukraine "On Public Prosecutor's Office".

One of the principles of criminal proceedings is legality, which means, inter alia, that prosecutor, chief of pre-trial investigation agency, investigator shall be required to examine comprehensively, fully and impartially the circumstances of criminal proceedings, find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well as the circumstances mitigating and aggravating their punishment; make adequate legal evaluation thereof and ensure the adoption of lawful and impartial procedural decisions (art. 9(2) of the CPC).

The law does not define the terms "objectivity" and "impartiality", which are given as synonyms. At the same time, we decided to draw a certain line between these terms.

In our view, objectivity in the context of criminal proceedings, characterizes full and comprehensive investigation, the use of all forms and methods of proof provided by the law.

At the same time, impartiality refers to the lack of stereotypes and prejudice of the prosecutor in relation to participants of criminal proceedings and the investigation in general. Impartiality means that a prosecutor in criminal proceedings has to discover both the circumstances that prove guilt of the accused/defendant, as well as exculpatory and mitigating or aggravating circumstances.

Study findings confirmed that these principles are not always upheld in practice. Among the reasons for failing to comply with the principle of objectivity, according to procedural supervisors, is the excess workload that prevents comprehensive examination of circumstances in each criminal case:

Prosecutor

Currently, I have over 20 proceedings in court where persons are mostly in detention, particularly grave murders, violent crimes that are difficult to prove. Approximately up to 35 persons – in one case there are 12, in others – 5, 4, 3 persons. Accordingly, being a procedural supervisor, I do not have time to organize the pre-trial investigation and ensure its objectivity. That is why we distribute cases among district (local) prosecutor's offices, and my criminal proceedings are spread all over the region.

Prosecutor

[We] can never have an expedient or comprehensive investigation because prosecutors are very busy. If you look at the workload of local prosecutors, some of them have 450-500 proceedings. If you

think about the number, it is impossible at the district level. In Kyiv, there are up to 900 cases for one procedural supervisor a year. The numbers are sky-high.

Investigating judges also confirmed that the workload has negative impact on the objectivity of a procedural supervisor, as well as the quality of the entire pre-trial investigation.

Investigating judge

After all, the number of cases he is supervising does not give him enough time to sit down, figure out, engage and conduct pre-trial investigation. It may be not the main one, but one of the reasons of low-quality pre-trial investigation.

Investigating judge

If you say that one procedural supervisor has 200-400 criminal proceedings, he cannot physically pay adequate attention to them and, as a rule, it works how it works. Namely, only the investigator is dealing with these criminal proceedings.

At the same time, there is a more deep-rooted reason that affects the objectivity of a prosecutor in criminal proceedings. The lack of objectivity stems from prejudice, which results in deliberate dismissal of circumstances by the prosecutor if they prove guilt or exculpate the suspect.

The most common violation of the objectivity principle is the so-called accusatory inclination of investigation. Investigating judges and lawyers mentioned this issue during focus groups:

Lawyer

Even at the first stage, before serving the notice of suspicion, there is an impression that the prosecutor's office has a position which is not foreseen by the Criminal Procedure Code in relation to establishing all objective circumstances of the proof of guilt or exculpatory evidence as foreseen, inter alia, by the CPC. Namely, they have a task to win the case, they perform a function "have to win the case" at any price… Under any circumstances.

Investigating judge

You know, for him [the prosecutor – ed. he [the suspect – ed.] is a criminal, and that defines everything. And the prosecutors have an original inclination.

In its turn, lack of impartiality can also have subjective and objective grounds. The latter include, in particular, the practices of imposing sanctions on public prosecutors for actions to the benefit of the suspect. It concerns, in particular, releasing the apprehended person or failing to serve a notice of suspicion, initiating the change of a restraint measure for a softer one, acquittal etc. As a result, the prosecutor is not interested in collecting exculpatory evidence and testimony, since this may lead to sanctions. We shall review this in detail in Chapter 3.

CONCLUSIONS

1. In practice, there are different views among prosecutors concerning the function of procedural guidance, its meaning and forms. In the legislation, the term 'procedural guidance' is used in different contexts, which does not support a unified understanding of the meaning and role of this function of the prosecutor's offices.

2. According to the Constitution of Ukraine, organization of pre-trial investigation is one of the functions of the public prosecutor's office whereas the Criminal Procedure Code assigns the role to the head of a pre-trial investigation agency. As a result, in practice, functions of these two positions have significant overlap, which prevents effective cooperation between these institutions. On the local level, cooperation between the investigation agency and prosecutor's office is often based on personal contacts of their heads, accompanied by 'informal' agreement process for joint activities and decision.

3. Despite rather clear legislative safeguards for the procedural supervisors' independence, in practice, they are fully dependent on their immediate superiors and the prosecutors of higher-level prosecutor's offices exercising 'area-based control'. The scope of possible interference with the procedural activities of the prosecutor is quite broad – from access to the materials of criminal proceedings through the Unified register of pre-trial investigations to reduction of bonuses and transfer of the case to another prosecutor only based on reporting at various operational meetings attended by the management.

4. Disqualification for bonuses (cancellation) is widespread at all levels of public prosecutor's offices. According to prosecutors, since the bonus constitutes a significant part of the prosecutor's salary, disqualification is an effective tool for putting pressure on prosecutors by their superiors to convince them to make a certain decision. Failure to observe provisions of article 81 of the Law of Ukraine "On the Public Prosecutor's Office", which defines the components of the public prosecutor's salary, including the official wages.

5. The principle of unchangeability of a prosecutor is not always observed in practice. There are widespread instances when prosecutors are replaced at different stages of pre-trial investigation.

In practice, groups of prosecutors are not an exceptional instrument; they are created almost in every case. As a rule, only the senior prosecutor in charge of the group is familiar with case files while the rest of prosecutors are engaged mostly on ad hoc basis.

6. The existing practice of negative consequences for public prosecutors for acquittals and other lawful actions alleviating the situation for the suspect (release without a notice of suspicion, initiating a less severe restraint measure) is one of the reasons behind violations of the principles of objectivity and impartiality in criminal proceedings and de facto denials to collect exculpatory evidence.

Chapter 3

Exercise of procedural guidance at different stages of pre-trial investigation

3.1 Appointment of a procedural supervisor in criminal proceedings

According to article 3 of the CPC, pre-trial investigation is a stage in criminal proceedings *which begins from the moment information on a criminal offence is entered in the Unified register of pre-trial investigations*[22] and ends with closure of the criminal proceedings or with submission to court of an indictment, a motion on enforcement of compulsory medical or educational measures, a motion on discharge of the person from criminal liability.

According to article 214(2) of the CPC, pre-trial investigation shall start from the moment the information concerned has been entered in the Unified register of pre-trial investigations. Regulations of the Unified register of pre-trial investigations the procedure of its creation and maintaining shall be subject to approval of the Prosecutor General's Office of Ukraine with consent of the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the National Anti-Corruption Bureau, and the authority supervising compliance with the tax legislation.

Upon the commencement of pre-trial investigation, the head of the appropriate prosecutor's office appoints his subordinate prosecutors to perform the duties of procedural guidance in the criminal proceedings (article 37(1) of the CPC). Information about appointment of the procedural supervisor shall be immediately entered into the Unified register of pre-trial investigations (Regulation on the URPI, paragraph 1, chapter 3).

When appointing a procedural supervisor, the head of the office has to take into account the *difficulty of qualification of criminal offences, the public attention, foreseen scope of procedural activities, as well as professional skills and experience of the prosecutors*[23].

22 Regulation on the Unified Register of Pre-Trial Investigations, PGO order No. 139 dated 6 April 2016. URL: : http://zakon5.rada.gov.ua/laws/show/z0680-16.

23 Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 (amended on 26 July 2013) "On organization of activities of public prosecutors in criminal proceedings".

As a rule, in practice, there is a division of prosecutors in accordance with their specialization in specific types or categories of crime. Sometimes, this division can be reflected in relevant orders of the head of office on division of responsibilities:

Prosecutor — *About appointment of the prosecutor in specific proceedings. In our prosecutor's office, there is an unofficial division between prosecutors by the types of crimes, for instance, against persons, general criminal offences, traffic violations, drugs etc. There are certain people appointed by the head of office.*

Prosecutor — *It remains that way for us, there is an order on separation of duties, which specifies which prosecutor is responsible for a certain category.*

At the same time, in practice, there are significant differences in the mechanisms for initial informing of the prosecutor about his assignment as a procedural supervisor in a criminal case. For instance, participants of the focus groups with prosecutors said that they found out about the assignment from their supervisor or the investigator:

Prosecutor — *The supervisors immediately enters information into the Unified register of pre-trial investigations and appoint a prosecutor.*

Prosecutor — *We find out about the appointment from the investigator or the head of the local prosecutor's office. Either way. It all happens very quickly.*

Other procedural supervisors stated that they regularly check the URPI where they find out about the appointment, otherwise, they can receive this information with significant delay:

Prosecutor — *We check the URPI because, otherwise, we can find out a week later.*

Prosecutor — *We go to the URPI and see it.*

Prosecutor — *Only from the URPI. These messages about the start of a pre-trial investigation and appointment of the group of prosecutors, in the best case, can arrive two weeks later. And if you sit and wait… Everything starts with the URPI.*

Article 37 of the CPC states that the prosecutor will perform the duties of prosecutor in a specific criminal proceeding from its commencement to the very completion (the principle of unchangeability).

If necessary, the head of the prosecutor's office can assign a group of prosecutors to perform duties in criminal proceedings, as well as the senior prosecutor to supervise others in the group.

Practical aspects of ensuring the principle of unchangeability and the specifics of establishment and activities of the groups of prosecutors in criminal proceedings are discussed in detail in chapters 2.2 and 3.3.

3.2 The role of a prosecutor at the stage of apprehension

According to article 209 of the CPC, an individual is considered to be apprehended if s/he, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official.

Article 210 of the CPC states that the competent official is required to bring the apprehended individual to the nearest station of the pre-trial investigation agency, where a record shall be promptly made of the date, exact time (hours and minutes) of the bringing of the suspect and other information provided for by the legislation.

The competent official immediately informs, through technical means, appropriate officials of the pre-trial investigation agency's station on each apprehension.

Article 208(5) of the CPC provides *that on apprehension of a person suspected of the commission of crime, a report shall be drawn up, including, in addition to information required by article 104 of the Code, the following: place, date and exact time (hours and minutes) of apprehension under Article 209 of the CPC; grounds for apprehension; results of personal search; pleas, statements or complaints of the apprehended person, if any; comprehensive list of procedural rights and duties of the apprehended person. A copy of the report shall be immediately handed over to the apprehended person against signature and sent to a public prosecutor*.

Therefore, in accordance with article 208, the prosecutor can find out about actual apprehension of a suspect only after receiving the copy of the apprehension report. At the same time, the CPC does not establish clear time limits for the investigator to send to copy of the apprehension report to the public prosecutor. There are no legal norms or instructions regulating this issue in Ukrainian legislation. Article 208(5) of the CPC only states that the investigator has to send the report to the public prosecutor but does not mention any time limits.

We should also note that it is possible that, at the time of apprehension, there is no criminal case as such and, accordingly, no procedural supervisor has been appointed. In these cases, the copy of the report is sent to the head of the prosecutor's office who has to appoint a procedural supervisor.

Study results show that, in practice, procedural supervisors find out about apprehensions not only after receiving the copy of the report. Usually, they receive this information from their immediate supervisor or the investigator:

Prosecutor *Over the phone, of course. From the investigator.*

Prosecutor — *I learn about apprehensions directly from the deputy in charge who calls me and says, "There is an apprehended person, go to the district unit, find out".*

Prosecutor — *A person was apprehended while committing a crime. The procedural supervisors finds out about that. Immediately.*

Prosecutor — *They can apprehend someone at night and inform you at night.*

Prosecutors – participants of focus groups said that the time for learning about the apprehension depends on the case: in high profile cases, they are informed immediately, in regular cases, there can be delays – a person has been apprehended, but the notification does not arrive for a long time.

At the same time, investigators pointed out the difficulties in notifying the prosecutor about apprehension if it happens outside office hours.

Investigator — *If a person was detained after 6 p.m., he [the prosecutor] will not show up before 9 a.m. for sure.*

Investigator — *Usually, if there is an apprehension, it means that there is still no [record in] the URPI. Therefore, their highness [head of the prosecutor's office – ed.] came home with a flash drive, though you can't take it out, they will appoint [the procedural supervisor – ed.]; and if not, then they will come to work in the morning and appoint.*

The study revealed that a practice of approval of procedural apprehension with the prosecutor (the need to draw up an apprehension report), which is not foreseen by the CPC. This is despite the fact that the person has already been apprehended. Often, this informal approval takes place at the level of the investigator and prosecutor or the prosecutor and the investigating judge who confirms the use of detention as a restraint measure.

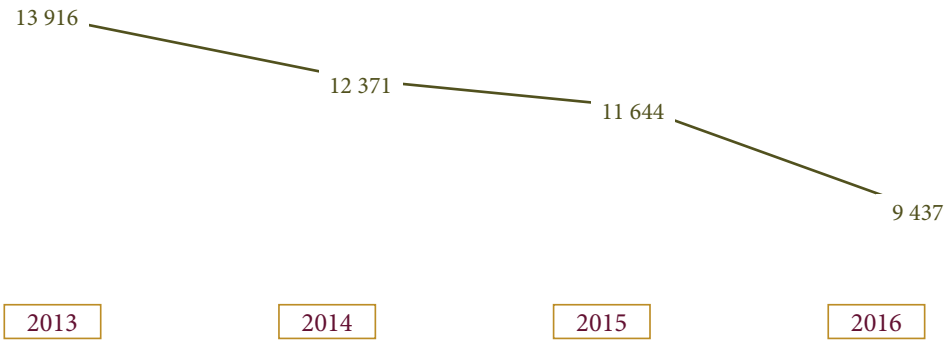
For instance, procedural supervisors and investigators commented on this issue during focus groups:

Prosecutor — *If the prosecutor does not approve, the investigator will no apprehend him. If you call and say, "We're apprehending". The prosecutor will say, "OK, I approve", which is not foreseen by any norm, and the investigator will apprehend. If he says, "No, I don't see any grounds – there will be no drawing up of the report.*

Prosecutor — *A report is not drawn up in every actual apprehension. Only in those where detention has been approved. The person was invited, there was communication, they were trying to convince the person at the precinct and then decided they would submit a motion for house arrest or commitment. Nobody will draw a report after that.*

Fig. 3.1

Number of apprehensions under article 208 of the CPC (statistics of the National Police)



Prosecutor *If they already apprehended under 208, with 99% chance there will be detention as a restraint measure.*

The reasons of this practice, according to the police investigators, include the negative consequences for the investigators if the apprehension was not approved by the prosecutor:

Investigator *If I sign 208, I have to provide a notice of suspicion within one day. And they [prosecutors – ed.] do not notify. What should I do? Release. And it is the prosecutor who orders the release. And then they ask me at the investigation department why I detained him. It means I deprived him of liberty illegally. And they charge me with article 146, illegal confinement. We have not notified the person of suspicion, therefore, you had no reasons to apprehend this person.*

Prosecutors consider this approval practice correct and even lawful even though it is not foreseen by the law:

Prosecutor *The right way is to have him [the prosecutor – ed.] approve the apprehension, lawfulness, grounds. In the wrong way, he is informed of the fact of apprehension in written form, and we are deciding whether it was lawful or if there were grounds.*

To summarize the above, we can conclude that despite the new CPC that clearly defines the term "actual apprehension", in practice, there is difference between actual and procedural apprehension. Similar to the old CPC, all time periods start from the point when the report is drawn up. If the prosecutor has not approved the apprehension, there is no apprehension report or an account of actual apprehension.

As a result of this differentiation, there is a significant decrease in the number of individuals apprehended under article 208 of the CPC. As illustrated in Figure 3.1, starting from 2013, there is a stable negative tendency in the number of official apprehensions by police.

In 2016, the number of apprehensions decreased by over one third (32%!) in comparison with 2013. Unfortunately, the cause is not a more humane work of our law enforcement bodies. The cause is that a significant portion of actually apprehended persons became "invitees", "persons brought to the precinct" and "witnesses".

Detailed analysis of the problem of differentiation of actual and procedural apprehension, including the causes and consequences, is provided in Chapter 4 of the report.

3.3. The role of the prosecutor in collection of evidence

International standards

Recommendation Rec(2000)19 of the Committee of Ministers to the member states on the role of public prosecution in the criminal justice system (adopted on 6 October 2000)

Public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence (paragraphs 28, 32).

Standards of professional responsibility and statement of the essential duties and rights of prosecutors (adopted by the International Association of Prosecutors on 23 April 1999)

- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

- seek to ensure that appropriate action is taken against those responsible for using such methods;
- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial (Article 4.3 (d), (e), (f), (g)).

National legislation and its implementation

The prosecutor and investigator[24] have the duty to prove the fact of a criminal offence, the guilt of the accused in committing the offence and other circumstances provided by article 91 of the CPC of Ukraine, as well as the relevance and admissibility of evidence they submit (art. 92, CPC of Ukraine).

In criminal proceedings, proving consists of collecting, examining and evaluating evidence in order to establish circumstances that are relevant for criminal proceedings (art. 91, CPC of Ukraine). Evidence is factual knowledge, which has been obtained in a procedure prescribed in the CPC of Ukraine on grounds of which investigator, public prosecutor, investigating judge and court establish the presence or absence of facts and circumstances which are relevant for the criminal proceedings and are subject to proving. Procedural sources of evidence are testimonies, objects, documents, expert findings (art. 84, CPC of Ukraine).

The prosecutor, investigator carries out collection of evidence by way of conducting investigative (search) actions and covert investigative (search) actions, by requesting and obtaining from state authorities, local government bodies, enterprises, institutions and organizations, officials and natural persons, of objects, documents, information, expert opinions, audit and inspection reports, by conducting other procedural actions specified by the CPC of Ukraine.

Since the procedural supervisor has the duty to conduct public prosecution in the criminal proceedings in court, he has to be directly interested in the amount and quality of collected evidence and has the opportunity to direct investigation as necessary.

Investigating judges also supported this view during a focus group:

Investigating judge

... He has to be interested in collecting evidence from the very beginning; and the evidence has to be proper and admissible since he will come to court and will prove the elements of a crime before the court using what? The evidence. Because if he doesn't collect it or use improper methods to collect evidence, why go to court then?... The prosecutor is the person who has to direct his work and the work of an investigator to collect evidence.

In addition, "ensuring compliance with the law on prompt, comprehensive and impartial investigation and trial in criminal proceedings" is one of the

24 And, in cases provided by the CPC, the victim.

criteria for assessing the effectiveness of prosecutors' performance in criminal proceedings[25].

Procedural supervisor, to a certain extent, takes part in the process of proving at the stage of planning and organizing collection of evidence, participating in this process and ensuring that the evidence is proper and admissible. We are going to consider the prosecutor's role at each of these stages in detail.

3.3.1 Planning the evidence collection process

Study data shows that, in practice, not every criminal case has an investigation plan. As a rule, there are investigation plans for gave and high profile crimes.

Prosecutor

... We don't make plans for all proceedings, only in cases of grave crimes: murders, robberies. There are [plans] in cases of theft if the amount is significant…

At the same time, there are cases where there is no plan in the form of a separate document even in most difficult and high profile cases but there is an actual planning process for the investigation:

Prosecutor

I have worked on the district and regional levels, as well as at the Prosecutor General's Office. In most high profile cases, there are no investigation plans. There can be plans to identify the time frame, scope of work; we decide what we need, what procedural supervisors will take (interrogations, requests), and distribute some expert conclusions etc. We just divide it into certain parts of work.

The chart in Figure 3.2 based on the analysis of materials of supervisory proceedings shows that only in 24 out of 305 proceedings (8%) there was an investigation plan[26].

Fig. 3.2

Analiz of case files: availability of an investigation plan in supervisory proceedings

25 P. 39, Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 "On organization of activities of public prosecutors in criminal proceedings".

26 Results of selective analysis of materials of supervisory proceedings in prosecutor's offices in different regions of Ukraine (2013-2016).

3.3.2 Organizing the evidence collection process

Perception of the prosecutor's role at the evidence collection stage by participants in criminal proceedings

In most civil law and some common law systems, the prosecutor has control over the entirety of the investigation and directs the police in what course of action they should take in their investigation and what charges will be brought against an accused[27].

According to Ukrainian legislation, public prosecutor, while supervising the compliance with law during pre-trial investigation in the form of procedural guidance, shall have the right to assign investigator, pre-trial investigation agency to conduct within a time limit set by the public prosecutor, investigative (detective) actions, covert investigative (detective) actions or other procedural actions, or give instructions in respect of conducting such actions, or participate in them, and where necessary, conduct investigatory (search) and procedural actions in accordance with the procedure set forth by the CPC (art. 36(2)(4), CPC of Ukraine).

Throughout the world today, there is a wide spectrum of prosecutorial involvement at the investigative stage, ranging from no involvement at all to being in charge of and taking an active role in criminal investigations. However, there is an increasing tendency for prosecutors to become involved at an earlier stage, particularly in complex cases such as fraud or corruption, even in countries where the prosecutor has no formal role in investigations, using the mechanism of the police seeking advice at the investigative stage[28].

In practice, the prosecutor's role in collecting evidence varies for different criminal proceedings. The nature of procedural supervisor's involvement of the procedural supervisor (or the head of the group of procedural supervisors) in the investigation is affected by various circumstances. These include both reaching an agreement during pre-trial investigation, which reduces the amount of evidence collection efforts, and also the circumstances that have an impact on the complexity of investigation in each case, such as the gravity of the crime, number of offences, the scope of necessary investigative activities and the level of engagement of the defense. In addition, the "high profile" category, which is widely used by the prosecutors, is taken into account[29].

27 The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide. United Nations, 2014.

28 Ibid.

29 Paragraph 2.7 of the Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 "On organization of activities of public prosecutors in criminal proceedings" obliges the heads of prosecutor's offices of all levels to inform the heads of prosecutor's offices of the higher level through a special notification, as well as inform the prosecutor on duty of the units for receiving, processing and analysis of field information of the Main directorate for oversight over compliance with the law in criminal proceedings of the Prosecutor General's Office and the specialized units of the regional prosecutor's offices, in accordance

Analysis of interviews and focus groups with different professional groups (investigating judges, prosecutors, investigators and lawyers) shows a broad range of activities of different prosecutors in different criminal cases, and also different perception of their role in the evidence collection process.

Investigating judges, investigators and lawyers mostly provided examples of passive waiting for the evidence collected by investigators and the ready materials for the necessary procedural decision (assigning the measure of restraint, notifying of suspicion, preparing the indictment and sending it to court).

Investigating judge — *They get involved at the stage of preparing the indictment. Why? Because then he understands that if he signs it, he will have to go to court.*

Investigator — *A lot depends on the procedural supervisor. Some actually get involved, while some just come and sign, that's it.*

Lawyer — *In practice, he can "supervise" when everything has been collected; they think that it is possible to draw up the indictment; [he] can browse through the case files and say that something needs to be collected, give directions to the investigator. That's it.*

The nature of the procedural supervisor's involvement in the evidence collection in criminal proceedings depends on the level of his knowledge about the details of a particular case. In practice, the lack of knowledge is common among procedural supervisors. This leads to procedural violations by investigators and cases when legality of investigator's action during evidence collection is challenged with the investigating judge. At the same time, the prosecutor is not always able to identify his stance on the legality of a certain investigative action since s/he did not participate or know about it.

Investigating judges expressed the following opinion during focus groups interviews:

Investigating judge — *During pre-trial investigation, when there are complaints against the investigator's actions, the prosecutor comes and waits for the investigators since he cannot answer a single clarifying question.*

with the established procedure, about information on criminal offences against national security, terrorist acts, racketeering, catastrophes, accidents, explosions and other events that led to significant material damages or deaths, murder committed under aggravating circumstances and in circumstances of unforeseeability, criminal offences committed by organized groups and criminal organizations, particularly responsible officials, Parliament members, judges, heads of law enforcement bodies, as well as offences committed against them, particularly grave crimes, offences committed by foreign nationals and against them, as well as offences against journalists while interfering with their lawful professional activities, and other criminal offences that have received high negative attention (high profile) in society.

The procedural supervisor's lack of knowledge of the case leads to situations when witnesses in court have not provided any support for the prosecution[30] during questioning at the pre-trial stage, and it consumes time and makes the trial lengthy.

Investigating judge — *If 300 witnesses were questioned, regardless of whether they know or provided information on the circumstances of the crime, they are brought to the court.*

At the same time, procedural supervisors mostly gave examples of direct guidance of the entire investigation, oversight and active participation in investigative actions, or conducting these actions by themselves.

Prosecutor — *He investigates 90% [of the case] by himself.*

Prosecutor — *In practice, the prosecutor is responsible for everything. Investigators and field officers are not responsible for anything. They put this pyramid on the prosecutor's shoulders, and he carries it.*

Prosecutor — *I have an economic [crime] case. I call people, witnesses, arrange expert examinations, motions for search.*

Yet, according to the prosecutors, they do not have to go deep into evidence collection, but rather supervise the quality of the process:

Prosecutor — *The prosecutor is the supervisor. That's it. They bring him the files, he looks and says that it is unlawful, puts the stamp and 'good bye'.*

Prosecutor — *And he has to stop the unlawful things, give directions, but not do everything himself. And now it is this way: you cannot influence, do it yourself.*

Prosecutor — *He doesn't have to investigate. Only in extremely exceptional cases does he have to hold a separate investigative action. Otherwise, why do you need an investigator if I videotape interrogations in my cases, conduct re-enactments; even with the investigator's participation it takes days. I disagree with the procedural supervision approach. It is impossible with the level of intensity. Supervision is real. It's interesting to do everything like in American movies where the prosecutor is running around with a flashlight and conducts investigative actions, but then relieve me of all other burdens.*

30 These situations should be distinguished from when a prosecutor has indirect witnesses in reserve in case there are difficulties in interrogating direct witnesses and later withdraws the motion to interrogate if that is unnecessary.

Prosecutor

The pre-trial investigation authority has to do it. The prosecutor approves the motion; the prosecutor takes part in investigative actions. He questions the person to have an objective understanding of the situation, not to substitute. And we have substitution.

One clear example is the opinion of one of the unit managers at the PGO who thinks that the prosecutor has to only supervise the legality of investigator's actions until the person responsible for committing the crime is identified. In his view, the situation changes when there is sufficient information to prosecute the person:

Prosecutor

At this stage, the prosecutor's function can change. The investigator brings the files and says, 'I think that this is enough for the notice of suspicion'. The prosecutor has three options: first option is to say, 'This is insufficient, continue collecting evidence'; the second option is 'I see enough evidence and I'm ready to go to court"; and the third option is 'Yes, I see that it is enough, but you need to have another ten investigative actions under my supervision'. And he is then, in fact, the procedural supervisor who decides what else is necessary to prove guilt. Prior to that, he is only supervising some decisions – on conducting a search etc[31].

Practice shows that procedural supervisors are more involved in evidence collection in cases of grave and multiple-episode crimes, as well as crimes that require many investigative actions or other complex or high profile cases:

Prosecutor

... There is a criminal case, let's say, not so significant, and the prosecutor has to sort of observe and supervise in a way. And there are also more serious high profile criminal cases, cases of grave crimes, where there is an issue of the prosecutor going to court with this and feeling that there might be serious problems. In these cases, he has to be engaged as a procedural supervisor and pay more attention, make the investigator's work more active; and the prosecutor must have an overall vision of what happens[32].

Lawyer

... In high profile cases, they do everything to collect, and if it's not high profile…

The management follows the high profile cases more closely.

Prosecutor

... The management asks every day 'When the case is going to trial, when will you have the notice of suspicion, sign'.

31 Interview with the head of a structural unit of the Prosecutor General's Office
32 Interview with the head of a structural unit of the Prosecutor General's Office

In addition, complexity, category of the criminal case, and the actual contribution to examining its circumstances are among the criteria for assessing effectiveness of the prosecutor's performance in criminal proceedings[33].

A lot less attention is directed to minor crimes or, for instance, several similar thefts, when compared with murders, robberies, rape or other grave and high profile crimes.

Prosecutor — *Robberies, high jacking are under constant supervision. Or other grave crimes…*

There is no legislative framework establishing criteria for different criminal proceedings that would guide the procedural supervisor in identifying the necessary level of interference with the investigation. We can only observe the variety of different practices of cooperation between the prosecutor and the investigator, as illustrated below. However, any explanation of this variety is only a research hypothesis based on observations of general tendencies and statements of procedural supervisors themselves.

Cooperation between the prosecutor and investigator at the evidence collection stage

Prosecutors have different opinions about cooperation with investigators. As mentioned in Chapter 2 (Fig. 2.1), prosecutors' opinions about the relation between the role of a procedural supervisor and investigator during investigation were divided almost in half. On one hand, 42% of respondents agreed to some extent that prosecutor organizes the entire process of investigation while the investigator only follows his directions. On the other hand, 46% of interviewees did not share this view.

There are different practices in cooperation between the prosecutor and the investigator in evidence collection. For instance, according to investigators, there are examples of proper mutual understanding and effective work.

Investigator — *There are procedural supervisors with whom investigators want to work. Everything happens quickly. Even if you need to bring a witness and a victim, the prosecutor conducts the interrogation.*

Investigator — *If the procedural prosecutor has authority with the police, the court, and the prosecutor's office, his cases will go ahead easier, as well as move simpler through the court.*

According to procedural supervisors, investigators know the requirements for evidence collection in similar cases and can work more or less effectively even without detailed

33 P. 39, Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 "On organization of activities of public prosecutors in criminal proceedings".

procedural guidance[34]. In each case, experience, professionalism, and workload of the particular investigator is very important. An investigator might not need constant supervision during collection of evidence and be quite independent or, on the contrary, not show initiative in criminal proceedings and require constant "boosts" from the prosecutor:

Investigator — *For instance, if the investigator is diligent and has authority, he will receive approval for the notice of suspicion and indictment faster because there is no criticism in relation to him. Proceedings of a weaker investigator are reviewed in more detail and longer, the notice of suspicion is revised several times.*

However, there are cases where the uniform vision of the evidence collection process is missing and, accordingly, there is a lack of proper constructive cooperation.

Procedural supervisors who took part in focus groups highlighted certain wrong opinions held by investigators.

Prosecutor — *... They are allegedly responsible for the case, they have to send the case, bring it to [the stage of] suspicion and take care of everything. In fact, it is not true.*

They insist:

Prosecutor — *... The investigator is procedurally dependent on the prosecutor and, in fact, is his assistant.*

Prosecutor — *Investigators, in fact, became assistants to the public prosecutors, similar to the position of assistant public prosecutors; there is a district prosecutor who has assistants; the prosecutor is responsible for everything, and his assistants perform the tasks, and he cannot do everything at the same time. This is how it is in the criminal proceedings at the moment – there is a public prosecutor and his assistant, the investigator, who has to work for him.*

At the same time, investigators complained that procedural supervisors imposed their opinion on them:

Investigator — *The new CPC was to make the work faster, right? Reasonable terms. Everything is ready. And then the directions come… The situation*

34 According to investigating judges who took part in focus groups, investigators can be quite successful in investigating similar cases, "If it's a theft, you need to come and examine the crime scene. You need to register everything. Further action depends on these first records, accurate and very diligent. In my view, you can create an algorithm for each type of crime for the investigating bodies, and, of course, there can also be individual cases".

is the following: I don't believe this witness, interview him on camera and with a lie detector. It usually happens in some case of theft. I don't like the video; I need the video to be available through temporary access. What if people give it upon request? No, I don't want that, only through temporary access….

When describing different forms of cooperation, the prosecutors pointed out the lack of ways to influence the investigator:

Prosecutor *...In some proceedings, there is an actual supervision. In some proceedings, there is clear participation. In some proceedings, it's only observation, only observation, because the prosecutor has no ways to influence the investigator, even when giving directions, since article 381 of the Criminal Code of Ukraine on sanctions against the investigator (fines, prohibition to serve in certain positions) was revoked in 2014. Therefore, the prosecutor has no ways to influence the investigator and improvement of his performance.*

In addition to the question of the lack of ways to influence the investigator, procedural supervisors raised the issue of investigative jurisdiction. In their opinion, it has to be linked not to the investigating body, but to the prosecutor's office:

Prosecutor *In countries that implemented a similar CPC to the one we have, I heard about Montenegro, investigative jurisdiction is not a category linked to the pre-trial investigation body, but to the prosecutor's office. Investigative jurisdiction is linked to the public prosecutor. The prosecutor creates the group of investigators, choses the specialists he wants to have and acts as a prosecutor, and others act exclusively on the grounds of his directions and decisions. We don't have that because the investigation unit's perception of itself has not changed, and the prosecutors have the same opinion of the investigation unit.*

In addition, proper cooperation between procedural supervisors and investigators in criminal proceedings is impeded by its dependence on relations the heads of local prosecutor's office and police creates significant obstacles for.

Investigator *If, God forbid, the head of the police unit had an argument with the prosecutor, you can rest until they fix their relations!!!"*

Procedural supervisors who took part in focus groups stated that, oftentimes, they initiate almost every investigative action instead of the investigator. In response to a question about how they do that, procedural supervisors from local prosecutor's offices responded:

Prosecutor *Every time. As a matter of fact, it is the core of the work.*

Prosecutor — *The investigator simply doesn't know what evidence is needed in court. This is the biggest problem. What can render evidence inadmissible in court. They also don't know that. That is why procedural [supervisor] guides them.*

Prosecutor — *No matter how responsible the investigator is, he doesn't see certain things. He says, "It's all clear, we questioned [the person], and that's it". And you are the prosecutor who goes to court and understands that as soon as the court sees the files, it will have a lot of questions, and there need to be some answers. Do you understand?.*

Investigators claim that a lot depends on the personality of a particular procedural supervisor:

Investigator — *Some actually take part, while some just come and sing, that's it.*

We should note that in some cases of grave or high profile crimes, heads of detection and investigation units, as well as the head of police department, join the investigation along with the procedural supervisor, the investigator and the field officer. There are joint meetings and reviews. In these cases, there is substantive cooperation, separation of duties, prosecutor's deep involvement in each procedural action. However, according to investigators, these cases make up less than 5 percent of proceedings[35].

Prosecutor's instructions and orders for the investigator

Prosecutor can exercise ongoing guidance of the activities of field officers and investigators in evidence collection through instructions and orders. According to article 40(4) of the CPC, investigator shall be required to follow instructions and orders given by the public prosecutor in written form. Article 41(1) of the CPC of Ukraine stipulates that operational units of the bodies of internal affairs shall conduct investigative (search) actions and covert investigative (search) actions in criminal proceedings upon written assignment of the investigator, public prosecutor.

At the same time, the public prosecutor cooperates with the investigator and provides him with all tasks directly. These tasks include bringing a person, collecting certificates etc. The investigator then delegates a portion of tasks to the field officer:

Investigator — *The prosecutor gives all tasks to the investigator. The investigator transfers the task to the field officer in the form of an assignment.*

Investigator — *...Instructions from the procedural prosecutor for the investigator, and the investigator copies and assigns it to a field officer.*

35 Information from the focus group with investigators.

However, on the regional/PGO level, assigning tasks directly to field officers is more common.

Prosecutor — *... On the district level, as a rule, no. If it's at the Prosecutor General's Office, the city prosecutor's office – I can chose, for the most part, any field support. But it is rare.*

Also, prosecutors often give the task of bringing a witness for repeat questioning or conversation to the field officers. They think:

Prosecutor — *What is signed during the interrogation held by an investigator is not always objective.*

According to investigating judges and investigators, instructions are provided in writing, verbally, by phone, e-mail or other means of communication:

Investigating judge — *I see that at least our prosecutor's office gives written instructions to the investigators, even listing questions for the investigator to resolve;*

Investigator — *Yes, they really give written instructions. After some time, they can also check their implementation.*

According to prosecutors who took part in focus groups, written instructions are given with the purpose of influencing (even though not in a very effective manner) an investigator who acts in bad faith or to "have a record of their work" for possible inspections by the management:

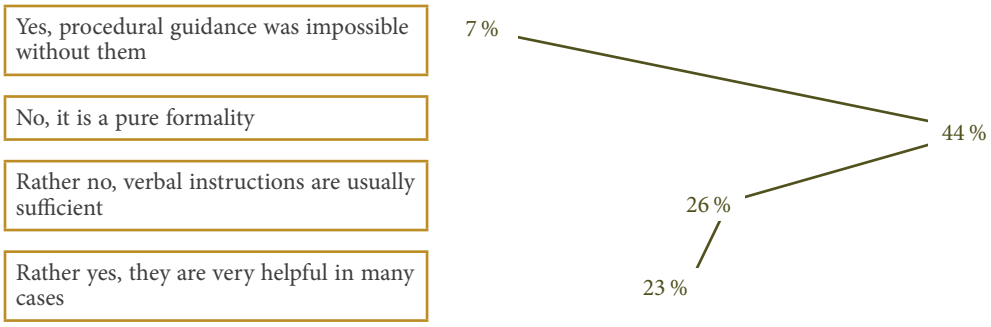
Prosecutor — *These papers are needed only, excuse my language, to cover your behind, because tomorrow there can be a question of how effective the pre-trial investigation is. There is a big question they ask me, 'You are the procedural supervisor, so how do you influence the investigator, where are the instructions… Insofar as I understand, these papers are only meant for punishing someone at an operational meeting. In reality, if the investigator and the prosecutor have the goal of investigating, they will investigate without these papers.*

Prosecutor — *Yes, the plans are developed, instructions are written for this purpose. In reality, they have no impact on the investigation. To actually influence the investigation, you find the investigator, study the case file in front of him and say, 'What are we going to do, what are the suggestions'. This is the most effective option. If you give instructions, one can avoid following them without any responsibility. Earlier, there was an option to have an entry in the URPI. There is no such option now. You will write complaints against him. They respond that the complaint was resolved.*

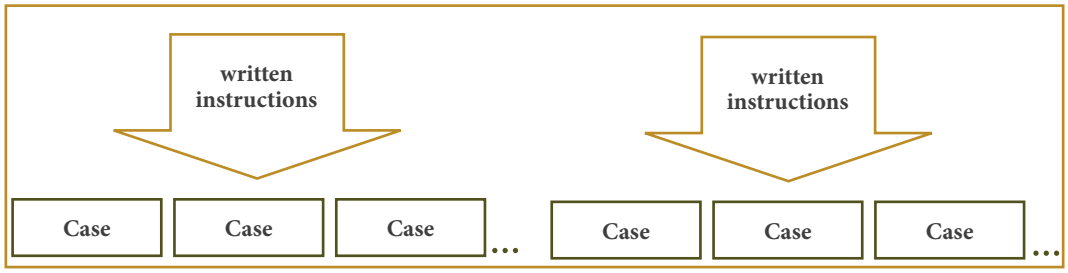
Prosecutor *If the work is normal, it is all in verbal form, because it is prompt that way...*

An anonymous questionnaire for prosecutors included a question about the effectiveness of written instructions as an instrument of procedural guidance. In Figure 3.3, we can see that 44% of respondents think that written instructions are just a formality, and 26% are not likely to consider it an effective instrument in criminal proceedings since verbal instructions are sufficient. Instead, 23 percent of respondents stated that they are very helpful, and only 7% said that procedural guidance was impossible without them.

Fig. 3.3 **Prosecutors' responses to the question "Do you consider written instructions to the investigator an effective instrument of procedural guidance?"**



At the same time, according to official statistics, written instructions are given almost in every third case. For instance, in 2016, prosecutors gave 162 368 written instructions in 592 604 registered criminal cases[36].

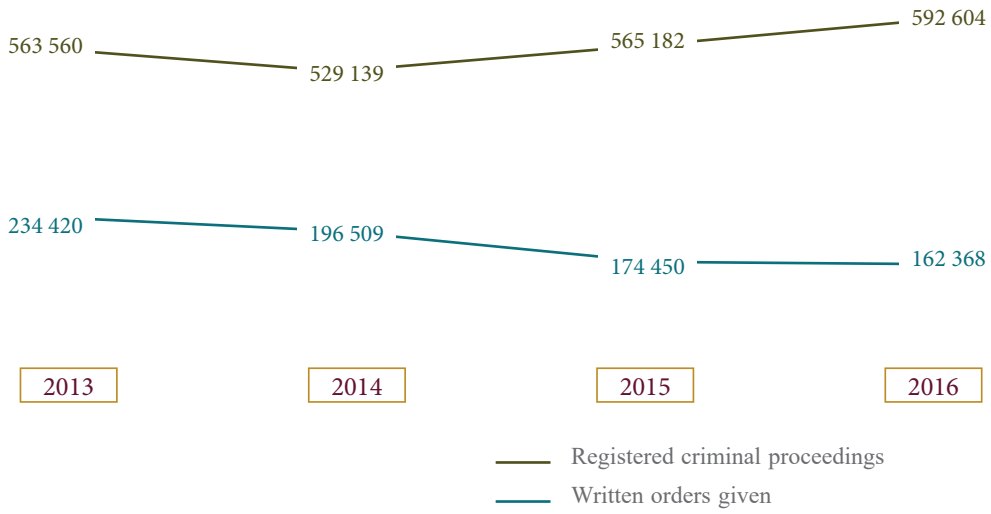


Since this information is part of general statistics, and any sudden changes in statistical data are monitored and can be interpreted as shortcomings in performance, in practice, the official number of these instructions is ensured by the heads of local prosecutor's offices at a relatively stable level. The procedural supervisors stated the following.

36 Prosecutor's performance report (2016), website of the Prosecutor General's Office, http://www.gp.gov.ua/ua/stat.html.

Fig. 3.4

Written orders given by prosecutors in criminal proceedings (PGO statistics)



Prosecutor

About the indicators. At the end of 2016, the chief called all deputies and said, 'What are you doing – you have 300 instructions more than last year, you will have to have more next year.

Official statistics over the past four years shows relatively high number of written instructions, which has been decreasing each year, but at a very slow rate (Figure 3.4).

At the same time, the study of materials in supervisory proceedings of prosecutors showed that written instructions were kept only in one quarter of proceedings (Figure 3.5) whereas the official statistics shows that instructions are more common[37].

Fig. 3.5

Analiz of case files: do supervisory proceeding materials include copies of documents on organization of pre-trial investigation?

37 Results of selective analysis of materials of supervisory proceedings in prosecutor's offices in different regions of Ukraine (2013-2016).

Lawyers expressed a slightly different view concerning these instructions and pointed out, for example, cases of insufficient prosecutorial control over their implementation:

Lawyer

In practice, the instructions are not limited regards the time limits, and there is no constant control of results.

Lawyer

A responsible and smart prosecutor controls the implementation of instructions and adjusts or adds instructions, as well as writes a list or exercises control or, at least, asks the investigator, 'What have you done?', 'Did you obtain/not obtain? If you haven't obtained, where is the proof that you had no possibility to do that?'. And, sometimes, the prosecutor gave an instruction, and regardless of whether the investigator obtained or did not obtain, the case is closed, and it's forgotten…

Though procedural supervisors point out significant difficulties in the control mechanism due to the lack of liability for failure to follow instructions and orders, they nevertheless insist on their regular practice of establishing time limits for executing instructions.

Prosecutor

In each written instruction, according to the practice in our region, we indicate and give almost a month for implementation. These are the proceedings where people have not been notified of suspicion. We examine the daily files, they are delivered to the prosecutor's office and we examine them immediately, and give instructions in grave and particularly grave categories.

One of the procedural supervisors provided a vivid description of when procedural supervisors give instructions and control their implementation without any actual need and, rather, due to unofficial requirements of the prosecutor's office:

Prosecutor

We give instructions. We ask questions about what was done, how effective the investigator was. We monitor these instructions. Sometimes, the response does not come in time. I sit down and write the proper answer to the instructions, and I sign it.

It is important for the procedural supervisor who organizes and plans investigation to use supervisory proceedings as a tool helping the prosecutor be up to date and direct the investigator's work towards positive outcome. However, study results show that the files of supervisory proceedings rarely contain investigation plans for criminal proceedings (8%) or contain written instructions much less often than statistics shows (25%). Therefore, prosecutors either do not keep these documents in supervisory proceedings files or simply do not collect them[38].

38 Results of selective analysis of materials of supervisory proceedings in prosecutor's offices in different regions of Ukraine (2013-2016).

Most supervisory proceedings include the following documents: copies of the register of pre-trial investigation files, extracts from the URPI, notifications about the start of pre-trial investigation (article 214 of the CPC), decisions creating a group of prosecutors, support letter for transfer of proceedings to court or other authority, notice of suspicion, indictments, certain reports of investigative (detective actions), expert assessments. These are selected criminal case files copied by investigators upon prosecutor's direction or by the prosecutor. They usually reflect the course of proceedings and its outcomes. However, in the absence of an investigation plan and written instructions, it is difficult to make conclusions on the prosecutor's role in organizing the investigation process and determining its tactics[39].

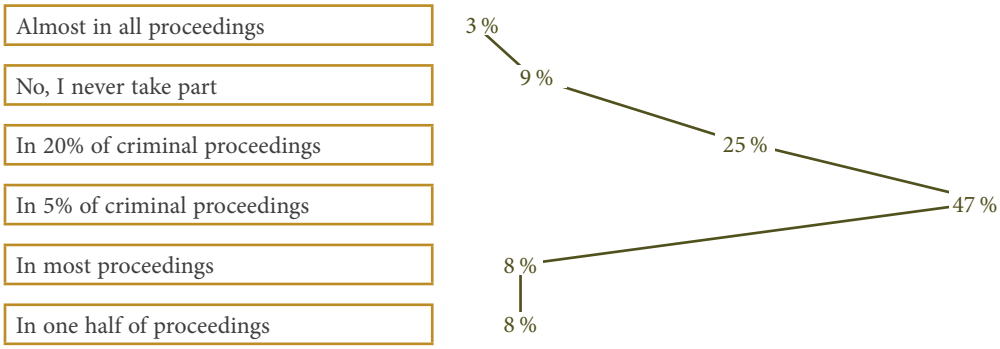
Specifics of the public prosecutor's direct involvement in investigative actions

Study results show that public prosecutors are most active in corroborating key evidence and proof that can be negated by the defense in court. For instance, it can be a questioning of the key witness or a re-enactment. On the other hand, the paperwork for obtaining certain documents is left mostly for the investigator.

Prosecutors who conduct procedural guidance were asked about their direct involvement in investigative actions. Figure 3.6 illustrates their answers on this subject.

According to the results, almost half of procedural supervisors (47%) mentioned that they are involved in investigative actions in 5% of criminal proceedings; 25% of them confirmed they took part in investigative actions in 20% of criminal proceedings. Nine percent of interviewees said they did not take any part in investigative actions, and 8% of procedural supervisors took part in the majority of proceedings, 8 percent – in the half of proceedings, and three percent – in almost all proceedings.

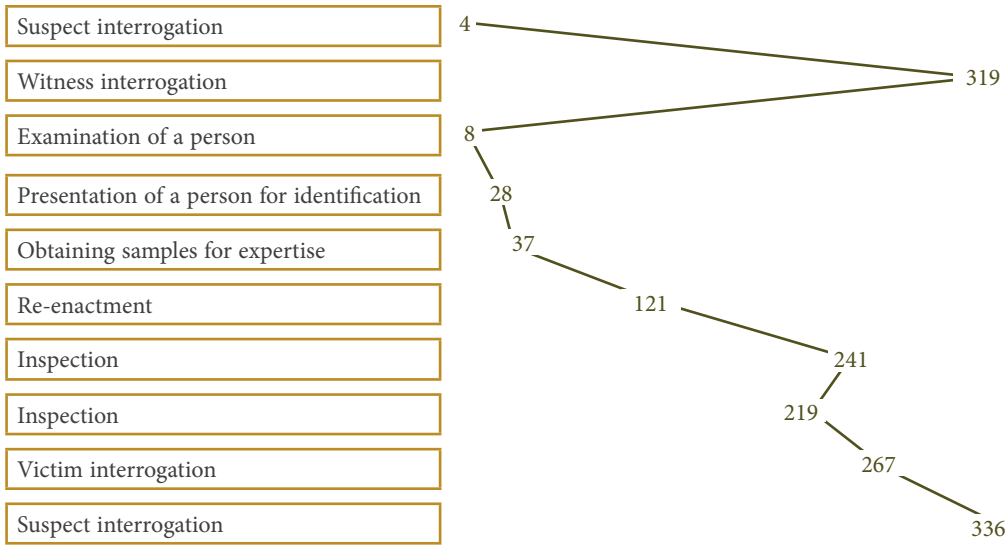
Fig. 3.6 **Prosecutors' responses to the question "Do you personally take part in investigative actions?"**



39 Ibid.

Fig. 3.7

Prosecutors' responses to the question "If you take part in investigative actions, in what actions do you participate most often??"



Prosecutors were also asked in what investigative actions they participated most often. According to Figure 3.7, majority of procedural supervisors mentioned interrogations of suspects or witnesses (336 responses). In addition, participation in witness interrogation (319), questioning the victim (267), examination (241), search (219), re-enactment (121) were mentioned often. Prosecutors mentioned they took part in obtaining samples for expertise (37 responses), presentation of a person for identification (28), or examination of a person (8) less often.

Procedural supervisors in focus groups also mentioned participation in interrogations, inspections, re-enactments and searches:

Prosecutor

If it's a murder – inspections, also re-enactments, because there are borderline situations when there is doubt about multi-episode offences, whether they were all committed by the same person. I had a case of article 121(2), there was one witness in the state of severe alcohol intoxication at the time of offence, he had -7 eyesight, so I had to understand there whether he could have seen anyone, and how many people. He said '10 people'. We put 5 people and asked, 'How many do you see?' Because an investigator will do the re-enactment in such a way that it will all look fine on paper, and then a lawyer in court will tell him, 'Take off your glasses and tell me how many fingers I'm holding'….

According to the lawyers:

> Lawyer *For instance, in cases under article 115 of the Criminal Code of Ukraine, prosecutors take part in interrogations, at least one of them, but not everyone does. However, it is increasing now, at least in one interrogation and one re-enactment. They want to make sure personally, especially when there is virtually no other evidence, no video, no witnesses etc. They want to make sure personally to be able to prosecute properly later on. Especially if the lawyer contests the qualification and, for instance, insists that it is not article 115, but article 121 or 119 of the Criminal Code of Ukraine.*

Procedural supervisors are more concerned about interrogations of the accused or victims who are underage. According to the lawyers, public prosecutors even interrogate these persons in certain cases[40].

When prosecutors are present during investigative (detective) actions, they oversee the legality of these actions. However, being procedurally interested in the outcome of proceedings, they mostly react to gross violations, especially if the defense counsel points them out.

> Lawyers *... If the defense counsel makes a comment, for instance, when the investigator conducts an actual interrogation during re-enactment, the prosecutor will never say, "No, we will have an interrogation later, let them show now etc". Only if the defense counsel insists, 'This is a comment, please, we're putting it in the report etc.', then the prosecutor might react…*

The quote above illustrates the scheme actively used by law enforcement officers to circumvent the prohibition on using testimony provided to the investigator or prosecutor as grounds for a court decision, which is prescribed by article 95 of the CPC of Ukraine. This is their way to "insure themselves" in case the person changes the testimony in court.

Collecting exculpatory evidence or evidence that mitigates the defendant's guilt

In practice, there are questions related to collecting exculpatory evidence or evidence that mitigates the defendant's guilt. According to article 220 of the CPC of Ukraine, investigative (search) activities can be initiated by the defense, victim or representative of the legal person in whose respect proceedings are taken by way of filing appropriate request with the investigator, public prosecutor. A decision of the investigator, public prosecutor to dismiss a request for the conduct of investigative (search) activities, covert (search) activities may be appealed to the investigating judge (art. 93, CPC of Ukraine).

40 Information from the focus group with lawyers.

According to the lawyers, public prosecutors in these circumstances mostly act in the interest of prosecution.

> Lawyer — *... actually, they even obstruct the collection of such evidence. I think that the more evidence, the better, since it makes the trial more objective. You can make a more objective decision. They interfere with collection of evidence for defense. Not only they do not collect it or take part in the process, they hinder the defense from collecting this evidence. The exculpatory evidence; even though it is their duty under part 2 of article 9 of the CPC – it is their duty! And they even stand in the way.*

In practice, the amount of evidence collected at the stage of notification on suspicion is extremely close or identical to the amount of evidence at the stage of preparing the indictment.

> Prosecutor — *After the notice of suspicion is served, only those investigative actions take place that are impossible before serving the notice of suspicion, for instance, psychiatric examination where the person has to have the status of a suspect. In general, we collect all evidence used as a basis for indictment before the [notification of] suspicion.*

This is a clear indication that prosecutors and investigators perceive the notification of suspicion rather as a procedure for serving charges under the 1960 CPC than a presumption that a person has committed a crime based on minimum grounds. In our view, this practice contradicts the idea of a notice of suspicion and may prevent the exercise of the right to defense, which is described in more detail in subchapter 3.4. In addition, this practice leads to widespread situations described in subchapter 3.2 when the actual apprehension is not on record to avoid the start of the 24-hour time limit for serving the notice of suspicion.

3.3.3 Ensuring propriety and admissibility of the evidence

Investigator, public prosecutor evaluates any evidence from the point of view of propriety, admissibility, and accuracy, and in respect of the aggregate of collected evidence, sufficiency and correlation, based on his own moral conviction grounded in comprehensive, complete, and impartial examination of all circumstances in criminal proceedings being guided by law.

Evidence is proper if it directly or indirectly confirms the presence or absence of circumstances subject to proving in criminal proceedings and other circumstances relevant for the criminal proceedings, as well as credibility or non-credibility, possibility or impossibility of using other evidence (art. 85).

Evidence is found admissible if obtained through a procedure prescribed in the CPC of Ukraine (art. 86). Inadmissible evidence cannot be used when making procedural decisions or referred to in a court decision.

Evidence obtained through significant violation of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties recognized as binding by Verkhovna Rada of Ukraine, as well as any other evidence resulting from the information obtained through significant violation of human rights and fundamental freedoms, is inadmissible. Significant violations of human rights and fundamental freedoms include the following acts (art. 87(1), (2), CPC of Ukraine):

- conducting procedural actions which require previous court authorization without such authorization or with disrespect of its essential conditions;
- obtaining evidence subjecting a person to torture and inhuman or degrading treatment or threats to apply such treatment;
- violating the right of a person to defense;
- obtaining testimony or explanations from a person who has not been advised of his/her right to refuse to give evidence or answer questions, or where these were obtained in violation of this right;
- violating the right to cross-examination.

Evidence is also inadmissible if it was obtained (art. 87(3), CPC of Ukraine):

- as a testimony of a witness who subsequently will be found a suspect or accused in these criminal proceedings;
- by pre-trial investigation agencies or prosecution after the start of the criminal proceedings through exercise of powers that are not foreseen by this Code for ensuring pre-trial investigation of criminal offences.

In this subchapter, we shall address the general aspects of ensuring admissibility of the evidence while Chapter 4 will focus on the violations of human rights committed to obtain evidence of the person's guilt.

It is crucial that the procedural supervisor is aware of the results of the investigator's evidence collection efforts and problematic aspects of the investigative actions that may affect the admissibility of evidence. The public prosecutor has to be ready to defend admissibility of each item of evidence obtained during pre-trial investigation and submitted to the court. At the same time, this awareness shall be ensured while participation of the procedural supervisor during every investigative action is not mandatory.

Under these circumstances, public prosecutors attempt to identify grounds that make the evidence manifestly inadmissible by examining the materials of investigators, investigative actions, and dismissing this evidence.

Prosecutor — *If it's not an external inspection, which is allowed in accordance with the law on police, but a search of a person, clearly, this is inadmissible, I will not accept that.*

We should note that not all prosecutors are principled and categorical about screening out such evidence. If there is a chance that defense will not raise the issue of admissibility, and the court will not notice it, not every prosecutor will refuse to submit this piece of evidence to the court. One of the answers received during a focus group with prosecutors in response to a question about the procedural supervisor submitting manifestly inadmissible evidence to the court was:

Prosecutor — *No, but if it may pass, you can submit it.*

The following example was provided:

Prosecutor — *Investigators received temporary arrest and other warrants using certain documents. And it was prohibited to use these documents without the party's consent. They are just special type of documents. And all those warrants, hundreds of warrants, were… Without these documents, could you have obtained these warrants? Investigators did it, procedural supervisors granted the motion.*

Lawyers used stronger statements to characterize the procedural supervisors' approach to admissibility and propriety of evidence:

Lawyer — *The prosecutor does not have that type of evidence. For them, all evidence is admissible, proper. Even when you point out that it was [obtained] in the absence of a defense counsel.*

Lawyer — *For them, everything is admissible, even the simplest. First they do a controlled buy, and only three hours later they open a criminal case, after the controlled buy. They are not bothered with the fact that the times do not match. 'Don't' they match? They will in court!'.*

Lawyer — *... In particular, when an investigator was in the line-up, and police interns served as attesting witnesses.*

There are also multiple cases when the prosecutors are unaware of the problems during the process of obtaining certain evidence. The lack of proper attention to supervising the investigative (detective) actions often leads to the situation when the prosecutor is unprepared to defend the legality of obtaining a piece of evidence and, accordingly, its "admissibility".

Investigating judge — *... Often, a position on inadmissibility of a certain piece of evidence expressed by the lawyers makes the 'computer in the prosecutor's head freeze'.*

Interestingly, prosecutors commented in the following way on this situation:

> Prosecutor: *We get up and say, 'Your honour, this motion was submitted prematurely'. The court decides on inadmissibility of evidence in the chambers. That's it….*

This statement confirms the prevalence of this type of situations and illustrates the prosecutors' attempts to minimize the impression of their lack of awareness concerning obtainment of certain evidence, which leaves the question of adequate screening of improper and inadmissible evidence open.

3.3.4 The prosecutor's activities in the framework of evidence collection in specific categories of criminal cases

Evidence collection in criminal proceedings resolved pursuant to agreements

We mentioned the issue of excessive workload for prosecutors in Chapter 2. One of the mechanisms to reduce the workload for procedural supervisors are agreements in criminal proceedings.

Special criminal proceedings based on agreements in various forms have been used in many countries of the Anglo-Saxon and the Romano-Germanic legal systems. The need for these procedures is stipulated in the Recommendation in the Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe concerning the Simplification of Criminal Justice[41], as well as in the 1966 International Covenant on Civil and Political Rights and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

Researchers of this issue state that, in general, from 30 to 90 percent of criminal proceedings in common law and civil law countries are resolved in that manner[42]. In the US, for many years now, approximately 98% of criminal cases in courts have been decided based on a plea-bargaining[43].

41 According to chapter III, paragraph 7 of the Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe concerning the Simplification of Criminal Justice, the procedure of "guilty pleas", whereby an alleged offender is required to appear before a court at an early stage of the proceedings in order to state publicly to the court whether he accepts or denies the charges against him [...] should be introduced.

42 Leliak O.O. Uhoda pro vyznannia vynuvatosti u kryminalnomu protsesi Ukrainy [plea-bargaining in the criminal procedure of Ukraine], PHD thesis summary. Kyiv, 2015, p. 1.

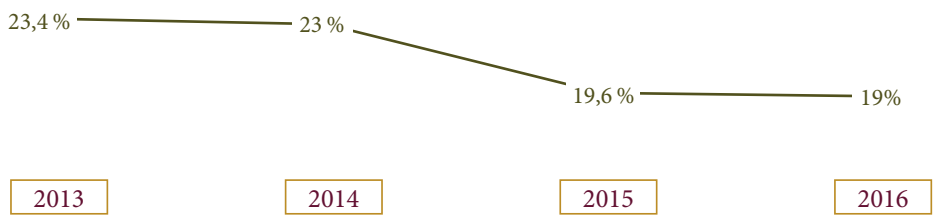
43 Stratii O.V. Uhoda z pravosuddiam u zakonodavstvi SShA [plea-bargaining in the US legislation] // Yevropeiski perspektyvy, No. 9 (2014), p. 166.

Agreements allow for significant economy on criminal and procedural resources, which allows saving time on proving guilt of a person who admits his/her guilt and avoid further appeals; they can be used to solve other (outside of the scope of the agreement) crimes and proving guilt of other perpetrators, as well as to reduce the time between the offence and the final decision in the case.

The idea of fast-track procedures that save procedural efforts by reducing the workload of the law enforcement bodies on proving guilt served as a basis of the concept of agreements (reconciliation agreements and plea-bargaining) in the CPC adopted in 2012. Since the concept involves an agreement between the suspect (defendant) and the public prosecutor or victim (depending on the type of agreement), it is designed to facilitate consensus between parties and resolve the social conflict.

The percentage of court decisions based on agreements in Ukraine is quite small and has been decreasing. According to the data of the judiciary (Fig. 3.8), in 2013, there were 23.4% of decisions based on agreements, in 2014, there were 23 percent, and in 2015, the number was 19.6 percent. This number was the lowest in the first half of 2016 – 18%[44].

Fig. 3.8 **Verdicts based on agreements (HSCU statistics)**



Approximately half (with a trend towards gradual decrease) of all agreements (58,3% in 2016; 51,6% in 2015; 45,2% in the first half of 2016)[45] were plea bargains between the prosecutor and the suspect (defendant) concluded following an initiative of any party (Fig. 3.9).

According to this data, there is an even steeper decrease in the number of decisions based on plea bargains when compared with the overall number of agreements.

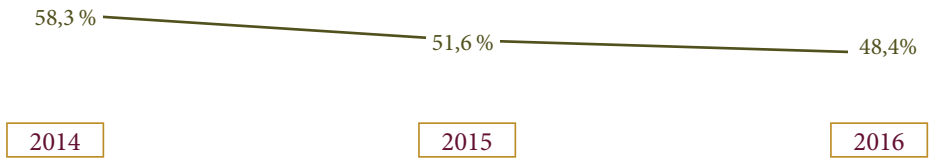
However, the low number of plea bargains cannot be linked to a small number of persons who admit their guilt and are not ready to rebut the prosecution's position. In fact, there are plenty of these people, however, they exercise their willingness to cooperate in a slightly different manner.

44 Court statistics, website of the High Specialized Court for Civil and Criminal Cases, http://sc.gov.ua/ua/sudova_statistika.html.

45 Ibid.

Fig. 3.9

The share of plea agreements between prosecutors and suspects (defendants) in all verdicts based on agreements (per year) (HSCU statistics)



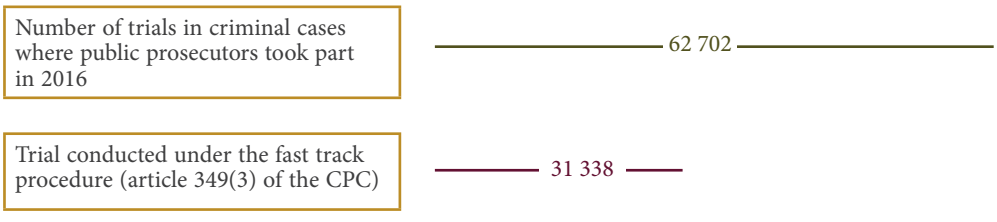
The data of the Prosecutor General's Office shows that approximately 50% (31338 out of 62702) of trials in criminal cases where prosecutors took part in 2016 were conducted under the fast track procedure provided by article 349(3) of the CPC of Ukraine (Fig. 3.10).

The use of this procedure, as well as the plea-bargaining process, entails admission of guilt and readiness not to oppose prosecution. However, unlike the agreement procedure, where the key idea is to simplify and shorten both the pre-trial investigation, and also the court proceedings, the idea of the procedure under article 349(3) of the CPC is to simplify and shorten the court proceedings only. According to the logic, the possibility of concluding an agreement should be considered first to optimize the workload for pre-trial investigation bodies and the procedural supervisor. Only if the agreement is not possible or feasible during pre-trial investigation, a question of using the fast track procedure under article 349(3) of the CPC of Ukraine can be raised.

Researchers who reviewed case files in specific criminal proceedings in different regions of Ukraine confirm that there was a large number (40-60 percent) of verdicts issued pursuant

Fig. 3.10

Trials in criminal cases where public prosecutors took part (PGO statistics, 2016)



to article 349(3) of the CPC of Ukraine. They state that failure to involve a defense counsel was characteristic for the majority of these proceedings[46]. We should note here that the absence of a defense counsel can be legal since the CPC does not prohibit this practice. However, the high prevalence of this practice raises certain concerns. The concern is that individuals who agree to the fast track procedure are not the ones who, at first, were not inclined to admit guilt and cooperate but changed their position in court after seeing the extensive evidence. On the contrary, participants of the procedure are those who had no defense counsel from the very onset. Therefore, we can assume that they agreed to cooperate with the justice system even without knowing the benefits of the agreement procedure, which include mandatory participation of a defense counsel from the moment of initiating the plea bargain (art. 52(2)(9), CPC of Ukraine).

As a result, instead of agreeing to a plea deal which requires participation of a defense counsel and negotiations on the scope of charges and severity of punishment, a person without proper defense and reduction of punishment guaranteed by the deal goes on to admit guilt and refrain from examining the evidence (which limits the possibilities for appeal) with the only hope of mercy from the prosecutor and the court in determination of punishment. At the same time, there are no savings in terms of time and state resources dedicated to collecting evidence.

Returning to the subject of agreements, we should admit that, since the courts dismiss some agreements and return the case to the prosecutor for continued investigation, prosecutors are concerned about the possible difficulties of proving guilt in these situations due to the loss of evidence. Therefore, agreements are usually sent to court only after a core number of evidence collection activities, which also does not support the use of agreements as a method of saving state procedural resources.

Prosecutor

In any case, we conduct all investigative actions. Because the courts often reject the agreement, not to have the indictment returned.

Accordingly, we should point out that the use of agreements currently does not reduce the workload of a prosecutor or investigator significantly. There is a need to further examine the use of this tool along with the fast track procedure under article 349(3) of the CPC of Ukraine.

3.4 The role of a prosecutor at the stage of notification of suspicion

According to Article 14 of the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966), everyone charged with a criminal offence shall have the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

46 Information from interviews with field researchers.

Notice of suspicion is one of the most important procedural acts designed to ensure practical implementation of the pre-trial investigation functions and the rights of an individual, in relation to whom the criminal proceedings are initiated. It includes a decision to notify of suspicion, preparing the notice itself, serving the notice to the individual concerned, as well as informing the persons about his/her rights.

Under the 2012 CPC, the notice of suspicion has a special place in pre-trial investigation and concludes in a way the work done during criminal proceedings and the data collected during the initial stage of investigation. It is the first step in criminal prosecution.

The meaning of the notice of suspicion is that a certain individual becomes the key party to the criminal procedure during pre-trial investigation based on the data collected. The state represented by justice authorities publicly formulates and declares the intention to prosecute this person. However, in the light of the presumption of innocence, the suspect is presumed innocent until convicted by a court. Therefore, the suspect acquires broad procedural rights to defend his/her interests.

The notice of suspicion can only be served to a sane person of the age of criminal liability and does not have the immunity from criminal liability during the investigation period.

The legal meaning of the notice of suspicion is that it starts a new stage of pre-trial investigation related to sufficient amount of evidence to suspect an individual of a crime. The suspicion should be specifically outlined in a written document – the notice of suspicion. The investigator (with the prosecutor's involvement) or a prosecutor provides a preliminary conclusion about the fact and nature of criminal acts committed by a certain individual.

According to article 277(1) of the CPC, written notice of suspicion shall be drawn up by public prosecutor or by investigator upon approval of public prosecutor.

Notification of suspicion is necessarily made in the following cases (art. 276(1) of the CPC):

1) apprehension of an individual at the scene of criminal offence or immediately after the commission of criminal offence;
2) enforcement of a measure of restraint against an individual as prescribed in article 176 of the CPC;
3) availability of sufficient evidence to suspect a person of having committed a criminal offence. At the same time, the notice of suspicion should be based not on the totality of evidence, but on its systematic nature.

When preparing the notice of suspicion, prosecutors should check carefully whether the suspicion is based on evidence obtained illegally, in particular through gross violations of human rights and freedoms.

In addition the prosecutor has to check the following:

- whether the suspicion is based on evidence obtained during procedural action conducted in the absence of a court warrant or

in violation of warrant conditions where a court warrant is required (search, examination of the residence or other property of a person; audio- or video-surveillance of a person; obtaining information from the telecommunication networks on transport etc.);

- whether the suspicion is based on evidence obtained through torture, cruel, inhuman or degrading treatment or threat to apply this type of treatment;
- whether the suspicion is based on evidence obtained as a result of violating the right to a defense;
- whether the suspicion is based on evidence obtained from a testimony of a person who was not informed of the right to waive testifying or answering questions/testimony obtained in violation of this right;
- whether the suspicion is based on evidence obtained in violation of the right to cross-examination;
- whether the grounds for suspicion stem from coerced explanations or testimonies in violation of the freedom from self-incrimination (article 18 of the CPC).
- whether the grounds for suspicion stem from a testimony from a witness who subsequently was found a suspect or accused in these criminal proceedings in violation of article 87(3) of the CPC.

The prosecutor also has to ensure that, in accordance with article 29(2) of the CPC, the person is notified of suspicion in the language s/he has sufficient command of to understand the nature of suspicion

The prosecutor has to ensure that a written notice of suspicion was handed to the person no later than 24 hours after actual apprehension (when an individual, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official). If s/he has not received the notice of suspicion, the prosecutor has to release the person immediately in accordance with article 278(3) of the CPC.

According to article 278(4) of the CPC, prosecutor has to ensure that date and time of serving the notice of suspicion, legal qualification of criminal offense of the commission of which the person is suspected, with indication of article (or its part) of Ukraine's law on criminal liability, is entered into the Unified Register of Pre-Trial Investigations.

According to the order of the Prosecutor General's Office of Ukraine No. 4гн dated 19 December 2012 "On organization of activities of public prosecutors in criminal proceedings" (amended by the order of the Prosecutor General of Ukraine No. 4гн-1 dated 26 July 2013)[47], the prosecutor shall:

47 Order No. 4гн of the Prosecutor General of Ukraine dated 19 December 2012 (amended on 26 July 2013) "On organization of activities of public prosecutors in criminal proceedings".

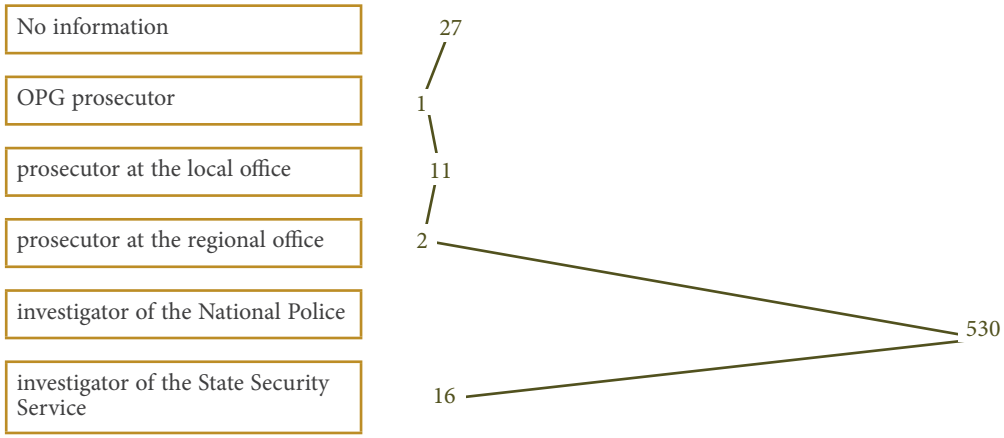
- if necessary, check the grounds for the notice of suspicion, compliance with time limits, the rights and legitimate interests of the suspects' rights;
- when making a decision on closing criminal proceedings where a person has been notified of suspicion, send the decision to the head of the prosecutor's office of the higher level with a reasoning within 5 days;
- to send these proceedings to the district prosecutors in cities through the city prosecutor's offices with district divisions;
- to take action in relation to officials responsible for violating the Criminal Procedure Code or the Criminal Code of Ukraine, which resulted in unlawful criminal prosecution.

Preparation and approval of the notice of suspicion with the procedural supervisor

According to article 276 of the CPC, a written notice of suspicion shall be prepared *by the prosecutor or by the investigator with the prosecutor's approval*. The notice of suspicion can also be served by an investigator but only *upon the approval from the prosecutor*.

According to article 277(8) of the CPC, the notice of suspicion shall be signed by the investigator or the prosecutor who is serving the notice of suspicion. However, a signature of the prosecutor on the notice of suspicion is not required by the CPC in cases where she is giving approval only.

Fig. 3.11 **Who prepared the notice of suspicion? (data of FLA centers)**



Investigators who took part in focus groups stated that they are the ones preparing the notice of suspicion in majority of cases. They only went to the procedural supervisor to get the approval.

The opinion of investigators is confirmed by the data from the free secondary legal aid center (FSLA centers). According to Figure 3.11, majority of notices of suspicion are prepared by police investigators.

During focus groups, investigators pointed out numerous difficulties they faced when obtaining approval of the notice of suspicion from the prosecutor. The key issues they pointed out included:

- complicated bureaucratic procedures that require significant time;

Investigator

We (police) take the notice of suspicion to the prosecutor's office only with registration. It means that I collect all documents that I consider to be sufficient for the notice of suspicion, and register in the administrative office that I send these materials to the prosecutor's office, then I take it to the administrative office, they register this case, the prosecutor takes the case and the procedural supervisor is sitting and waiting when the prosecutor will assign the case to him. And all of this means time, apprehended people, and what we should do next. He is reading it for an hour, two, half a day, it's already evening, [and he is still] reading. He gives it to the procedural supervisor: conduct the questioning. People turn around and leave, they say, "Why do we have to sit here all day". It is also a problem because all these materials are registered with the administrative office.

Investigator

An investigator brings the files: six types of suspicions in one case. In one place it is written that way, in another one – in another way. The versions on the thumb drive are different. There is a line. We have 60 investigators. All of them go to one procedural supervisor. And this is how it takes a day to sign the notice of suspicion.

Investigator

We register the "suspicion" and then write on the top – "draft". Because, if he doesn't like something, we have to do it again, wait for the registration through the records office... It takes me a week to sign one notice of suspicion. These are mild injuries that can be signed in 5 minutes

- the lack of procedural independence of procedural supervisors;

Investigator

The problem is that procedural prosecutors are very afraid of the responsibility for signing the notice of suspicion. This is the big problem in signing the notice of suspicion, as colleagues have rightly

pointed out. You go to the procedural supervisor, he goes to the deputy head who is in charge of police, and then they also go to the head of the prosecutor's office. So the investigator can spend the entire day approving the notice of suspicion.

Investigator

You have to get an approval and signature of the prosecutor for every document. The procedural supervisor signs it, deputy head gives the approval though it is not provided by legal norms, the prosecutor also puts his signature and gives approval, and you need to go to everyone.

Investigator

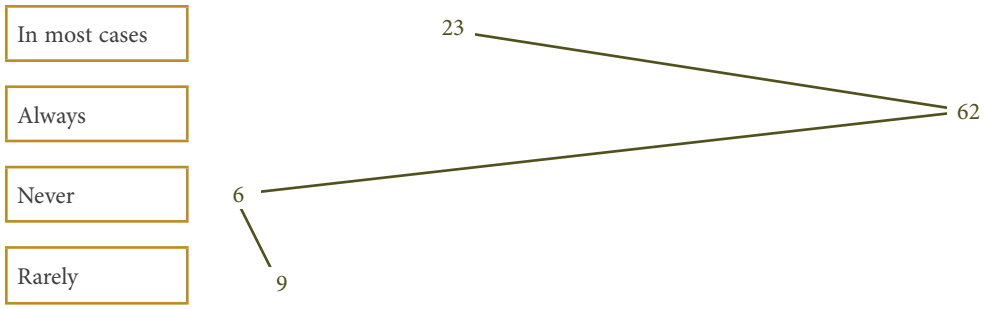
The procedural supervisor will not approve the notice of suspicion without consent of his supervisor.

Information from the focus groups is supported by the results of questionnaires for procedural supervisors (see Fig. 3.12).

As we can see from the data below, procedural supervisors approve the notice of suspicion in 91 percent! In 62% of cases this approval is obtained in all cases, and in 23 percent – in most cases.

Fig. 3.12

Prosecutors' responses to the question "Do you need to receive an approval for serving the notice of suspicion from your supervisors?"



- radically different perception of the same case circumstances by different prosecutors;

Investigator

If he doesn't like that one, I have another one. Conspiracy is written in one way. The property list is provided with forensic examination in one place and without it in another one. It also happens that [they say], "Why are you writing the forensic examination? It is not

necessary". While another one will say, "Why did you not write about the forensic examination?"?!;

Investigator

Every procedural supervisor has his own view not only about qualification, but even regarding the text and contents of the notice of suspicion. The head of the investigation unit reads it, he likes it; it works for him. You go to the procedural supervisor; he doesn't like it and changes it. The point then is about that. Then he goes to the deputy prosecutor, she reads it and also says it is wrong. And we go through three circles of hell like that.

- lack of familiarity of the prosecutor with the case files;

Investigator

We also had cases when the prosecutor said, "I don't know the case, why will I check, I didn't talk to the people. Again, give me the people". We bring the people again. Our district is rather stretched out. We go to get the people again and bring them to this other prosecutor. She says, "No, you have to do it another way".

We should note that prosecutors themselves consider it normal to discuss the contents of the notice of suspicion with the head of the prosecutor's office. However, they also report cases of pressure from the management in certain criminal proceedings noting their dependence on the prosecutor:

Investigator

Perhaps, you can report either before or after so that the supervisor knows that you have notified the person on suspicion today, what was the alleged crime and evidence. It takes 5-10 minutes, but the supervisor needs to know that.

Investigator

So the supervisor has to know before, be informed. He understands that there is covert detective actions there. There are practically no problems with the notice of suspicion here. There are problems when the prosecutor has not seen the suspicion, and he is told to serve the notice.

The difference concerning approval for the notice of suspicion in case of apprehension of a person

In case of apprehension of the suspect, the procedure for approving the notice of suspicion is somewhat simpler since the criminal proceedings are under special oversight and there are time limits for notifying of suspicion – within 24 hours following the apprehension:

Investigator

Of course, the procedure in cases where an individual has been apprehended is a bit faster because we have to provide the court with the files within 60 hours, so the prosecutor himself also tries to hurry us, "Come one, bring the files faster".

Investigator

When the deputy head of the prosecutor's office came [to the apprehended persons], we had a conversation and I said, "I need five procedural prosecutors for today". "You will have them now". And all procedural prosecutors came to work on Sunday. Procedural prosecutors went to the searches with the investigators. Procedural prosecutors gave approval for the notice of suspicion at 1 a.m. This is an example of effective cooperation. The criminal case went to the court, it was sent.

Serving the written notice of suspicion

According to article 278 of the CPC, written notice of suspicion shall be served the day on which it has been drawn up by investigator or public prosecutor, and if it appears impossible to serve it, in the way prescribed by the present Code for serving notifications.

Date and time of serving the notice of suspicion, legal qualification of criminal offense of the commission of which the person is suspected, with indication of article (article part) of Ukraine's law on criminal liability, shall be immediately entered by investigator, public prosecutor to the URPI.

However, though the CPC provides that the prosecutor can serve the notice of suspicion, it rarely happens in practice.

Investigators who took part in focus groups:

Investigator

Prosecutors prepare and serve the notice of suspicion very rarely.

Lawyers – participants of focus groups – shared this opinion when answering questions about the prosecutor's role in serving the notice of suspicion:

Lawyer

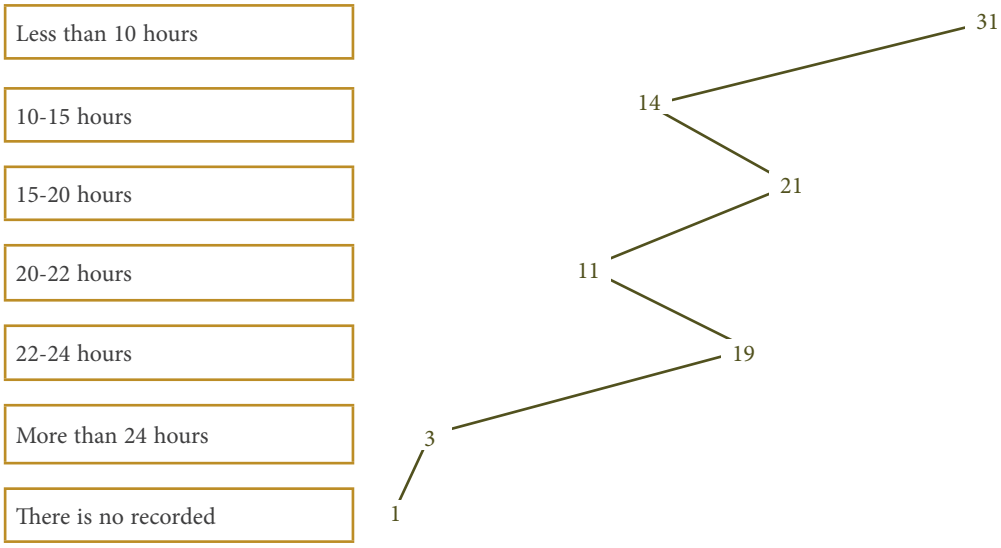
I never see the prosecutor, I work with the investigator all the time, there is no prosecutor.

Lawyer

[They] approve, sign of the notice of suspicion, but prosecutors are rarely present when it is served. Royalty does not do that. I didn't have any cases when the prosecutor was there. I had a notice of suspicion already signed by the prosecutor.

Fig. 3.13

Analysis of case files: how much time has passed between the time of actual apprehension (according to the apprehension report) and serving the notice of suspicion?



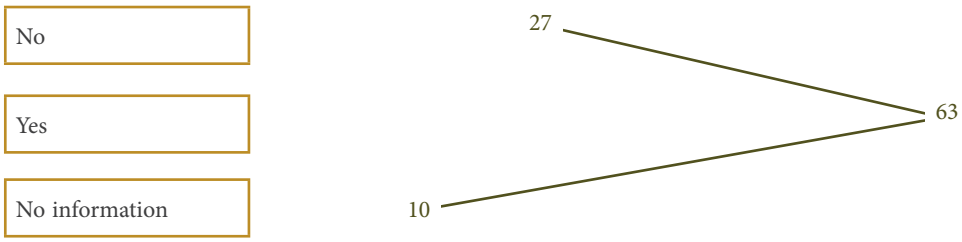
Lawyer *In most cases, the investigator is preparing it on his own. "Do you need a copy?", no problem, he will go sign and bring it back. So what is the prosecutor doing? I don't know.*

The study included an analysis of the prosecutors' compliance with the 24-hour time limit for notification of suspicion. Data in Figure 3.13 shows that the prosecutors, apparently, meet the 24-hour requirement in most examined cases (96%).

At the same time, considering data in Figure 3.14 on indicating the law enforcement premises as a place of actual apprehension, one can make a radically opposite conclusion! According to information of FSLA centers, the apprehension reports indicated the investigator's office as a place of apprehension in 67% of cases. Consequently, law enforcement officials often indicate the time of procedural apprehension, contrary to what the CPC requires.

Accordingly, time frame for serving the notice of suspicion illustrated in Figure 3.14 is much broader since this data does not take into account the time of actual apprehension. Therefore, in practice, the requirement for notifying the person of suspicion within 24 hours is not always observed, which constitutes a gross violation of the law.

Fig. 3.14 **Does the report indicate law enforcement premises as the place of actual apprehension? (data of FLA centers)**



The study also showed that the existing practice of omitting registration of apprehension to avoid the 24-hour time limit for the notice of suspicion is connected with another informal practice. According to this practice, the person's guilt has to be actually proven at the stage of notification of suspicion. Therefore, almost all investigative actions have to be completed. According to prosecutors, as a result of this informal requirement the notice of suspicion is usually identical to the indictment.

Prosecutor — *In principle, before serving the notice of suspicion, we collect all evidence that will be included into the indictment.*

Investigators also expressed this opinion:

Investigator — *Serving the notice of suspicion is practically solving the crime.*

Changing or serving a new notice of suspicion

If the investigator notified a person of suspicion, public prosecutor or investigator upon approval of public prosecutor shall notify the person of a new suspicion or change previously notified suspicion. If notice of suspicion was given by public prosecutor, only the public prosecutor shall have the right to notify of the new suspicion or to change previously notified suspicion (article 279 of the CPC).

Notifying of a new suspicion or changing the previously notified suspicion shall follow the procedure for the "initial" written notice of suspicion (article 278 of the CPC).

The CPC provisions state the grounds for a new notice of suspicion include the receipt of a statement or any other information about commission of the crime by the person who has already been notified of suspicion.

For instance, according to article 214 of the CPC, investigator, public prosecutor shall be required immediately but in any case no later than within 24 hours after submission of a report, information on a criminal offense that has been committed or after he has learned on his own from any source, about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the URPI, and to initiate investigation.

Despite the legal grounds for changing the notice of suspicion and possibilities of serving a new notice, the practice suggests that prosecutors have negative attitude to these actions in certain regions.

In particular, prosecutors who took part in focus groups stated that amendments to the notice of suspicion almost automatically have negative consequences for them:

Prosecutor — *If you change the suspicion, you are under the reprimand in accordance with the monitoring by the regional prosecutor's office, and they will sanction... that I was wrong in taking into account previous convictions. Changing the suspicion is just as bad as withdrawing it.*

In some regions, on the contrary, changing the suspicion is a long-standing practice, particularly in cases accompanied by apprehension of the person:

Prosecutor — *The notice for apprehended persons is provided in the understanding of the CPC, i.e. as a short statement of circumstances that lead the prosecutor at the moment of apprehension to believe that this person has committed the crime. According to the CPC. The final notice of suspicion is prepared in detail.*

Prosecutor — *The new notice of suspicion can have a completely different qualification than the previous one.*

According to the prosecutors, the practice of changing the notice of suspicion at the end of pre-trial investigation is widespread because judges often return indictments to the prosecutors because the notice of suspicion does not match the indictment:

Prosecutor — *We had the problem in the region when judges return indictments simply because the suspicion does not match the indictment. We try to explain that suspicion is short, that if we suspected a person of taking a bribe under article 368(1) of the Criminal Code, we charge him, and prepare a detailed indictment that describes everything. That's why we have to serve one notice of suspicion and then do it again, clarify, and issue an amended notice of suspicion. Even though qualification does not change.*

Prosecutor — *The grounds for suspicion change in the final notice.*

3.5 The prosecutor's role in application of measures to ensure criminal proceedings

3.5.1 The grounds for application of measures to ensure criminal proceedings

According to the current criminal procedure legislation, measures to ensure criminal proceedings are applied to ensure efficiency of these proceedings.

In particular, according to article 131 of the CPC of Ukraine, measures to ensure criminal proceedings include summons by investigator, public prosecutor, court summons and compelled appearance; imposition of pecuniary penalty; temporary restriction on a special right; suspension from position; provisional access to objects and documents; provisional seizure of property; attachment of property; apprehension of a person; and measures of restraint.

Some of these measures to ensure criminal proceedings are applied without a court order (summons by investigator, public prosecutor, court summons, apprehension without an orders of the investigating judge, court), while others require an order of the investigating judge or court (compelled appearance; imposition of pecuniary penalty; provisional access to objects and documents; provisional seizure of property; attachment of property; apprehension of a person with the purpose of compelled appearance for the application of restraint measures, and measures of restraint).

The common element of these procedural instruments for the purposes of this study is the prosecutor as a special subject that initiates these measures and conducts procedural guidance in their application. Accordingly, principles and legislative grounds for the prosecutor's participation in application of the measures to ensure criminal proceedings are important. Here, we should look at the general principles and international standards on role of prosecutors in criminal proceedings in relation to the use of measures to ensure criminal proceedings.

Criminal proceedings in Ukraine shall be conducted with respect for the rule of law principle. At the same time, general principles of criminal proceedings suggest that this principle and its elements shall be used not only in the framework of national legislation; the CPC clearly provides for application of international standards. For instance, articles 8(2) and 9(5) require that prosecutors apply the criminal procedure law of Ukraine with due consideration of the case law of the European Court of Human Rights. This Court's case law is quite broad and, as a rule, specific, causal, and based on the Convention for the Protection of Human Rights and Fundamental Freedoms.

Given the nature and meaning of the measures to ensure criminal proceedings, we can state with certainty that they include restrictions on the rights and freedoms of an individual.

Moreover, according to the notion of criminal proceedings and its tasks outlined in article 2 of the CPC, measures to ensure criminal proceedings are a form of procedural coercion and, therefore, in the meaning of the Convention for the Protection of Human Rights and Fundamental freedoms, their aim is interference with human rights. Most often, there is interference with the right to respect for private and family life. Article 8 of the Convention states:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*[48].

When applying this provision, the European Court for Human Rights noted:

> *"... any interference under the paragraph one of Article 8 must be justified in terms of the paragraph two as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein.... The wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law … The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities"*[49].
>
> *"...the expression "necessary in a democratic society" implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued… The Contracting States have a certain margin of appreciation in assessing whether an interference is "necessary in a democratic society", but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it"*[50].
>
> *"... domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention... The law must, moreover, afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural*

48 Convention for the Protection of Human Rights and Fundamental Freedoms.

49 Belousov v. Ukraine (2013), application No. 4494/07, ECtHR.

50 Karpyuk and others v. Ukraine (2016), applications No. 30582/04 and 32152/04, ECtHR.

safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question…"[51].

These and other international standards set a number of requirements to the national legislation and its implementation by courts, law enforcement, and other public authorities. Current CPC of Ukraine, despite certain shortcomings, still provides clear and effective mechanisms for the protection of human rights in criminal proceedings. At the same time, implementation of these legal norms does not always reflect the content of legal provisions, moreover, international human rights standards. Given the above, one of the most important aspects of research of the role of prosecutor in application of measures to ensure criminal proceedings is analysis of compliance with the norms of procedural legislation concerning proper application of these measures. In each section, key issues and shortcomings in this area are described through specific measures.

3.5.2 Preparation of motions for application of measures to ensure criminal proceedings

The problem of cooperation between the prosecutor and the investigator is one of the most important criteria for analyzing the prosecutor's role at this stage of criminal proceedings. For instance, Chapter 10 of the CPC of Ukraine provides that the investigator and the prosecutor are the key subjects in the process of initiation and implementation of measures to ensure criminal proceedings. They can initiate the majority of measures on par; however, the prosecutor as a procedural supervisor has to ensure the investigator's compliance with the procedure.

In relation to the summons procedure, the CPC provides that investigator, public prosecutor during pre-trial investigation shall have the right to summon a person if there are sufficient grounds for a belief that such person can give testimonies that are important for criminal proceedings, or his participation in a procedural action is mandatory. Investigator, public prosecutor during pre-trial investigation shall have the right to summon the suspect, witness, victim or other participant in criminal proceedings for interrogation or participation in other procedural action (art. 133, CPC of Ukraine).

However, the practice of application of this measure to ensure criminal proceedings reveals the inactive conduct of prosecutors. For instance, lawyers mentioned the following when asked about the use of summons:

Lawyer *How does the prosecutor summon... He doesn't. The prosecutor doesn't summon me. The investigator calls me and says, 'Please, come to the prosecutor'.*

When characterizing the prosecutor's general role in criminal proceedings using the example of summons, one of the lawyers who took part in focus groups stated:

51 Oleksandr Volkov v. Ukraine (2013), application No. 21722/11, ECtHR.

Lawyer *...They don't summon. Why would they, if they don't conduct any investigative actions with the person. The investigator does that all. That is why they don't summon. About the measures of restraint. The situation is the same: the investigator prepares it, the prosecutor signs something for him. For instance, I have never seen that either when the motion for detention is considered or during consideration of release. No, one time it happened, but the prosecutor just didn't come because he was ashamed. They don't take part in this.*

In addition, lawyers pointed out the fact that the prosecutor is not involved in proceedings in ordinary circumstances, however, he can interfere if there are difficulties or problematic moments:

Lawyer *When you initiate and complain through legal means, then – yes.*

Lawyer *Because these are work moments. Application of these measures is a working question, and they are not interested in that. They only care about performance, for instance, if they have an instruction to lock up the person, they will lock up the person. The investigator has to do the rest. Maximum, if the case is under control, the prosecutor can take part in the interrogation.*

This comment reflects the general tendency identified during this study as regards inactivity of prosecutors both in initiating the measures to ensure criminal proceedings, and in preparing relevant procedural documents. To illustrate this trend, we provide several charts based on analysis of criminal proceedings (Figures 3.15 and 3.18) and questionnaires for procedural supervisors (Figures 3.16, 3.17 and 3.19).

Figures 3.15 and 3.18 reflect the results of analysis of 305 criminal proceedings concerning cooperation of investigators and prosecutors as procedural supervisors in preparing, supporting and consideration of motions for measures of restraint. Figures 3.16, 3.17 and 3.19 show the results of questionnaires for procedural supervisors about the use of measures to ensure criminal proceedings in general.

In general, Figure 3.15 illustrates a situation where investigators of the National Police prepare (initiate) most motions on the use of measures of restraint as one of the measures to ensure criminal proceedings. At the same time, the answers to a question for procedural supervisors (in the questionnaire) 'Do you personally prepare motions for measures to ensure criminal proceedings?' (Fig. 3.16) are interesting. The majority responded affirmatively, however, only 27 % of respondents (134 out of 499) said that the investigator prepares these motions.

On the other hand, there is an important question about participation of investigator during consideration of motions to enforce, for instance, measures of restraint in courts. We should note that the majority of prosecutors (in questionnaires) indicated that the presence and active participation of investigators during consideration of motions to enforce measures of restraint was extremely important (Fig. 3.17).

Fig. 3.15

Analysis of case files: who prepared the motion for application of the measure of restaint?

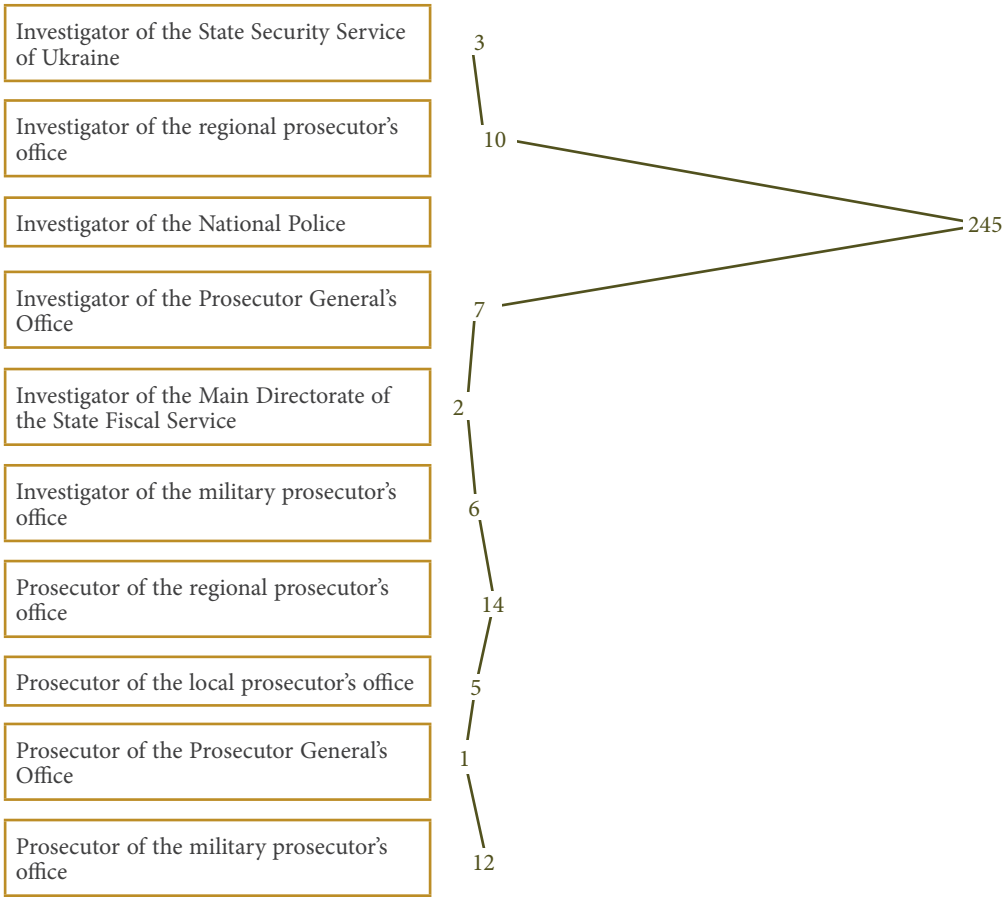


Fig. 3.16

Prosecutors' responses to the question "Do you personally prepare motions for measures to ensure criminal proceedings?"

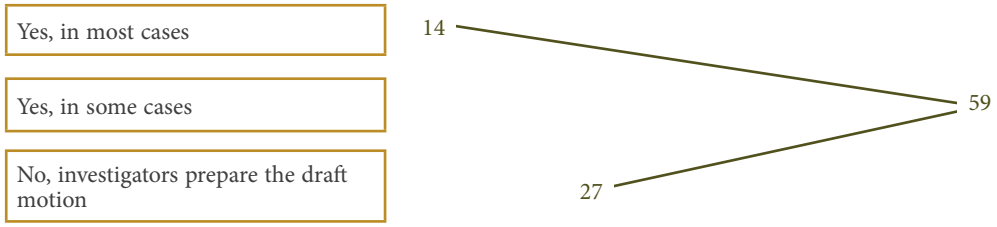
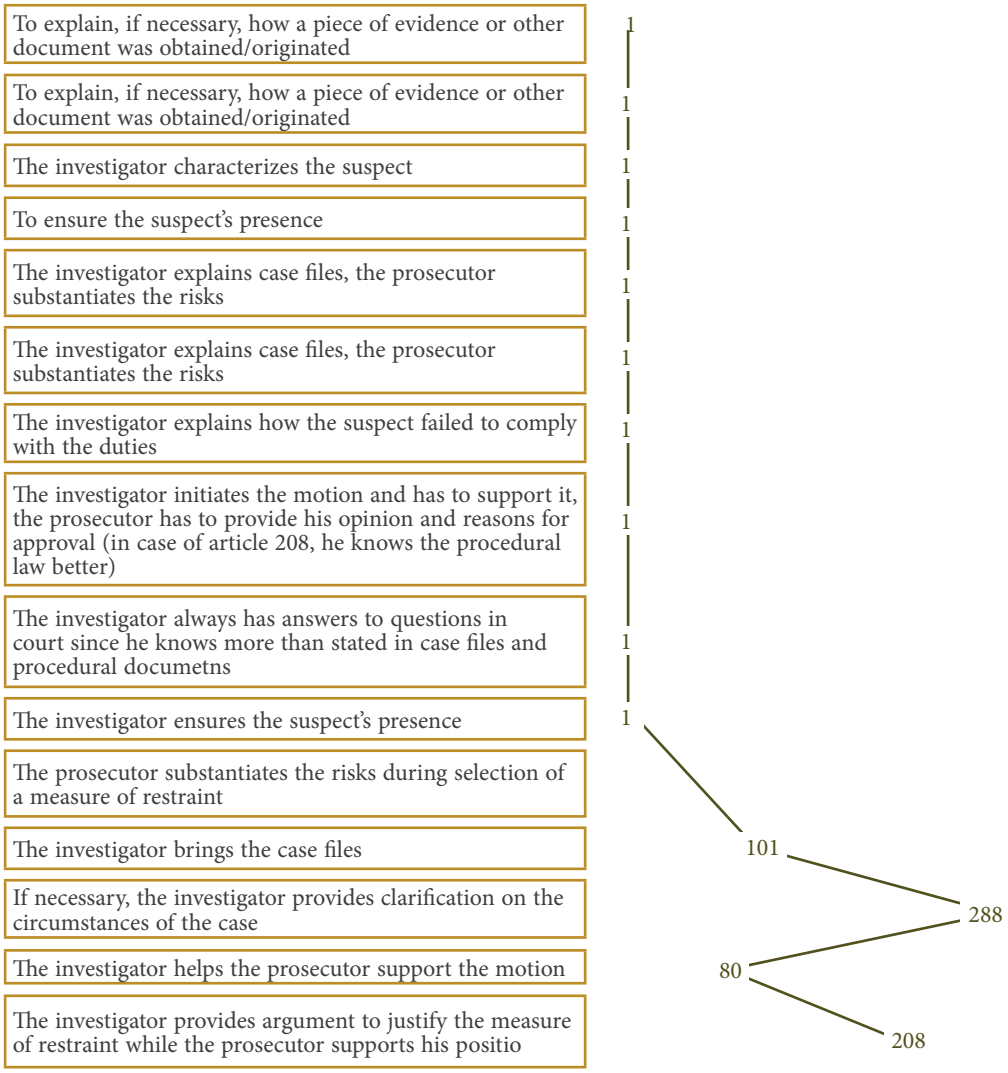


Fig. 3.17

Prosecutors' responses to the question "What is the investigator's role during consideration of motions to enforce measures of restraint in courts?"



For instance, 80 out of 688 respondents stated that investigators helped prosecutors support the motion, and 208 prosecutors agreed that the investigator provides arguments to justify the measure of restraint while the prosecutor supports his position. Overall, more than 40% of prosecutors accept that investigators play a key role during consideration of motions to enforce measures of restraint in courts.

Fig. 3.18

Analysis of case files: who provided arguments in favour of the measure of restraint before the investigating judge?

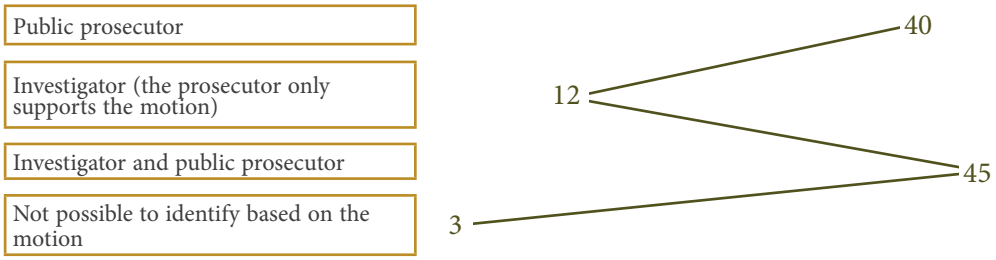
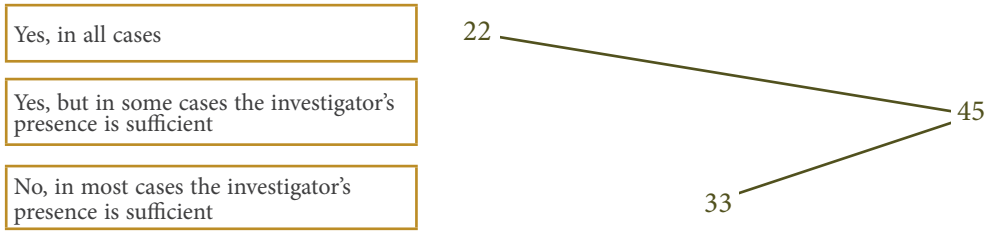


Fig. 3.19

Prosecutors' responses to the question "Do you think that the prosecutror has to be present in court during consideration of a motion for other measures to ensure criminal proceedings?"



A similar trend was identified during analysis of criminal proceedings in the framework of this study. Figure 3.18 shows in detail this interesting aspect – argumentation for the motions before the investigating judge. We can see that in most cases (45% – together with the prosecutors, 12% – independently) the investigator supports the motion while this procedural status does not include these powers.

Figure 3.19 provides even more interesting data: almost one third of respondents (33%) said that the prosecutor's presence in court during consideration of a motion for measures to ensure criminal proceedings was not always necessary, and in most cases it was enough to have the investigator there.

These indicators clearly demonstrated the trend regarding activity and effectiveness of prosecutors at this stage.

The quality of motions and their grounds is a practical issue since it has direct impact on the prospects of their success and the level of responsibility in preparing the motion.

The use of measures to ensure criminal proceedings, given their nature, constitute interference (restrictions) with human rights and have to be used in criminal proceedings only in exceptional cases. The CPC of Ukraine also reflects this line of reasoning. For instance, article 132(3) of the CPC states that application of measures to ensure criminal proceedings should be denied unless investigator, public prosecutor proves that:

- there is a reasonable suspicion of the commission of criminal offence of such severity which may be grounds for application of measures to ensure criminal proceedings;
- needs of pre-trial investigation justify such degree of interference in rights and freedoms of a person that is stipulated in the motion of investigator, public prosecutor;
- the task can be fulfilled and in order to accomplish this task the investigator, public prosecutor files a motion.

Therefore, the prosecutor's role (initiating the application of measures to ensure criminal proceedings or exercising procedural guidance) clearly includes preparation of relevant reasoning and arguments for the use of this exceptional procedure in criminal proceedings. Therefore, the need to restrict the right in each individual instance has to follow the goal of the criminal proceedings. However, in reality, these motions are not always prepared well or have relevant reasoning.

Let us look at the situation of proper grounds for the motion for temporary restriction on a special right. According to article 148 of the CPC, the investigator, public prosecutor, other competent official has the right to temporarily seize documents confirming special right from the person (the right to operate a vehicle or a ship; the right to hunt; the right to conduct entrepreneurial activity) lawfully apprehended by them without an order of the investigating judge or court where there is a good reason to believe that it is necessary to restrict a suspect in his enjoyment of a special right.

The law also lists the aims for this measure, namely stopping a criminal offence or preventing commission of another offence, stopping or preventing a suspect's unlawful acts intended to obstruct criminal proceedings, or securing compensation of damage caused by a criminal offence (article 148, CPC of Ukraine).

Article 150(2) of the CPC provides that the motion for a temporary restriction of a special right must state the reasons for temporary restriction of a special right.

At the same time, in its review of jurisprudence on motions for application of measures to ensure criminal proceedings, the High Specialized Court of Ukraine for Civil and Criminal Cases has determined that the key problem is the prosecutor's failure to provide grounds that suggest the availability of risks that justify restrictions on a special right.

As to the issue of the content of motions analyzed by the High Specialized Court for Civil and Criminal Cases, the key problem was the lack of provided grounds for the use of temporary restrictions on a special right. For instance, the fact of suspicion of a crime cannot be sufficient to justify temporary restrictions on specialized rights. Investigating

judges have to dismiss motions on the grounds that the party submitting the motion did not prove the circumstances that suggest existence of risks that justify application of this measure. The Court gave an example from practice:

> *"... The ruling of the investigating judge of Suvorovskyi district court in Kherson dated 29 May 2013 dismissed the motion of the investigator to impose temporary restrictions the specialized right of X, who is suspected of committing a crime under article 286(1) of the Criminal Code, to operate a vehicle. To support the ruling, the investigating judge stated that there were grounds to suspect X of committing a crime under article 286(1) of the Criminal Code, however, the prosecutor and investigator failed to prove the circumstances that justify the need to impose temporary restrictions on the right to operate a vehicle"*[52].

Therefore, article 151 of the CPC obliges the investigating judge to verify whether the submitting party fulfilled the requirements. This verification has to constitute an effective mechanism of judicial oversight concerning the quality and availability of grounds for motions for application of measures to2 ensure criminal proceedings. Having established that motion for temporary restriction of the enjoyment of special right does not comply with the requirements, investigating judge has to return it to the public prosecutor and adopt a ruling thereon.

Given the above, it is important to review the relevant court statistics in Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation" of the Report of the first-instance courts on consideration of criminal case files[53].

Overall, analysis of indicators for 2013-2016 (Figure 3.20) shows a clear trend on the relatively low number of returned motions.

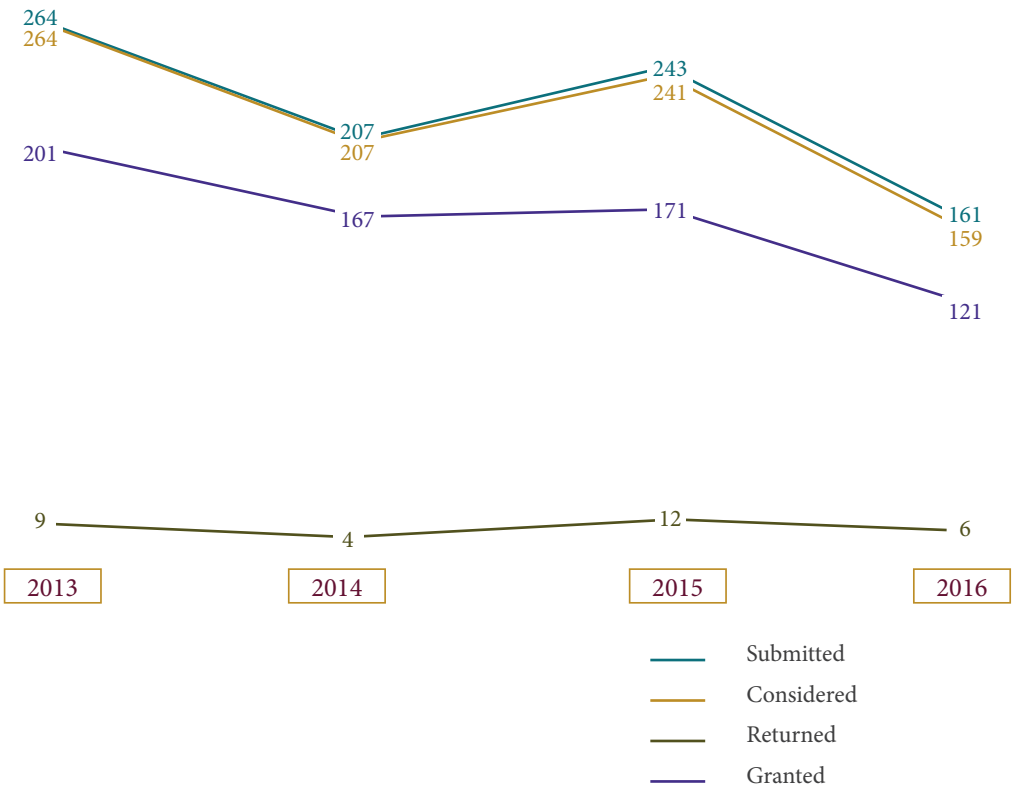
At the same time, the situation in general is quite interesting if one takes in account the number of motions dismissed by investigating judges (Fig. 3.21). In general, the courts dismissed approximately 1/4 of all considered motions. Accordingly, in quarter of cases, motions for temporary restrictions on a special right did not contain relevant arguments, reasoning and grounds for application of a relevant measure to ensure criminal proceedings.

From this point of view, another equally important issue is proper evidence-based support for the motions, which relates directly to proving the need to use a certain measure to ensure criminal proceedings. First, it relates to preparing and submitting proper evidence, documents, materials etc.

52 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

53 Report of the first-instance courts on consideration of criminal case files, Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation", approved by the order of the State Judicial Administration of Ukraine No. 158, 21 November 2012.

Fig. 3.20 **Consideration of motions for temporary restrictions on special right**



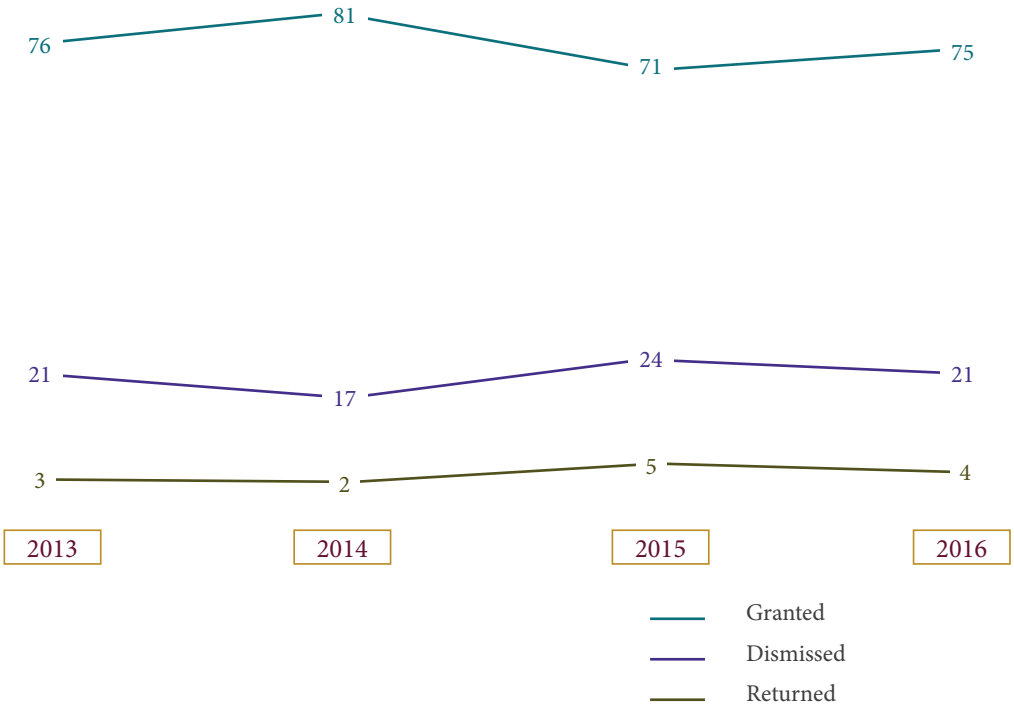
For consideration of application of measures to ensure criminal proceedings, the prosecutor or investigator, as well as other parties in criminal proceedings, have to submit proof of circumstances they refer to (art. 132, CPC of Ukraine).

One of the most common violations is the failure to add copies of materials used to support the arguments in the motion, as well as documents that confirm the provision of the copies of the motion and materials used to support the motion to the suspect.

To examine this issue, let us look at suspension from office as a measure to ensure criminal proceedings, which can be applied pursuant to a ruling of investigating judge during pre-trial investigation or a court during trial against a person suspected or accused of committing a moderately grave, grave or particularly grave crime and, regardless of the gravity, against a law enforcement official.

Fig. 3.21

Outcomes of consideration of motions for temporary restrictions of a special right by investigating judges (2013 - 2016)



The public prosecutor or the investigator with the concurrence of the public prosecutor shall have the right to approach the investigating judge in the course of pre-trial investigation or the court in the course of judicial proceedings with a motion for suspension of a person from the office.

When submitting a motion for suspension from office, the investigator, prosecutor has to prove existence of reasonable grounds to believe that this measure is necessary to stop criminal offence, stop or prevent unlawful behavior of the suspect or the accused, who, if holding the office, may destroy or forge objects and documents of essential importance for the pre-trial investigation, or exert illegal influence on witnesses and other participants in criminal proceedings, or otherwise illegally obstruct criminal proceedings.

According to article 155 of the CPC of Ukraine, the following documents shall be attached to the motion:

1) copies of the materials used by the investigator or public prosecutor to support their arguments for the motion;

2) documents which prove that the suspect or the accused was provided with the copies of the motion and the materials which substantiate the motion (art. 155, CPC of Ukraine).

According to the court practice, a significant practical problem in application of this measure to ensure criminal proceedings is the submitting party's failure to prove all the necessary grounds to believe that the measure is relevant for the aim of its use against an individual (i.e. to stop criminal offence, stop or prevent unlawful behavior of the suspect or the accused, who, if holding the office, may destroy or forge objects and documents of essential importance for the pre-trial investigation, or exert illegal influence on witnesses etc.). Moreover, there is a widespread practice of failing to submit sufficiently substantial evidence of guilt for suspension from office. Below is the practical example from a ruling of an investigating judge:

> *"… According to requirements of article 157(2)(2) of the CPC of Ukraine, when deciding the issue of suspension from office the investigating judge shall be required to take into account the sufficiency of evidence that indicates perpetration of criminal offence by this person. Considering the totality of materials provided by the prosecution, the investigating judge concluded that the investigator did not provided sufficient evidence of the suspect's guilt in committing the alleged crimes to suspend citizen L. from office. In fact, the only argument in the motion is the possibility of influencing witnesses in criminal proceedings and the opportunity to continue committing the crimes; however, we cannot agree with the prosecution's arguments... Moreover, the motion has no indication as to what witnesses can be influenced by citizen L., no evidence that the suspect attempted to influence witnesses or victims, or otherwise illegally obstruct criminal proceedings"*[54].

Part two of article 156 of the CPC also clearly requires that, having established that the filed motion does not comply with the requirements of Article 155 of the CPC, the investigating judge or the court shall return it to the public prosecutor and adopt a ruling thereon. Here, the court statistics support the trend mentioned above in relation to other measures to ensure criminal proceedings, towards a low number of returned motions[55]. For instance, in 2015, only 75 out of 1281 motions were returned, and 974 motions were granted. The situation during previous years was approximately the same (2013 and 2014), and it continued in 2016 (Figure 3.22)[56].

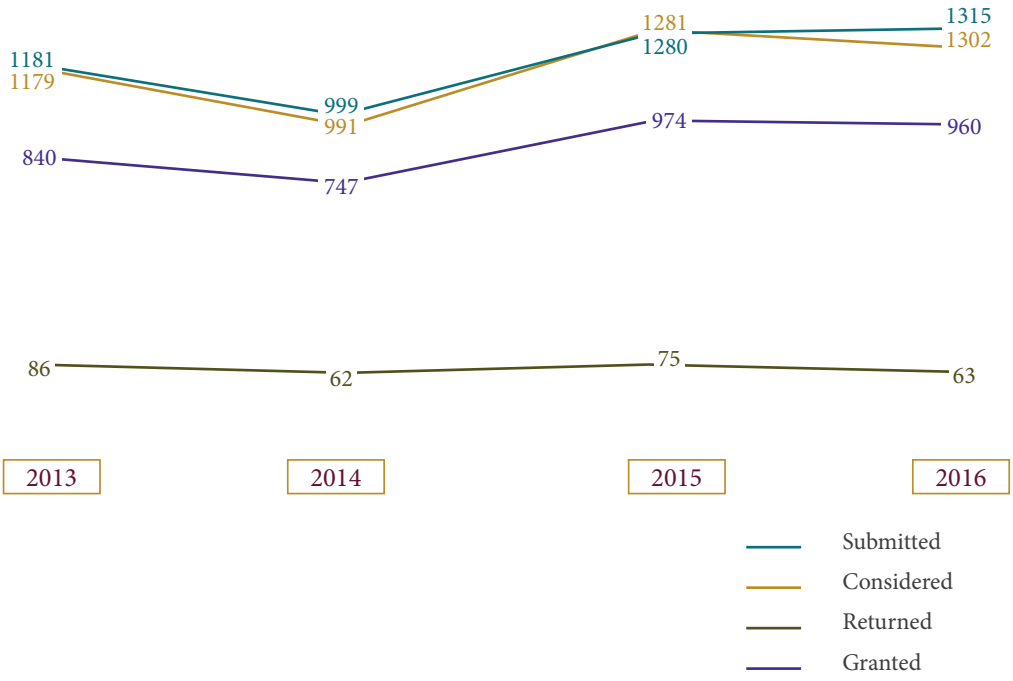
54 Ruling of Zarichnyi district court in Sumy, 13 November 2015. http://zr.su.court.gov.ua/sud1805/novini/218960/

55 Report of the first-instance courts on consideration of criminal case files, Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation".

56 Report of the first-instance courts on consideration of criminal case files, Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation", approved by the order of the State Judicial Administration of Ukraine No. 158, 21 November 2012.

Fig. 3.22

Consdideration of motions for suspension from office by investigating judges

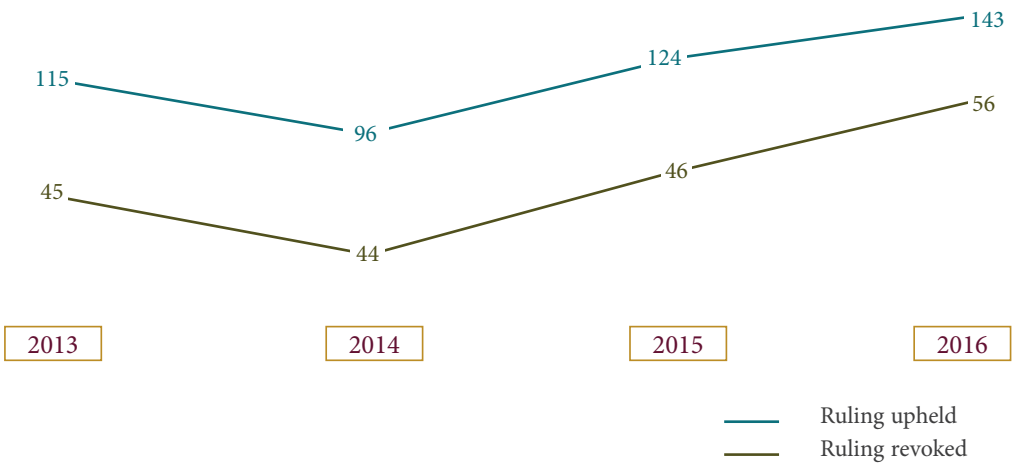


At the same time, we should note the increasing number of motions for suspension from office over the past three years. We should also note that the number of returned motions has proportionally decreased whereas the number of dismissed motions has remained almost the same (approximately 20 percent). To some degree, it is possible to assess the effectiveness of a prosecutor or an investigating judge based on other indicators in the court statistics[57].

For instance, the results of appeals against rulings on suspension from office are interesting. According to data presented in Figure 3.23, in 2015, there were 170 out of 974 granted motions on suspension from office appealed, and 46 rulings were revoked by appeal courts. In general, the ratio is more than 27%, which is quite high. In 2016, there were 56 out of 199 rulings revoked by appeal courts, which is approximately the same as in 2015. We should also point out the increase in the number of appeals over the last three years.

57 Chapter 4 "Outcomes of consideration of appeals against rulings of investigating judges (number of persons)". Report of the first-instance courts on consideration of criminal case files approved by the order of State Judicial Administration of Ukraine No. 158 dated 21 November 2012.

Fig. 3.23 **Outcomes of appeals against suspension from office**



As a result of the review of jurisprudence, we should mention another relevant problem. When dismissing the motion for suspension, courts often refer to the lack of grounds for suspension of a suspect from office, as well as the failure to prove the existence of reasonable suspicion in committing a crime of such gravity which renders suspension from office.

Since the use of this measure to ensure criminal proceedings includes interference with the human rights and freedoms, arguments for such interference should be quite serious. However, in certain cases, even judges commit such violations. The High Specialized Court for Civil and Criminal Cases provided the following example:

> *"The investigating judge of Korolivskyi district court in Zhytomyr issued a ruling on 15 July 2013 whereby the head of the housing and public utilities department of Malyn executive committee of the city council was suspended from office. At the same time, the judge did not take into account that all investigative actions had been completed by the time the motion was submitted to the court: all documents were attached, all witnesses questioned; therefore, the prosecutor failed to prove that the suspect, if holding the office, may destroy or forge documents or exert illegal influence on witnesses"*[58].

In fact, the statistics on appeals against rulings allowing suspension from office proves the quoted statement that there is significant room for improvement concerning argumentation and practice of application of this measure to ensure criminal proceedings in court.

58 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

3.5.3 Misapplication of measures to ensure criminal proceedings

Procedural violations in the application of measures to ensure criminal proceedings

For the purposes of this study, misapplication of measures to ensure criminal proceedings includes violations of the procedure established by law and the aim of application of such measures. This set of problems includes issues that vary in scope, from significant deviations from the procedure to serious abuse of procedural powers. However, all these issues result in human rights violations, and it is usually impossible to foresee all possible consequences thereof. Accordingly, they can have serious negative impact on participants of criminal proceedings.

Let us examine legislative provisions on the summons as an example of a relatively minor violation of the procedure for application of measures to ensure criminal proceedings. Article 135 of the CPC of Ukraine provides that a person is summoned to investigator, public prosecutor, investigating judge, court by serving court summons on the person concerned, sending it by mail, electronic mail or facsimile communication, by telephone or cable. If the individual concerned is temporarily out of his home, ruling on court summons shall be served against signature on his adult family member or to another individual who resides together with the addressee, to the residential management organization at the place of residence, or to the administration at the place of employment.

A ruling on court summons of an underage person is served, as a rule, on the person's father, mother, adopter, or legal representative; a ruling on court summons of an individual with limited capacity is served on the caretaker. Part 6 of article 135 of the CPC of Ukraine clearly states that a ruling on court summons shall be served on a person by an employee of the post office, employee of a law enforcement agency, investigator, or a public prosecutor.

The practical issue here is frequent violation of the requirement stating that if the individual concerned is temporarily out of his home, ruling on court summons shall be served against signature on his adult family member or to another individual who resides together with the addressee, to the residential management organization at the place of residence, or to the administration at the place of employment. Therefore, contrary to part six of article 135 (exceptional cases of serving the ruling on summons), rulings on summons can be served on other persons, not the addressee. These shortcomings in application of the CPC provisions were emphasized by the High Specialized Court for Civil and Criminal Cases in review of jurisprudence. The following examples were used to illustrate the practice:

> *"For instance, the investigating judge dismissed the motion to summon the person stating that the case files lacked data confirming that D. was summoned in accordance with the procedure under article 135 of the CPC of Ukraine, and the stub of the ruling on summons was not a proof of proper notification, since it did not suggest that the suspect's husband received the ruling; the ruling on*

summons was served less than three days prior to the indicated time (indeed, the ruling on summons for 28 February was served on 27 February).

The ruling of the investigating judge of Leninskyi district court in Sevastopol dated 12 December 2012 dismissed the motion of an investigator of Leninskyi district unit of the MoI Directorate in Leninskyi district in Sevastopol to summon a witness Z. due to the lack of grounds, namely: if the person was summoned over the phone, his/her failure to appear cannot be considered as unconditional grounds for application of summons"[59].

Violations of procedural time limits for the summons constitute another equally pressing and serious procedural issue. Article 135(8) of the CPC of Ukraine provides that a person has to receive the ruling on summons or be notified about the ruling no later than three days before the date of required appearance on the prosecutor's summons. If the CPC establishes time limits for procedural actions that preclude summons within the said time limit, the person shall receive the ruling on summons or be notified about the ruling through other means as soon as possible, but, in any case, with the necessary time allocated for preparation and arrival upon summons.

In practice, there are widespread situations when the summons is conducted in violation of the three-day period provided by article 135(8) of the CPC of Ukraine. These cases were also identified during focus groups and interviews:

Lawyer

The investigator called me at five thirty in the evening. I mean, I found out from my client that it's necessary to appear before the investigator tomorrow morning. I said, 'Right'. I called the investigator and explained, 'You know me, if he told you I was his defense counsel, you had to inform me'. 'I'm telling you – tomorrow by 10'. I said, 'Excuse me, what if I have the whole day planned tomorrow'. 'You can reschedule'. I said, 'No, mister'. 'Well, if you can't make it, I will call the lawyer for the investigative and detective activities. I said, 'I will not let you do it, that's why tomorrow morning there will be a complaint at the free legal aid center, your office, and the prosecutor that you failed to inform me at least 3 days prior, as required by the CPC, and now you tell me you're summoning me, while you're summoning me to serve the motion on the measure of restraint and to the consideration of the motion of restraint. As a result, I had to call the prosecutor. The prosecutor agreed with me, and we rescheduled without any problems.

Importantly, on the other hand, the prosecutor or investigator can be held liable for violating their procedural duties of participants in the criminal proceedings. According to article 144 of the CPC of Ukraine, pecuniary penalty may be imposed on participants

59 Ibid.

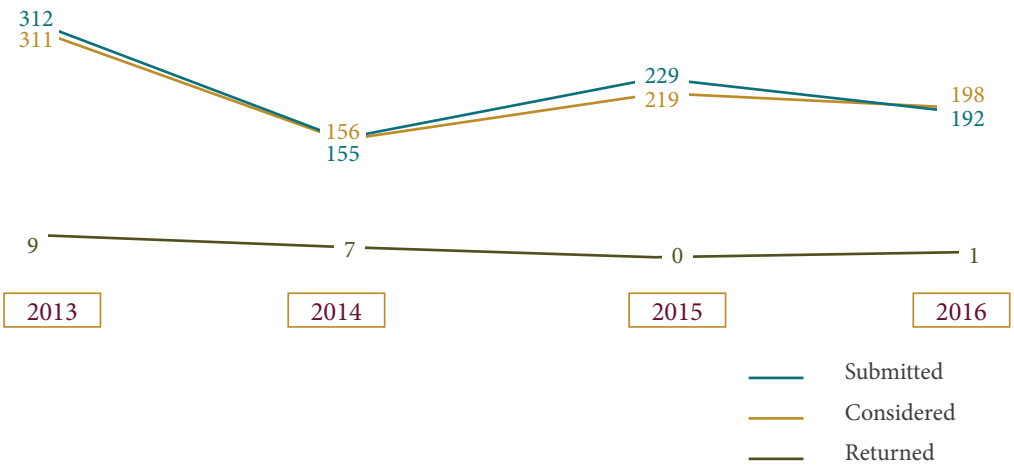
in criminal proceedings. Pecuniary penalty shall be imposed: in the course of pre-trial investigation – upon the ruling of the investigating judge based on the motion made by the investigator or the public prosecutor or on his own initiative, or in the course of the judicial proceedings – upon the court's ruling based on the public prosecutor's motion or on its own initiative.

The prosecutor or investigation shall include the following information in the motion for imposition of pecuniary penalty in the course of the pre-trial investigation: name of criminal proceedings and registration number thereof; procedural status of the person for whom the motion for imposition of pecuniary penalty was made, his last name, first name, patronymic and place of residence; duty imposed on this person by the CPC or by ruling of the investigating judge; circumstances under which this person failed to fulfill his duty; facts that corroborate the person's failure to fulfill his duty; last name, first name, patronymic and position filled by the investigator or public prosecutor; date and place of making the motion (art. 145, CPC of Ukraine).

Copies of the materials used by the investigator or public prosecutor to support their arguments shall be attached to the motion. In the course of pre-trial investigation, the motion made by the investigator or public prosecutor for imposition of pecuniary penalty on a person shall be examined by the investigating judge no later than three days after the date of submission of the motion to the court. The official who submitted the motion and the person on whom pecuniary penalty may be imposed shall be notified of the time and place of consideration of the motion; however their failure to appear shall not impede examining this issue.

Official statistics shows that this measure to ensure criminal proceedings is not used often (Figure 3.24).

Fig. 3.24 **Consideration of motions for pecuniary penalty by investigating judges**



In contrast, in 2016, investigating judges considered 1302 motions for suspension from office, 230 861 motions for temporary access to objects and documents, and 37 903 motions for seizure of property[60].

This measure should be considered as an instrument of disciplining participants in criminal proceedings to ensure their responsible attitude in fulfilling their procedural duties. However, based on its application, it does not serve the purpose. According to the review of jurisprudence, judges focus on the failure to meet the requirements of article 145 of the CPC according to which the prosecutor has to prove the fact of failure to perform a procedural duty in criminal proceedings. In the review, the HSCU stated that motions are often submitted without the copies of materials to support the arguments of a prosecutor/investigator. If copies of the materials that confirm existence of certain duties are attached to the motion, they show that there are grounds and actual failure to fulfill procedural duties. Moreover, the court provides the following examples:

> *"The ruling issued by the investigating judge of Leninskyi district court in Sevastopol on 23 May 2013 dismissed the motion to impose pecuniary penalty on the victim for failure to fulfill procedural duties submitted by the senior investigator of the prosecutor's office in Crimea region for oversight over legality in military sphere. There were no established grounds to consider that A. failed to appear when summoned by the investigator without reasonable grounds…*
>
> *The ruling issued by the investigating judge of Sokalskyi district court in Lviv region on 22 May 2013 dismissed the motion of the investigator of Sokalskyi district unit of the Main Directorate of the MoI in Lviv region to impose pecuniary penalty of ½ minimum wages on Ch. for failing to fulfill procedural duties. During trial, it was established that the summons was conducted twice with violations of requirements stated in article 135(8) of the CPC, and the confirmation of summons was served less than three days before the date"*[61].

Abuse in the application of measures to ensure criminal proceedings

We should also focus on the possible abuse of power by prosecutors in application of measures to ensure criminal proceedings. In previous chapters, we mentioned this issue in the context of abuse of the right to summon a person, for instance, for actual apprehension.

60 Report of the first-instance courts on consideration of criminal case files, Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation", approved by the order of the State Judicial Administration of Ukraine No. 158, 21 November 2012.

61 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

These are different in content and procedural meaning, and it is unacceptable to interchange them. Apprehension triggers a range of procedural rights, including the right to immediately inform close relatives, family members or other individuals, in accordance with the person's choice, about the apprehension and whereabouts of the person.

In this part of the study, we examine the measure of provisional (temporary) access to objects and documents to identify specific issues.

Provisional access to objects and documents is granted by the ruling of an investigating judge, court, and consists in providing a party in criminal proceedings by the person who owns such objects and documents the opportunity to examine such objects and documents, make copies thereof and seize them (execute seizure).

Provisional access to electronic information systems or their components, mobile terminals of communication systems takes place in the form of creating a copy of information contained in these electronic information systems or their components, mobile terminals of communication systems without seizing them (art. 159, CPC of Ukraine). Access to correspondence or any other form of communication between defense counsel and his client or any person, who represents his client, in connection with the provision of legal assistance, as well as to objects which are attached to such correspondence or any other form of communication, is prohibited (art. 161, CPC of Ukraine).

The CPC of Ukraine also identifies objects and documents that contain secrets protected by law, such as information, which may constitute doctor-patient privilege, personal data, or a State secret etc. (art. 162, CPC of Ukraine)

An investigator upon approval of public prosecutor, as a party to criminal proceedings, may apply to investigating judge during pre-trial investigation or to court during trial, for granting provisional access to objects and documents of criminal proceedings, except those access to which is prohibited. A motion shall contain, inter alia, the following information:

- objects and documents the provisional access to which is planned to be granted;
- grounds to believe that the objects and documents are or can be in possession of the physical or legal person concerned;
- significance of the objects and documents for establishing circumstances in the criminal proceedings concerned;
- possibility to use as evidence the information contained in the objects and documents, and impossibility to otherwise prove circumstances which are supposed to be proved with the use of such objects and documents, in case the motion to grant provisional access pertains to objects and documents containing secrets protected by law;
- substantiation of the necessity to seize the objects and documents, if such an issue is raised by a party to criminal proceedings (art. 160, CPC of Ukraine).

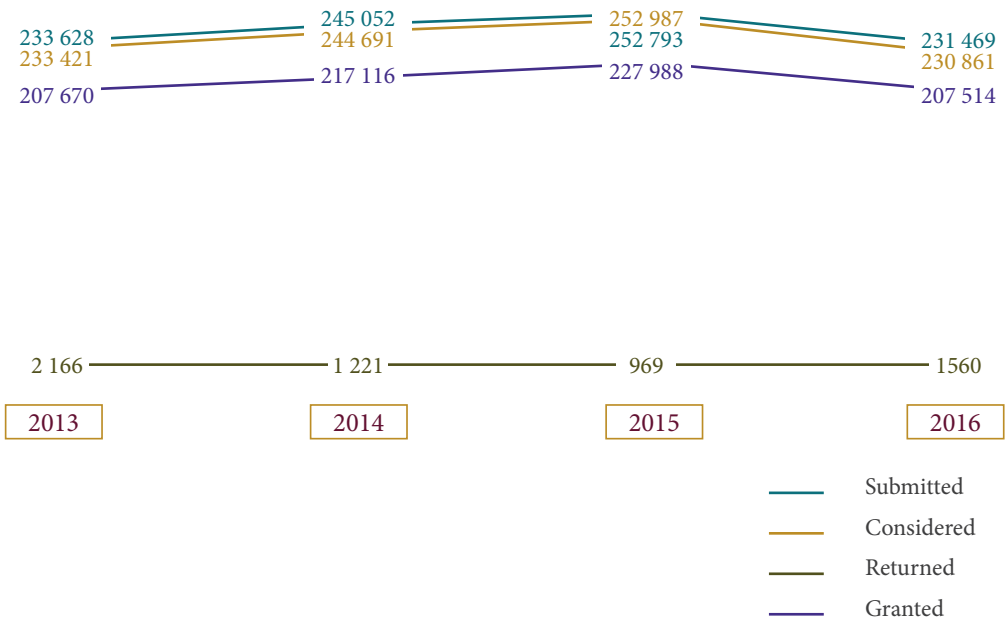
In case of failure to execute court's ruling on provisional access to objects and documents, investigating judge, court upon motion of the party to criminal proceedings, which has been granted access to objects and documents, may pass a ruling authorizing search with the purpose of finding and seizing the objects and documents concerned.

In case the search authorization was given upon motion of defense party, investigating judge, court shall assign the conduct of search to the investigator, public prosecutor or body of internal affairs at the venue of the conduct of the action (art. 166, CPC of Ukraine).

As an illustration of general quantitative trends and critical issues in application of this measure, we shall use the official court statistics from Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation" of the Report of the first-instance courts on consideration of criminal case files, which provides interesting insights on provisional access to objects and documents (Figure 3.25)[62].

The extremely high number of submitted and considered motions, compared with the other measures to ensure criminal proceedings, is particularly striking. To identify how frequently this measure is used (approximate ratio) we asked procedural supervisors

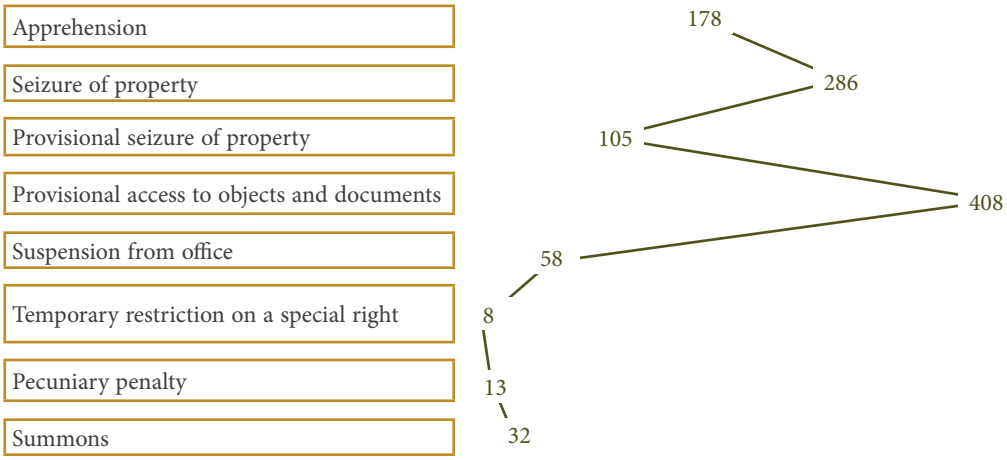
Fig. 3.25 **Consideration of motions for provisional access to objects and documents by investigating judges**



62 Report of the first-instance courts... Chapter 5.

Fig. 3.26

Prosecutors' responses to the question "What do you usually request in motions for measures to ensure criminal proceedings (except measures of restraint)?"



'What do you usually request in motions for measures to ensure criminal proceedings (except measures of restraint)?' Questionnaire results (Fig. 3.26) show that provisional access to objects and documents is sought significantly more often than other measures to ensure criminal proceedings (408 responses from 1088 collected answers).

In this regard, we should mention the problem related to the procedural supervisors' efforts to speed up the evidence collection primarily through provisional access to objects and documents. This aspect can be examined in relation to possible abuse of power.

Analysis of case law shows that pre-trial investigation agencies try to use measures to achieve something they are not designed to provide. For instance, the issue of provisional access to objects and documents is raised with the purpose of collecting evidence. Participants of focus groups and interviews had interesting comments about his. For instance, investigators claimed:

Investigator

And then there is an issue with these materials. We also have these similar identical cases. It happens then that people in this shop, or the person who has video surveillance volunteer and write that they provide the record, and we examine it. No, you need provisional access. We go to the court, and they say, 'No, we will not give you provisional access, you already had access, examined it, why do you need provisional access. The prosecutor says, 'This evidence is inadmissible, it's illegal, no suspicion'. That's a dead end, what to do.

The case has a face matched. There are confirmed materials, and only because of one piece of evidence, because everyone has their own vision.

In this regard, the HSCU considers that motions of investigators in certain cases are based on the need to lawful access and seizure of objects that can serve as material evidence. However, investigators, prosecutors and investigating judges do not take into consideration that collection of evidence takes place through investigative actions (in particular, seizure during examination or search). In these cases, misinterpretation of criminal procedure norms by pre-trial investigation agencies and investigating judges leads to replacement of investigative actions with the measures to ensure criminal proceedings. According to article 132(4) of the CPC, in order to evaluate the needs of pre-trial investigation, investigating judge or court are required to take into account the possibility to obtain, without applying a measure to ensure criminal proceedings, objects and documents which can be used during trial for establishing circumstances in criminal proceedings. Here, it is necessary to remember that objects and documents could be obtained through investigative actions, i.e. without the use of measures to ensure criminal proceedings. In addition, according to article 223(1) of the CPC, investigative (detective) actions imply actions aimed at obtaining (collecting) information or verifying already obtained evidence in specific criminal proceedings. In the review, the Court clearly stated that analysis of the court practice shows that investigators not only ignore the legal provision, but also arbitrarily request consideration of their motions in the absence of persons who possess certain objects or documents. Motions have formal reference to possible destruction of objects and documents by these persons, however, there is no evidence to support these claims[63].

The above quote from a focus group with investigators suggests that these actions of investigators are also based on the position of a prosecutor in the capacity of a procedural supervisor.

Judges point out various violations of procedural law, as well as gross violations of fundamental human rights. During implementation of the ruling, authorities make copies and seize objects that are not indicated in the ruling, which constitutes a violation of the CPC. Moreover, they do not always respect the prohibition on access to correspondence or any other information exchange between the defense counsel and client, or any person who represents the client in relation to provision of legal aid, as well as to objects attached to this correspondence and other forms of information exchange, as well the requirements on access to objects and documents that contain secrets protected by the law.

Investigating judge

The most common motions are for provisional access. However, again, they are not always necessary in criminal proceedings, and they go ahead and use them. You ask, "Why? What will it give you? What circumstances will you support? What information will you receive as a result?' They also don't understand.

63 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

The review of jurisprudence shows that there are multiple instances when the investigator (prosecutor) fails to attach a properly certified copy of the extract from the URPI for the relevant criminal proceedings; they fail to mention legal qualification of the criminal offence, and only reference the article (part of the article) of the Criminal Code of Ukraine; there is no comprehensive and specific information about the objects and documents they are seeking provisional access to. As an example, the following situations are described:

> *"The investigating judge of Pavlohrad city district court in Dnipropetrovsk region, in the presence of the investigator of Pavlohrad city unit of the Main MoI Directorate in Dnipropetrovsk region, has considered the motion for provisional access to objects and documents and ruled to dismiss the motion. The investigating judge considered that the investigator only mentioned the article of the law of Ukraine on criminal liability, and not the legal qualification of the criminal offence in the framework of investigation of which the issue of provisional access is raised…*
>
> *The investigating judge of Kalininskyi district court of Horlivka, Donetsk region, on 11 February 2014 returned the motion to the investigator of Horlivka city unit of the Main MoI Directorate in Donetsk region for provisional access to objects and documents in criminal proceedings due to the fact that the motion had incorrect names of objects and documents the investigator sought access to, the lack of grounds justifying the need to obtain information which may constitute bank secret, and since the investigator's position was indicated inaccurately"*[64].

As a rule, the above shortcomings of submitted motions lead to dismissal of the motion for provisional access to objects and documents. A logical response to such ruling would be an appeal by the prosecutor's office. Accordingly, it is useful to look at the statistics from Chapter 4 "Outcomes of consideration of appeals against rulings of investigating judges (number of persons)" of the Report of the first-instance courts on consideration of criminal case files (Figure 3.27)[65].

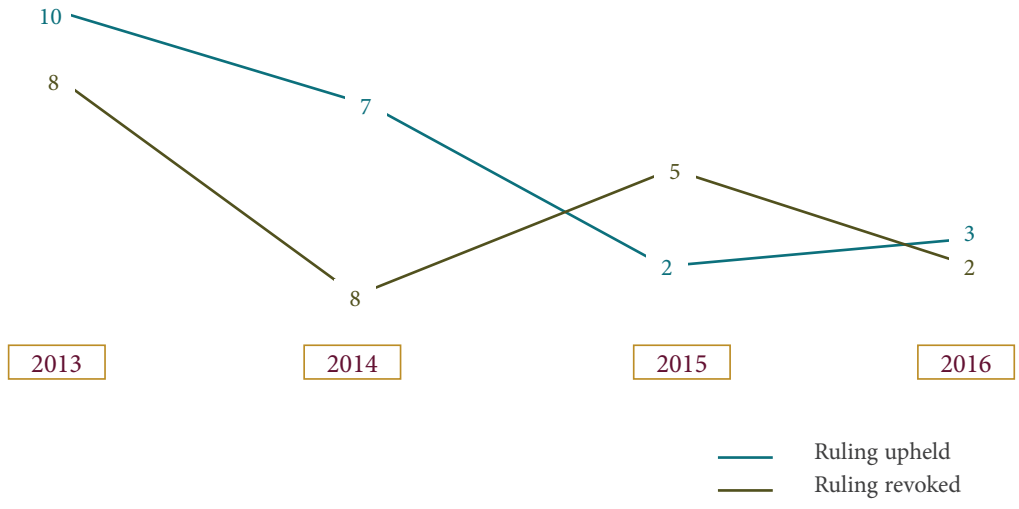
The chart shows that, despite extremely high number of motions in comparison to other measures to ensure criminal proceedings, and relatively proportionate number of dismissals, the number of appeals against these rulings is extremely low. Moreover, there is a downtrend in the number of these appeals.

We should note that it concerns appeals against dismissals, i.e. disagreement of prosecutors with the investigating judge's decision. For instance, in 2016, only 5 of 21 000 rulings that dismissed motions for provisional access were appealed. We should also note that the number of opposite appeals (against rulings allowing provisional access to objects and documents), according to official statistics, is not so high – only 83 appeals, the majority

64 HSCU Review of jurisprudence on consideration of motions the use of measures to ensure criminal proceedings by investigating judges, 07 February 2014.

65 Report on consideration of criminal case files by appeal courts… Chapter 4.

Fig. 3.27 **Outcomes of appeals against rulings granting provisional access to objects and documents**



of which were granted (50 appeals). Despite critical comments, statistics suggests that the quality of motions for this measure to ensure criminal proceedings is relatively higher. At the same time, statistics does not reflect the problem of correlation between the number of motions for provisional access to objects and documents as a measure to ensure criminal proceedings compared to the possible alternative goal of evidence collection.

3.5.4 Negative consequences of the measures to ensure criminal proceedings

Excessive restrictions on human rights as an issue related to application of measures to ensure criminal proceedings and during criminal proceedings in general is examined separately in this publication. Chapter 4 "The prosecutor's role in ensuring the rights and freedoms of a suspect" provides detailed analysis of problems and cases of human rights violations. In particular, it examines the failure to ensure the right to defense, prevent torture, cruel or inhuman treatment, as well as other issues. Here, it is necessary to turn our attention to other aspects of human rights violations in application of measures to ensure criminal proceedings, for instance, the restriction on property rights during temporary seizure of property.

Article 167 of the CPC defines provisional seizure of property as actual deprivation of the suspect of the possibility to possess, use, and dispose of certain property until the issue of seizure or return of property is decided. The property in the form of objects, documents,

money, etc. may be provisionally seized if there is sufficient grounds for the belief that such property:

- has been found, fabricated, adapted, or used as means or instruments of the commission of criminal offence and/or preserved signs of it;
- has been intended (used) to induce a person to the commission of a criminal violation, financing and/or providing material support to or as a reward for its commission;
- has been an object of a criminal violation related inter alia to its illegal circulation;
- has been gained as a result of commission of a criminal violation and/or is proceeds of such as well as any property to which they have been converted in full or in part.

Property may be provisionally seized during apprehension of a person without a ruling of an investigating judge or court, search, or examination. Provisional seizure of electronic information systems or their components, mobile terminals of communication systems for inspection of their physical properties relevant to the criminal proceedings is only allowed if they are explicitly mentioned in the court ruling.

During apprehension or search and provisional seizure of property or immediately thereafter, the investigator, public prosecutor, other authorized official is obliged to draw up a report; a copy of this report is provided to the person whose property was seized or his/her representative (art. 168, CPC of Ukraine).

We should also emphasize that current legislation provides clear grounds for terminating provisional seizure of property, In particular, provisionally seized property shall be returned to the person from whom it has been seized in the following cases (art. 169, CPC of Ukraine): "upon public prosecutor's resolution finding the seizure ill-grounded; upon ruling of investigating judge or court dismissing public prosecutor's motion to seize the property; if the investigator, public prosecutor does not submit a motion for the seizure of provisionally seized property, or the motion is submitted later than the next day after the seizure of property, or the investigating judge, court has not issued a ruling to seize the property within 72 hours from receiving the motion; in cases where seizure of the property is cancelled" (Art. 171(5), 173(6), CPC of Ukraine).

According to these provisions of the CPC, the prosecutor has a duty to oversee the use of this measure to ensure criminal proceedings. Therefore, violations of the rights of individuals at this stage of criminal proceedings suggest, inter alia, that the prosecutor is not performing his/her duties properly, which should lead to a complaint. According to article 303(3) of the CPC, during pre-trial proceedings, omission of the prosecutor consisting in failure to return temporarily seized property as prescribed by Article 169, as well as failure to carry out other procedural actions which s/he is required to carry out within a period of time specified by the CPC, may be challenged by an applicant, victim, his/her representative or legal representative, the suspect, his/her defense counsel or legal representative, representative of legal person in whose respect proceedings are taken, or the owner of temporarily seized property.

In this situation, we have to recognize that the complaint mechanism is one of the most effective remedies for the protection of violated rights. The HSCU states, *"... in many cases, motions for provisional access to objects and documents raising an issue of seizure are characterized by formal nature and lack of grounds. Pre-trial investigation agencies raise the issue of seizure of objects and documents when submitting the motions to investigating judges without providing proper arguments of seizing objects, and in most cases it concerns the seizure of original copies of the documents without stating grounds that justify that seizure of certified copies of documents does not satisfy the objectives of criminal proceedings"*[66].

Unlawful decisions, actions or failure to act in cases of illegal provisional seizure of property was the focus of a separate review of HSCU jurisprudence concerning complaints against decisions, actions, or failure to act of pre-trial investigation agencies or prosecutor during pre-trial investigation (letter dated 01 January 2017). For instance, the Court notes that *"the failure to fulfill the procedural duty to return the property immediately leads to the procedural mechanism of complaints against prosecutor's failure to act (failure to return the temporarily seized property mentioned in paragraph 1 of part one of article 303 of the CPC of Ukraine). As mentioned, whether the complaints against failure to return the temporarily seized property are reviewed correctly depends to a significant extent on the clarity of the list in the investigating judge's ruling authorizing the search."* Therefore, the investigator or prosecutor should be careful in preparing the motion and indicating a list of objects or documents.

According to the review of jurisprudence, the analysis of court practice and contents of part five of article 171 of the CPC of Ukraine *"show that it creates a duty for the investigator, prosecutor to submit a motion to seize the property no later than the next working day after it was temporarily seized. If this duty is not fulfilled, the subjects have another duty – to return the seized property immediately, and the term to fulfill the obligation is not limited in time, since it ceases to exist only when fulfilled… The analysis of the rulings of investigating judges shows that prosecution argues that recognizing this property as evidence proves that it is legal to leave the property in possession of pre-trial investigation bodies and there are no grounds for returning the property. However, it is necessary to consider that if this evidence was obtained during a search and was not mentioned in the ruling as property to be found during the search in accordance with the ruling, recognition of this property as evidence without submitting a motion to seize cannot be considered a proper procedure to ensure the legality of possession of this property by pre-trial investigation agencies. Accordingly, investigating judge issues reasonable rulings ordering the return of this property"*[67].

An excerpt from a ruling of an investigating judge of Halytskyi district court in Lviv illustrates the investigator's failure to fulfill the necessary procedural duties in relation to the temporarily seized property:

66 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

67 HSCU Review of jurisprudenc on complaints against decisions, actions, or failure to act of pre-trial investigation agencies or prosecutor during pre-trial investigation (letter dated 01 January 2017)

"... Halytskyi district court in Lviv received a letter from the senior investigator of the Main directorate of the National Police in Lviv region, M. Hnidets, with a request to explain the procedure for implementing the ruling since the seized property has been recognized as evidence in criminal proceedings and are not subject to return to the person from whom they were seized…

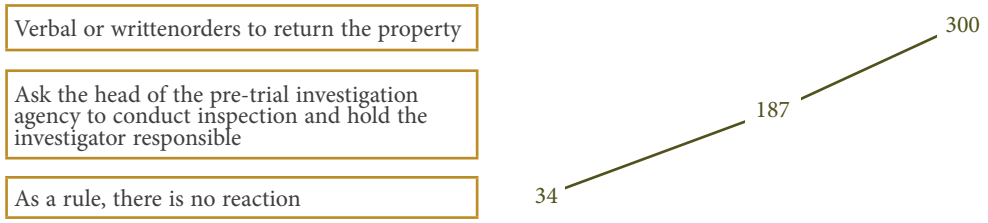
The resolutive part of the ruling of an investigating judge of Halytskyi district court dated 06 May 2016 states, "To oblige the senior investigator of the Main directorate of the National Police in Lviv region M. F. Hnidets to immediately return all property temporarily seized in accordance with the report dated 18 February 2016, which belongs to Lvivska Credit Union. This is the procedural decision on the matter.

It is completely clear that any average sane person who understands Ukrainian would understand the meaning of words 'to immediately return all property temporarily seized in accordance with the report dated 18 February 2016, which belongs to Lvivska Credit Union'. These words have not hidden or ambiguous meaning, difficulties in comprehending them since they are not specific legal or other terms that are difficult to understand, and they can't be understood in any other way…"[68].

Such examples of court "response" to investigator's decisions, actions or failure to act are at the very least odd given that the prosecutor has to conduct effective procedural guidance in each criminal case. Therefore, procedural supervisors were asked 'How do procedural supervisors usually react to the failure to return property after the property seizure is revoked?'. More than 90% of respondents (Fig. 3.28) stated that procedural supervisors took certain action. However, some prosecutors said that 'as a rule, there is no reaction'.

Fig. 3.28

Prosecutors' responses to the question «How do procedural supervisors usually react to the failure to return property after the property seizure is revoked?»



68 Ruling of the investigating judges of Halytskyi district court in Lviv, case No. 461/3095/16-к, 11 May 2016. http://www.reyestr.court.gov.ua/Review/57625227

The question about the prosecutor's role in these situations seems rhetorical since clear violations of human rights, in this case – property rights, should not be ignored by the prosecutor. Moreover, s/he has a number of legal and procedural instruments for the protection of human rights against arbitrary restrictions or unlawful disproportionate interference. Therefore, several aspects of the practice of provisional seizure of property as a measure to ensure criminal proceedings require significant improvement.

The neglect of human rights due to procedural violations is different from excessive restrictions on the rights because the measures and consequences of the former are more grave. In some cases, this neglect can amount to deprivation of the right. We will consider several examples of these violations through analysis of application of property seizure as a measure to ensure criminal proceedings.

According to the CPC of Ukraine, seizure of property is a temporary deprivation of the possibility to alienate, dispose and/or use certain property by a ruling of the investigating judge or court to prevent concealment, damage, destruction, conversion or alienation provided that there are grounds to consider that this property:

- has been an object, means or instruments of the commission of criminal offence;
- constitutes evidence of the criminal offence;
- has been gained illegally;
- constitutes proceeds of the criminal offence;
- has been gained through the proceeds of the criminal offence;
- can be confiscated from a suspect, accused, convicted person or a legal person subject to criminal legal measures;
- is subject to special confiscation concerning third persons or a legal person, and with the purpose of securing the civil claim (art. 170(1), CPC of Ukraine).

The property in possession of a good-faith acquirer cannot be seized (art. 170(6), CPC of Ukraine). A ban on use of living quarters where any persons reside on legitimate grounds is not allowed (art. 170(8), CPC of Ukraine).

Public prosecutor, investigator upon approval of the public prosecutor and, with a view to securing a civil action, a civil plaintiff may file a motion for the seizure of property with investigating judge, court. Investigator's, public prosecutor's motion for the seizure of property shall include:

- grounds and objectives, as well as relevant reasoning, for the seizure of property;
- list and types of property to be seized;
- documents confirming the title to the property that must be seized, as well as specific facts and evidence confirming ownership, use or disposal of property by the suspect, accused, convicted person, or third persons.

- the amount of damage or unlawful gain for the legal person in case of motions to seize property of a legal person (art. 171(1), CPC of Ukraine).

Originals or copies of documents and other materials with which investigator, public prosecutor substantiates his/her arguments shall also be attached to the motion.

Investigator, public prosecutor shall submit motion for the seizure of provisionally seized property no later than the next day after the property was taken, otherwise the property has to be immediately returned to the person from whom it was taken (art. 171(5), CPC of Ukraine).

Dismissing or partially granting motion for the seizure of property shall entail the immediate return of all or a part of temporarily seized property, respectively, to the person concerned (art. 173(3), CPC of Ukraine).

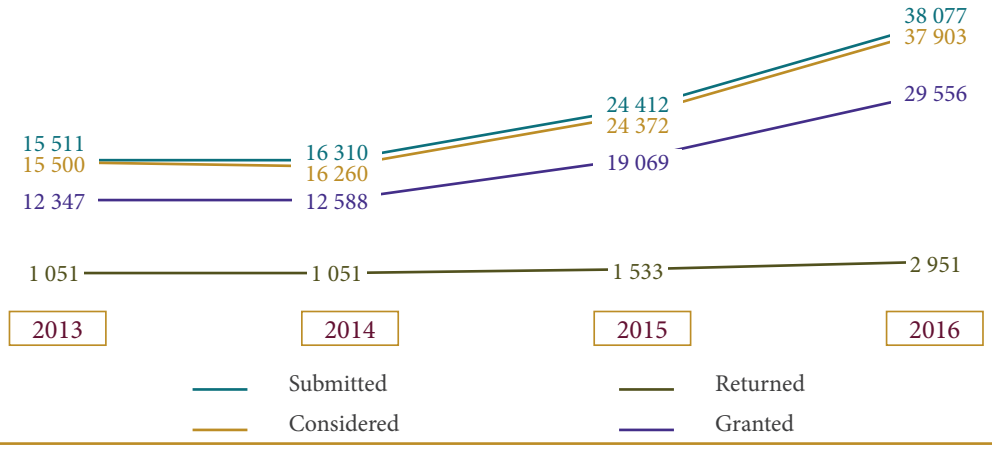
If the investigating judge, court does not issue a ruling to seize the provisionally seized property within 72 hours after receiving the motion, such property has to be returned to the person from whom it has been seized (art. 173(6), CPC of Ukraine).

Ruling on the seizure of property shall be immediately executed by investigator, public prosecutor (art. 175(1), CPC of Ukraine).

From a practical viewpoint, the use of seizure of property as a measure to ensure criminal proceedings is also quite interesting since it may lead to human rights violations. Thus, we should turn again to the relevant court statistics from Chapter 5 "Consideration of motions, complaints and applications to the investigating judge during pre-trial investigation" of the Report of the first-instance courts on consideration of criminal case files (Fig. 3.29)[69].

Fig. 3.29

Consideration of motions for seizure of property by investigating judges



69 Report of the first-instance courts on consideration of criminal case files … Chapter 5.

Even a quite general analysis of the chart demonstrates a clear and unambiguous trend towards a constant increase in the number of these motions over the past years.

Moreover, compared to data on other measures to ensure criminal proceedings, we should note a significantly larger proportion of returned motions.

Part three of article 172 of the CPC of Ukraine provides that having established that motion for the seizure of property has been filed disregarding the requirements of Article 171 of the CPC, the investigating judge or the court returns the motion to the public prosecutor or civil plaintiff for correction of deficiencies within 72 hours, and issues an appropriate ruling thereon. In this case, the property provisionally seized from a person is subject to immediate recovery on expiration of the period determined by the judge or, where a motion is filed within the period determined by the judge after the deficiencies have been rectified, upon consideration of the motion and its dismissal.

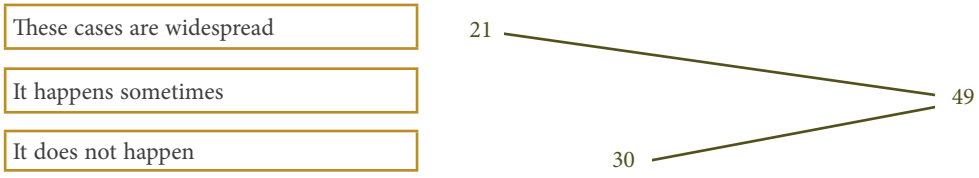
Certainly, tatistics refers not only to the actions of prosecutors, however, it presumably shows more detailed approach to preparation of these motions, as well as their consideration by the investigating judge. It seems that the provision establishing a certain time period for correction of deficiencies also contributes to this situation.

When analyzing the deficiencies in motions for seizure of property, the HSCU noted that *"key deficiencies in motions that resulted in their return included the failure to attach documents confirming the title to the property to be seized; the insufficiency of grounds in the motion provided for the seizure of property; the lack of the list and types of property that must be seized"*[70].

We should also point out that the issue of procedural time limits was mentioned several times. Questionnaire results showed that in the majority of cases motions to seize the provisionally attached property are submitted later than the next business day following the attachment. 21% of interviewed prosecutors said that these cases are widespread, and 49% stated that it happens sometimes in their work (Figure 3.30).

Fig. 3.30

Prosecutor's responses to the question "How often is the motion to seize the provisionally attached property is submitted later than the next business day?"



70 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

Another significant violation mentioned during the focus group with investigating judges is submitting motions for the seizure of property with a request to consider the motion in the absence of an owner. According to article 172 of the CPC, a motion for seizure of property submitted by the prosecutor or investigator upon approval by the prosecutor is considered by the investigating judge or court not later than two days after it has been lodged, with participation of the investigator and/or public prosecutor, suspect, accused, other holder of property, and also of the defense counsel, legal representative and representative of the legal person in whose respect proceedings are taken, if any. Failure to appear by these persons at the court session does not preclude consideration of the motion (art. 172(1), CPC of Ukraine).

A motion for the seizure of property which has not been provisionally seized may be considered without notifying the suspect, accused, other holder of property, their defense counsel or legal representative and the representative of the legal person in whose respect proceedings are taken where this is necessary to ensure attachment of property (art. 172(2), CPC of Ukraine). At the same time, consideration of this motion in the absence of an owner is an exceptional measure and can only be used if there are no other ways to achieve the objective of the measure to ensure criminal proceedings. Accordingly, the prosecutor has to provide sufficient reasoning for consideration of the motion in the absence of an owner. However, results of focus groups show that sufficient reasoning is submitted by far in not all cases:

Investigating judge

When they submit a motion for the seizure of property, they write, 'We request that the motion is considered in the absence of an owner since there is a risk of destruction or damage to the property.

Especially when it has already been taken.

Yes. And here, again, you start to dismiss because they do not provide any reasons. It's just a line from the Code.

It is easier without the owner than with....

At the same time, prosecutors have a different view, and they expressed it during focus groups and interviews:

Prosecutor

...In general, there are big issues with the seizure of property, particularly at Pecherskyi court. They have a practice of summoning everyone. Even if you seize accounts with millions on them, they notify them, and the money is gone. And the court says, 'Sorry, I have to observe their rights.

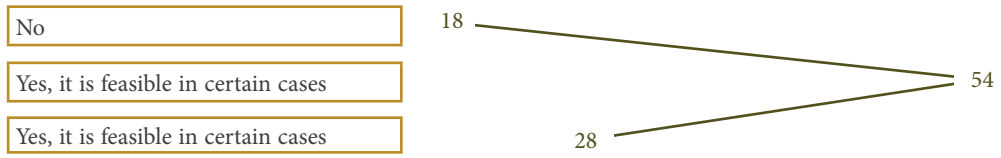
How often do you raise the issue of considering the motion for seizure in the absence of an owner?

Well, we always try to have it without them....

Questionnaires for procedural supervisors also confirmed this position of prosecutors. For instance, the majority – 54% of respondents – think that it is better to consider the motion for seizure of property without notifying the owner (Fig. 3.31).

Fig. 3.31

Prosecutors' responses to the question «Do you think that it is better to consider the motion for property seizure without notifying the owner?»



Prosecutors who took part in focus groups also mentioned a possibility of abuse of rights by suspects who have information about the potential seizure of their property:

Prosecutor

...They have state acts at their disposal, which are not in the register. They can easily sell them. We even found ads about the sale of several land plots in a newspaper. We seized his entire property. His wife came a year later to challenge the seizure at the court of appeals. She said, 'One half is mine, these land plots, part of the house and apartment. As a wife, I have a right to a half'. There is a marriage contract that they agreed to share property in 2013... We seized these state acts at his home. Now she requests, 'Give me my property, give me the state act'. We say that the state act is one document and we can't give it to her.

The most significant violation of rights at this stage of criminal proceedings, which can constitute neglect or deprivation of rights, is the failure to return the seized property after the relevant period. Lawyers in focus groups and interviews responded to the question about prosecutor's role in this issue:

Lawyer

...No role. He has no role in this.

He doesn't even know what was seized.

He [prosecutor] does not extract anything or follow whether it was seized. If the investigator is normal, if it's the region, they know it and they do it. In the district, no one oversees that.

In response to the question about prosecutorial control over observance of procedural time limits and other human rights issues at this stage of criminal proceedings, the lawyers noted the following in focus groups:

Lawyer

...Only possible if there is a complaint.

Is it enough, or sometimes [you need] a letter to the prosecutor?

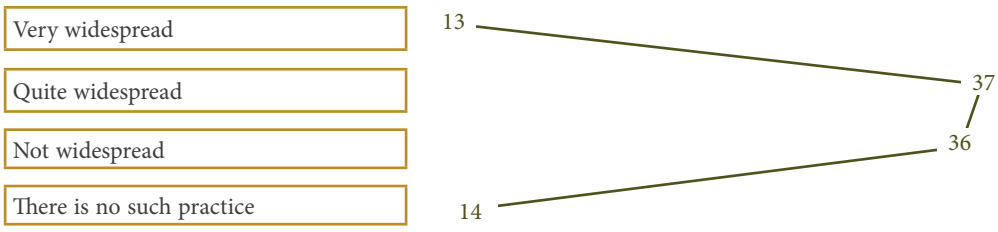
... Enough.

... And the investigator says in a month, 'Oops, I forgot to give you the motion for the seizure of property I was supposed to submit the following working day'. And the investigating judge agrees with him. We had two cases like this, I know for sure. However, I've never had these issues. I come to them, bring the motion. They read it and say, 'We have to discuss with the boss tomorrow'. And I say, 'Do what you want', but they give everything back the following day without any problems.

The situation is particularly difficult with illegally seized property that was not indicated in the relevant order. Questionnaire responses of procedural supervisors (Figure 3.32) show that these cases exist: for instance, 37% of respondents (187 out of 501) said that this practice was quite common, and `135 (63 out of 501) said that this practice was very widespread.

Fig. 3.32

Prosecutors' responses to the question «In your opinion, how widespread is the practice of seizing property (objects) that are not indicated in the court order for provisional attachment?»



Judges in focus groups also mentioned failure to return the property. However, they focused on slightly different aspects and talked about the problem of returning the extracted property which was not mentioned in the ruling:

Investigating judge

Often, during search, they take the property that is not on the list, or it is irrelevant for these proceedings, but not listed for other proceedings. Therefore, they either put it on the list, but then the property is under provisional seizure, and they have to submit a motion to the court. Or they don't go the court promptly and violate the time limit of the following working day. If it is relevant for criminal proceedings, I have to dismiss. There is such problem. There is [also] a problem when it is irrelevant, you rule to return the property, but people start complaining that they don't get it back, asking where to find it. The investigator sends [them] to the prosecutor, the prosecutor – to the investigator. They go in circles. And then you can't find a solution, and they stay in this circle.

The statistics for appeals against rulings that allow the seizure of property (Fig. 3.33) or dismiss the motion (Fig. 3.34) is particularly interesting with the view to abovementioned issues[71].

Fig. 3.33 **Outcomes of appeals against rulings allowing the seizure of property**

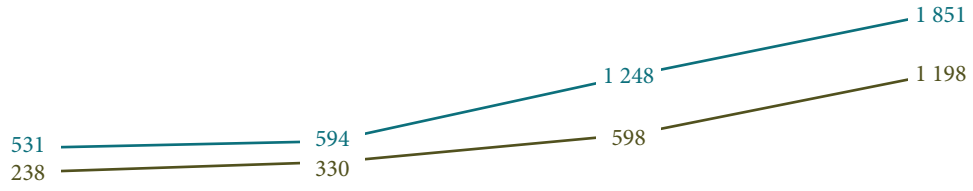
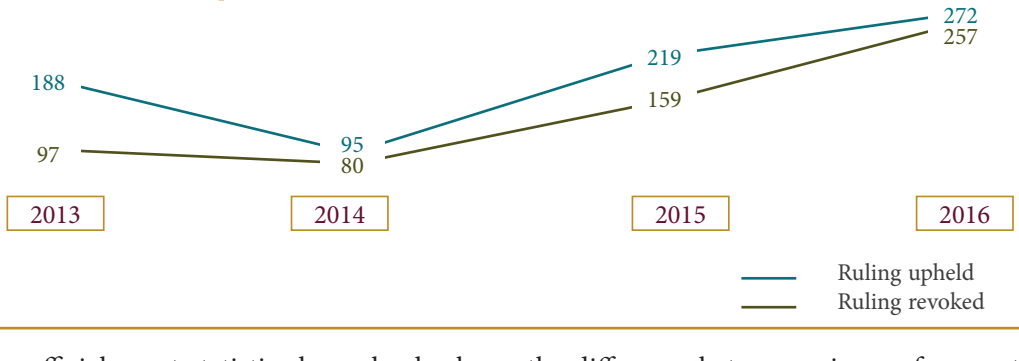


Fig. 3.34 **Outcomes of appeals against rulings denying the seizure of property**



The official court statistics here clearly shows the difference between seizure of property and other means to ensure criminal proceedings. The rate of success for appeals against these measures is extremely high. In fact, starting from 2014, the number of revoked rulings rejecting the seizure of property is almost the same as the number of upheld rulings. This statistics confirms the need for prosecutors to provide relevant reasoning in the motions and arguments during consideration of these motions. Even more so, the clear upward trend in the number of appeals (both against the rulings to seize or deny seizure of property) shows that participants of criminal proceedings treat this measure with particular attention.

The statistics on appeals against rulings on the seizure of property in 2016 is interesting for the purposes of assessing the prosecutors' effectiveness at this stage of criminal proceedings. The courts granted 1198 out of 3049 appeals (approximately 39%), which is a vivid illustration, inter alia, of the quality of motions for the seizure of property and their presentation in courts.

71 Report of the first-instance courts on consideration of criminal case files… Chapter 4.

3.6 The prosecutor's role in the assignment/ extension and termination of the measures of restraint

3.6.1 Grounds for application of the measures of restraint in criminal proceedings

Measures of restraint in criminal proceedings are used to ensure criminal proceedings with the purpose of achieving their effectiveness (art. 131(2)(9), CPC of Ukraine).

The law prescribes the following measures of restraint (art. 176(1), CPC of Ukraine):

- personal commitment;
- personal warranty;
- bail;
- house arrest;
- remand in custody.

These measures of restraint vary in the degree of severity, and they lead to certain restrictions on human rights. These restrictions are applied to prevent the risk(s) to criminal proceedings, and they need to be properly justified since restrictions on human rights must be proportionate to the aim. Therefore, the type and degree of restrictions must be accompanied with weighty arguments.

Provisional measure of restraint is apprehension of a person (art. 176(2), CPC of Ukraine) which can take place without a ruling of an investigating judge, court on suspicion of having committed an offence (art. 207, 208, CPC of Ukraine), or pursuant to a court ruling authorizing the apprehension of a suspect with the purpose of ensuring his participation in consideration of a motion for application of a custodial measure of restraint (articles 187 – 191, CPC of Ukraine). A detailed analysis of the use of this measure of restraint is provided in subchapter 3.2. "The prosecutor's role at the stage of apprehension". However, this chapter will identify and highlight certain general issues that can apply to apprehension as a measure of restraint.

Measures of restraint (except provisional measure of restraint – apprehension without a ruling of an investigating judge, court on suspicion of having committed an offence) shall be enforced: during pre-trial investigation, by investigating judge upon motion of investigator approved by public prosecutor, or upon motion of public prosecutor; and during trial, by court upon motion of public prosecutor (art. 176(4), CPC of Ukraine).

Motion to enforce a measure of restraint is considered with participation of public prosecutor, suspect, accused, his defense counsel (art. 193(1), CPC of Ukraine). During consideration of the motion to enforce a measure of restraint, the prosecutor, as any other

party to the proceedings, can submit motions to the investigating judge, court to hear any witness or examine any materials of importance for deciding on the enforcement of a measure of restraint (art. 193(4), CPC of Ukraine).

These CPC provisions are a rather generalized reflection of principles of the use of measures of restraint in criminal proceedings. Every component of the process of their enforcement has several weak aspects, which may cause disproportionate or excessive restriction of human rights and freedoms. Therefore, proper understanding and perception of international standards in this field is important and timely.

International standards

The Convention for the Protection of Human Rights and Fundamental Freedoms provides,

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."*[72].

The European Court of Human Rights has developed a set of interpretations determining the general principles for the use of measures of restraint. Though majority of the Court's decisions concern the remand in custody or arrest, they are applicable to other measures of restraint that should have been enforced or were inappropriately enforced in each situation. Within the framework of this study, we shall quote only few legal opinions of the European Court of Human Rights on the issue of remand in custody.

> *"... in order for deprivation of liberty to be considered free from arbitrariness, it does not suffice that this measure is executed in conformity with national law; it must also be necessary in the circumstances. Detention pursuant to Article 5 § 1 (c) must embody a proportionality requirement, which requires a reasoned decision balancing relevant arguments for and against release. The arguments for and against release, including the risk that the accused would hinder the proper conduct of the proceedings, must not be assessed in the abstract, and the reasoned decision must be supported by factual evidence. The authorities must assess whether an applicant's*

72 Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms.

placement in custody is strictly necessary to ensure his presence at trial and whether other, less stringent, measures could have been sufficient for that purpose... "[73].

"… detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to attempt to apply the relevant legislation correctly… the requirement that detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question…"[74].

"... the persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but with the lapse of time this will no longer be enough to justify continued detention. The Court has not attempted to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence. Once the existence of "reasonable suspicion" is no longer enough, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty…"[75].

When describing the damage from the measures of restraint, in particular, remand in custody, the Committee of Ministers of the Council of Europe identified several areas of vulnerability in this regard. These include the detrimental impact that remand in custody may have on the maintenance of family relationships, the financial consequences of remand in custody for the state, the individuals affected and the economy in general, the considerable number of persons remanded in custody and the problems posed by prison overcrowding, and the need to ensure that not only are persons remanded in custody able to prepare their defense and to maintain their family relationships but they are also not held in conditions incompatible with their legal status, which is based on the presumption of innocence etc. Considering these issues, the Committee of Ministers in its Recommendation Rec (2006) 13 to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse suggested the following:

"... to set strict limits on the use of remand in custody; b. encourage the use of alternative measures wherever possible; c. require judicial authority for the imposition and continued use of remand in custody and alternative measures…

73 Budan v. Ukraine (2016), application no. 38800/12, ECtHR.

74 Yaroshovets and others v. Ukraine (2015), applications nos. 74820/10, 71/11, 76/11, 83/11, and 332/11, ECtHR.

75 Gudz v. Ukraine (2015), application no. 25032/11, ECtHR.

… A person may only be remanded in custody where all of the following four conditions are satisfied: a. there is reasonable suspicion that he or she committed an offence; and b. there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and c. there is no possibility of using alternative measures to address the concerns referred to in b.; and d. this is a step taken as part of the criminal justice process…

… The burden of establishing that a substantial risk exists and that it cannot be allayed shall lie on the prosecution or investigating judge. A decision to use remand in custody rather than an alternative measure must be well-founded...

… It will be impermissible for the prosecution or the investigating judge to be treated as having discharged the responsibility concerning risk assessment by reference only to the gravity of the offence or for the latter to justify a requirement that the suspected offender demonstrate that there was not even a hypothetical danger that could ensue from his or her remaining at liberty or being released…

… It is the responsibility of the prosecuting authority or the investigating judicial authority to act with due diligence in the conduct of an investigation and to ensure that the existence of matters supporting remand in custody is kept under continuous review.

… The existence of a continued justification for remanding someone in custody shall be periodically reviewed by a judicial authority, which shall order the release of the suspected offender where it finds that one or more of the conditions in Rules 6 and 7 a, b, c and d are no longer fulfilled. The interval between reviews shall normally be no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release. The responsibility for ensuring that such reviews take place shall rest with the prosecuting authority or investigating judicial authority, and in the event of no application being made by the prosecuting authority or investigating judicial authority to continue a remand in custody, any person subject to such a measure shall automatically be released. The recognition that the circumstances of a case can change – see Rule 11 – necessitates a periodic review by a judicial authority as to whether the imposition of remand in custody or alternative measures continues to be justified and the responsibility for initiating such a review is placed on the prosecuting authority or the investigating judicial authority since the burden of proving that there is still a sufficient justification for either measure rests with that

authority. Although a monthly interval between such reviews ought to be observed, it is recognised that the objective of such reviews can be fulfilled by the existence of a possibility for a person remanded in custody to apply to a court for release him- or herself at any point during his or her remand. It is also recognised that the authorities may provide for restrictions on the ability to apply for release on account of the shortness of the time elapsing from a previous application or the failure to adduce any new basis for ordering his or her release…"[76].

The UN Minimum Standard Rules for Non-custodial Measures (The Tokyo Rules) provide that pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim; alternatives to pre-trial detention shall be employed at as early a stage as possible; pre-trial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; the offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed[77].

National legislation on the measures of restraint and its implementation

The investigator, public prosecutor shall initiate application of a measure of restraint if there are relevant grounds, which include a reasonable suspicion of having committed a criminal offence, as well as the existence of risks that provide sufficient grounds to believe that the suspect, the accused or the convicted person can:

- hide from pre-trial investigation agency and/or the court;
- destroy, conceal or spoil any of objects or documents that have essential importance for establishing circumstances of criminal offence;
- exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings;
- obstruct criminal proceedings in other way;
- commit similar or the same criminal offence, or continue the criminal offence of which he is suspected, charged (art. 177, CPC of Ukraine).

76 Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies.

77 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990.

When submitting a motion to enforce a measure of restraint, the investigator or public prosecutor have to prove that there are sufficient established facts to substantiate the impossibility to prevent the risk or risks referred to in the motion through the application of less strict measures of restraint provided by the law (art. 176(1), CPC of Ukraine). At the same time, the least strict measure of restraint is personal commitment, while remand in custody is the strictest one (art. 176(3), CPC of Ukraine).

Investigator's, public prosecutor's motion to enforce a measure of restraint shall be filed with the local court in the bounds of the territorial jurisdiction of which the pre-trial investigation is conducted, and shall contain, inter alia:

- legal qualification of this criminal offence with indication of the Article (paragraph of Article) of the Ukraine's law on criminal liability;
- reference to one or several risks specified in Article 177 of the CPC;
- description of circumstances which gave ground to investigator, public prosecutor to conclude that a risk or several risks as stated in his motion are real, and reference to materials which support such facts;
- substantiation of impossibility to prevent the risk or risks referred to in the motion through the application of less strict measures of restraint (art. 184(1), CPC of Ukraine).

An extremely important part of the list is reference and substantiation of one or several risks specified in Article 177 of the CPC that the suspect, accused, or convicted person can: *"hide from pre-trial investigation agency and/or the court, destroy, conceal or spoil any of objects or documents that have essential importance for establishing circumstances of criminal offence; exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings; obstruct criminal proceedings in other way; commit similar or the same criminal offence, or continue the criminal offence of which he is suspected, charged"*. The investigating judge decides on the use of a measure of restraint or dismissal of the motion based on the analysis of relevant reasoning in the motion and the attached material (art. 178(1), CPC of Ukraine).

3.6.2 Preparation and approval of the motion and substantiation in court

The prosecutor's role in preparing the motion

Within the framework of the study, the application of the above principles, international standards, and national legislation is based directly on the prosecutor's role in the process of selecting the measure of restraint.

Considering the general duties of a prosecutor conducting oversight over observance of laws during pre-trial investigation in the form of procedural guidance, when submitting a motion to enforce a measure of restraint the prosecutor shall ensure that:

1. Copies of the motion and materials in substantiation of the necessity to enforce the measure of restraint shall be handed over to the suspect, accused no later than three hours before the consideration of the motion begins (art. 184(2), CPC of Ukraine)

2. The motion shall be attached with:
   - copies of materials which investigator, public prosecutor uses to substantiate his arguments;
   - list of witnesses whom investigator, public prosecutor finds necessary to question during consideration of the measure of restraint;
   - confirmation that the suspect, accused has been handed over copies of the motion and materials used to substantiate the necessity to enforce the measure of restraint (art. 184(3), CPC of Ukraine).

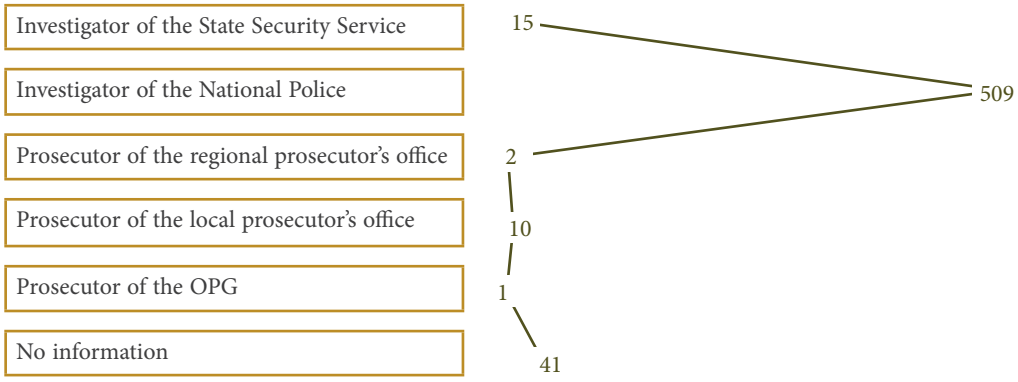
In fact, focus groups, interviews and research prove that there are quite different approaches to implementation of relevant legal norms and procedures. Often, unfortunately, there are cases when prosecutors play a purely formal and inactive role when it comes to choosing the measure of restraint. For instance, lawyers in a focus group, when responding to the question about the role and degree of activity of the prosecutor at the stage of preparing the motion to enforce a measure of restraint, said the following:

Lawyer *Purely formal. For instance, when choosing a measure of restraint for a minor. The investigator initiated a motion for personal commitment. Upon receiving the notice of suspicion, I requested an opportunity to examine the files, I looked through the files. There was no assignment of a group of investigators, group of prosecutors, neither there were orders that they were representatives of juvenile justice [services], nothing like that…*

There was no response from the prosecutor or investigator. I tell the investigator about this in court, and there is still no reaction...

An interesting illustration of how prosecutors take part in preparing motions to enforce a measure of restraint comes from analysis of the data from FSLA Centers (Figure 3.35). The majority of motions to enforce a measure of restraint (509 out of 578 motions) were prepared by investigators of the National Police of Ukraine. This situation can be explained by unequal distribution of caseload between law-enforcement agencies concerning a number of criminal proceedings, however, this significant difference, most likely, is caused by other factors and circumstances that will be analyzed herein.

Fig. 3.35 **Who prepared the motion to enforce a measure of restraint? (FSLA Centers data)**

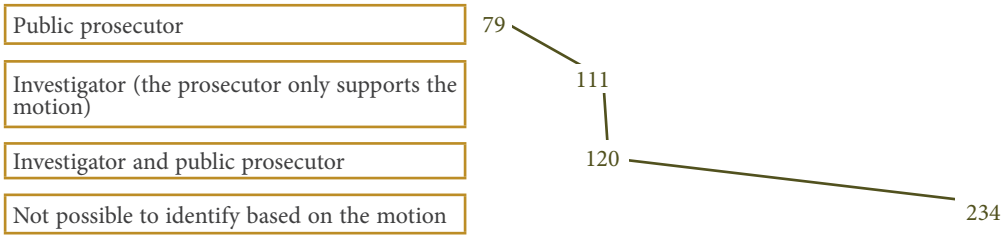


Presenting and defending a motion before the investigating judge

The issue of the subject of preparation of the motion can also be illustrated through other results of the study regarding the following stage – consideration of the motion by the investigating judge.

For example, Figure 3.36 shows that prosecutors defended the motion only in 111 cases out of 544 analyzed proceedings, which is only about 20 percent of all submitted motions.

Fig. 3.36 **Analysis of case files: who provided arguments in favour of the measure of restaint before the investigating judge?**



In most cases, the motion is defended by the investigator either independently, when the prosecutor only supports the investigator's claims (120 cases), or together with the prosecutor (234 cases).

At the same time, we should note that the CPC of Ukraine does not provide any legal grounds for participation of the investigator in presenting and defending the relevant motion in a court hearing.

Of course, this trend does not present a definite fact of prosecutors' inactivity, however, it shows significant issues in their level of activity when courts consider motions to enforce a measure of restraint. The practice of preparation and consideration of these motions, as well as prosecutors' vision of their role in this process, also raise concerns. The majority of prosecutors who filled out the questionnaire (92%, 461 out of 502) gave affirmative response to the question 'Do you think that the investigator has to be present when a motion for a measure of restraint is considered in court?' (Fig. 3.37). It means that prosecutors as procedural supervisors are certain about the active involvement of investigators in consideration of motions for measures of restraint in court despite the legal status of the prosecutor's office and the CPC provisions mentioned above.

Fig. 3.37

Prosecutors' responses to the question "Do you think that the investigator has to be present when a motion for a measure of restraint is considered in court?"

In addition, we should mention the results of analysis of criminal proceedings (a sample of 301 cases selected for this aspect of the study) that also confirm the abovementioned comments and problems. For instance, Figure 3.38 reflects the number of statements of trial participants concerning a measure of restraint.

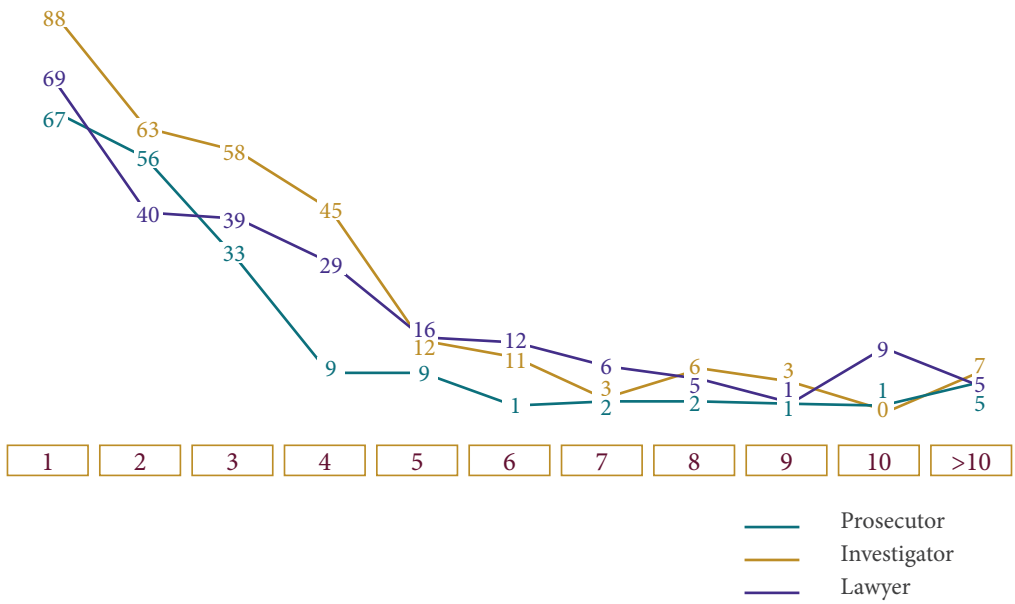
The number of statements by investigators, as well as their frequency, is almost equal to those of lawyers and slightly less than that of prosecutors.

Figure 3.39 shows other interesting indicators – the length of trial participants' statements in proceedings regarding the measure of restraint. This chart also clearly illustrates that investigators speak during a significant portion of the hearing. Moreover, the number of these statements by investigators is only slightly lower than that for prosecutors. These indicators shows the actual involvement of investigators as independent parties in court proceedings concerning these motions. At the same time, the prosecutor's role at this stage of criminal proceedings is significantly reduced.

As a matter of fact, participants of focus groups with lawyers confirmed this trend in their statements:

Fig. 3.38

Analysis of case files: number of statements presented by trial participants concerning a measure of restraint



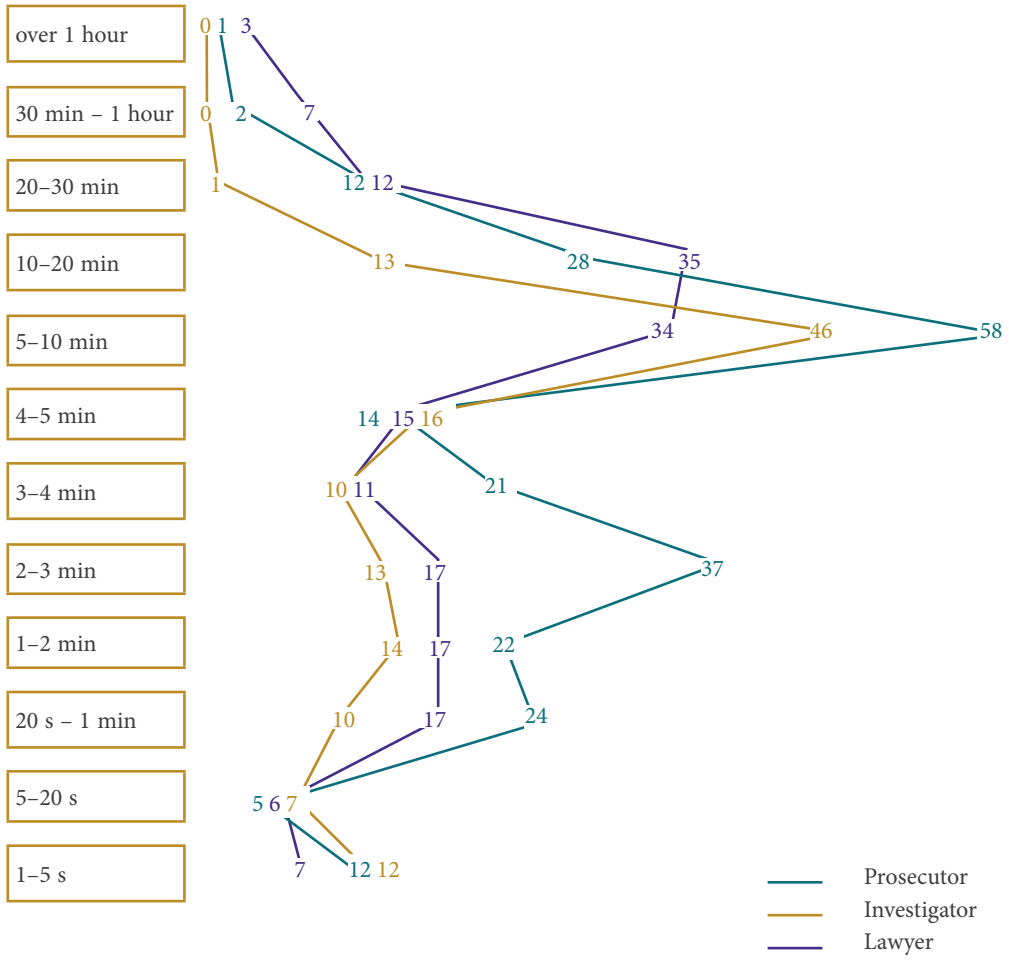
Investigator

... The prosecutor is clearly not working with that, he comes and he cannot even substantiate what is written in the motion, I don't know, maybe something is wrong with his speech. He is just standing and reading from a paper, and when the judge asks certain clarifying questions, which is rare, or sometimes the judge is asking because the lawyer says, 'Explain it to me. I didn't understand that part'. The prosecutor cannot do it, starts to look through the case, gives it to the investigator, and the investigator finds it and points to it, 'Read here'. And he reads where the investigator showed because he doesn't know the files, the investigator does. Again, at this stage of assigning the measure of restraint, I think that the prosecutor is actually absent....

Of course, the quote cannot provide a definite and comprehensive characteristic for all cases and the general practice of consideration of motions for measures of restraint by investigating judges. At the same time, it can probably serve as one of explanations for the information in Figure 3.39. One of the reasons of extremely high activity of investigators during court consideration of motions for measures of restraint is that the investigators, not the prosecutors, prepare the motions, know all circumstances and case files while the prosecutor cannot always present the necessary arguments to the investigating judge at the same level.

Fig. 3.39

Analysis of case files: length of statements at hearings concerning the measure of restraint



Opinions of investigators expressed during focus groups and interviews also support this conclusion:

Investigator

...The investigator has the case ready, let's say, from the moment the notice of suspicion is signed, he can finish it the next day. And they tell him, 'Choose the measure of restraint'. He needs to find the procedural prosecutor, put a stamp, make copies, set the court date, then make sure everyone is present; and this process takes 2-3 days from the investigator. Procedural supervisors, what the prosecutor has to prove is done, as a rule, by the investigator; the investigator explains why he filed this motion.

The quality of arguments and grounds for application of measures of restraint

Participants of focus groups and interviews raised another very important issue – the substantiation of motions to enforce measure of restraint, and the quality of their content. One of the most problematic aspects is that investigators and prosecutors use a highly formalized approach to preparing these procedural documents. It happens when motions are prepared with the same template and small changes only concerning personal data of the person. For instance, lawyers expressed the following opinion:

Lawyer

...I have an impression that prosecutor does not work with the investigator on the motion to enforce the measure of restraint at the stage of selecting the measure; they simply have some charges, an article simply. Perhaps, since 2012, I saw only 2 motions that were different from the others. In most cases, it's the same template.

A cliché.

A cliché with a different last name and article, qualification, etc. In most cases, the text is copied from the notice of suspicion, pasted into the motion, they add the risks under article 173 without substantiation of their content. There are such risks, and what they are – is not important. I saw, maybe, two times. One time the prosecutor had a strong stance in the case, he said immediately he had this stance, and he was the one preparing the motion. It was really a different motion, because it had approximately three pages, not one…

And the rest was prepared by the investigator?

My impression is that the investigator prepared the rest, it's all cliché. It is a cliché where only the name is different. If you put them all together, from different districts in Lviv, about 90 percent of them will match. The way they are built, the order of presenting information, first there is a notice of suspicion, and then no one works on this….

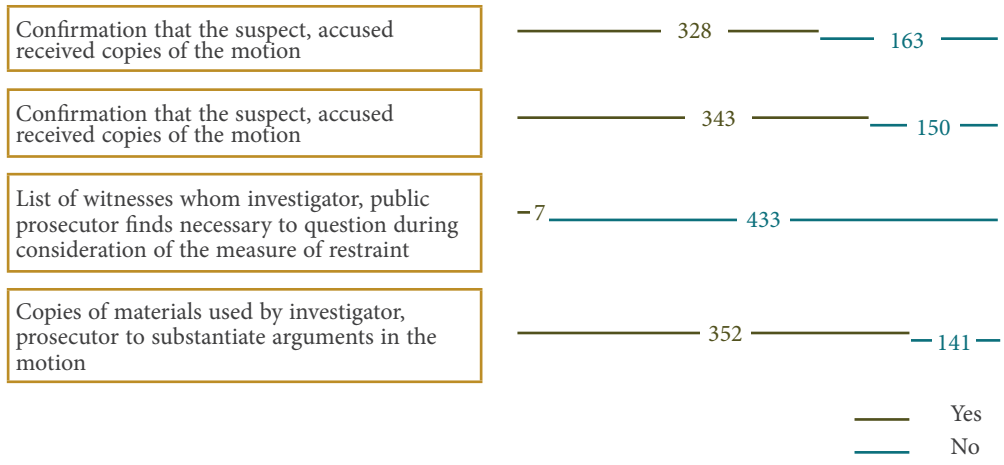
Attaching materials to the motion to enforce a measure of restraint

The lack of supporting documents that confirm the facts and circumstances stated in the motion is a significant problem.

For example, according to analysis of information of FSLA Centers (Figure 3.40), in most cases, the motion to enforce a measure of restraint has information about the time when the suspect received a copy of the motion (66%), confirmation that the suspect (accused person) received copies of the motion and copies of materials used by investigators, prosecutor, to substantiate the arguments in the motion (70%).

Fig. 3.40

Information included in the motion to enforce a measure of restraint (FSLA Centers data)



However, there were many cases, approximately one third, when the motion did not contain this data. The situation is even more difficult concerning the question about listing witnesses that the investigator, prosecutor considers necessary to question during the hearing. Here, study results are extremely negative since almost all interviewees (96.6%) responded that the motion did not contain this information. The failure to indicate this information can constitute violation of article 184(3) of the CPC of Ukraine.

In the framework of this study, 306 criminal proceedings in different parts of Ukraine were analyzed. The analysis of this aspect is provided in Figure 3.41. Despite variations in certain indicators, the dynamics concerning the list of witnesses that the investigator, prosecutor considers necessary to question during the hearing about a motion of restraint is also critical.

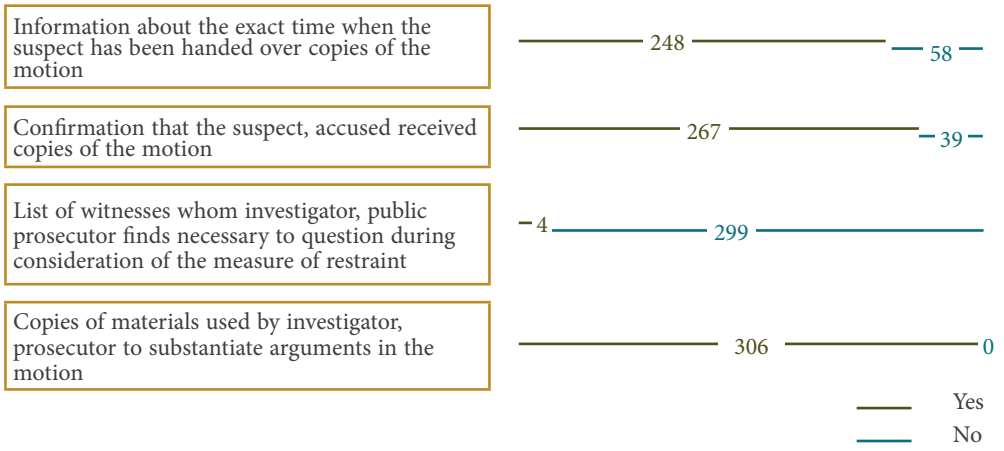
The above charts (Figures 3.40 and 3.41) illustrate general trends, which are also confirmed in the HSCU review of jurisprudence: *'... in some cases, investigators (prosecutors) indicate the incorrect name of the suspect, there is no legal qualification, copies of materials to support arguments in the motion are not always attached..."*[78].

It is very important to emphasize that this statistics does not take into account the quality of attached materials pursuant to article 184(3) of the CPC of Ukraine. Only the fact of availability or absence of these materials was taken into account, and not their quality. Therefore, it is necessary to look at cases of irregularities in attachments or supporting materials. If materials attached have no relevant content or legal weight, it invalidates the attachment. For instance, lawyers described the following situation:

78 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

Fig. 3.41

Analysis of case files: information included in the motion to enforce a measure of restraint



Lawyer

I had a case when they were choosing the measure of restraint for the client. The prosecutor is reading the motion, stumbling, he probably hadn't read it before. He refers to the evidence in the motion. The motion is signed, for instance, today, and the evidence is recorded in the case tomorrow. The expert statement is dated the following day. Question, 'How did you get it? We called the expert and he told us it will be ready then. I ask the prosecutor, and he doesn't know what to say. Not only he doesn't know the case, but he also comes to court without reading the motion. They treat it formally. I also want to say, the person is present when they chose the measure of restraint, and the prosecutor never pays attention that his face is all beaten up. He is just reading. The prosecutor will not ask the person, 'Where did you?....

Substantiation of risks that give grounds to use the measure of restraint

We should direct attention to criteria that the prosecutor has to take into account in the motion for remand in custody, especially the grounds for choosing a certain measure of restraint.

According to the HSCU review of jurisprudence, one of the most common grounds to dismiss motions to enforce measures of restraint is that investigators, prosecutors do not comply with article 184 of the CPC of Ukraine concerning the content of the motion.

Investigating judges often dismiss motions because investigators or prosecutors do not prove that there is at least one of the risks specified in Article 177 of the CPC of Ukraine. The Court referred to the following example:

> *"For instance, the investigating judge of Prymorskyi district court in Zaporizhzhya region dismissed the investigator's motion to enforce personal commitment as a measure of restraint for suspects Person 1 and Person 2 because the investigator did not prove existence of at least one of the risks specified in article 177 of the CPC"*[79].

Lawyers also pointed attention to the issue of substantiation and relevance of risks:

Lawyer *For the risks. They copy the article. And the main thing is the previous conviction, so the person can commit new crimes.*

…. they don't prove anything. The certificate on previous convictions, the request, and that's all, it means that he can commit crimes again. That's the main thing….

Lawyer *... For instance, he quotes what is written in the article to substantiate. The judge asked a question yesterday, it was nonsense, 'Alright, you named the risks, I heard them, they are in the article 177, how do you substantiate them?'. You know what the prosecutor said? 'I don't substantiate them, I have no evidence to confirm, but I think these risks exist, and you should chose remand in custody as a measure of restraint'. The judge says, 'Perhaps, you did not understand me. I did not see that there are risks. I heard that they exist, as you say, but what are they specifically? Can abscond? Why do you think that he can abscond somewhere?' 'I can't provide the exact evidence, but I think that the person should be taken into custody'.*

So they read the general risks listed in the CPC, and they simply read them again?

He just reads the provision, 'may abscond and hide from pre-trial investigation agency or the court', the judge asks, 'Why do you think he can do that?' 'I think that he can hide from investigation'. Also, what the prosecution does, is killing me – very often, at least in Lviv, in 90 cases, prosecutors stand and say, 'The person is obstructing investigation and refused to testify in accordance with [article] 63'…

Based on the review of jurisprudence, the HSCU identified another interesting issue related to substantiating motions to use measures of restraint:

79 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

"We should take into consideration that if the party in criminal proceedings does not prove the existence of reasonable suspicion that the suspect, accused has committed criminal offence under a certain article/part of the article of the Criminal Code (cases of disproportionately high qualification), the investigating judge shall consider and dismiss this motion. This rule applies to existence or absence of qualifying signs of a crime, reasonable suspicion subject to proving by the party to criminal proceedings before the court. Accordingly, cases of incorrect qualification of criminal offences constitute, in fact, the failure to prove commission of the criminal offence, and the motion shall be dismissed in these circumstances…"[80].

Another practical problem related to the quality of motions for measures of restraint is the similar approach that does not account for individual circumstances of each person in the same criminal proceedings:

Lawyer *... Again, one of the common violations, especially when there are many suspects, is when the motion is considered by the bulk, for everyone. Even though it is not allowed, it is prohibited, and there is a HSCU instruction whereby arguments and risks, as well as characteristics, have to be provided for each individual.*

Of course, separately for everyone.

No, they go by the bulk. There are 7 people, and extension is necessary for all of them because the charges are severe, the risks persist, that's all. What about the fact that all these people are very different – one of them, maybe, does not have relatives, and the other one's wife is pregnant and he has 7 children. They don't take anything into account, you see? Everything is in one pile….

In general, issues described here about the need to substantiate the motions are quite clear based on the information of the FSLA Centers (Figure 3.42). In 372 out of 491 cases (approximately 76%), there is no proper substantiation of the risks in the motions to enforce a measure of restraint.

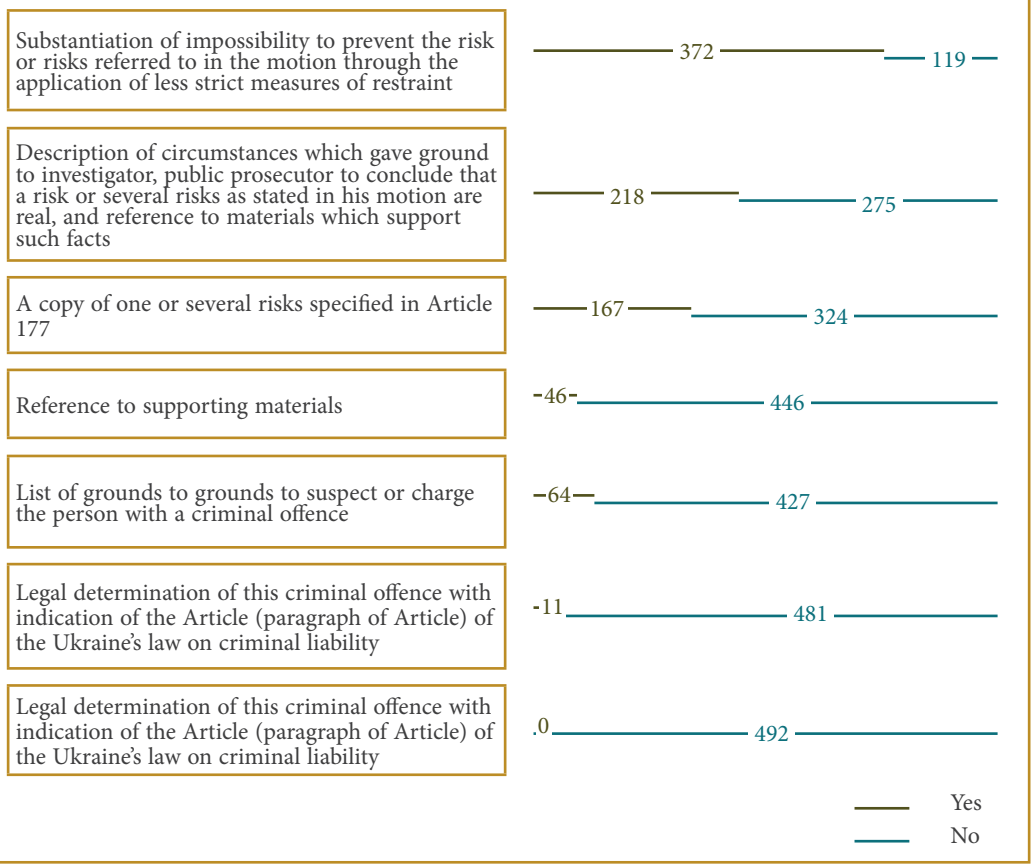
The same trends are clearly described in a chart based on the analysis of 305 individual criminal proceedings (Figure 3.43). This information clearly describes the problem of including the substantiation of risks under the CPC whereas the main objective of a restraint measure is to avoid (prevent) these risks.

We can see quite clearly that the majority of analyzed criminal proceedings contain motions for measures of restraint with factual circumstances only. Therefore, the majority of motions include factual circumstances of criminal offence, reference to materials that support these facts etc.

80 HSCU Review of jurisprudence on consideration of motions the use of measures to ensure criminal proceedings by investigating judges, 07 February 2014.

Fig. 3.42

Information included in the motion to enforce a measure of restraint (FSLA Centers data)

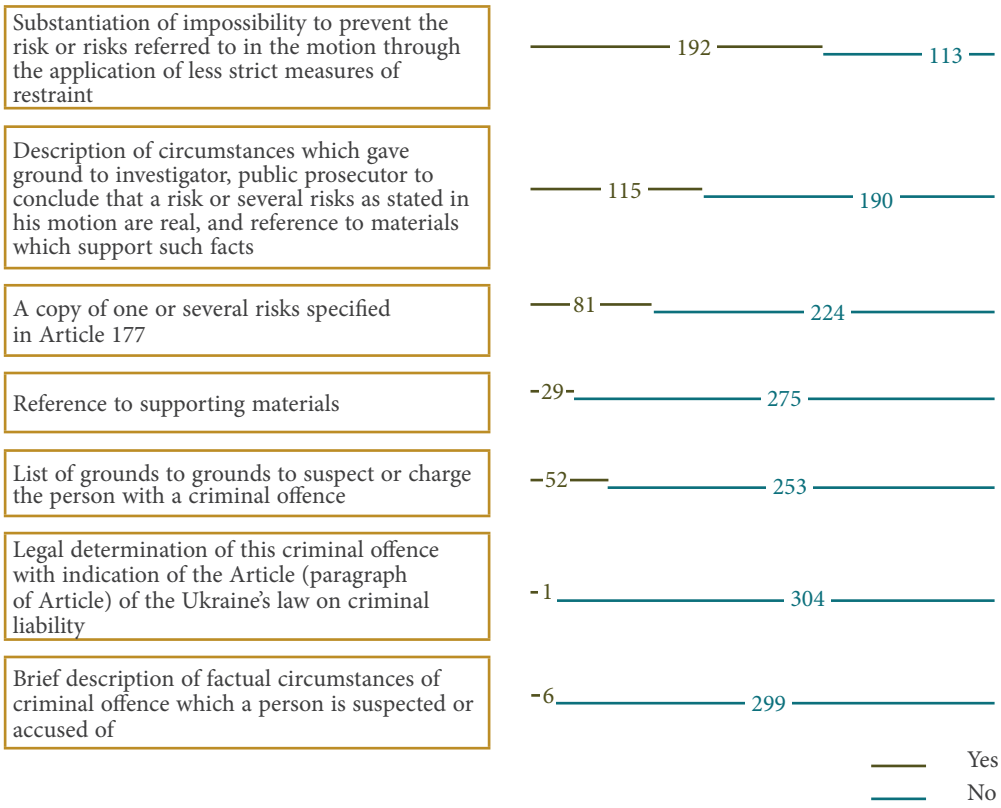


At the same time, in 26% of criminal proceedings, a motion to enforce measures of restraint included the risks under Article 177 of the CPC copied directly from the procedural legislation.

The situation is worse when it comes to description of circumstances which gave ground to investigator, public prosecutor to conclude that a risk or several risks as stated are real, and reference to materials which support such facts. Here, motions in 37% of criminal proceedings did not contain the risks or supporting information.

However, the most critical issue is providing grounds for selecting a certain measure of restraint. The majority of motions (62%) did not include substantiation of impossibility to prevent the risk or risks referred to in the motion through the application of less strict measures of restraint while this is a required component of the motion in accordance with article 184(6) of the CPC.

Fig. 3.43 **Analysis of case files: information included in the motion to enforce a measure of restraint**



We should note here that prosecutors identified some reasons and additional incentives for using these approaches to substantiate motions to enforce measures of restraint and relevant arguments. In particular, the following opinion was expressed during a focus group:

Prosecutor

Risks are a different question. When we choose remand in custody, we pay attention to the fact that it is the strictest measure, and why it is necessary to choose it. It is difficult to distinguish house arrest and custody, as well as the related risks, because the conditions are similar etc. Risks. The court needs to see a confirmation of the risks that the person will hide, interfere, influence witnesses etc. Judges ask questions about the choice of the measure of restraint, 'Are you aware of any facts of influence on the witness or victims so far? The person has just been apprehended, nobody has been questioned yet.

Why did you decide that he will hide? What are the risks?' We argue that there is a risk; it is a grave crime, a violent crime, or there was a previous conviction. And if he has no priors. In most cases of murder I worked on, they had no convictions, but killed two people, committed robbery pursuant to an order, for instance. And we have a legal collision, where the decision is taken based on the judge's enthusiasm. He says, 'Show why we cannot choose house arrest or other measure of restraint'. For murders, they choose remand in custody. And if it's a robbery, part 2 with violence, the person did not kill, seems dangerous, but not so much. How do you show that he can influence when sitting at home? It is impossible. The only thing is that you can escape house arrest when wearing the bracelet. This is the difference. There are no bracelets. He can disappear physically. We write to the court, 'Please, order wearing the electronic means of control. They respond, 'We don't have those...'

Prosecutor

... In terms of risks, in majority of cases we can convince the judge that risks are assumptions. We don't have to prove that he will run away. We assume that he can abscond. For instance, if he is a law enforcement officer working at the law enforcement bodies, knows tactics of pre-trial investigation and all our moves. Not all investigating judges understand that risk is an assumption. They still ask for concrete evidence from prosecutors. If there is influence on witnesses, there should be witnesses who will speak about being pressured....

Investigators also expressed similar arguments during interviews and focus groups. Their arguments regarding this practice of application of provisions on the measures of restraint were based on the difficulties in practical implementation of the CPC, and sometime complex practical cases when there are limits regarding the time and amount of evidence. For instance, investigators stated:

Investigator

The investigative process is designed for the person to find out about the case. The prosecutor has to prove the risks. When you read 99% of risks, he is not going to abscond anywhere. Prove that he is not going to abscond. Ideally, it should be a plane ticket. It is very difficult for the prosecutor to prove the risks. Lawyers are usually right in using it, because they rebut one risk, another one, and it's really hard to prove they exist. However, the investigator knows all details in the case. That's why they ask the investigator more than the procedural supervisor....

Analysis and comparison of these two opinions, which are different in content and form, is not an easy task. The issue of proper preparation and submission of motions to enforce a measure of restraint should be studied in more detail. At the same time, we should emphasize that it is not just a question of formal and practical aspects of application of the criminal procedure law, but also of legal culture and specific mental characteristics. In this regard, a conclusion of a participant of focus groups and interviews for judges is important

and interestin:

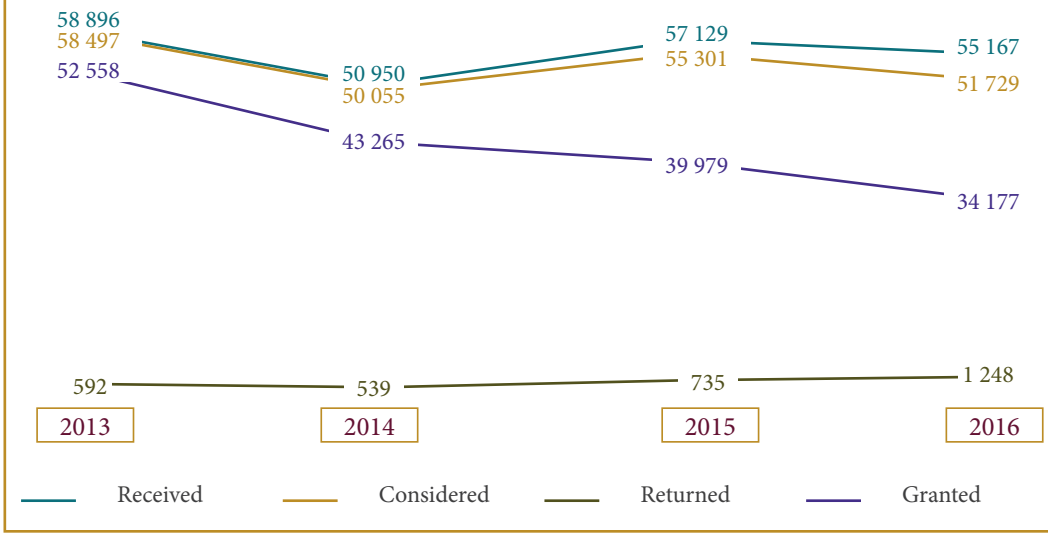
Investigating judge

...In reality, prosecutor cannot provide an explanation when coming to court and supporting the motion. I ask, 'The measure of restraint is imposed to ensure proper procedural actions, what was improper? What motivated you to come with this motion?' There is a pause here, we don't understand. It is necessary. And who needs it, why it is necessary – we can only guess. The prosecutor's office has to understand that even a person suspected of a grave or particularly grave crime who does not violate procedural requirements gives no reasons to raise an issue about a measure of restraint. The person comes when called by the investigator.

There is a stereotype to detain the person and hold him for at least a bit in isolation to have some confession, and the prosecutors and investigators have not moved past that. With difficulties, but courts are abandoning this approach, we deny motions for remand in custody, change it to house arrest etc.

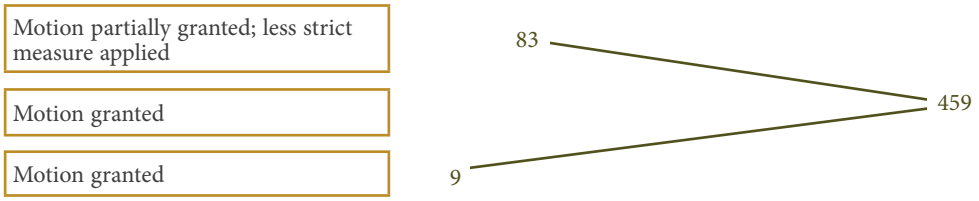
The ratio of initiated, considered and granted motions is quite logical and even foreseeable with the view to the above statement. Here, it is feasible to look at the court statistics on consideration of motions by investigating judges[81] (Fig. 3.44).

Fig. 3.44 **Consideration of motions to enforce measures of restraint by investigating judges (statistics of the first-instance courts)**



81 Report of the first-instance courts on consideration of criminal case files… Chapter 5.

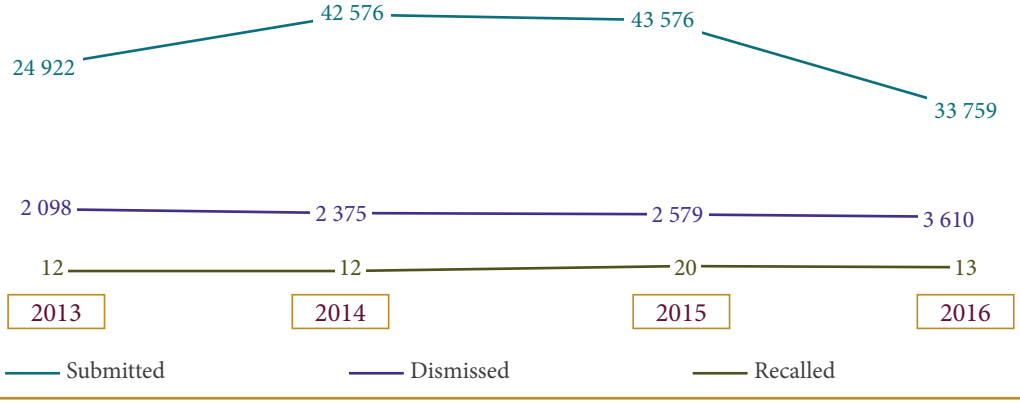
Fig. 3.45 **Decisions of investigating judges/courts on investigators'/prosecutors' motions to enforce a measure of restraint (FSLA Centers data)**



The statistics shows a relatively low number of motions returned to the submitting party due to deviations from the CPC requirements and lack of grounds. However, there is a relatively high number of motions to enforce a measure of restraint granted by investigating judges. This aspect also calls for a separate study of effectiveness in assessing the quality of motions to enforce measures of restraint. Even results of a specialized study of the FSLA Centers also reflect this trend (Fig. 3.45). In 551 analyzed proceedings, approximately 83% of motions to enforce a measure of restraint were granted in full. When we add another 15% of motions granted partially, the situation is even more difficult and problematic in terms of effectiveness of human rights protection at this stage of criminal proceedings.

Here, we should look at the general trend on dismissal of motions to enforce a measure of restraint. For instance, Figure 3.46 shows the official statistics of the Prosecutor General's Office on the measures of restraint[82].

Fig. 3.46 **Motions to enforce measures of restraint (PGO statistics)**



82 Reporting. Report on prosecutor's performance. Form No. II. Approved by orders of the Prosecutor General of Ukraine nos 121 (28 November 2012) and 350 (18 November 2012).

The official statistics of the prosecution service and the courts does not lead to definite conclusions on the effectiveness of prosecutors in specific situations (cases) regarding measures of restraint.

However, these charts (at least in relation to submitted and granted motions) show the trend pointed out by one of the judges – the existence of a certain bias towards the role and meaning of the measure of restraint in criminal proceedings. Unfortunately, measures of restraint are still perceived as a mandatory element showing the effectiveness of investigators or prosecutors, and not as one of instruments to achieve the objective of criminal proceedings.

Substantiation of the choice of a measure of restraint

It is necessary to examine the relation between the meaning and the role of certain measures of restraint. According to the CPC of Ukraine, remand in custody is an exceptional measure of restraint enforced exclusively if public prosecutor proves that none of the less strict measures of restraint can prevent risks that the suspect, accused or convicted person can:

- hide from pre-trial investigation agency and/or the court;
- destroy, conceal or spoil any of objects or documents that have essential importance for establishing circumstances of criminal offence;
- exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings;
- obstruct criminal proceedings in other way
- commit similar or the same criminal offence, or continue the criminal offence of which he is suspected, charged (art. 183(1), CPC of Ukraine).

At the same time, the prosecutor is relieved of the duty to prove that none of the less strict measures of restraint can prevent risks when filing a motion to commit to custody a person suspected/accused of crimes against national security (articles 109 – 1141 of the Criminal Code), terrorism (articles 258– 2585 of the Criminal Code), as well as establishing militarized or armed groups (art. 260 of the Criminal Code) that are not prescribed by the law, as well as attacks on objects that contain items of heightened hazard for the population (art. 261 of the Criminal Code). In these cases, the only possible measure of restraint is remand in custody (art. 183(1); art. 176(5), CPC of Ukraine).

Custody as measure of restraint shall not apply except as follows (art. 183(2), CPC of Ukraine):

- a person suspected of or charged with an offence the primary punishment for which by law is a fine in the amount exceeding 3000 times the minimum citizen's income – currently UAH 51 000 – exceptionally where the public prosecutor, in addition to

the grounds, has proven that the suspect, accused person failed to fulfill the obligations imposed upon him when an earlier measure of restraint or failed to comply as prescribed with the requirements concerning depositions of bail and submission of documentary proof of such deposition;

- a person with prior record of convictions who is suspected of or charged with an offence punishable by imprisonment of up to three years, exceptionally where the public prosecutor, in addition to the grounds, has proven that such person, when released, was fleeing pre-trial investigation or trial, obstructed criminal proceedings or has been notified of suspicion in the commission of another offence;
- a person without prior convictions who is suspected of or charged with an offence that according to law is punishable by imprisonment of up to five years, exceptionally where the public prosecutor, in addition to the grounds, has proven that such person, when at large, was fleeing pre-trial investigation or trial, obstructed criminal proceedings or has been notified of suspicion in the commission of another offence;
- a person without prior convictions who is suspected of or charged with an offence punishable by imprisonment of more than five years;
- a person with prior record of convictions who is suspected of or charged with an offence punishable by imprisonment of more than three years;
- a person wanted by competent authorities of a foreign state for commission of a criminal offence in connection with which the issue of extradition to such foreign state for the purpose of instituting criminal proceedings against him or execution of the sentence may be decided, in the manner and on the grounds provided for by Section IX (International cooperation in criminal proceedings) of the CPC of Ukraine or an international treaty of Ukraine to which the Verkhovna Rada of Ukraine consented to be bound.

Where a person is suspected of or charged with an offence for the primary punishment is a fine in excess of 3000 times the minimum citizen's income, the only applicable measure of restraint shall be bail or custody, in the cases and in accordance with the procedure provided for by the CPC of Ukraine (art. 197(7), CPC of Ukraine).

The legislation provides for the following non-custodial measures of restraint (art. 176(1), CPC of Ukraine):

- personal commitment;
- personal warranty;
- bail;
- house arrest.

Personal commitment (art. 179, CPC of Ukraine) consists in submission on the suspect, accused of an obligation to perform duties imposed on him by investigating judge, court as specified in part 5 of Article 194 (appear before the official specified with periodicity established; not to leave the locality where he is registered, resides or stays, without permission of the investigator, public prosecutor or court; inform the investigator, public prosecutor or court on the change of place of residence and/or employment; abstain from communicating with any individual specified by investigating judge, court or communicate with such person on conditions imposed by investigating judge, court; not to visit places specified by investigating judge or court; to undergo treatment from narcotic or alcohol addiction; to make efforts to find a job or to enter an educational institution; to surrender his internal ID, foreign travel passport(s) or other documents authorizing exit and entry to Ukraine; to carry an electronic monitor).

Control over the observance of personal commitment in the course of court proceedings shall be carried out by public prosecutor. During pre-trial investigation, such control shall be carried out by investigator.

Personal warranty (art. 180, CPC of Ukraine) consists in the giving by persons whom investigating judge, court regard as worthy of confidence, of a written obligation that they warrant the observance by the suspect, accused with duties imposed on him in accordance with part 5 of Article 194 of the CPC (appear before the official specified with periodicity established; not to leave the locality where he is registered, resides or stays, without permission of the investigator, public prosecutor or court; inform the investigator, public prosecutor or court on the change of place of residence and/or employment; abstain from communicating with any individual specified by investigating judge, court or communicate with such person on conditions imposed by investigating judge, court; not to visit places specified by investigating judge or court; to undergo treatment from narcotic or alcohol addiction; to make efforts to find a job or to enter an educational institution; to surrender his internal ID, foreign travel passport(s) or other documents authorizing exit and entry to Ukraine; to carry an electronic monitor) and undertake, if necessity should arise, to bring him to the agency of pre-trial investigation or to court at first request. There can be one or several warrantors. If the warrantor waives assumed obligations, he shall ensure the appearance of the suspect, accused at the agency of pre-trial investigation or court for disposal of the issue of replacing his measure of restraint for another one.

House arrest is a prohibition to the suspect, accused to leave his home, on the 24-hour basis or during a certain period of day (art. 181, CPC of Ukraine). House arrest may be applied to a person who is suspected or accused of committing a crime punishable by imprisonment. A ruling on application of the measure of restraint in the form of house arrest shall be transferred for execution to the National Police authority at the suspect's, defendant's place of residence. The term of validity of the order issued by an investigating judge concerning the period of keeping a person under house arrest may not exceed two months.

Bail constitutes payment of funds to a special account with the purpose of ensuring the observance by the suspect, accused of obligations imposed on him, on condition of reverting the paid-in funds to the State's revenue in case of non-observance of such duties.

Bail can also be set for a person to whom custodial restraint is already applied. In this case, the investigating judge, court shall indicate in their ruling on remand in custody the amount of bail selected which is sufficient to guarantee the fulfillment by the suspect, accused of obligations imposed upon him according to the CPC (art. 182(3), CPC of Ukraine). A person to whom a custodial restraint is applied can deposit bail in the amount established by the judge during the term of validity of the ruling. In this case, the person is released and considered as one to whom bail was applied.

A decision on the amount of bail in criminal proceedings may be set aside:

- in the matter of a violent offence or one involving threat of violence;
- in the matter of an offence causing death of an individual;
- in regard of the person who has violated the terms of a bail selected earlier as a measure of restraint, within the same set of proceedings.

When a custodial measure of restraint is imposed, bail does not apply to persons (art. 183(1); art. 176(5), CPC of Ukraine) suspected/accused of crimes against national security (articles 109 – 1141 of the Criminal Code), terrorism (articles 258– 2585 of the Criminal Code), as well as establishing militarized or armed groups (art. 260 of the Criminal Code) that are not prescribed by the law, conducting attacks on objects that contain items of heightened hazard for the population (art. 261 of the Criminal Code).

From a practical point of view, we should look at the percentage of such motions based on the official statistics of the Prosecutor General's Office (Fig. 3.47)[83].

It is quite expected that remand in custody is used more often than all other measures of restraint. Moreover, there is a critical difference in the numbers of remand in custody during the past two years (2015-2016). Results based on information of the FSLA Centers show virtually similar tendencies (Fig. 3.48).

Remand in custody prevails both on the chart of the official PGO statistics, and also on the chart based on FSLA Centers information. We should say that this information was collected in criminal proceedings where legal aid was provided to the apprehended persons, and this fact had certain impact on the correlation of statistical data. At the same time, it is a clear illustration of the trend mentioned in other chapters of this study, namely the direct correlation between the apprehension and subsequent enforcement of a custodial measure of restraint.

However, it is also necessary to emphasize the general decrease in the total number of motions for measures of restraint filed in 2016. Statements and conclusions voiced during focus groups and interviews support this data. The use of custodial measures of restraint is sometimes justified by scarce arguments even when this measure should be replaced by a less strict one. These cases are an example of a systemic problem, namely that law enforcement agencies try to choose the strictest measure of restraint without taking

83 Reporting. Report on prosecutor's performance. Form No. II. Approved by orders of the Prosecutor General of Ukraine nos 121 (28 November 2012) and 350 (18 November 2012).

Fig. 3.47 Motions to enforce measures of restraint (PGO statistics)

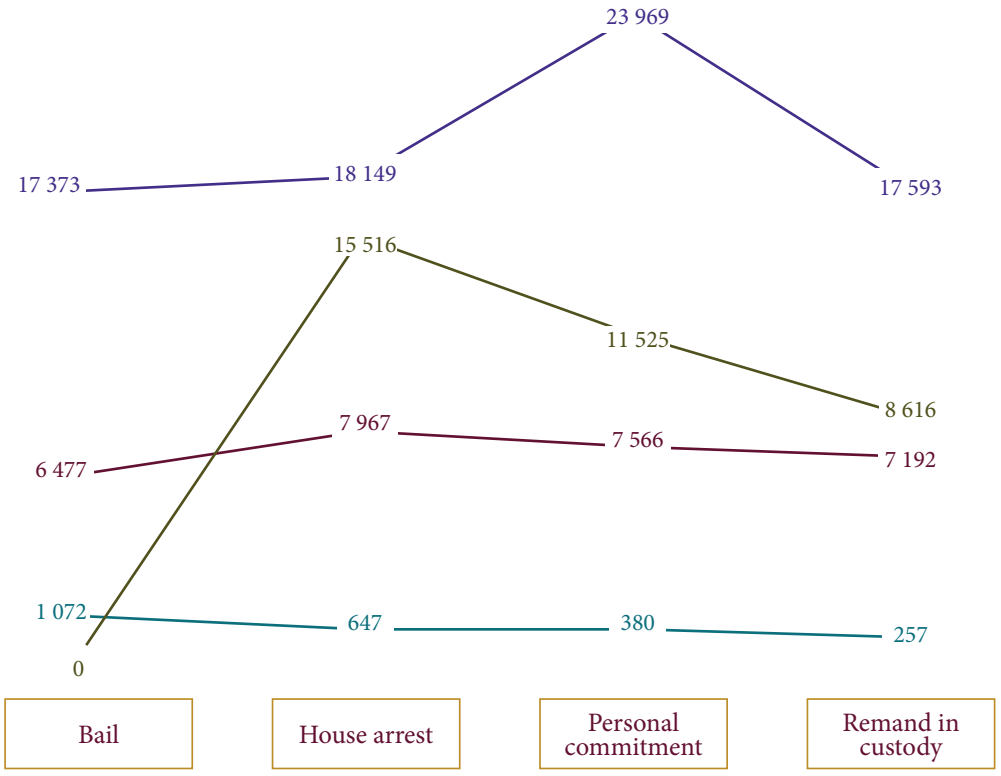
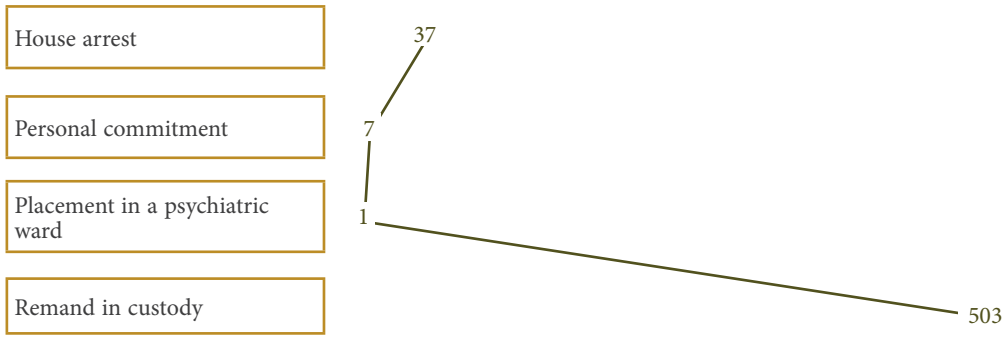


Fig. 3.48 Motions to enforce measures of restraint (PGO statistics)



into account all circumstances and the lack of proper reasoning. One of these cases was described during a focus group with lawyers:

> Lawyer — *...during my confidential meeting, you don't have enough time to talk about everything, and, in many cases, there is advice to use article 63 and then have further discussion and determine the position with the client. Because the client also says, 'I don't even know what to say'. Accordingly, in these situations, it often happens that they come and emphasize that the main reason for a custodial measure of restraint is that the person refused to testify. For some reason, in Lviv, it is the main argument….*

Prosecutors expressed interesting views on this matter during focus groups. In response to a question on the number of motions for remand in custody, they said:

> Prosecutor — *... It's decreasing... Always... In the old CPC, if it was a grave crime, robbery, part 3, we always apprehended. We have an instruction to apprehend if it's a grave crime. That's it... Now, it is chosen less often, the position of the prosecutor's office, and the investigation, is more reasonable...*

We should also note that the trend comes from not so much a conceptual change in selection of measures of restraint, but from a change in preferences. According to the information from the FSLA Centers (Figure 3.49), in most cases, when a non-custodial measure of restraint is imposed, the court prefers to restrict the freedom of movement and apply house arrest. The same trend was also identified during a study of criminal proceedings (Figure 3.50). Moreover, there is a strong correlation of indicators whereby house arrest is shown as the most frequent alternative to remand in custody.

At the same time, even this shift toward a 'more humane' process is not so widespread in Ukraine, and the investigating judges confirm this suggestion. For instance, when

Fig. 3.49 **If the investigating judge assigned a less strict measure, which measure was imposed? (FSLA Centers data)**

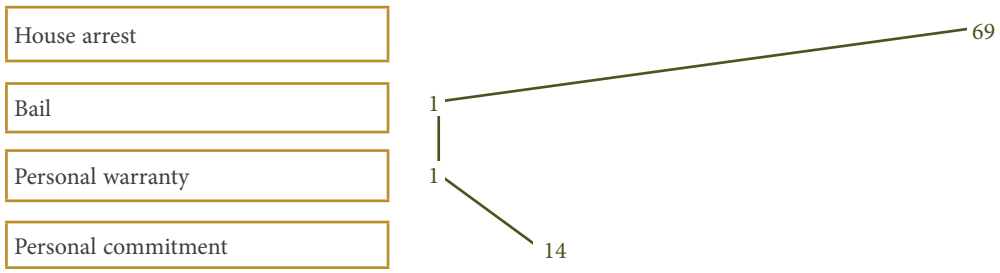
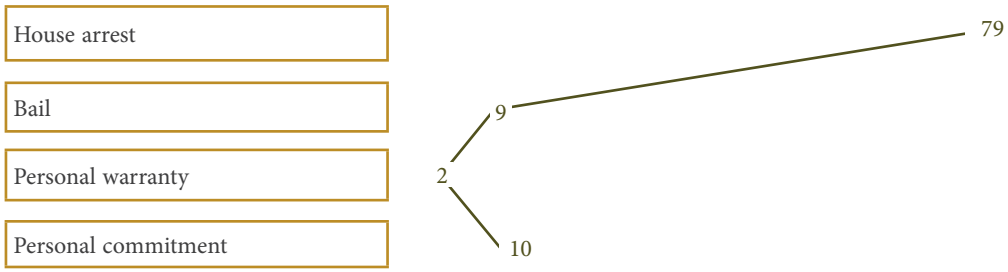


Fig. 3.50 **Analysis of case files: if the investigating judge assigned a less strict measure, which measure was imposed?**



responding to a question whether the prosecutor changed position in court and asked to change the measure of restraint to a house arrest, investigating judges said:

Investigating judge

Investigating judge:... It never happened. I have been an investigating judge for 4 years, once they came with a motion for house arrest. It was so strange. The prosecutor insisted it had to be house arrest. In general, it is always a custodial measure of restraint...

Investigating judge

... When you change it to a less strict measure, I had 3-4 cases in Lviv, there was hysteria all over the city.

In response to the question whether prosecutors had asked about a non-custodial measure of restraint for persons apprehended under article 208 of the CPC, investigating judges said:

Investigating judge

In a court hearing, we definitely discuss the possibility of a less strict measure ensuring proper behavior. Again, prosecutors are not ready for this question in trial. They come with a motion, and can't take a step to the right or left. We say, 'Wait, maybe house arrest can ensure'. 'No, it can't'. 'Why?' That's it. Even though it's an important question and they have to understand that there are other alternative measures of restraint.

In terms of other measures of restraint, investigating judges point out the unwillingness of prosecutors to file for personal commitment or house arrest due to inability to control the person if these measures are applied. For instance, the following views were recorded during focus groups:

Investigating judge

... In general, they think that personal commitment, house arrest – why choose it, since it does not guarantee the person's behavior, because we know the meaning of personal commitment, he can still

run away somewhere, and it won't stop him. There are also no means to control house arrest. As far as I remember, they told us that there are provisions for the use of bracelets, in the CPC, however, there are no bracelets and, probably, won't be. However, in the ruling, you need to write 'with the use of these devices'. And there are no devices. How are they going to control? They think that they don't need personal commitment and house arrest when they can have them in custody and ease the investigative actions. That's why they're oriented towards remand in custody...

Bail as a measure of restraint requires separate attention. As a matter of fact, prosecutors in focus groups and interviews pointed out the shortcomings of this instrument, which creates the need to use stricter measures of restraint.

Prosecutor

... there are high amounts of bribes etc. However, everyone understands that these people are capable of depositing bail. Here, we have a question. The legislator defined that the judge should determine an alternative amount of bail when enforcing a custodial measure of restraint. Clearly, there are such and such limits, and he can increase the amount in exceptional cases... But there is a question of how the bribe and bail conditions are comparable. It turns out that people who take large bribes have a lot of funds to deposit bail. In this case, judges simply don't respond to arguments about not setting bail due to public interest. They are afraid of violations of rights, of the ECHR... In this case, we indicate separately in the motion that sometimes public interest prevails over the interest of a detainee or suspect who committed a particularly grave crime....

At the same time, according to judges, the quality of motions to apply bail is relatively low. A common problem is that the prosecutor does not indicate the amount of bail in the motion and leaves it to the court's discretion:

Investigating judge

... They don't ask – don't indicate. There is nothing about that in the motion. According to the law, we have to either set bail, or justify why we haven't done so in relevant cases. My opinion is that it also has to be in the motion. It is an important question because it relates to human rights. And the amount of bail, there is a question – what was the prosecutor's reasoning? The amount of bail is determined within a certain range in the law, maximum – minimum. Why is it maximum? Why is it minimum? Then, you need to examine his financial situation.

You need to discuss this issue, how to write it properly. When characterizing certain documents, we also examine the person. Then, his financial situation is one of the characterizing documents relevant to determining bail. And the investigator, prosecutor has to prepare

these documents, it's not a function of the court. Investigating judge has the right to examine evidence, however, suspect and the lawyer usually refuse. Very often, the opposite party provides any evidence. Most often, it is a job for the prosecution. Therefore, I think, it should be their responsibility, not the court's. And we have this problem...

Investigating judge

... When it was necessary to set bail under the CPC, there was not a single word about bail. In terms of risks, we all discussed this question. About bail. The prosecutor, 'Bail'. 'Which amount?' 'Maximum'. And he is unemployed, homeless or something, sick. Why is it maximum?!

Please tell me, does the court have to set the amount of bail, or does the prosecutor have to set the amount?

They can set the amount. I think that the court has to work with what was given, and not take functions that are not up to the court, looking outside the scope of the motion. However, we have to set bail. And they are passive regarding this issue…".

3.6.3 Supporting motions to extend or change the measure of restraint

Public prosecutor, investigator upon approval of public prosecutor may apply, as prescribed under the CPC (art. 184, CPC of Ukraine), to the investigating judge, court for changing a measure of restraint, including for revocation, alteration or imposition of additional duties as provided for by the CPC (art. 194(5), CPC of Ukraine), or for modifying the manner of their performance.

A motion to change a measure of restraint shall necessarily state circumstances which occurred after the previous decision to enforce the measure of restraint and/or existed during the adoption of the previous decision to enforce the measure of restraint but which public prosecutor was at that time unaware of and could not be aware of.

Copies of the motion and materials by which the necessity to change the measure of restraint was substantiated, shall be handed over to the suspect, accused no later than three hours before the beginning of consideration of the motion (art. 200, CPC of Ukraine).

Motion to extend custody may be filed by public prosecutor, investigator upon approval of public prosecutor not later than five days before expiry of the previous ruling to commit to custody (art. 199(1), CPC of Ukraine). At the same time, the term of validity of the investigating judge's, court's ruling to commit to custody or to extend custody may not exceed sixty days. Duration of custody shall be calculated from the date of having been committed to custody, and if commission to custody was preceded by apprehension of the suspect, accused, from the date of apprehension. Time of custody shall include the time spent by the person concerned in a medical institution while undergoing in-patient

psychiatric examination. In case of repeated commission to custody of a person in the course of the same criminal proceedings, time of custody shall be calculated with account of the time of the previous term under custody. Total duration of keeping under custody of the suspect, accused in the course of pre-trial investigation shall not exceed:

- six months in criminal proceedings in respect of crimes of small or medium gravity;
- twelve months in criminal proceedings in respect of grave or especially grave crimes (art. 197, CPC of Ukraine).

In addition to information specified in article 184 of the CPC of Ukraine, a motion to extend custody shall include (art. 199(3), CPC of Ukraine):

- description of circumstances which show that the stated risk has not decreased or that new risks have emerged, which justify committing to custody;
- description of circumstances which obstruct completion of the pre-trial investigation before expiry of the previous ruling to commit to custody.

Investigating judge shall be obliged to deny the extension of custody period unless public prosecutor, investigator proves that circumstances justify continued keeping under custody of the suspect, accused (art. 199(5), CPC of Ukraine).

Therefore, periodic review of a measure of restraint is not only a requirement of international human rights standards, but also a clear obligation under the current criminal procedure law in Ukraine.

At the same time, its application does not always reflect the law. Similar problems are characteristic for review or initiating extension of a restraint measure. However, in these

Fig. 3.51 **Analysis of case files: who prepared the motion to extend the measure of restraint?**

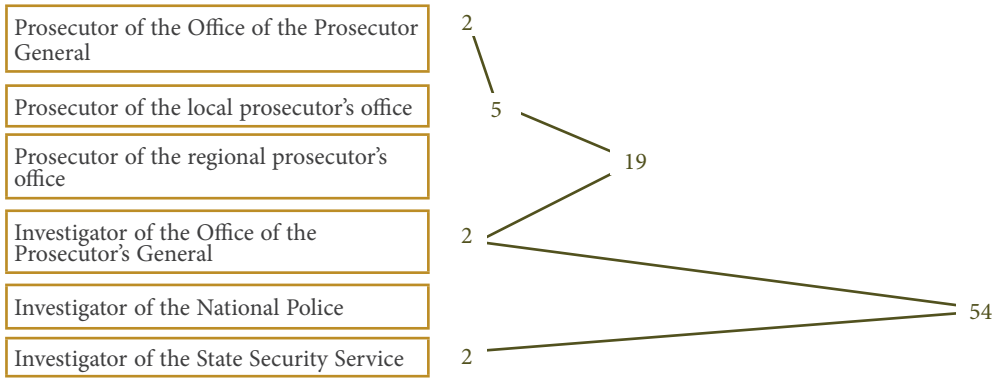
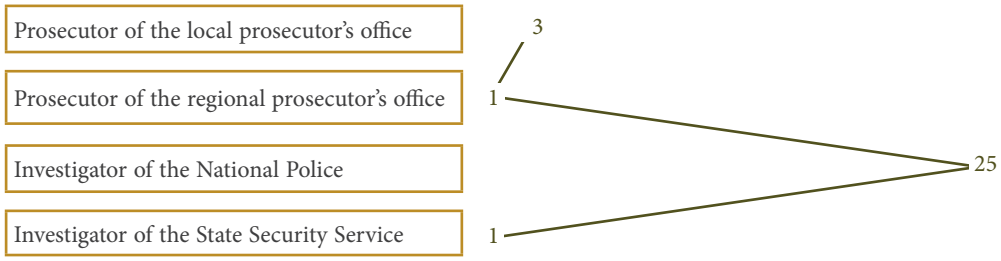


Fig. 3.52 **Who prepared the motion to extend the measure of restraint? (FSLA Centers data)**



cases, they have different meaning and become more significant, severe and unambiguous from a human rights perspective. The analysis of statistics in criminal proceedings (Fig. 3.51) and information from the FSLA Centers (Fig. 3.52) looking at who prepares the motion for extension of a measure of restraint show a similar situation, namely when majority of motions are prepared by investigators of the National Police.

The content-related problems in preparing the initial motion remain, and even become more acute in some cases. The relevant trends appear as a result of examining the FSLAC information, as well as analyzing the materials of criminal proceedings in relation to motions to extend custody (Fig. 3.53 and Fig. 3.54).

Fig. 3.53 **Motions to extend the remand in custody (FSLA Centers data)**

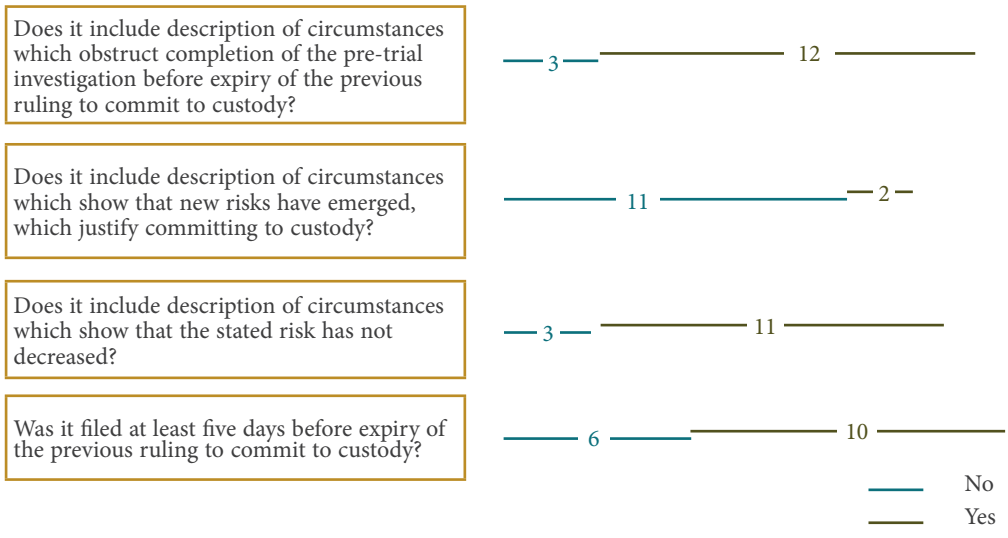
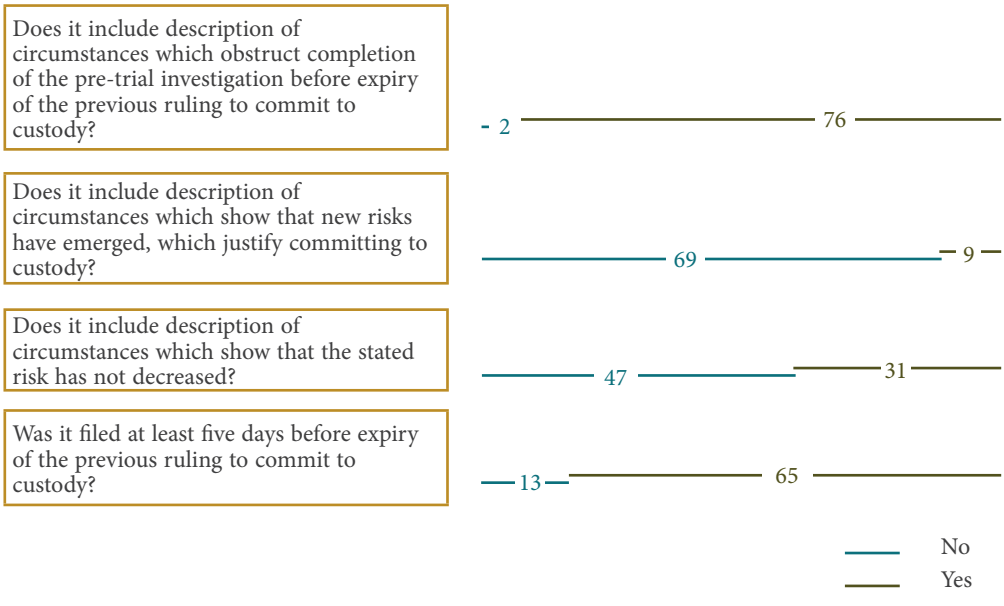


Fig. 3.54 **Analysis of case files: motions to extend the remand in custody**



Participants of a focus group with investigating judges said that motions to extend custody are sometimes even less reasonable than the initial motions. Prosecutors almost never ask for a replacement of the measure with a less strict measure of restraint. Investigating judges had the following comments on the quality of reasoning in these motions:

Investigating judge

...If they don't provide grounds during the stage of choosing the measure of restraint, they only use these formal phrases for extension.

Again, they only copy phrases from the CPC?

Yes".

Investigating judge

... No reasons at all... The risks remain, and the same information is listed from the previous motion.

Can go abroad. Question, 'He doesn't have an international passport, how?' 'Can go abroad in general'. There are motions stating that there is no place of permanent residence. You provide evidence that....

Investigating judge

... I can say that recently listening to prosecutors has become more pleasant. Why. Because earlier everything was a copy of one thing, only voices changes, the substantiation of risks, they read 177 directly from the code without substantiating any points. When lawyers

starting working on what I just said – there is no international passport, there is a family, we would have a break in the hearing. The following day, there was some sort of conversation...

Judges do that often. But I didn't finish saying what I started. The issue is that now they are just starting to be more responsible about extension during trial, for remand in custody they at least file written motions. I had situations like this one, 'Prosecutor, do you have any motions?' 'No'. And then the judge says, 'You know, I have to choose the legality before the monthly term expires in accordance with the CPC, so maybe you would like to speak about this'. And the person gets up and starts talking...

Investigating judge

... the prosecutors.... We have 7 defendants. She writes a motion that risks have not disappeared. She wrote a one-page long motion. As a result: 'I request extension of the measure of restraint for 60 days for so and so. I say, 'It's not a wholesale market, we don't sell by the bulk. One of my clients has 45 episodes, another client – 2 episodes, another one – 9 episodes. Well, distinguish them somehow....

The abovementioned judges stated that it is important to identify circumstances that may affect the outcome of consideration of a motion and can be presented to the investigating judge through changing or amending the motion to enforce a measure of restraint. Extension of remand in custody is only possible if the prosecutor provides circumstances that preclude finishing pre-trial investigation before the expiry of the previous ruling to commit to custody and proves that there are circumstances that confirm the risks which justify committing to custody, justify further detention of the suspect, accused person. However, in reality, prosecutors often neglect these requirements and only indicate that there are no grounds to revoke the custodial measure of restraint, which is unacceptable. Nevertheless, according to the study of criminal proceedings (Fig. 3.55), there is a complex situation when investigating judges still grant the majority of motions for extension despite a number of comments and issues.

Therefore, we should also direct attention to the observance of procedural time limits in the application of measure of restraint. The situation is particularly challenging with regard to remand in custody. According to the HSCU, *"... the correct practice of investigating judges is to dismiss the motion for compelled appearance, if the notice of summons was delivered outside the three-day term under article 135(8) of the CPC"*[84].

Below is a statement recorded during focus groups with investigating judges:

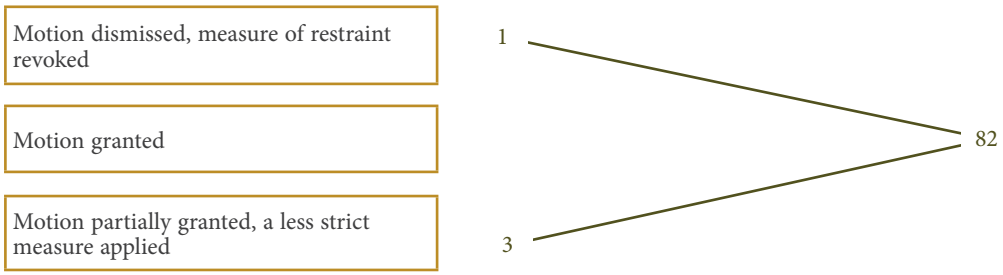
Investigating judge

... On the role. To extend the measure of restraint, they have to file a motion with the court five days earlier. There was a case in my practice, where I would have refused if it weren't article 152.

84 Review of jurisprudence, High Specialized Court of Ukraine for Civil and Criminal Cases.

Fig. 3.55

Analysis of case files: decision of the investigating judge (court) on the motion to extend remand in custody filed by the investigator (prosecutor)



However, I couldn't do it as a woman and mother of two children. There are time limits that should be observed. I called the prosecutor and said, 'You are setting me up. It's good there was no complaint. There would be a complaint against me, they understand it. However, if it were any other article, I would not extend it, because they did not file the motion before the deadline....

Lawyers in focus groups mentioned another aspect related to procedural time limits. In particular, when responding to a question "Do prosecutors control the time limits of serving the notice of suspicion? Were there cases when the lawyer found out that the protocol did not indicate the time of actual apprehension, and 24 hours had passed without serving the notice?", they said:

Lawyer *He is trying to fix the situation. It happened once in my work, and it happens often in practice, but at different stages. When they apprehend a group, they miss the 24-hour deadline. I come and politely tell him that if they apprehend them for more than 24 hours, and there is no notice of suspicion etc. He is writing politely, we solve it without scandals. As a result. I leave and he stays. It all ends with the prosecutor approving my motion for a less strict measure of restraint, and everyone else is sent to the remand prison, people are sitting there... These violations sometimes give certain bonuses for our defense strategy.*

Lawyer *... It's OK during the initial application, but during the extension, when the motion is in oral form, what document is there? No substantiation, no motion, no submission five days before. They try to finish the pre-trial investigation in 60 days, and during the*

preliminary hearing for extension, and subsequent hearings, all these oral motions in any districts, not the entire region, are provided normally, three hours prior to the hearing. Here, there are no questions, 99%. And the materials too....

The lawyers stated on the issue of changing the measure of restraint:

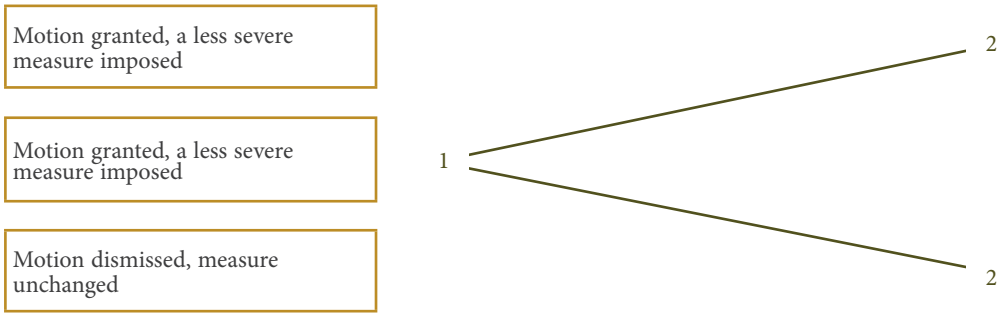
Lawyer

... I agree, for the prosecutor to initiate a less strict measure is unreal. I don't know any prosecutors like that. I would write to the Prosecutor General and suggest. There are no prosecutors like that... There is no logics in selection, for instance, this is a grave crime, and we would like to keep the person in custody, and if the crime is not grave, it can be house arrest. They don't have that, in most cases, it's apprehension, 90 percent in Lviv, if there is apprehension – they will move for a custodial measure of restraint, and only 10% – for house arrest. Why is that? Who makes that decision? Is it just easier? It's not possible to understand the prosecutor's actions at this stage, but I repeat, they never ask to change the measure for a less strict one, and when you ask to change, there is even new evidence, the prosecutor is against, always against....

We should note here that our analysis of criminal proceedings also identified another interesting aspect. In 300 criminal proceedings selected for analysis, there were motions to change the measure of restraint only in 7 cases. Moreover, in three cases, the lawyers initiated this change, and only two of them were initiated by prosecutors. Accordingly, there is clear trend on the issue of initiation of the change of the measure of restraint to a less strict one by the prosecutor illustrated with the results of the study of FSLAC information (Fig. 3.56).

Fig. 3.56

Decision of an investigating judge (court) on the investigator's (prosecutor's) motion to change the measure of restraint (FSLA Centers data)



3.6.4 Remand in custody after the end of pre-trial investigation

We should also turn our attention to the review of jurisprudence by the HSCU concerning detention after the end of pre-trial investigation and before the trial stage.

The practice and shortcomings in legislation have created certain issues in this field. The Court stated that the courts need to take into account the ECtHR case law when applying or extending the remand in custody during preparatory court sessions under article 315(3) of the CPC. According to this article, along with determination of legal cases of remand in custody and procedural guarantees for application and extension of such measures, the "automatic" extension of remand in custody is considered incorrect. Therefore, in absence of relevant motions from parties to criminal proceedings, the court in preparatory sessions has the power to raise the issue of restraint measures (restricted in time according to the CPC) since the court is responsible for observing reasonable length of proceedings at this stage[85].

Another important issue here are the shortcomings of the current legislation relating to determination of the issue of remand in custody following a conviction during appeal proceedings. For example, investigating judges note:

Investigating judge

... In fact, it's a very serious problem. The issue of extension and custody based on convictions, and what the appeal court has to do. As far as I know, Kyiv [courts] decide about extension for a certain period during announcement of the verdict. In our region, for instance, in Vinnytsia, they still write, 'Consider extended', and the person can stay there for 2, 3, 4, 5 months.…

… Because in Kyiv, I know, they found a solution, but the appeal court considers the issue of a measure of restraint again.

… Therefore, it is a big problem. I also had interesting appeal cases when the prosecutor's appeal against the return of indictment was considered, and they also looked at the extension of custody at the court of appeal. We also found a solution, released a person after 3 years in custody. But the issue is that the prosecutor said, 'It's nonsense, you know, they rescheduled the hearings 5 times, and extended his measure of restraint for two days each time. And then you come, and they say, 'He has been illegally detained for a week now'. I say, 'Cool, say this in the hearing now'. No…

Prosecutors in focus groups and interviews had the following opinion on the issue:

Prosecutor

The chairman – When talking about extension, how often do you provide reasoning, or does it automatically extend?

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- Defense counsels now make us work more. We have to provide reasoning.

- We provide reasoning at the appeal stage as well. If the proceedings are directed to a new trial for some reason, the judge in appeal court rules, 'Revoke the verdict, refer to the appeal court for retrial' and automatically includes the extension. We have a different position – we want the verdict upheld, but he judge takes the initiative, revokes the verdict, sends it for re-trial and usually extends the remand in custody by two months….

In our view, to summarize the issues described in this chapter, it is necessary and interesting to look at the statistics of appeals against rulings to apply measures of restraint in accordance with the official court statistics from Chapter 4 "Outcomes of consideration of appeals against rulings of investigating judges (number of persons)" of the Report of the first-instance courts on consideration of criminal case files[86]. Examples from these appeal proceedings are relevant due to specific issues pertaining to the remand in custody. Figure 3.57 shows the outcomes of appeals against rulings to enforce remand in custody as a measure of restraint, and Figure 3.58 provides quantitative data on the outcomes of appeals against rulings denying remand in custody as a measure of restraint.

Fig. 3.57

Outcome of appeals against rulings to enforce remand in custody as a measure of restraint (statistics of the first-instance courts)

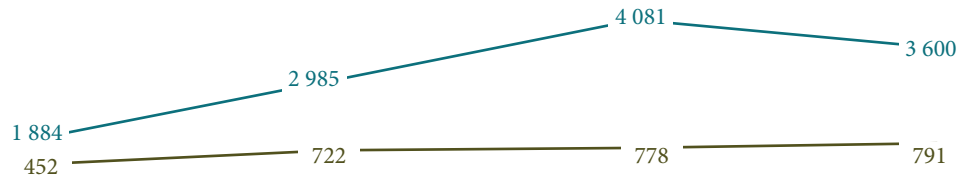
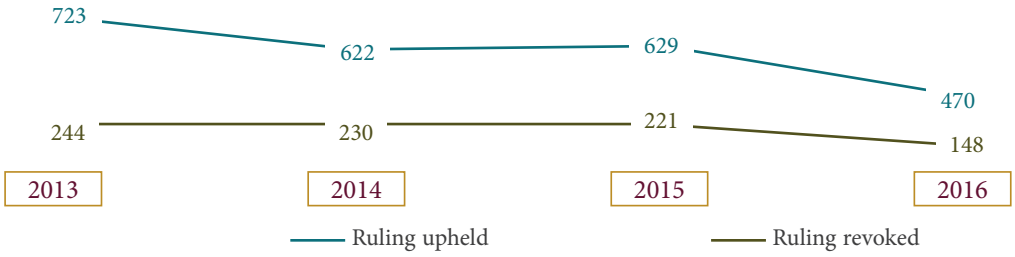


Fig. 3.58

Outcome of appeals against rulings denying remand in custody as a measure of restraint (statistics of the first-instance courts)



86 Report on consideration of criminal case files by appeal courts… Chapter 4.

These charts reflect an interesting development that can be positively assessed. We can see a slight increase in the large number of appeals against rulings to enforce remand in custody and a much lower number of appeals against rulings denying application of the custodial measure of restraint. Moreover, during the past year, the number of appeals against rulings that deny application of custodial measures, which are prepared mostly by prosecutors, has been decreasing.

This dynamics, in addition to other factors, can be a sign of changes in the prosecutor's' work – attention to their performance and the number of appeals have increased, and the number of appeals they initiate or support is dropping.

3.7 The prosecutor's role at the stage of completion of investigation in criminal proceedings

The Criminal Procedure Code of Ukraine provides for several forms of completion of criminal proceedings:

- closing the criminal proceedings;
- submitting an indictment to the court;
- submitting a motion to impose compulsory medical or educational measures to the court.

In the framework of this study, we focused on the first two forms, which are most common, namely when criminal proceedings are closed or the indictment is sent to the court.

Closing criminal proceedings

In practice, investigators close proceedings in most cases. The law stipulates that the investigator has to issue a decision to close the proceedings on the grounds referred to in paragraphs 1, 2, 4, and 9 of article 284(1) of the CPC of Ukraine if no person has been notified of suspicion in these criminal proceedings. Public prosecutor renders a decision to close criminal proceedings against the suspect based on grounds referred to in part one of article 284 of the CPC.

During this study, we analyzed the official statistics of the PGO on closing criminal proceedings in 2014-2016 available in the annual Uniform Crime Reports[87]. There were certain difficulties in the analysis since monthly reports are compiled with the principle of accumulation, where data for each month is a sum of data for previous months. Therefore, there was a need for manual calculation to obtain monthly data.

87 Form No. 1 (monthly) approved by the PGO order No. 100 dated 23 October 2012 (approved with the State Statistics Service of Ukraine).

For the purposes of this analysis, we chose monthly data on registered criminal proceedings, proceedings sent to the court with indictments, and the proceedings that were closed.

The data shows that the number of proceedings referred to the court remained stable in 2014-2061, ranging from 10 to 20 thousand proceedings per month.

The trends in relation to registered and closed proceedings are much more dynamic. We can see a relatively strong annual trend towards a decrease in the monthly number of registered criminal proceedings from January until December and, on the contrary, an increase in the numbers of closed proceedings towards the end of the year.

At the same time, there is an inverse correlation between these sets of data – the number of closed proceedings inversely correlates with the number of registered offences and vice versa! In fact, there is a mirroring asymmetry between the two indicators in all three charts.

The explanation for this correlation is quite simple. Turns out, the number of registered criminal offences does not equal the number of criminal offences recorded during the year, as it might seem at the first glance. Unlike the latter number, it can not only increase, but also decrease. Each closed case closed on the grounds stipulated in paragraphs 1, 2, 4 and 6 of article 284(1) of the CPC is deducted from the number of registered criminal offences.

This approach to statistics, according to the prosecutors, allows for preventing the situation where an average citizen would see the number of all registered proceedings almost double during the year. At the same time, we think that this creates an obstacle for assessing the actual situation in the field of combating crime, as well as its effectiveness.

Analysis of the data on closed proceedings in all three charts shows a clear pattern, namely a significant increase in the number of closed criminal proceedings. As we can see, the grey line (closed proceedings) peaks in April, June, September, and December (highlighted in red).

Fig. 3.59

Recording and outcomes of criminal proceedings (PGO statistics, 2014)

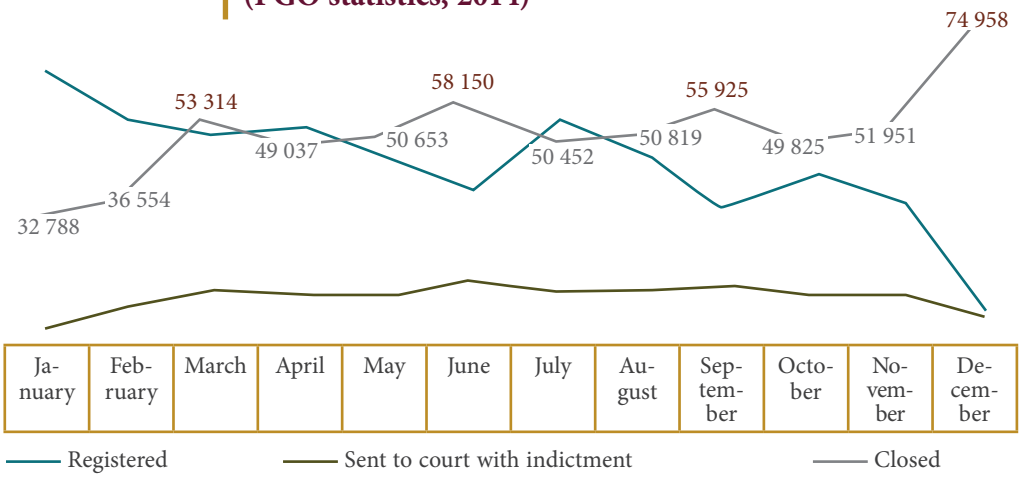


Fig. 3.60

Recording and outcomes of criminal proceedings (PGO statistics, 2015)

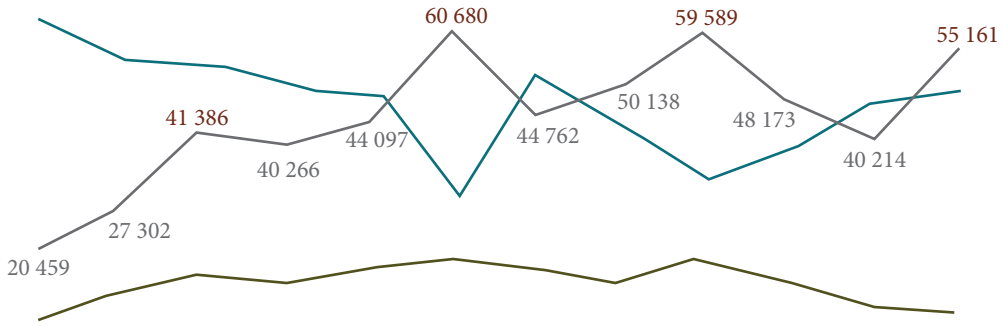
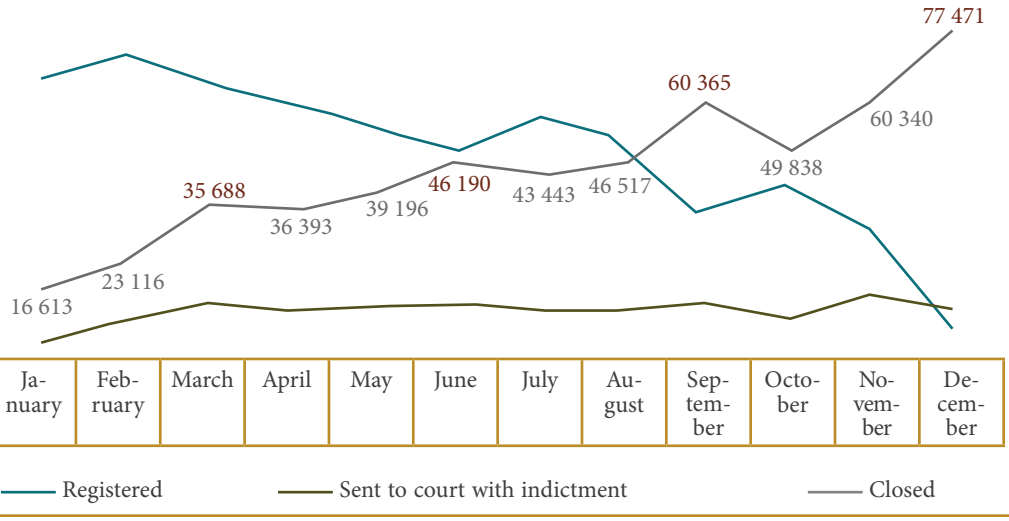


Fig. 3.61

Recording and outcomes of criminal proceedings (PGO statistics, 2016)



Results of the study suggest that the reason for the "peaks" is connected with submission of quarterly reports by the prosecutors and investigators. These are the months when they submit these reports. In addition, the six-month and annual reports are submitted in June and December accordingly.

Analysis of the practice of preparing these reports shows that there is widespread tradition of coordinating the data between the National Police and the PGO, their territorial units, as well as "artificial adjustment" of the statistics.

As a result of these "closing indicators", heads of pre-trial investigation agencies have to close a certain number of proceedings in order not to "spoil the statistics" of the prosecution authorities.

Investigator — *We had 64.9 percent of closed proceedings instead of 65, the prosecutor is calling: close five more cases. It was absurd – we came to submit the 6-months report, and they calculate the number of closed cases; for instance, we launched one thousand proceedings and closed 500, and our percentage is 50 percent. The prosecutor says, 'It's not going to work, we don't accept the report. You have 50% of closed proceedings. Go home and click on until it is 65%';*

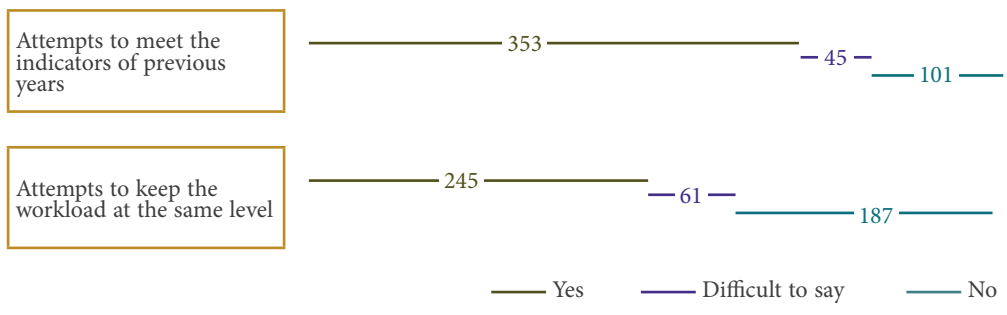
Investigator — *The regional prosecutor comes and says, 'You have a bad ratio of closed proceedings, go and close more. We went, 'closed more', it was 650. 'Give me the report'...*

Clearly, these examples can serve as evidence that heads of local and regional prosecutor's offices try to keep the numbers at the same level year after year to avoid questions in case of any changes in these indicators.

During interviews, prosecutors – procedural supervisors were asked about the factors that influence their decision to close (not to close) criminal proceedings. The results presented in Figure 3.62 show that the majority of prosecutors think that these factors include the need to keep statistics linked to the numbers from previous years and the attempt to keep the caseload at a certain level.

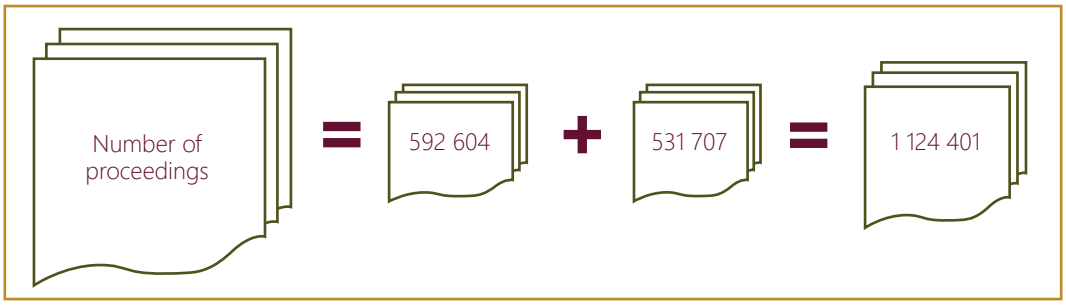
As mentioned above, PGO statistics shows that the number of proceedings closed under paragraphs 1, 2, 4, and 6 of article 284(1) of the CPC of Ukraine is not included into the total number of registered criminal proceedings (592 604 cases in 2016).

Fig. 3.62 **Prosecutors' responses to the question "Do you think that the following factors influence the procedural supervisor's decisions on closing criminal proceeding?"**



Therefore, to come up with the total number of proceedings where investigation started in 2016, we need to add the number of proceedings where the criminality of acts was not confirmed (closed under paragraphs 1, 2, 4, and 6 of article 284(1)) to the total number of registered proceedings, i.e. the number would constitute the sum of 592 504 and 531 797 cases (1 124 401 cases). Statistics for other years looks similar. As a result, we can see that the number of proceedings closed in 2016 (535 170) constitutes 47.6% of all proceedings where investigation started in 2016 (i.e. 1 124 401 cases, according to our calculations).

The figure shows the situation for 2016:



Procedural supervisors have to conduct oversight over the legality of closing criminal proceedings. According to article 284(6) of the CPC, a copy of the investigator's decision to close criminal proceedings is forwarded to the applicant, victim, and public prosecutor. Prosecutor may within overturn it on grounds of illegitimacy or groundlessness thereof within a period of twenty days from the date of receipt. Investigator's decision to close criminal proceedings may also be overturned by public prosecutor upon complaint from applicant, victim, if such complaint was filed within a period of ten days from the date of receipt by applicant or victim of the copy of decision.

According to the prosecutor's report for 2016[88], there were 27843 decisions to close criminal proceedings overturned in the framework of oversight over legality of actions of agencies conducting detective work or pre-trial investigations.

88 Statistics available at the website of the Prosecutor General's Office, http://www.gp.gov.ua/ua/stat.html.

At the same time, only 751 (less than 3%) of these "restored" proceedings were sent to court, which means that this direction of the prosecution service's work is a formality.

Sending the indictment to court

In criminal proceedings that include a possible indictment, the criminal case files must be disclosed to the other party. The prosecutor or investigator as directed by prosecutor is required to grant access to materials of pre-trial investigation in his/her possession, including such evidence which as such or in totality with other evidence may be used to prove the innocence or lesser degree of guilt of the accused or facilitate mitigation of punishment. Prosecutor or investigator as directed by prosecutor informs the victim and representative of legal person in whose respect proceedings are taken on opening by parties to criminal proceedings of materials, after which the latter shall have the right to review such materials (art. 290, CPC of Ukraine).

The conflict of prosecutor's duties becomes significant at the stage of disclosing evidence. On the one hand, the have interest in prosecution, and, on the other hand, their duty is to ensure collection and disclosure of evidence that can be used by both sides.

According to the Recommendation Rec (2000) on the Role of Public Prosecution in the Criminal Justice System adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law – any information which they possess which may affect the justice of the proceedings.

According to the obligations under the CPC, prosecutor has to examine comprehensively, fully and impartially the circumstances of criminal proceedings; find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well as the circumstances mitigating and aggravating their punishment; make adequate legal evaluation thereof and ensure the adoption of lawful and impartial procedural decisions (art. 9(2), CPC of Ukraine).

If either of the parties to criminal proceedings does not disclose materials under article 290 of the CPC, the court shall have no right to accept information contained therein as evidence (art. 290(12), CPC of Ukraine).

Lawyers in focus groups provided examples of prosecutors avoiding disclosure of case files, as well as referred to cases where the defense party was offered to look at the evidence examination report but not access to the material evidence itself.

Lawyer *Material evidence has not been provided, the defense explained it by the fact that the lawyer has no access to the storage room...*

Lawyer *Prosecutors don't give us material evidence, they come to court and insist that this evidence is admissible. I say, 'But you didn't show it to the defense counsel', 'No, this evidence is admissible'.*

At the same time, lawyers also provided examples when prosecutors fulfilled their duties properly in this area:

Lawyer

We went to SIZO [remand prison] several times, examined the case files on the murder, I asked, 'Would you like to give me, for instance, the material evidence'. The investigator said, 'No'. The smart prosecutor said, 'Let's spend several days examining the case files and then return to this issue. The next day, he came and said, 'Are you going to look at the material evidence?' He looked at the Supreme Court's case law, he understood where the [requirement] comes from. This is an educated prosecutor. And he understood how to support the prosecution. That's why this is a positive case.

Study results showed that there are cases when prosecutors try to avoid obtaining, disclosing and providing the court with evidence that can be used for acquittal of the suspect or accused, or to mitigate the liability.

Lawyer

... I often write motions that I could not have access to certain evidence due to some objective grounds and ask the prosecutor or investigator to request the evidence to support or dismiss some circumstances. When no one responds to the motion under article 220, I write a complaint under article 303 of the CPC of Ukraine, and the prosecutor comes in and denies existence of any evidence because, according to him, it does not support prosecution. I often explain to prosecutors that they don't have to support prosecution in all cases, they have to prove circumstances. The prosecutor's duty is to collect evidence to confirm certain circumstances. They prosecutor's duty is to collect the evidence that support prosecution, but also the exculpatory evidence.

The prosecutor's unwillingness to collect exculpatory and mitigating evidence, as well as to provide it to the defense, is clearly related not only with the pure competitive interest in the adversarial process. Procedural supervisors are responsible before the strict vertical system for "failing to lose" the case in court, which definitely affects the evidence collection process and its submission to the court.

Investigating judge

In fear of reprimand, they have no right to withdraw prosecution in court. If they refuse, they are reprimanded. If it's an acquittal, also – up to dismissal.

Lawyer

They have a task to win the case. In reality, they don't perform their duties under the CPC, they perform the duty "we need to win the case" at any price. Whether it is wrong or right, or contradicting the CPC, there is a task to win the case. If there is suspicion, there is prosecution, and it has to reach its logical end. Under any circumstance.

In these conditions, it is hard to expect that the prosecutor will follow the principles when screening out inadmissible evidence and providing the defense with exculpatory or mitigating evidence.

Examination of disclosed files usually takes place in a regular mode with a possibility of making copies. According to article 290 of the CPC, prosecutor or investigator as directed by prosecutor is also required to grant access and possibility to copy or appropriately reproduce any exhibits or parts thereof, documents or copies thereof, as well as provide access to premises or places if they are in possession or under control of the State and if the public prosecutor intends to use information contained therein as evidence in court (art. 290(3), CPC of Ukraine). Providing access to materials implies the possibility to copy or reproduce the materials (art. 290(4), CPC of Ukraine).

There can be certain difficulties with the amount of time provided and used to examine the files. According to article 290(10) of the CPC, the parties to criminal proceedings, victim and representative of legal person in whose respect proceedings are taken shall be afforded time sufficient for examining the materials to which they have been granted access. In case of procrastination in reviewing the materials to which access has been granted, investigating judge upon a motion of a party to criminal proceedings, with due account of the scope, complexity of the materials and of conditions of access thereto, shall be required to set a time limit for reviewing the materials, upon expiry of which the party to criminal proceedings, victim or representative of legal person in whose respect proceedings are taken shall be deemed as such who realized their right of access to the materials.

For instance, lawyers mentioned cases when the prosecutor set limited time to examine the case files:

> Lawyer *The prosecutor takes into account his deadlines, when his pre-trial investigation is over, he leaves 2-3 days for the lawyer to examine the case, and that's it.*

According to article 290(6), the defense, upon public prosecutor's request, is required to grant access and possibility to copy or appropriately reproduce any exhibits or parts thereof, documents or copies thereof, as well as provide access to home or any other possession if they are in possession or under control of the defense, if the latter intends to use the information contained therein as evidence in court. Parties to criminal proceedings shall be required to confirm, in writing, to the other party, and victim and the representative of legal person in whose respect proceedings are taken, to public prosecutor, the fact of having been granted access to the materials, with indication of titles of such materials (art. 290(9), CPC of Ukraine).

At the same time, there is a widespread practice when the prosecutor submits the request, and the lawyer indicates that such evidence is absent on the request itself. However, in general, there is no developed and sustainable practice of exchanging evidence.

Procedural supervisors provided the following examples:

Prosecutor

Usually, the [lawyer] signs the request stating 'I have no evidence at my disposal'. But the lawyer responded to me that there is no provision requiring that the signature is provided to the prosecutor.

Prosecutor

... Lawyers not only prepared a list stating what they provide, and whether it is a copy, or it is necessary to come and examine it; they prepared a register. The same thing I do. They did everything in accordance with the register and gave it to me.

Preparing the indictment

An indictment is a procedural decision whereby public prosecutor brings charges of the commission of criminal offence and pre-trial proceedings is terminated (art. 110(4), CPC of Ukraine).

In Vashchenko v. Ukraine (26 June 2008, paragraph 51), the European Court of Human Rights defined the notion a "charge" as the official notification given to an individual by the competent authority of an allegation that he has committed an offence proscribed by a rule of a general character, which establishes a punitive and deterrent penalty for the conduct in question.

An indictment shall be drawn up by investigator, following which shall be approved by public prosecutor. Indictment may be drawn up by public prosecutor, in particular, if he does not agree with the indictment drawn up by investigator.

Indictment is signed by investigator and public prosecutor who approved it, or only by public prosecutor if he drew it up alone (art. 291, CPC of Ukraine).

Attached to the indictment (art. 291(4), CPC of Ukraine), inter alia, shall be the register of materials of pre-trial proceedings (art. 109, CPC of Ukraine) compiled by the investigator or prosecutor containing the following:

- number and title of procedural actions conducted during pre-trial investigation, including the time of its conduct;
- requisites of procedural decisions taken during the pre-trial investigation;
- the type of a measure to ensure criminal proceedings, the date and duration of its application.

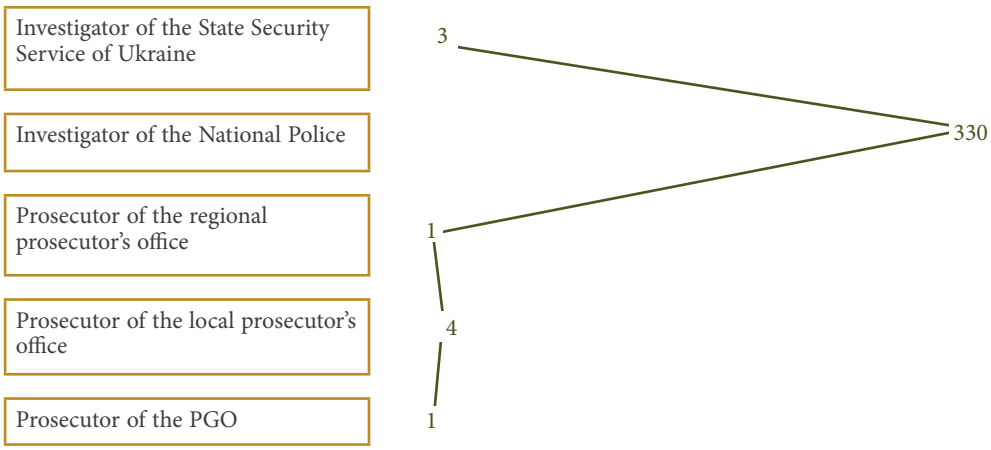
Analysis of criminal case files at the Free Secondary Legal Aid Centers shows that indictments are usually prepared by investigators (Figure 3.63).

According to the lawyers, investigators usually use the wording of the notice of suspicion to prepare the indictment.

Lawyer

The investigator prepares [the indictment], and 90% of the indictment, you can compare, is the text of the notice of suspicion.

Fig. 3.63 **Who prepared the indictment? (FSLA Centers data)**



Lawyer *Even when there is a coma in a wrong place, it is obvious that they are identical.*

The prosecutors confirmed that this practice exists and explained that some courts require that indictments have to reflect the notice of suspicion:

Prosecutor *... Courts return indictments only because their contents do not match the notice of suspicion. Judges follow the old rule that the charges have to match the indictment. We try to explain that the indictment is short, and if we suspected someone of taking a bribe under article 368(1), we charge him under article 368(1), and write a more detailed explanation in the indictment. Therefore, we have to notify of suspicion once, and then do it again, notify of amended suspicion.*

Considering the fact that the verdict depends on the indictment, as well as the chances that the indictment will be returned, prosecutors usually read and correct them. For instance, a participant of the focus group with lawyers noted:

Lawyer *In principle, I see in my practice and interaction with prosecutors that they really read these indictments. They change the wording because they are interested in not receiving these indictments back. That's why, being familiar with a certain practice for returning indictments, they are in the position to read them and change them so that it's not just a copy of the notice of suspicion.*

At the same time, lawyers also described other approaches to preparing the indictment:

> Lawyer *They usually approve it over the phone with the prosecutor – which article, what and how. Prosecutors do not control that. You can tell because the courts grant many lawyers' motions to return the indictment;*

> Lawyer *The prosecutor submitted it to the court without reading. When the judge called me and the prosecutor, I said, 'Withdraw the prosecution, it's a bad situation, there is no crime here'. The prosecutor said he could not withdraw prosecution because he will be asked by the management how he signed it. In my presence, the judge called both of us and asked, 'What are you doing?' The prosecutor didn't even look at what he signed; he just signed what the investigator gave him. It is so trivial, they don't even read what they sign, they don't check, don't' see it. I ask them to check the indictment under article 291 of the CPC when the investigator gives it to you. It takes 5 minutes [to check] for date and place of approval, description of actual circumstances, the suspicion, personal data of the person, part and qualification of the crime, the exact charges. The charges are indicated. That's all! The aggravating and mitigating circumstance – and period! There is nothing more to look for.*

Only in certain cases, prosecutors prepare the indictment (see Figure 3.63). It is related either to the lack of trust in the investigator's experience, or to the professional approach of certain prosecutors who want to prevent missing any details in the proceedings. The latter is an exception in the current system, however, the benefits of this approach are illustrated by the following comment from a prosecutor:

> Prosecutor *I prepared all indictments in my practice, did not let the investigator do it. I started writing the indictments even before article 290 of the CPC of Ukraine. When you prepare the indictment, you study the case in detail, write down things that are understandable or not understandable, what can be improved. When article 290 of the CPC is used, you can't go back. The investigator can write anything, but it requires additional examination of the files and checking whether you are prepared for trial or not.*

In certain cases, indictments are returned. In the prosecution system, these cases are perceived as inadequate performance by the procedural supervisors and punished by reprimands, withholding bonuses or dismissals.

> Lawyer *The prosecutors have a system; return of the indictment practically equals reprimand. If the indictment was incorrect, it's a reprimand.*

If there are several reprimands, they will raise the issue of possible dismissal.

At the same time, the effectiveness of this approach is rather questionable:

Lawyer *I had an experience when the judge returned [the indictment], and they appealed the decision. The court of appeals considers the case two months later, finally. It decides that the judge was correct, the case goes back to the prosecutor's office. The court issues an order to return the indictment to the prosecutor because he cannot return it to the investigator in accordance with the CPC. The indictment is submitted to the court in 3 days, I look at the indictment that was returned, take the new indictment, and see no difference – they are identical! They are just printed out and signed. I write a repeat motion for the return. The prosecutor is not concerned at all! When it was submitted, I talked with the prosecutor and said, 'What are you submitting to the court? You just had it returned. He said, 'Did I prepare it? I told the investigator to fix it, did he not?' I said, 'No, he didn't'. 'How come?...' He didn't even look, just submitted it without looking....*

The indictments are returned when they do not meet the clear requirements stated in article 291 of the CPC of Ukraine:

Lawyer *Very often, prosecutors fail to indicate the place of approval. According to article 291 of the CPC, an indictment shall contain the place and time of its drawing up, and the place and date of approval. There is a big issue with the place and time of approval, they forget it! They write 'Approved on so-and-so date", but they don't indicate the place. Judges have already learned to return the cases where some data under article 291 is missing. Very often, there are violations of the presumption of innocence. Very often, they write 'Committed such and such crime', which means already committed. Not accused of such and such crime, but they formally state 'Committed the crime'....*

A separate issue for the prosecutor is when indictments are returned because the register of materials of pre-trial investigators does not meet the requirements of article 109 of the CPC of Ukraine:

Prosecutor *... 2015 was the year of returned indictments due to shortcomings in the registers of pre-trial investigation materials. We defended a decision in the appeal court that if the register does not include information about informing the suspect of his rights and duties, examination of the notice on the rights, the same thing is with the victim. There is a leaflet on the rights and duties in the case signed*

by the person that he received the information and the leaflet, but if there is no mention in the register, you violated the right to defense.

Prosecutor

We have one defense counsel, if he is involved as a counsel in proceedings, 99 percent of indictments are returned to the prosecutor because the register, not the indictment, does not meet the requirements of the CPC.

However, there is gradual development of the case law and, if followed, it is possible to avoid these situations.

Prosecutor

...In the beginning, nobody knew how to prepare it. Now there is case law. I recommend everyone to look at the website of Kyiv Court of Appeals and read. They have an overview on returning the indictment. They described a stance whereby, first, you need to state the factual circumstances, i.e. everything established by the prosecutor. Then, these circumstances need to be described with a legal qualification for each of them.

The need to have "good" statistics has significant negative impact on the quality of criminal cases sent to the court.

Lawyer

They try to send indictments to the court at the end of the month. Sometimes, really meaningless cases. You say, 'They don't meet the requirements'. 'We don't have enough, we need to put them, and then we will deal with this...' In my practice, there was a case where they claimed that 13 bicycles were stolen in 13 locations in the city within 2 hours on the same day! When discussion in the court started, the prosecutor said, 'He stole 13 bicycles in 2 hours'. The judge said, 'Mister prosecutor, allow me to interrupt, but he had to put them somewhere. Even I clearly imagine that he had to hide these 13 bicycles within 2 hours! He could not physically do it!'. They needed to charge with theft in 13 episodes; they put it in one case and sent it to court, because they needed it. They even said, 'We needed the indicators'....

Issues connected with preparing and registering the indictment, the register of materials and collected evidence are even more pertinent in court because judges have different approaches to the procedure of submitting evidence. Clearly, the 2012 CPC includes the idea of gradual submission of evidence during trial with further examination, which is designed to support the principles of adversarial proceedings. Among others, this approach is supported by article 291(4) of the CPC of Ukraine which prohibits submitting other documents, with exception to the indictment, the register of materials of the pre-trial investigation, the civil lawsuit, and the acknowledgements and certificates mentioned in this article) to court before commencement of the trial.

Yet, in reality, there is no unified approach to this issue.

Prosecutor

The issue is that different courts want to see the mechanism for providing evidence after submission of the indictment in a different way. Some judges say, 'Separately, piece by piece during trial. Some say, 'Bind and deliver with a description'.

3.7

Often, there are cases when the indictment, the register and all available evidence is sent to court together.

CONCLUSIONS

The role of a prosecutor at the stage of apprehension and notification of suspicion

1. Practice continues to show that despite the new CPC that clearly defines the term "actual apprehension", there is a difference between actual and procedural apprehension. Similar to the old CPC, all time periods start from the point when the apprehension report is drawn up.

2. There is no unified procedure for informing a public prosecutor about apprehension of a person and appointing a procedural supervisor in criminal proceedings. Prosecutors learn about this from different sources either by looking at the Unified register of pre-trial investigation, receiving a notice from the investigator or the head of the prosecutor's office, or even by receiving a copy of the order.

3. Practice shows that there are informal agreements on apprehension of a suspect with the prosecutor and, often, with the investigating judge concerning the possibility of imposing a custodial measure of restraint. In the absence of prosecutor's approval, the apprehension report is not drawn up and the time of actual apprehension is not recorded.

4. In most cases, investigators prepare the notice of suspicion. In many instances, the prosecutor is absent when the notice of suspicion is served. In practice, key parties to the process lack understanding of the nature of notice of suspicion whereby the latter becomes analogous to the indictment. As a result, law enforcement officials

often omit registration of apprehension to avoid the 24-hour time limit for the notice of suspicion; the notice of suspicion is prepared at the end of pre-trial investigation. In part, this practice is caused by a similar understanding of the notice of suspicion by individual judges who return indictments to the prosecutors because the text thereof does not match the notice of suspicion.

5. In many cases, the procedure for approving the notice of suspicion is a complicated bureaucratic process requiring significant time resources from investigators and prosecutors. Practice shows that prosecutors approve the notice of suspicion only upon approval from the head of the prosecutor's office.

6. There are significant issues in cooperation between investigators and procedural supervisors in different regions. These issues are related to the following: there is a lack of understanding of their role in pre-trial investigation; there are no effective ways to influence the investigator who fails to follow the prosecutor's instructions; the work of investigators and field officers is not geared towards result in the form of a court decision; and prosecutors and heads of the investigation units compete in assigning workload for the investigator (overlap of their duties). Effectiveness of cooperation between investigators and procedural supervisors often depends on personal contacts between the heads of these institutions.

The role of the prosecutor in collection of evidence

1. Prosecutors have different understanding of their role and level of engagement in the evidence collection process. The prosecutor's role in collection of evidence varies significantly in different criminal proceedings. It is in part due to the lack of minimum requirements (standards) on the public prosecutor's work in criminal proceedings that would establish specific criteria for engagement in collection of evidence.

2. The number of plea agreements has been decreasing steadily in 2013-2016. Instead, there is a growing practice of fast track court proceedings under article 349(3) of the CPC of Ukraine. Unlike cases resolved through plea agreements, most of fast track proceedings take place in the absence of a lawyer.

3. Official statistics includes data on written instructions, which are considered one of the main effectiveness criteria for the prosecutor's performance in criminal proceedings. At the same time, prosecutors see written instructions as a purely formal tool that does not contribute to the effectiveness of investigation.

The prosecutor's role in application of measures to ensure criminal proceedings

1. The prosecutor as a special subject initiating/approving the motions for application of measures to ensure criminal proceedings and conducting procedural guidance in their application does not always comply with the CPC requirements, such as submitting proof of circumstances to the investigating judge or court, as well as the general rules on the use of measures to ensure criminal proceedings (concerning the need to justify application of these measures).

2. Practice reveals that prosecutors not only almost never prepare motions for application of measures to ensure criminal proceedings, but also fail to carefully review the motions prepared by investigators

3. The passive, sometime purely formal position (participation) of the prosecutor during consideration of motions for application of measures to ensure criminal proceedings in court is often reduced to reciting the CPC in criminal proceedings. In addition, some prosecutors even think that investigator's presence is sufficient to support a motion for measures to ensure criminal proceedings in court.

4. There is a widespread practice of considering motion to ensure criminal proceedings in court in the absence of the defense party and the person concerned. Moreover, according to individual prosecutors, the prosecutor does not have to be present, and the presence of investigator is sufficient.

The prosecutor's role in the assignment/extension/ termination of the measures of restraint

1. As practice shows, investigators and prosecutors often initiate measures of restraint without relevant grounds, i.e. a reasonable suspicion of the person having committed a criminal offence, as well as the existence of risks prescribed by the CPC. Motions are prepared according to the same template with slight changes concerning personal data of the individual concerned. There is a widespread practice when investigators and prosecutors fail to prove that there are sufficient grounds to conclude that at least one of the risks under article 177 of the CPC exists. When preparing the motion, investigators and prosecutors often simply copy the list of possible risks from the Criminal Procedure Code.

2. In many cases, investigators and prosecutors submit motions to enforce measures of restraint in the absence of necessary attached documents used to substantiate the facts and circumstances in the motion, as well as fail to provide a copy of materials in substantiation of the necessity to enforce the measure of restraint on the suspect/accused no later than three hours before the consideration of the motion begins.

3. Cases when investigators support the motion during court proceedings without relevant procedural status are widespread; the prosecutor's participation is purely formal and limited to "I support".

The prosecutor's role at the stage of completion of investigation in criminal proceedings

1. The study revealed a widespread practice of artificial adjustment of statistical indicators related to closing criminal proceedings used by the prosecution authorities on different levels. As a rule, these adjustments take place during reporting periods (quarterly, semi-annually, at the end of the year).

2. The available official statistics does not reflect the number of proceedings recorded during the reporting year; instead, it shows the number of "registered criminal offences', excluding proceedings closed under paragraphs 1, 2, 4, and 6 of article 284(1) of the CPC of Ukraine.

3. In most cases, the investigator prepares the indictment and tries to use as much of the notice of suspicion as possible. There are individual cases when the prosecutor prepares an indictment.

4. There are varying approaches to sending the indictment and the register of pre-trial investigation materials. In some instances, prosecutors continue to send virtually all available materials of pre-trial investigation, which used to be the practice under the 1960 CPC.

Chapter 4

The prosecutor's role in ensuring the rights and freedoms of a suspect

4.1 International standards

Standards of professional responsibility and statement of the essential duties and rights of prosecutors (adopted by the International Association of Prosecutors on the 23 April 1999)

Prosecutors shall respect, protect and uphold the universal concept of human dignity and human rights[89].

When supervising the investigation of crime, [prosecutors] should ensure that the investigating services respect legal precepts and fundamental human rights[90].

Prosecutors shall always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial[91].

Prosecutors shall:

- *safeguard the rights of the accused in co-operation with the court and other relevant agencies;*
- *disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;*

89 Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on the twenty third day of April 1999. Section I. Professional Conduct.

90 Ibid, Section IV. Role in Criminal Proceedings. Paragraph 4.2 (b).

91 Ibid, Section I. Professional Conduct.

- *examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;*
- *refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment*[92].

Recommendation Rec(2000)19 of the Committee of Ministers to the member states on the role of public prosecution in the criminal justice system

In the performance of their duties, public prosecutors should … respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms[93].

Guidelines on the Role of Prosecutors

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system[94].

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice[95].

92 Ibid, Section IV. Role in Criminal Proceedings. Paragraph 4.3.

93 Recommendation Rec(2000)19 of the CoE Committee of Ministers to the member states on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies).

94 Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Paragraph 12.

95 Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Paragraph 16.

4.2 National legislation and its implementation

As mentioned in previous chapters, article 36 of the CPC defines in detail the powers of a prosecutor in relation to procedural guidance in pre-trial investigation. It is important to emphasize that the list of powers in the article does not include a direct obligation for the prosecutor to check whether the rights of the suspect are ensured, or to exercise control over the law enforcement officials' compliance with these rights.

At the same time, in our view, the role of the prosecutor during pre-trial investigation in relation to the suspect's rights should be examined from a broader perspective than the scope of article 36 of the CPC. In particular, current Ukrainian legislation has a number of provisions that relate directly or indirectly to the rights of a suspect in criminal proceedings, as well as relevant duties to ensure these rights imposed on pre-trial investigation authorities and prosecutors. These provisions are enshrined in the Constitution of Ukraine (articles 28-29, 59, 62, 63), the Law of Ukraine "On the Public Prosecutor's Office" (article 1), as well as across the entire Criminal Procedure Code, including norms related to objectives (article 2 of the CPC) and general principles of criminal proceedings (articles 7 – 29 of the CPC).

According to the Law of Ukraine "On the Public Prosecutor's Office", the goal of the Public Prosecutor's Office is to protect human rights and freedoms, general interests of the society and the state (art. 1). In addition, its activities shall be based on the following principles (extract):

- rule of law and the recognition that a human being, his/her life and health, honor and dignity, inviolability and security constitute the highest social values;
- legality, fairness, impartiality and objectivity;
- presumption of innocence (art. 3(1)(1)).

Article 2 of the Criminal Procedure Code of Ukraine states that the objectives of criminal procedure include the protection of rights, freedoms and legitimate interests of participants in criminal proceedings.

General requirements to ensure the rights and freedoms of a suspect are also covered by the general principles of criminal proceedings, including the following:

Rule of law:

- Criminal proceedings shall be conducted in accordance with the principle of the rule of law, under which a human being, his/her rights and freedoms are the highest value that defines the content and direction of State activities.
- The principle of the rule of law in criminal proceedings applies with due consideration of the case law of the European Court of Human Rights (art. 8, CPC of Ukraine).

Legality:

- During criminal proceedings, a court, investigating judge, public prosecutor, head of a pre-trial investigation agency, investigator, and other officials of state authorities shall be required to steadfastly comply with the requirements of the Constitution of Ukraine, the CPC, and international treaties binding pursuant to the decisions of Verkhovna Rada of Ukraine, and requirements of other laws;
- A prosecutor, chief of pre-trial investigation agency, and investigator shall be required to examine comprehensively, fully and impartially the circumstances of criminal proceedings, find circumstances both of incriminating and exculpatory nature in respect of the suspect/accused, as well as the circumstances mitigating and aggravating their punishment, make adequate legal evaluation thereof, and ensure lawful and impartial procedural decisions;
- The criminal procedural legislation of Ukraine shall be applied in the light of the case law of the European Court for Human Rights (art. 385, CPC of Ukraine).

Respect for human dignity:

- In the course of criminal proceedings, respect for human dignity, rights, and freedoms of every person must be ensured.
- Everyone shall have the right to protect through all means not prohibited by law their dignity, rights, freedoms, and interests violated in the course of criminal proceedings (art. 11, CPC of Ukraine).

Presumption of innocence and conclusive proof of guilt:

- An individual shall be considered innocent of the commission of a criminal offence and a criminal penalty may not be imposed unless their guilt is proved in accordance with the procedure prescribed in the CPC and is established in the court judgment of conviction which has taken legal effect;
- No one shall be required to prove their innocence of having committed a criminal offence and shall be acquitted unless the prosecution proves their guilt beyond any reasonable doubt;
- Suspicion or charges may not be based on evidence obtained illegally;
- Any doubt as to the proof of the guilt of an individual shall be interpreted in this person's favor;
- A person whose guilt has not been found in a valid judgement of conviction, which has taken legal effect, shall be treated as an innocent one (art. 17, CPC of Ukraine).

Current Criminal Procedure Code contains an important provision that evidence obtained through significant violations of human rights and freedoms shall be inadmissible.

Article 87(1) of the CPC states, evidence obtained through significant violations of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties the Verkhovna Rada of Ukraine has given its consent to be bound by, as well as any other evidence resulting from the information obtained through significant violation of human rights and fundamental freedoms is inadmissible.

The list of serious violations of human rights and fundamental freedoms is provided in Article 87(2) of the CPC. It includes, among others, the following:

- obtaining evidence through torture and inhuman or degrading treatment or threats to apply such treatment;
- violating the right of a person to defense;
- obtaining testimony or explanations from a person who has not been advised of his/her right to refuse to give evidence or answer questions, or where these were obtained in violation of this right etc.

The courts shall find evidence referred to in this article inadmissible during any trial except proceedings to establish liability for the said significant violations of human rights and fundamental freedoms that had resulted in obtainment of such evidence (art. 87(4), CPC of Ukraine).

Certain gross human rights violations during criminal investigation constitute crimes under the current Criminal Code of Ukraine. For instance, articles 127, 365, 371, 373, 374, and 397 criminalize the use of violence against suspects (torture, compelling to testify), unlawful detention, violation of the suspect's right to defense.

Taking into account the above provisions of the Constitution, the Law of Ukraine "On the Public Prosecutor's Office", as well as the Criminal Procedure Code, in particular article 36(2) of the CPC whereby procedural guidance is a form of supervision over observance of laws during pre-trial investigation, we consider that the procedural supervisor's role in ensuring the rights and freedoms of the suspect includes, at the minimum, verification of the following:

- whether the apprehension was lawful;
- whether the suspect was promptly informed about his/her rights, including the right to keep silence;
- whether the person's right to defense has been ensured properly;
- possible use of illegal investigation methods against the suspect (torture, assault, compelling to testify etc.);
- whether the evidence is admissible (possibility that it was obtained through gross human rights violations).

If the prosecutor finds violations of the law committed by law enforcement officials that include elements of crimes under the current Criminal Code, s/he shall enter the information concerned to the URPI and initiate investigation, or identify competent investigation authority. In this regard, procedural supervisor has powers to initiate pre-trial

investigation on the grounds provided by the CPC. Moreover, article 214(1) of the CPC states directly that an investigator or public prosecutor shall be required immediately, but in any case "no later than within 24 hours after submission of a report, information on a criminal offense or after s/he has learned on his own from any source about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the Unified Register of Pre-Trial Investigations, and to initiate investigation".

Let us analyze how prosecutors fulfil their duties to ensure the rights and freedoms of suspects in practice.

During a study titled "Procedural Guarantees for Apprehended Persons" conducted in 2014-2015 with the support of the International Renaissance Foundation[96], we found a number of violations of procedural guarantees for apprehended persons committed by law enforcement officials during pre-trial investigation. The study results fully reflect the data of monitoring visits of the National Preventive Mechanism, the Ukrainian Parliamentary Commissioner for Human Rights, reports of the European Committee for the Prevention of Torture and the Subcommittee on Prevention of Torture of the UN Committee against Torture, as well as annual reports of national human rights organizations.

We shall refer to materials of the abovementioned study to illustrate human rights violations during pre-trial investigation.

4.3 The opinion of participants of criminal proceedings on the prosecutor's role in ensuring the rights of suspects

Analysis of data from interviews and focus groups with representatives of different professional communities whose activities are related to the field of the study (police investigators, lawyers, investigating judges, and public prosecutors) allows us to identify two key approaches to identifying the current roles of procedural supervisors in relation to ensuring the rights and freedoms of a suspect:

Approach 1

The prosecutor's main task is to collect evidence of the person's guilt and send the file to the court. Lawyers and the court should take care of ensuring the rights and relevant oversight. There can be exceptions only in certain categories of proceedings (grave or high profile crimes) or suspects (minors, persons with physical or mental disabilities etc.)

96 Human Rights behind Closed Doors: Procedural Guarantees for Apprehended Persons / Study Report. Kyiv, 2015.

We should note that majority of interviewees during the expert study, including prosecutors, identified this as the role currently performed by procedural supervisors in relation to ensuring the rights of suspects.

This approach, inter alia, includes a possibility that procedural supervisors can ignore certain violations when they helped collect relevant evidence.

For example, below are several quotes from focus groups and interviews:

Investigating judge

You know, for him [the prosecutor – ed.] he [the suspect – ed.] is a criminal, and this is what matters above all. And the prosecutor has inclination from the beginning.

Lawyer

Unfortunately, no one responded to complaints submitted to the public prosecutor's office; I spoke with the procedural supervisor, there were statements and complaints written, and nobody responded. Everybody simply suggests to go to the investigating judge with all complaints, or whatever you wish, and [the judge] can take a look at that. From the public prosecutor's office, if they see a clear violation of the law, that certain investigating actions with the person took place, they do not react.

Lawyer

And they [prosecutors – ed.] have an attitude in their head that the person is guilty and has no rights, whether he is beaten or not, what are you even talking about! Formal responses to all complaints, including unlawful treatment, assault, failure to provide medical help, failure to provide an opportunity to speak to a council, all these are formal run-arounds.

Prosecutor

The law does not impose an obligation on the procedural supervisor to conduct oversight in relation to observance of the apprehended person's rights. The prosecutor has an accusatory inclination… The prosecutor's main task is to send the case to the court. He has to collect evidence, and supervision of observance of the rights is optional for him[97].

Prosecutor

It [supervision of observance of human rights – ed.] is related to the notion that a prosecutor should not investigate the case… When he investigates the case, he is a hostage of the fact that he is involved in investigation. He will not say that he missed something, did something wrong and still send the file to the court.

Prosecutor

You are involved in the violation of rights. You think that, perhaps, you will somehow conceal this in court.

97 Interview with the deputy head of the regional prosecutor's office.

Approach 2

The main task of a prosecutor is to collect evidence of person's guilt and send the file to court promptly. At the same time, the prosecutor has to carefully check observance of the suspect's rights to prevent the court from declaring evidence inadmissible in the future.

Quotes from focus groups with procedural supervisors serve as good explanations of this approach:

Prosecutor

When lawyers say that the investigation had an accusatory inclination, I respond, "I am a public prosecutor, I have to support prosecution". They say, "The prosecutor should be protecting the law". I say, "Wait, lawyers, let me do you work as well". At the same time, I understand that I have to present legally obtained evidence that is admissible and necessary for a judgement. In fact, the prosecutor is between defense and prosecution itself. We are interested in not violating any rights since we will not able to push that in court.

Prosecutor

I evaluate mostly as a public prosecutor than a procedural supervisor since I understand that these [human rights] will serve as grounds to overturn any decision of a court, and I will not let that happen for, in that case, what was the purpose of investigating that case.

The above approaches reflect subjective perception of the procedural supervisors' own role in ensuring the rights and freedoms of a suspect during pre-trial investigation, which determines their actions in criminal proceedings.

In its turn, the subjective perception of their role by prosecutors directly depends on their attitude towards human rights in general. During this study, we conducted a questionnaire for procedural supervisors and analyzed their opinion on the need to ensure the rights of suspects, the scale and types of human rights violations during pre-trial investigation, and the need to respond to these violations etc.

Figure 4.1 shows the answers of procedural supervisors about their assessment of the scale of violations of the rights of apprehended persons during pre-trial investigation.

According to the data above, 75% of procedural supervisors who filled out the questionnaire consider that there are almost no violations of the rights of apprehended persons (combined with the "violations are rare" opinion). Only a quarter of respondents have another opinion – they think that these violations are quite widespread.

At the same time, data on specific violations are in sharp contrast with the general vision of the human rights observance during pre-trial investigation expressed by prosecutors (see Figure 4.2).

Fig. 4.1

Prosecutors' responses to the question "n your opinion, how common are violations of the rights of apprehended persons during pre-trial investigation in Ukraine??"

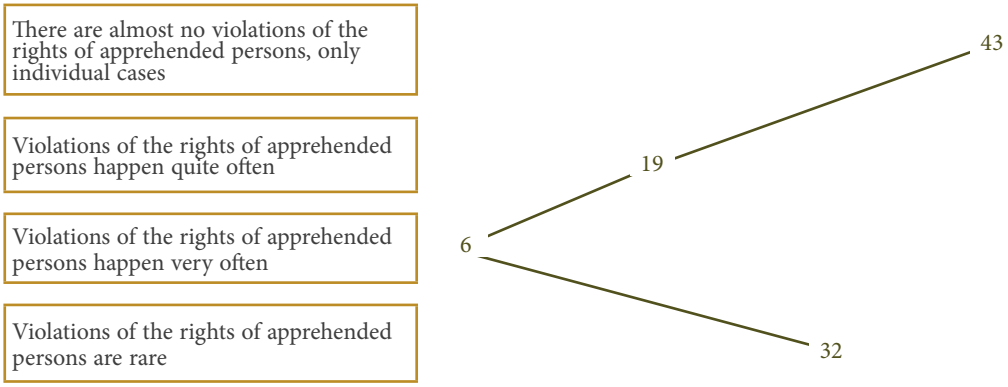


Fig. 4.2

Prosecutors' responses to the question «How widespread are the following violations during pre-trial investigation?»

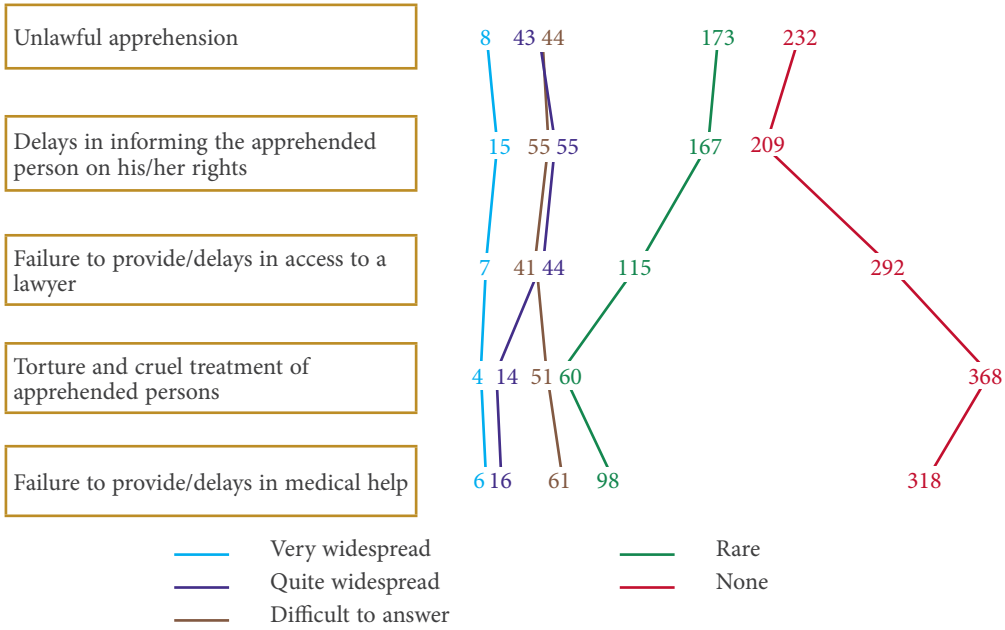
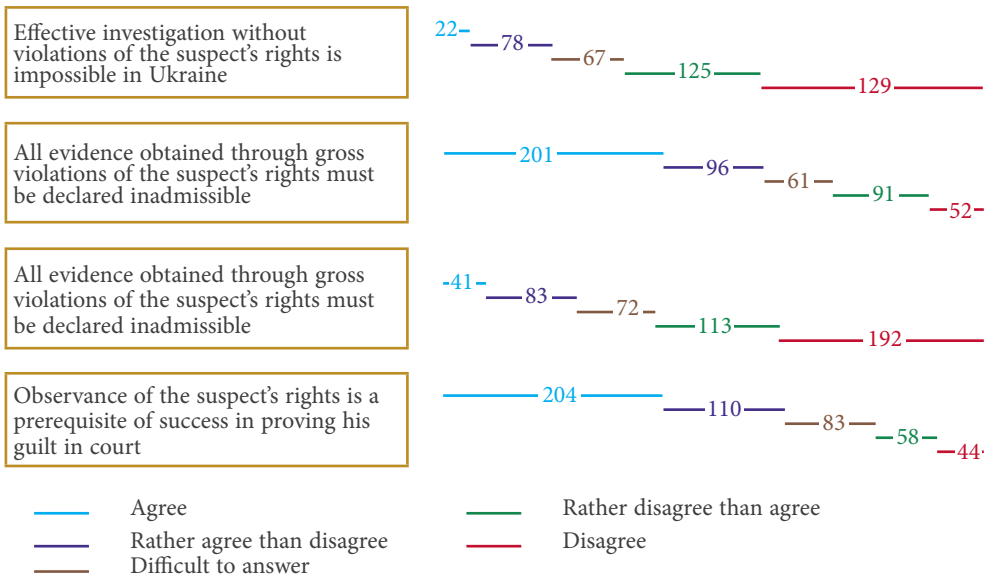


Fig. 4.3

Prosecutors' responses to the question «What is your opinion on the following statements?»"



Here, the percentage of prosecutors who thought that violations were almost non-existent or rare was much higher than on the previous chart. For instance, 81% of respondents thought that unlawful detention was not widespread (combined results for "almost non-existent" and "rare"). Percentage is even higher for responses about violations of the right to defense (82%), right to medical help (84%), and torture and cruel treatment (86%).

Prosecutors also gave interesting answers about statements on their general attitude towards the need to ensure human rights on the local level (see Fig. 4.3).

This data shows that, in general, procedural supervisors agree that it is necessary to respect human rights during the investigation. In particular, majority of respondents did not agree with the statements 'Effective investigation without violations of the suspect's rights is impossible in Ukraine' and 'Observance of the suspect's rights prevents effective investigation of the offence' (67% and 61% respectively). Also, prosecutors agreed with the statements 'All evidence obtained through gross violations of the suspect's rights must be declared inadmissible' and 'Observance of the suspect's rights is a prerequisite of success in proving his guilt in court' (59% and 63% respectively).

However, we should also note that a significant number of respondents expressed other attitudes towards the above statements. For instance, 20% of respondents agree that 'Observance of the suspect's rights prevents effective investigation of the offence', one quarter of procedural supervisors (25%) considers that 'Observance of the suspect's rights prevents effective investigation of the offence'.

Almost one third of procedural supervisors (28%) disagreed with the statement 'All evidence obtained through gross violations of the suspect's rights must be declared inadmissible' and 21% disagreed that 'Observance of the suspect's rights is a prerequisite of success in proving his guilt in court'.

Procedural supervisors provided similar responses concerning the need to ensure specific rights of suspects (Fig. 4.4). The majority of respondents (approximately 90%) agreed that it is necessary to ensure the procedural rights of apprehended persons. The only exception was in case of the statement about the need to enter every complaint about torture and cruel treatment into the Unified Register of Pre-Trial Investigations. Though 72% of prosecutors agreed with the statement, yet, 21% of respondent disagreed with the need to follow the procedure for response.

Fig. 4.4

Prosecutors' responses to the question «Do you agree with the following statements?»

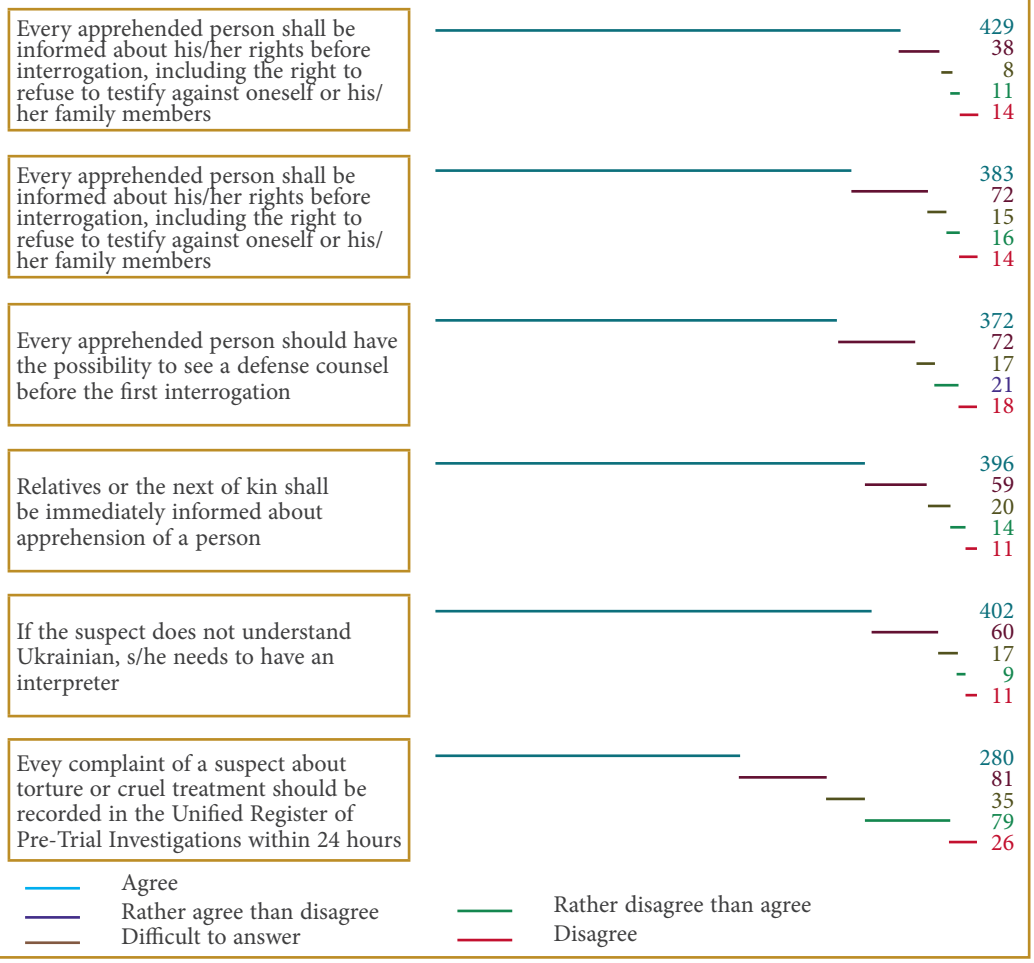
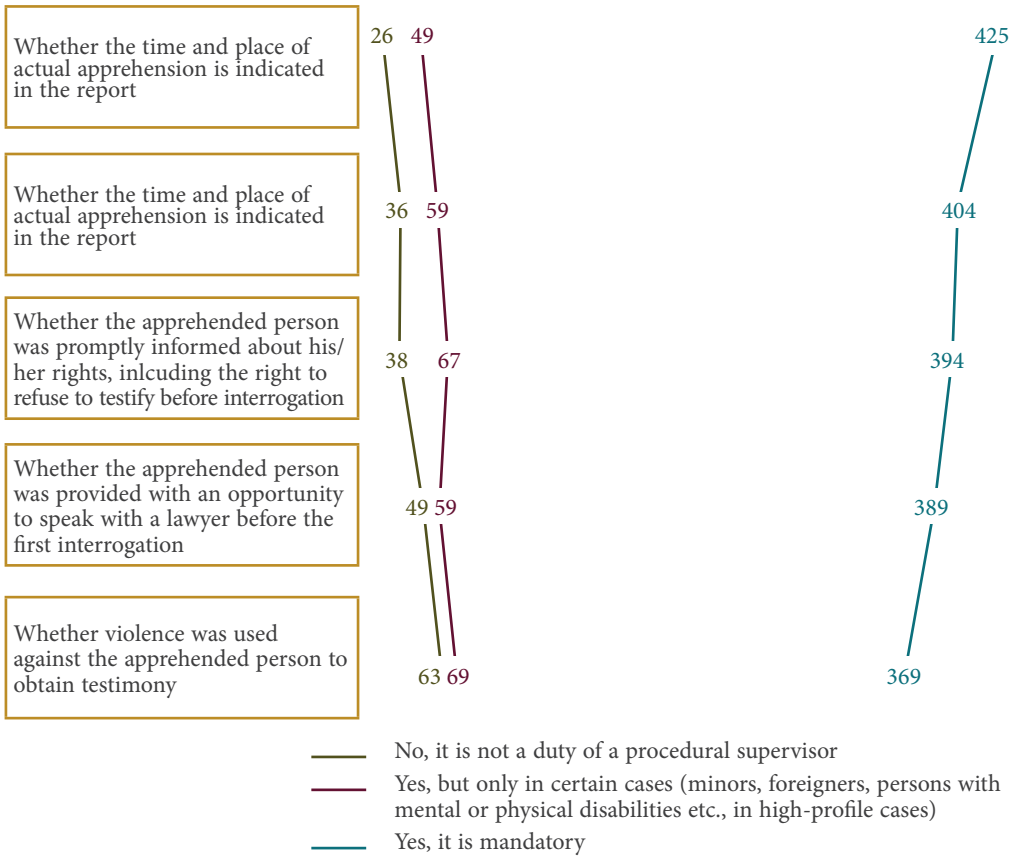


Fig. 4.5

Prosecutors' responses to the question "Чи має процесуальний керівник перевіряти у кожному провадженні перелічені обставини?"



A separate question concerned the role of the procedural supervisor in ensuring the rights of a suspect (see Fig. 4.5).

As you can see from the above data, the majority of procedural supervisors agreed that they need to take these measures to ensure the rights and freedoms of individuals in criminal proceedings. However, some of them think that these actions are necessary only in certain category of cases, or they do not constitute the duties of a procedural supervisor.

There is a contradiction between the unity of opinion on ensuring the rights of suspects and their view on the number of human rights violations during pre-trial investigation. On one hand, they express commitment to the rights of apprehended persons while, on the other hand, they think that this problem is almost non-existent.

Fig. 4.6

Prosecutors' responses to the question «Do you agree that suspects mostly complain that their rights are violated to avoid responsibility for the offence?»

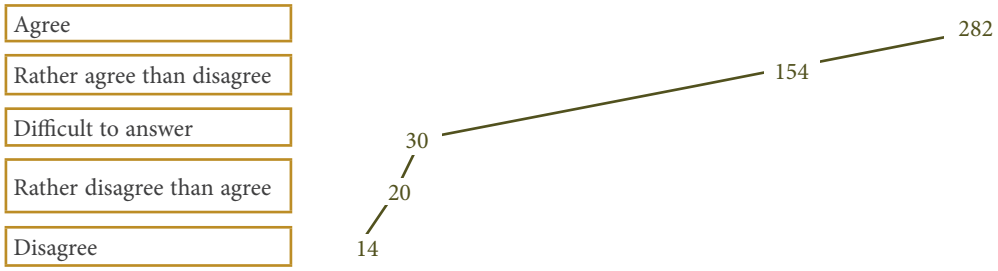
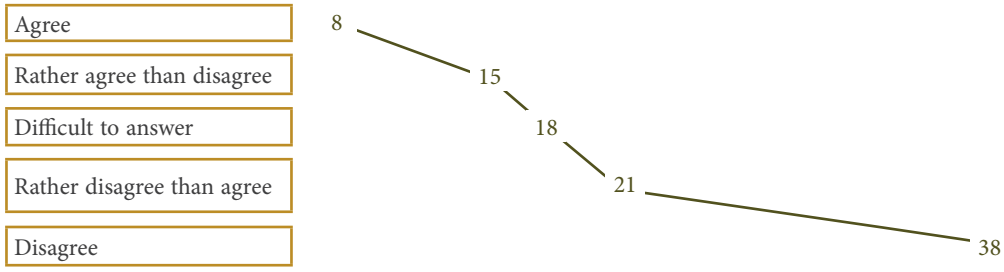


Fig. 4.7

Prosecutors' responses to the question «Do you agree that it is possible to disregard certain violations of the suspect's rights if it helps obtain evidence of his involvement in the offence?»



One of possible explanations for this discrepancy is that some answers can be 'suggested' in questionnaires. In this case, these could be the answers reflecting the criminal procedure legislation on the rights and freedoms of a suspect.

To support our assumption, we can look at other information from the same questionnaire. For instance, 87% of interviewed prosecutors stated that in most cases, suspects complain that their rights are violated to avoid responsibility for the offence (Fig. 4.6).

Only 3% of procedural supervisors disagreed with this statement.

Every fourth respondent considers that it is possible to disregard certain violations of the suspect's rights if it helps obtain evidence of his involvement in the offence. Another 18% of respondents could not provide an answer to this question (Fig. 4.7).

Let us look in detail how the role of a procedural supervisor is implemented in relation to specific rights of the suspect.

4.4 Activities of a prosecutor to verify legality of apprehension of a suspect

Chapter 3.2 contains detailed discussion of the prosecutor's role during apprehension of a suspect. However, since the largest number of human rights violations take place at the apprehension stage, we deem it necessary to focus on certain aspects of prosecutor's activities in this chapter.

It is difficult to overstate how important it is for a prosecutor to verify the legality of apprehension. The moment of actual apprehension is when the suspect acquires a number of procedural rights and guarantees. It is also the starting point for procedural temporal requirements for serving the notice of suspicion, bringing a person before the court and issuing a decision on detention or release, as well as for calculating the length of detention.

The lack of recording of apprehension or delay in doing so deprives the person of the necessary procedural status and, consequently, impedes exercise of his/her constitutional rights and freedoms.

The European Court of Human Rights considers that *"the unacknowledged detention [unregistered detention – ed.] of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention"*[98].

In a number of Article 5 decisions, the European Court of Human Rights concluded that there has been a deprivation of liberty from the moment when *"an individual was taken into custody by the police and he was treated as a suspect and remained under the effective control of the police officers at the police station. Having established these facts, the Court considers that a person is deprived of liberty in the understanding of sub-paragraph (c) of Article 5 § 1 of the Convention"*[99].

In another case, the Court pointed out that the arrest report did not take any account of the fact that the applicant *"had already been in police custody for over thirty hours before the report was drafted. Above all, this fact affected the calculation of the seventy-two-hour statutory period failing which the police was obliged to release the applicant, unless a relevant court order to hold him in custody had been obtained. The applicant's police custody during the period under examination [i.e. from the moment of actual apprehension until the arrest report was drawn up – ed.] was therefore not lawful"*[100].

98 Menesheva v. Russia (2006), Application no. 59261/00, ECtHR.

99 Osypenko v. Ukraine (2010) , application no. 4634/04 (2010), Grinenko v. Ukraine, (2012), application No. 33627/06, ECtHR.

100 Belousov v. Ukraine (2013), application No. 4494/07, ECtHR.

ECtHR standards have been incorporated into the new Criminal Procedure Code of Ukraine. Article 12 of the CPC recognizes the right to liberty and personal inviolability as one of the fundamental principles of criminal proceedings, including the following:

- in the course of criminal proceedings, no one shall be kept into custody, be detained or otherwise restrained in their right to freedom of movement upon criminal suspicion or charge other than on grounds and according to the procedure specified in the CPC;
- everyone who has been taken into custody or apprehended upon suspicion or charge of having committed a criminal offence or otherwise deprived of liberty shall as soon as practicable be brought before an investigating judge to decide on the lawfulness and reasonableness of their detention, other deprivation of liberty and continued custody. The detained person shall be promptly released from custody if within seventy-two hours from the moment of his/her detention he is not served a reasoned court decision on keeping in custody;
- a person's detention, taking into custody or other restraint in his/her right to freedom of movement, as well as his location, must be immediately brought to notice, as provided herein, of his/her close relatives, family members or other persons of such person's own choosing in accordance with the procedure in the CPC;
- anyone kept in custody or otherwise deprived of liberty in excess of the time prescribed by the CPC must be promptly released;
- where performed without grounds or in contravention of the procedure set forth in the CPC, a person's detention, taking into custody or other restraint of his/her right to freedom of movement during the criminal proceedings shall entail a liability as provided by law (art. 12, CPC of Ukraine).

The Criminal Procedure Code adopted in 2012 also incorporated international standard on determining the moment of actual apprehension. According to article 209 of the CPC, *"a person is considered apprehended from the moment when an individual, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official"* (art. 209, CPC of Ukraine). This is the moment when an apprehended person acquires the rights and procedural guarantees provided by the legislation.

If an individual is apprehended without a court order, the court shall verify legality of apprehension within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision on detention (art. 29, Constitution of Ukraine).

In case a person has not been served the notice of suspicion within twenty-four hours from his/her actual apprehension, the person is subject to immediate release (art. 278(3), CPC of Ukraine).

An individual apprehended without a ruling issued by investigating judge or court shall be released if within sixty hours from the moment of actual apprehension s/he was not brought to court for consideration of a motion to impose a restraint measure. In addition, an individual is subject to immediate release if a court has not reviewed the motion during seventy-two hours after apprehension (art. 211, CPC of Ukraine).

In addition, the moment of actual apprehension serves a starting point for the period when apprehended person can exercise his/her rights and procedural guarantees, including the right to notify third parties, to see a medical professional or a doctor.

However, despite clear legislative norms mandating the recording of the moment of apprehension, law enforcement officials commit numerous violations during this stage. According to the report "Procedural guarantees for apprehended persons"[101], these violations include::

- failure to include the time and date of actual apprehension in the apprehension report;
- apprehension of a suspect without a decision of an investigating judge or court after a long period following commission of a crime;
- questioning of the apprehended individual without putting these actions on record (without a protocol)
- interrogation (questioning) of the actual suspect as a witness etc.

What is the actual response of public prosecutors to these violations? Do they verify circumstances and the legality of the actual apprehension?

The state of response of the prosecution authorities to illegal apprehensions is clear when looking at the official *PGO statistics*[102]. The *Unified reports on criminal offences*[103] and the *Reports on activities of pre-trial investigation authorities*[104] contain statistics on the numbers of registered crimes concerning human rights violations by police officials.

Figure 4.8 shows the data on criminal proceedings registered and sent to court by public prosecutors under article 371 of the Criminal Code (knowingly unlawful apprehension, taking into custody, arrest or detention).

We should note that the PGO statistics does not allow for identifying the number of proceedings on illegal apprehensions or the actual units where persons suspected or

101 Human Rights behind Closed Doors: Procedural Guarantees for Apprehended Persons / Study Report. Kyiv, 2015.

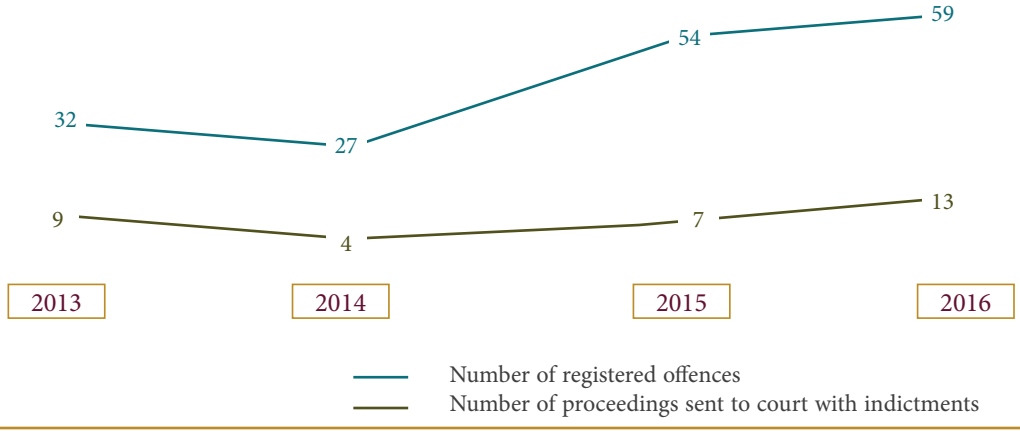
102 Statistical information, 2017. URL://http://www.gp.gov.ua/ua/stat.html.

103 Form No. 1 (monthly) / Approved by the PGO order No. 100 dated 23 October 2012 with the approval of the State Statistics Service of Ukraine.

104 Form No. СЛ (quarterly)/ Approved by a joint order of the PGO, MoI, SSU, SFS of Ukraine no. 110/1031/1037/514 dated 15 November 2012, amended, (version of a joint order of the PGO, MoI, SSU, SFS No. 23/194/233/157 dated 12 March) with the approval of the State Statistics Service of Ukraine.

Fig. 4.8

Criminal proceedings in cases of knowingly unlawful apprehension, taking into custody, arrest or detention (article 371 of the Criminal Code) (PGO statistics)



convicted of these crimes work. At the same time, even overall numbers in all types of crimes under this article (unlawful apprehension, taking into custody, arrest or detention) are extremely low. The annual number of proceedings sent by the public prosecutors to court with indictments did not exceed 10 cases (only last year it increased to 13 cases).

Focus group data provides partial explanation as to why the number of proceedings under this article, which were registered and sent to court, is so low. For instance, there is a clear link between registering apprehension and imposing a restraint measure. There is a consistent practice of drawing up the apprehension report only when the investigator or prosecutor filed a motion to impose a restraint measure of detention with the court.

When they file a motion for another restraint measure, for instance, home arrest or personal commitment, the apprehension protocol is not drawn up despite the fact of apprehension.

Therefore, in practice, there is still a gap between actual and procedural apprehension despite the updated CPC requirements, in particular, defining the moment of actual apprehension.

Analysis of FSLA centers data supports this conclusion. During the study, we analyzed 512 apprehension reports under article 208 of the CPC, which provides the following grounds for apprehension of a suspect:

1) the person was caught while committing a crime or making an attempt to commit it;
2) if immediately after the commission of the crime, an eyewitness, including the victim, or totality of obvious signs on the body, clothes or the scene indicates that this individual has just committed the crime;

3) if there are reasonable grounds to believe that the individual may flee to abscond criminal liability for grave or particularly grave corruption crime under the jurisdiction of the National Anti-Corruption Bureau of Ukraine.

This analysis did not cover apprehensions for corruption crimes, therefore, we shall focus on the first two grounds for apprehension.

According to article 208(5) of the CPC, on apprehension of a person suspected of the commission of crime, a report shall be drawn up in which, in addition to information specified in Article 104 of the CPC, the following shall be indicated: place, date and exact time (hours and minutes) of apprehension under Article 209 of the CPC, which provides the definition for the time of actual apprehension.

Therefore, taking into account the abovementioned CPC requirements, apprehension reports should include the following time as the time of actual apprehension:

- when an individual was apprehended while committing a crime or making an attempt to commit it;
- when an individual was apprehended if immediately after the commission of the crime, an eye-witness, including the victim, or totality of obvious signs on the body, clothes or the scene indicates that this individual has just committed the crime.

However, Figure 4.9 below shows that law enforcement officials have their own interpretation of the CPC provisions on the time of actual apprehension of a suspect. In majority of apprehension reports we analyzed, the premises of the law enforcement agency were indicated as a place of apprehension (*usually, the investigator's' office – ed.*).

Therefore, we can conclude that at least 67% of all apprehensions under article 208 of the CPC are unlawful since the person is in unidentified status, and the time of apprehension goes unrecorded. As a result, the time of unofficial apprehension is not taken into account when calculating the abovementioned procedural periods (24/60/72 hours).

Fig. 4.9 **Does the report indicate law enforcement premises as the place of actual apprehension? (responses of law enforcement officials)**

Unfortunately, prosecutors do not think that it violates the law since, in their view, the person has not been apprehended if there is not apprehension report. To support this conclusion, we will provide some quotes from focus groups with procedural supervisors:

Prosecutor — *We check the grounds for apprehension, what proof there is, whether the person has actually been apprehended at the crime scene. Several times [they] called and said they were detaining a person under 208, for instance, at the apartment, people came home, the person was stealing, the actions were noticed, and [the person] was apprehended. We came to the police precinct and the head of the investigations unit said, "Let's choose house arrest, no 208, or the performance indicators will be worse". The head [of the local prosecutor's office – ed.] said, "Let's choose house arrest".*

Prosecutor — *They called me and said that a person was being apprehended under 208. I came, the person was no longer being apprehended under 208 and there is no more drawing up a report.*

Prosecutor — *It happens that a person is apprehended under 208 and there is no report, and everything is fine, the person has been questioned.*

In addition, there are widespread cases when procedural supervisors deliberately dismiss violations of time limits on detention and do not release the person in accordance with articles 211 and 278 of the CPC. For instance, procedural supervisors mentioned the following cases during focus group interviews:

Prosecutor — *The prosecutor is serving the notice of suspicion. I thought I would show commitment to principles and asked, "Were you apprehended today?" And it was the 28th, for example. And he says, "They apprehended me on the 25th". And what do you do in this situation? And you're talking about taking him to court.*

Prosecutor — *There was a woman apprehended by the SSU, the prosecutor was there at the time, but when they brought her to our office, we saw that 24 hours had already passed. I talked to her directly: 'we understand that the bright is small, we will not push for detention, and you will sign the papers that you received a notice of suspicion within one day'. She was reasonable and signed it. We find ways to resolve the issue. If she decided to stick to the principle, it would have been unlawful apprehension. I would have to say simply, 'The door is open, you can leave'.*

Prosecutor — *The right prosecutor prepares another notice of suspicion. We had situations when the terms have expired, and we had to release*

from SIZO [remand prison], i.e. we were considering it in a video conference format and the time ran out. SIZO says, "I have to release him". Go ahead, release. As soon as he is out, there is a special unit, second suspicion and court.

Prosecutor

I would not contradict the code in this situation if I released him and at the same moment issued a 208 as a prosecutor. This will still be considered in court. In fact, one can say I'm violating what the law says. However, the situation is that, under 208, I am the prosecutor. I write the apprehension report, apprehend him and provide him with a notice of suspicion, file a motion and go to court. And he can tell the court that I apprehended him unlawfully.

Lawyers also think that this practice is widespread. According to lawyers who took part in focus groups, in their practice, there were no cases when prosecutors released someone apprehended under article 208 in the absence of grounds for apprehension provided by the law.

4.5 Verifying observance of the right to defense by prosecutors

The European Court of Human Rights considers that *"the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial"*[105].

The Court reiterated that *"Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it is demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict that right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during questioning by police without access to a lawyer are used for a conviction"*[106].

As mentioned above, violation of the right to defense is a significant violation of human rights and fundamental freedoms (art. 87(2), CPC of Ukraine). Therefore, evidence obtained as a result of this violation can be deemed inadmissible by the court (art. 87(4), CPC of Ukraine).

The High Specialized Court of Ukraine also addressed the inadmissibility of proof obtained as a result of violations of the right to defense in the summary of case law concerning the

105 Nechiporuk and Yonkalo v. Ukraine (2009), application No. No. 42310/04, ECtHR.

106 Yevgeniy Petrenko v. Ukraine (2015), application No. 55749/08, ECtHR.

right to defense in criminal proceedings. According to the Court, "*ensuring key guarantees of the right to defense at all stages of criminal proceedings is a necessary condition for exercising the right to defense. Instances when a lawyer was not assigned to the suspect/ accused during pre-trial investigation, where it was mandatory, cast doubt on whether the evidence in the prosecutor's indictment is proper and admissible*"[107].

A number of articles in the Criminal Procedure Code are dedicated to the specifics of ensuring the right to defense. According to article 20 of the CPC, *ensuring the right to defense is one of the general principles of criminal proceedings, which entails that:*

- A suspect, an accused, acquitted or a convicted person shall have the right to defense consisting in the opportunity to give oral or written explanations in respect of the suspicion or accusation, collect and produce evidence, attend the criminal proceedings personally, as well as benefit from legal assistance of a defense counsel, as well as exercise other procedural rights as set forth in the CPC;
- Investigator, public prosecutor, investigating judge, and court shall be required to advise the suspect, the accused of their rights and ensure their right to a competent legal assistance by a defense counsel whom they select or appoint on their own;
- Legal assistance to a suspect, an accused shall be provided at no cost at the expense of the state in cases specified by the present Code and/or the law, which regulates provision of free legal assistance
- Participation of a defense counsel of the suspect, the accused, representatives of the victim or third party in cases where the proceedings concern seizure of this party's property, in criminal proceedings shall not affect procedural rights of the suspect, accused, victim, or third party in cases where the proceedings concern seizure of this party's property (art. 20, CPC of Ukraine).

Article 42 of the CPC provides a detailed list of the suspect's rights, including the right to have, on first demand, a counsel and consultation with him/her prior to the first and each subsequent interview under conditions ensuring confidentiality of communication, and also upon the first interview to have such consultations with no limits as to their number or duration; the right to the presence of defense counsel during interviews and other procedural actions, refuse from services of counsel at any time in the course of criminal proceedings; have services of a counsel provided at the cost of the state in the cases stipulated for in the CPC and/or the law regulating provision of free legal aid, including when no resources are available to pay for such counsel.

Unfortunately, violations of the right to defense are quite widespread in the law enforcement practice. According to the study "Procedural guarantees for apprehended persons"[108], these violations include primarily:

107 Information letter from the High Specialized Court of Ukraine "On the case law concerning the right to defense in criminal proceedings".

108 Human Rights behind Closed Doors: Procedural Guarantees for Apprehended Persons / Study Report. Kyiv, 2015.

- untimely notification of free secondary legal aid centers on apprehension. For instance, in 68 percent of cases examined during the study, there were significant delays between the actual apprehension and notification of the FSLA center (several hours);
- first interrogation of an individual without prior consultation with a lawyer. Results of monitoring of the law enforcement work show that lawyers were absent during 46 percent of initial interrogations.
- failure to provide proper conditions for confidential communication between the lawyers and the apprehended person; this communication often takes place in the hallway or the investigator's office.

Official data of the Coordinating Center for Free Legal Aid Provision supports the study findings[109].

As illustrated in Figure 4.10, majority of violations (3683 cases) concerned the failure to comply with article 213 of the Criminal Procedure Code of Ukraine and paragraph 2 of the Notification Procedure[110] (*violation of time limits for notifying regional centers on apprehension*). At the same time, there were 25 recorded cases of impeding free access of the lawyer to the apprehended person.

A number of Criminal Code articles establish liability for violating the right to defense, including articles 374 (violation of the right to defense), 397 (interference with activities of a defense counsel or representative), and 399 (willful destruction of property owned by a defense counsel or representative).

In this analysis, we shall focus on violations that are characteristic for law enforcement officials and covered by articles 374 and 397 of the Criminal Code.

The majority of criminal proceedings under article 374 were registered by the prosecution services in 2015 (41 proceeding), and only 2 criminal proceedings with indictments were sent to court in 2016 (Figure 4.11). In 2013-2015, there were no indictments sent to court.

The situation with recording and investigation of interference with activities of defenders is almost identical (Figure 4.12). There were no indictments sent to courts over the past four years.

Therefore, official data of the Prosecutor General's Office on the number of proceedings on violations of the right to defense instituted and sent to court differs significantly from the data of the Coordinating Centre for Legal Aid Provision. According to the latter, in the last year, there were 3805 violations of the criminal procedure law and the procedure for notification of free secondary legal aid centers on apprehension.

109 3805 violations of the CPC and FSLA center notification procedure by law enforcement bodies – 2016 overview. URL: http://legalaid.gov.ua/ua/holovna/142-liutyi-2017/1939-3-805-faktiv-porushen-pravookhorontsiamy-kpk-ta-informuvannia-tsentriv-z-nadannia-bvpd-uzahalnenyi-analiz-2016-roku.

110 Procedure for notifying free secondary legal aid centers on arrests, administrative arrests or application of custodial measures of restraint, approved by decree No. 1363 of the Cabinet of Ministers of Ukraine on 28 December 2011.

Fig. 4.10

Criminal proceedings in cases of interference with the actions of a defender/representative (art. 397 of the Criminal Code) (PGO statistics)

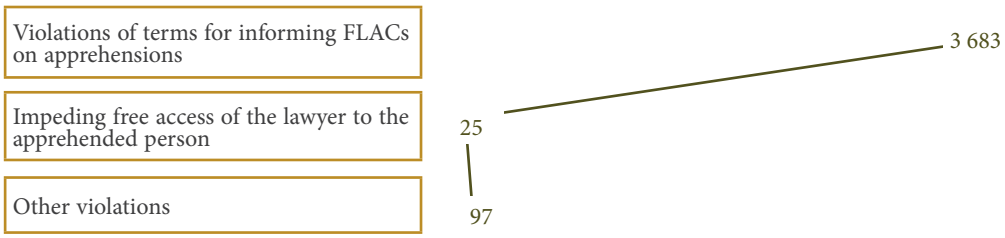


Fig. 4.11

Criminal proceedings in cases of violations of the right to defence (art. 374 of the Criminal Code) (PGO statistics)

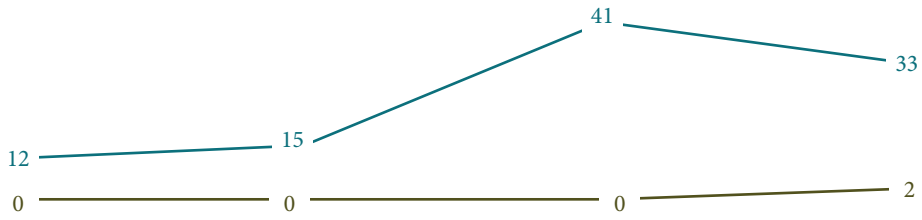
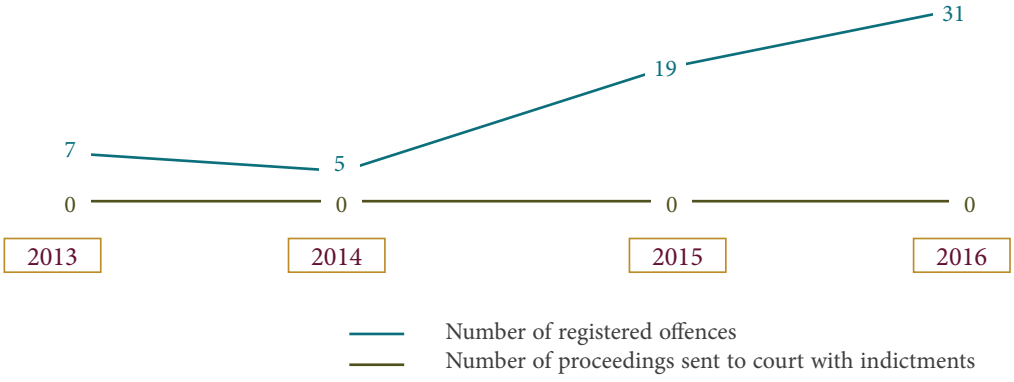


Fig. 4.12

Criminal proceedings in cases of interference with the actions of a defender/representative (art. 397 of the Criminal Code) (PGO statistics)



In fact, the number of proceedings launched by the prosecution authorities, did not exceed 1% of the number of violations recorded by the Coordinating Centre. This situation can be a sign of unwillingness to investigate these cases or blatant neglect of violations of the right to defense by prosecutors.

The lawyers' opinions provided below confirm these conclusions:

Lawyer

Procedural supervisor calls and says, "Dear lawyers, you come but do not speak up a lot. He will tell you what is hidden where; we will come and dig it all out".

Lawyer

Last year, August 2015. I was called by the Centre for an apprehension. I came, asked the investigator, there was a prosecutor together with the investigator, which surprised me. I thought, "Prosecutor is together with the investigator at the apprehension, it is the first time the district precinct is working, and the prosecutor's office is working. I came, and they are showing me the investigating judge's ruling on restraint measure of detention for 2 months – without a lawyer! I came, and he already had the ruling. He is in the precinct. I could only write an appeal since all the documents were there. And the prosecutor is standing there; I laughed and said, "Guys, this is it. I don't know how else you can mock the law". He said, "Everything is alright. He didn't want to have a lawyer, he signed a statement".

Lawyer

There were cases when I [lawyer – ed.] came upon assignment from the Centre, talked to the person and found out that before I arrived the person had been in the precinct for 4-5 hours. They questioned the person as a witness, the person gave these explanations. After that, they told her she was arrested, drew up an apprehension report without a lawyer. When I came, the apprehension report had already been drawn up. Then I asked who the procedural supervisor was. I tried to figure out how an apprehension report was drawn up without a defender, namely, whether the person informed about all the rights. How did it happen? Unfortunately, nobody responded to the complaints submitted to the prosecutor's office. I had a conversation with the procedural supervisor, there were complaints and statements, but nobody responds to that. Everyone is simply suggesting to go to the investigating judge with all complaints, everything you want, and the judge will review those.

We should also note that lawyers are extremely inactive in response to violations of their clients' rights to defense. Lawyers should submit a crime report to the prosecutor's office in each of these cases, as well as request that information is included into the Unified register of pre-trial investigations within 24 hours and the pre-trial investigation is launched. Unfortunately, this practice is more often an exemption rather than a rule.

The study also revealed a widespread practice that constitutes a gross violation of several human rights, including the right to defense. The practice concerns maximum delays by investigators and prosecutors in notifying the actual suspected person of suspicion where this person is not officially arrested.

According to prosecutors, the notice of suspicion in these cases is served only when almost all proof of the person's involvement in the offence has been collected, i.e. at the end of pre-trial investigation.

Prosecutor — *If a person was notified of suspicion, only those investigative activities take place that are impossible without the notice of suspicion, for example, psychiatric assessment. In general, all evidence is collected before the notice of suspicion is served; and this evidence serves as a basis for the indictment.*

Prosecutor — *It sometimes happens that indictment is prepared right after the notice of suspicion was served.*

Prosecutor — *I don't know about the others, but this is what we do: after the person is notified of suspicion, police consider their work done and that they can rest. You cannot contact the investigator, support services will be busy with other cases. If you leave investigative activities for later [after the notice of suspicion – ed.] there is a chance that you will have to extend [extend the pre-trial investigation – ed.] because everyone else is busy. I sleep better at night when I know that I have done the maximum of what is possible in grave or particularly grave crimes, i.e. investigative experiments with the suspect. We try to do everything before serving the notice of suspicion to avoid reasons for extension in the future.*

As a result of this practice, there is full pre-trial investigation concerning the actual suspect without recognizing the suspect's status, which prevents the person from exercising his/her right to defense from prosecution, as well as all relevant rights.

In addition to "convenience" for the law enforcement officials (the lawyer comes into the case only after the notice of suspicion has been served), we should note that prosecutors are punished for recalling the notice of suspicion. As a result, they "play safe" and try to collect as much evidence as possible to support suspicion:

Prosecutor — *Recalling the notice of suspicion will definitely result in reprimand.*

In addition, prosecutors in a focus group talked about a practice used by judges when they return the indictment because it is inconsistent with the notice of suspicion.

As a result, the new instrument of the notice of suspicion, initially aimed at providing a suspect with a status during initial stages of investigation, has actually become analogous to the issuance of charges under the previous Criminal Procedure Code, or even a prototype of the indictment.

4.6 Inquiry into potential acts of torture and ill-treatment of apprehended persons

According to Article 1 of the UN Convention against Torture,

> *the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"*[111].
>
> *"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"*[112].
>
> *"An order from a superior officer or a public authority may not be invoked as a justification of torture"*[113].

International standards on the prohibition of torture are incorporated into the criminal procedure law of Ukraine. For instance, article 11 of the CPC states directly, *"In the course of criminal proceedings, it shall be prohibited to subject an individual to torture or to inhuman or degrading treatment or punishment, or to threaten or use such treatment, or to keep an individual in humiliating conditions, or to force to actions which humiliate dignity"* (art. 11, CPC of Ukraine).

Since law enforcement officials use violence against the suspects, as a rule, to obtain testimony or confession, the law provides additional safeguards for this groups to protect them from ill-treatment – freedom from self-incrimination and the right to not testify against close relatives and family members, which has been included into the general principles of criminal proceedings (art. 18, CPC of Ukraine). According to article 18 of the CPC, freedom from self-incrimination and the right not to testify against close relatives and family members includes the following:

- no one shall be compelled to admit their guilt of a criminal offence or to give explanations, testimonies, which may serve a ground for suspecting them or charging with a commission of a criminal offence;

111 Article 1, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

112 Ibid, Article 2.

113 Ibid, Article 2(3).

- everyone shall have the right to keep silence about suspicion, a charge against him/her or waive answering questions at any time, and, to be promptly informed of such right;
- no person may be compelled to give any explanations or testimonies, which may serve a ground for suspecting his/her close relatives or family members of, or charging them with, commission of a criminal offence.

Freedom from self-incrimination and the right not to testify against oneself are enshrined in article 42 of the CPC among the rights of a suspect. For instance, according to article 42, the suspect has the right to:

- keep silence about suspicion, a charge against him/her or waive answering questions at any time;
- give explanations, testimony with regard to the suspicion, and a charge against him/her or waive giving explanations, testimony at any time.

In addition to the negative obligation of the state to refrain from the use of torture against detainees, international standards in this field establish a number of positive duties, including the duty of the state to investigate these acts.

As stated by the European Court of Human Rights in its decisions in Article 3 cases, each claim or report on torture should be examined through an effective official investigation, which must be objective, impartial and comprehensive.

For the investigation to be regarded as "effective", *"it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. For an investigation to be effective, those responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence. Moreover, the notion of an effective remedy in respect of an allegation of ill-treatment also entails effective access for the complainant to the investigation procedure*[114].

In its decisions against Ukraine, the ECtHR has repeatedly pointed out the low effectiveness of investigation of reports on the use of torture in our country. The key deficiencies in investigation, according to the Court, include:

- pre-investigation instead of comprehensive investigation of these claims. According to the Court, this investigative procedure does not comply with the principles of an effective remedy, because the

114 See Danilov v. Ukraine (2014), application No. 2585/06, ECtHR, para 69.

enquiring officer can take only a limited number of procedural steps within that procedure while a victim's procedural status is not properly formalized;

- failure to ensure the effective participation of the victim in the investigation;
- ordering police to conduct an internal inquiry (investigation);
- delay in providing medical forensic evidence;
- failure to establish all circumstances in which the applicant had sustained injuries;
- failure to investigate lawfulness and proportionality of the use of force by law enforcement officials;
- excessive length of investigation etc.[115]

In 2012, taking into account the systemic nature of violations of Article 3 of the Convention – the failure to conduct effective investigation into acts of torture, the court issued the so-called pilot judgement in the case of Kaverzin v. Ukraine. To execute this judgement, Ukraine had to take measure to bring the investigation of complaints on ill-treatment and torture in compliance with the Convention requirements and ECHR case law.

Has the situation with investigation of torture and ill-treatment changed following the pilot judgement of the European Court of Human Rights?

The answer to this question can be given through analysis of the PGO official data on the number of criminal proceedings in these cases registered and sent to courts by prosecution authorities.

Unlike the statistical data provided earlier, statistics form No. 1 СЛ contains more detail on criminal proceedings in cases of torture and makes it possible to identify cases against MoI officials (the National Police)[116].

Figure 4.13 shows that despite significant difference in the number of proceedings registered under the article prohibiting torture in 2013 when compared to other years, the number of proceedings sent to court with an indictment remains virtually the same, less than 6 proceedings per year.

Article 365 of the Criminal Code is more "popular", and it is often used when prosecuting law enforcement officials for cruel treatment of suspects.

Part 2 of this article covers *"the excess of authority or official powers accompanied with violence or threat of violence, use of weapons or special gear, or actions that caused pain or were derogatory to the victim's personal dignity in the absence of signs of torture"*.

115 See ECtHR judgments in Savitskiy v. Ukraine, Vitkovskiy v. Ukraine, Belousov v. Ukraine, Bocharov v. Ukraine, Gordiyenko v. Ukraine.

116 Form No. 1 СЛ "On activities of pre-trial investigation authorities", Annex 1.

Fig. 4.13

Criminal proceedings in cases of torture (article 127) (PGO statistics)

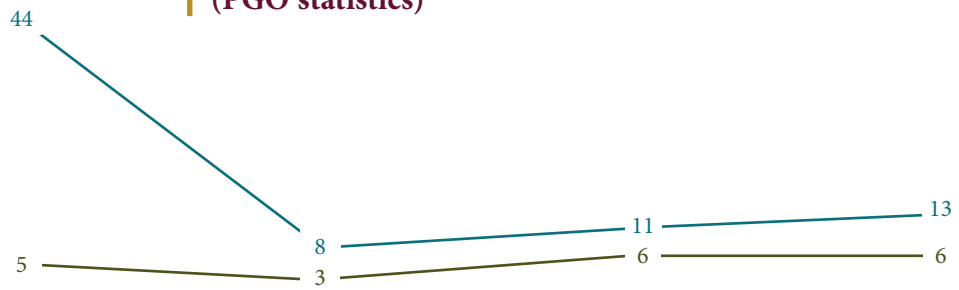
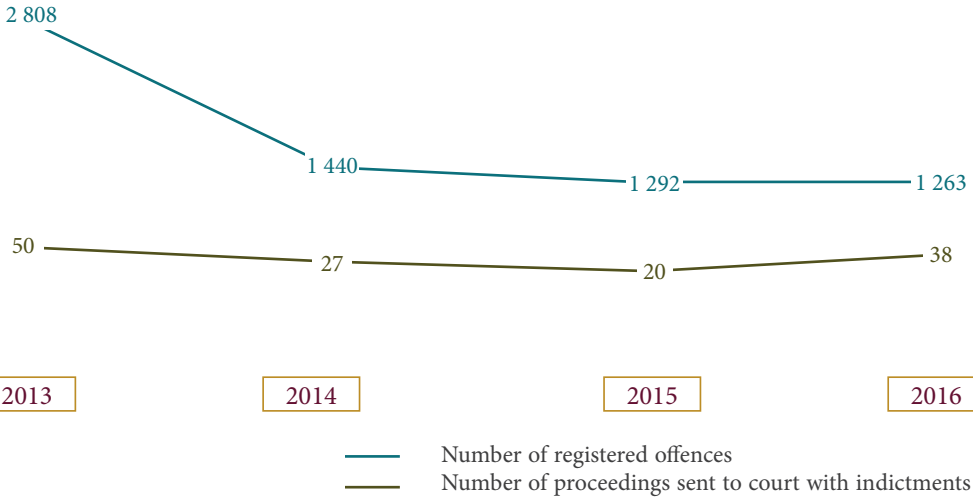


Fig. 4.14

Criminal proceedings in cases of abuse of power (article 365) (PGO statistics)



Unfortunately, statistics forms of the PGO do not allow for disaggregating data in accordance with different parts of article 365, which makes it impossible to receive accurate information about the number of crimes committed by law enforcement officials with the use of violence (statistics under part 2 of this article would provide such information).

At the same time, even aggregated data on all three parts of article 365 provides a very clear illustration (Figure 4.14). To provide better illustration, we will present a number of proceedings sent to court with indictments as a percentage of proceedings registered under this article: 2013 – 1, 78 %, 2014 – 1,87 %, 2015 – 1,55 % , 2016 – 3 %.

Analysis of provided data shows a stable tendency of decrease in the number of proceedings registered by prosecution authorities under article 365 (2808 in 2013 and 1263 in 2016). At the same time, the percentage of proceedings sent to court with an indictment remained virtually the same, except in 2016, when it increased almost by two-fold. However, even despite certain increase, the percentage of proceedings sent to court with an indictment was less than 3% of all proceedings registered under this article.

As mentioned above, liability for ill-treatment of the detainee is also covered by article 373 of the Criminal Code, which establishes punishment for compelling an individual to testify.

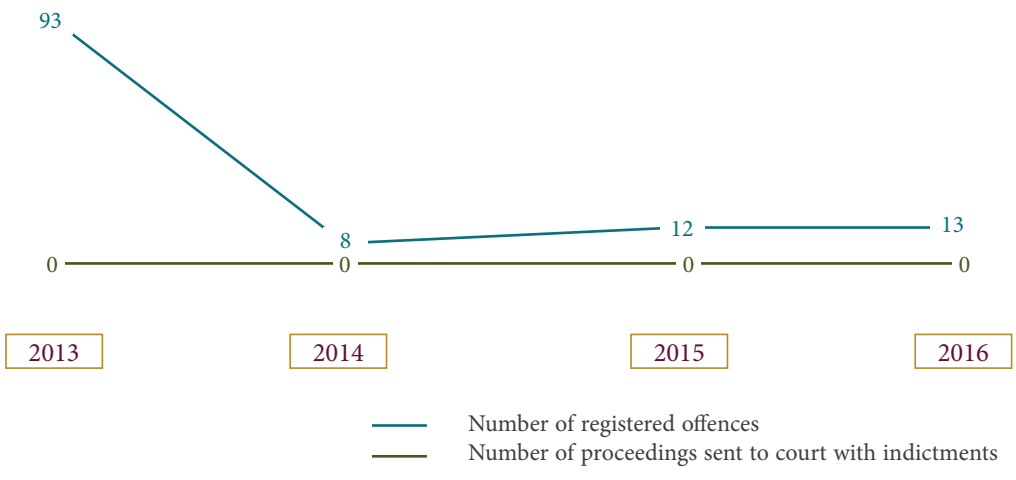
The highest number of proceedings registered by prosecution authorities under this article (also under articles 127 and 365) was in 2013 – 93 proceedings (Figure 4.15). In 2014, the number has dropped sharply – by more than 10 times – to only 8 proceedings.

In 2016, there were 13 proceedings registered. At the same time, prosecution authorities did not send a single case with an indictment for compelling to testify to court over the past four years.

Analysis of the PGO data shows that investigation of ill-treatment of apprehended persons by prosecution authorities correlates with the unsatisfactory investigation of other human rights violations mentioned above.

In our view, the number of proceedings registered by prosecution authorities in relation to gross human rights violations and the number of proceedings sent to court with an indictment do not reflect the scale of human rights violations committed by law enforcement officials.

Fig. 4.15 **Criminal proceedings in cases of coercion to testify (art.373 of the Criminal Code) (PGO statistics)**



Currently (before the State Bureau of Investigations begins to operate), pre-trial investigation of crimes of torture is conducted by investigation units in regional prosecutor's offices and the Prosecutor General's Office.

At the same time, as mentioned above, any public prosecutor, including a procedural supervisor in criminal proceedings, is obliged in accordance with article 214 immediately, but in any case no later than within 24 hours after submission of a report, information on a criminal offense or after s/he has learned on his own from any source about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the Unified register of pre-trial investigations, and to initiate investigation.

Accordingly, after receiving information about torture from any source, even in the absence of relevant complaints, procedural supervisor shall enter this data into the URPI and assign jurisdiction to the investigation unit of the regional prosecutor's office to conduct relevant investigation.

Any inquiry into these complaints without official investigation are in violation of domestic legislation and the ECtHR case law.

Unfortunately, there are cases when procedural supervisors fail to respond to clear signs of bodily injuries on suspects. During an interview with a deputy head of the prosecutor's office in one of the regions, he provided the following comments on these cases:

Prosecutor — *Even if procedural supervisor sees bodily injuries on a suspect in his case, most likely, he will not take any action, since the law does not require that he do so.*

At the same time, during focus groups with lawyers and investigating judges, they said that prosecutors sometimes even facilitate this treatment by law enforcement officials.

Investigating judge — *The stereotype is to apprehend a person and hold him isolated at least for some time to obtain confession – both the prosecution service and investigators still use this approach.*

Investigating judge — *If the client pleads article 63 [of the Constitution – ed.] and refuses to testify, the investigators receives an order [from the prosecutor – ed.] to work him, instead of telling the investigator to look for other sources of evidence.*

CONCLUSIONS

1. The study showed that prosecutors do not fully understand their role in ensuring the rights and freedoms of a suspect.

2. The majority of respondents in this study consider that there are almost no violations of human rights during pre-trial investigations. In addition, procedural supervisors think that in most cases, suspects complain that their rights are violated to avoid responsibility for the offence. Every fourth respondent considers that it is possible to disregard certain violations of the suspect's rights if it helps obtain evidence of his involvement in the offence.

3. Human rights violations often constitute criminal acts. Therefore, they should be investigated in the same way as other categories of crimes except for certain specific aspects. Unfortunately, there is virtually no practice among prosecutors on recording information about violations of suspect's rights into the Unified register of pre-trial investigators with the purpose of conducting investigation.

4. There is a widespread practice among investigators and prosecutors to delay notifying the actual suspect of suspicion in cases when the person has not been arrested officially. As a result, there is full pre-trial investigation concerning the actual suspect without recognizing the suspect's status, which prevents the person from exercising his/her right to defense from prosecution, as well as all relevant rights.

5. Due to potential negative consequences following acquittals or any other action mitigating the situation of a person, public prosecutors avoid collecting exculpatory evidence and can "turn a blind eye" to certain human rights violations if they resulted in collecting valuable evidence for the prosecution.

Key recommendations of the study

1 On the nature of the role of procedural guidance

1. **To exclude the elements of supervision inconsistent with procedural guidance through legislative amendments and leave procedural guidance as a single function of the prosecutor's office during pre-trial stage of criminal proceedings.**
2. **To separate the functions of the head of pre-trial investigation agency and procedural supervisor concerning organization of pre-trial investigation by distinguishing organizational and procedural functions and assigning organizational functions to the head of pre-trial investigation agency.**
3. **To develop algorithms of possible action for prosecutors to ensure effective procedural guidance at different stages of proceedings.**
4. **To develop indicators of effectiveness of prosecutor's exercise of procedural guidance and introduce a system of regular evaluation.**
5. **To develop a quality management system for prosecutor's performance based on minimum requirements for exercise of procedural guidance, regular internal peer review by most experienced colleagues, needs assessment concerning training and professional development of prosecutors – procedural supervisors, as well as regular training activities.**

2 On the structure of the prosecution system and effective exercise of procedural guidance

1. **To harmonize the structure and key functions of the prosecutor's offices ensuring consistency of the exercise of each function, in particular, by eliminating overlaps of functions and tasks between structural units.**
2. **To eliminate the function of area-based control performed by high-level prosecutor's offices and redistribute human and financial resources to support local prosecutor's offices.**

3. **To develop reasonable criteria for determining workload for prosecutors – procedural supervisors and the optimal number of procedural supervisors for different levels of prosecution authorities.**

4. **Taking into account the international practice of using dossiers of public prosecutors, to analyze the feasibility of using the outdated instrument of supervisory proceedings. To consider the possibility of integrating the dossier into the electronic criminal case system in the future.**

5. **To ensure proper compliance with the provisions of article 81 of the Law of Ukraine "On Public Prosecutor's Office" on the structure of prosecutor's salary by decreasing the proportion of bonuses in the overall structure of remuneration for prosecutors and increasing the share of required payments.**

6. **To take action to ensure proper procedural independence of prosecutors including, in particular:**
   - **To discontinue the practice of reporting on the progress of investigation at operational or other meetings;**
   - **To ban heads of prosecutor's offices from giving written and verbal instructions on the investigation process;**
   - **To discontinue the practice of 'informal punishment' of prosecutors for taking lawful action that mitigates the situation of the suspect or apprehended/accused individual;**
   - **To ban approvals for procedural documents from the superiors.**

7. **To review relevant internal regulations on the exercise of procedural guidance and restrict the regulatory powers to the matters of organizing the work of prosecutor's offices and managing, without interference with procedural activities of prosecutors.**

3 On substantive and high-quality performance of a procedural supervisor

1. **The following aspects should be given due consideration during development of training programs for prosecutors – procedural supervisors**
   - **procedural supervisors exercising control over the time and date of actual;**
   - **means to identify illegal pressure on an individual, the use torture or other ill-treatment;**
   - **the role and meaning of notice of suspicion in criminal proceedings;**
   - **constructive and effective communication between the investigator and public prosecutor's office, forms of cooperation and joint action relevant to procedural guidance;**

- **the need to enter all information about crime into the Unified registry of pre-trial investigation, in particular those concerning gross violations of human rights.**

2. **For the High Specialized Court of Ukraine, to produce an review of jurisprudence on analysis and assessment of the reasonability of the term for serving the notice of suspicion during evaluation of evidence in consideration of the case on merits.**
3. **To amend the list of gross human rights violations (part 2 of article 87 of the CPC) by adding, "deliberate postponement of the time for serving the notice of suspicion".**
4. **To transfer the function of challenging reasonability of the length of pre-trial investigation from prosecutors to investigating judges; to establish a procedure for determining just satisfaction in monetary form should the investigating judge find violation of reasonable terms.**
5. **In the CPC, to provide for mandatory participation of a defense counsel; the use of 'fast-track procedure' for evaluation of evidence as described in article 349(3) of the CPC.**

Belousov et. al.
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STUDY REPORT

THE ROLE OF THE PUBLIC PROSECUTOR AT THE PRE-TRIAL STAGE OF CRIMINAL PROCEEDINGS

2017