

**UNIVERSITY OF TIMISOARA
FACULTY OF LAW**

**UNIVERSITY OF PÉCS
FACULTY OF LAW**

**JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 1/2015**

**Edited biannually by courtesy of the Criminal Law
Departments within the Law Faculties of the West University
of Timisoara and the University of Pécs**



Powers Vested with the Public Prosecutor in Criminal Proceedings at the First Instance Court Pursuant to the Effective Laws of Ukraine

Ph.D. student Mariia ZHUK*

*The National University of Ostroh Academy,
I. Malynovskyi Institute of Law, UKRAINE*

Abstract:

The present article contains research on legal status of the public prosecutor in criminal proceedings at the first instance court pursuant to the Code of Criminal Procedure of Ukraine. In particular, the author has analysed the scope of fundamental powers vested with the public prosecutor in criminal proceedings at the first instance court, specifically: supporting the charges brought by the public prosecution before the court, changing charges, bringing supplemental charges, initiating proceedings against a legal entity and refusal to support the charges brought by the public prosecution.

Keywords: *Code of Criminal Procedure of Ukraine, public prosecutor, court proceedings, prosecution on behalf of the state, bill of indictment.*

1. Introduction

An important step towards harmonization of the Ukrainian laws pursuant to the international norms and standards consisted in approval in 2012 of a new Code of Criminal Procedure of Ukraine; the norms of such new Code implement fundamental ideas and values in the field of securing human rights and freedoms, fix the principles of supremacy of the law and are aimed at renovation of a democratic state. In this Code the law-maker joined the positive Ukrainian experience together with the experience of European countries and countries of Anglo-Saxon legal family; the law-maker also proposed such model of criminal proceedings which complies, to the maximum extent, with the international standards in the field of criminal proceedings, practice of the European Court of Human Rights and regulations of the Constitution of Ukraine. Due to the above, the provisions set out in the Code of Criminal Procedure of Ukraine were highly appreciated by the international organizations and experts, who emphasized their compliance with the existing standards and progressiveness of contents thereof, even in comparison with similar codes of numerous European countries. Nowadays, Ukraine faces the most complicated stage of reforms in the criminal justice: from legislative initiatives towards implementation of elaborated ideas. The aforesaid challenging activities require consolidation of efforts by all relevant bodies, conducting numerous specialized scientific researches as well as active support and understanding on the part of the public.

The Code of Criminal Procedure of Ukraine contains numerous novelties that changed not only the relevant law-enforcement practice of courts, prosecutor's office and pre-trial bodies, but also theoretical fundamentals of such activities.

* E-mail: Maria_Zhuk@yahoo.com.

As to the implemented innovations, it should be pointed out that the following innovations are of the essence: those pertaining to the public prosecutor's status in the court proceedings and his powers in the court proceedings conducted at the first instance court, specifically: powers regarding supporting the charges brought by the prosecution on behalf of the state, changing the charges already brought or bringing supplemental ones, initiating proceedings against a legal entity and refusal to support the charges brought by the public prosecution.

2. The public prosecutor's supporting the charges brought by the prosecution on behalf of the state before court

The public prosecutor's supporting the charges brought by the prosecution on behalf of the state before the court, is one of the constitutional fundamentals for administration of justice in Ukraine (section 5 (part 3) of Article 129 of the Constitution of Ukraine)¹ and, concurrently, is a duty in criminal proceedings, carried out by the public prosecutor as a core participant of prosecution in court proceedings (section 2 of Article 121 of the Constitution, part 2 of Article 36 of the Code of Criminal Procedure of Ukraine²). Such duty is also fixed by Article 22 of the Law of Ukraine "On the Public Prosecution Service", whereby the public prosecutor shall support the charges brought by the prosecution on behalf of the state in criminal proceedings by exercising the rights, and performing the duties, stipulated by the Code of Criminal Procedure of Ukraine.³

The participants in the process pertaining to supporting the charges brought by the prosecution on behalf of the state are listed here below: Prosecutor General of Ukraine; First Deputy Prosecutor General of Ukraine; Deputy Prosecutor General of Ukraine; Deputy Prosecutor General of Ukraine – Chief Military Procurator; Deputy Prosecutor General of Ukraine – Head of the Specialized Anti-Corruption Prosecutor's Office; head of the department of the Office of the Prosecutor General of Ukraine; deputy head of the department of the Office of the Prosecutor General of Ukraine; head of the regional public prosecutor's office; first deputy head of the regional public prosecutor's office; deputy head of the regional public prosecutor's office; deputy head of the department of the regional public prosecutor's office; public prosecutor of the regional public prosecutor's office; head of the local public prosecutor's office; first deputy head of the local public prosecutor's office; deputy head of the local public prosecutor's office; head of the department of the local public prosecutor's office; deputy head of the department of the local public prosecutor's office; public prosecutor of the local public prosecutor's office.

The public prosecutor's participation in all criminal proceedings is mandatory, except for the instances stipulated by the Code of Criminal Procedure of Ukraine. In particular, such instances include: 1) criminal proceedings initiated by a private person,

¹ Constitution of Ukraine: Verkhovna Rada of Ukraine, Law dated 28.06.1996. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 1996, № 30.

² Code of Criminal Procedure of Ukraine: Verkhovna Rada of Ukraine, Law dated 13.04.2012. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2013, № 9-10, № 11-12, № 13.

³ On the Public Prosecution Service: Verkhovna Rada of Ukraine, Law dated 14.10.2014. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2015, № 2-3.

wherein a victim and his/her attorney act as prosecution (part 4 of Article 26, Section 4 (part 3) of Article 56, Article 477 of the Code of Criminal Procedure of Ukraine) and 2) the public prosecutor's refusal to support the charges brought by the public prosecution on behalf of the state (part I of Article 264 of the Code of Criminal Procedure of Ukraine) (if the public prosecutor refuses to support the charges, then the right to support the charges brought by the public prosecution, shall pass to the victim. The proceedings wherein the victim agreed to support the charges brought by the prosecution before court shall acquire the status of the proceedings initiated by a private person and shall be conducted in accordance with the procedure applicable for charges brought by a private person).

Pursuant to the procedural laws of Ukraine, supporting the charges brought by the prosecution on behalf of the state shall mean carrying out procedural activities by the public prosecutor, aimed at producing enough evidence for the court in order to support the charges, which leads to holding the person who committed the criminal offence, liable under the criminal laws. The charges to be brought by the prosecution on behalf of the state shall be set out by the investigator in the bill of indictment. In turn, the public prosecutor shall have the right either to approve the bill of indictment, or if he fails to agree with the bill of indictment prepared by the investigator, then the public prosecutor shall compile a new bill of indictment pursuant to part 1 of Article 291 of the Code of Criminal Procedure of Ukraine.

Acting as the prosecutor on behalf of the state, participating in adversary criminal proceedings, the public prosecutor shall apply during such proceedings all available procedural means for proving the accused party's guilt. The public prosecutor must take an active part in establishing the circumstances of criminal offence and their examination on the basis of relevant evidence, be objective and unbiased in assessing the same according to the criteria of relevance, admissibility and credibility.⁴ Being a party engaged in the process of tendering an averment, the public prosecutor shall have the right to provide evidence to court, participate in examination of such evidence, submit arguments in favour of the evidence provided by him, counter arguments provided by the defense, file pleas seeking new evidence in the case, and make assessment of the collected evidence etc.

When supporting the charges brought by the prosecution on behalf of the state before court, the public prosecutor shall enjoy procedural autonomy and independence. No party shall be allowed to interfere with the public prosecutor's activities, including the public prosecutor of a higher rank and even the official who assigned for the public prosecutor such duty of supporting the charges brought by the prosecution on behalf of the state in specific criminal proceedings. The public prosecutor shall elect his own position in the proceedings brought before the court, based on his own belief and shall be free in making his own conclusions and motions before the court in connection with assessment of the evidence, provability of charges, nature of the offence, and application of specific punishment with respect to the defendant, etc. The public prosecutor, along with other participants of the criminal proceedings shall be subordinate only to the judge presiding in the proceedings.

⁴ On organization of the public prosecutors in criminal proceedings: Order of the Prosecutor General, dated 19.12.2012.

3. Powers vested with the public prosecutor in connection with changing the charges during criminal proceedings at the first instance court

The Code of Criminal Procedure of Ukraine in its Article 337 "Determination of scope of trial" determines that "a trial is conducted only with respect to the person against whom charges were brought and only within the scope of charges brought pursuant to the bill of indictment, except for the instances stipulated by the Code of Criminal Procedure".

Correspondingly, the court is not entitled: to conduct a trial with respect to any other persons, no matter whether they are involved in the current proceedings, via examination and assessment of evidence of their guilt or lack thereof in commitment of the crime inculcated to the criminal defendant or commitment of another crime; to make the proceedings-related decisions with respect to any other persons, whereby the persons whose criminal proceedings were closed for any reasons or were severed into other proceedings, are included into the current proceedings. Based on results of examination, the court is not entitled to change charges, at its own initiative, and pursuant to such changed charges to deliver a judgment which would worsen the criminal defendant's position and against which such criminal defendant did not defend in court.

The Code of Criminal Procedure of Ukraine vests the right to change the scope of trial in criminal proceedings, with the prosecutor. Thus, pursuant to Article 338 of the Code: for the purpose of changing legal qualification and (or) volume of charges, the public prosecutor is entitled to change charges towards both less and more severe ones. According to the Code, establishment of new factual circumstances relating to the criminal offence of which a person is accused and the prosecutor's convincement in the necessity to change charges upon examination of evidence in court serves as grounds for change of charges by the public prosecutor in court.

The laws provide the public prosecutor with the possibility to change (during examination) the charges brought against the person within the event of crime inculcated to such person in connection with all constituent elements of such crime: 1) event of crime, its objective aspects (in terms of nature of criminal act, its stage, partnership in crime, time, place, method, circumstances and environment, nature and volume of criminal consequences; 2) as to subjective aspects of crime (in terms of forms of guilt, motives, goal, evil intents, etc.; 3) as to legally important elements of the subject of crime (in terms of age, degree of legal capacity, special (ad hoc) elements of subject; 4) as to elements of the object of crime (elements of legal entities or individuals injured as a result of commitment of crime, rights, freedoms, interests and other benefits of the victim, elements of target of crime).

A prosecutor's plea seeking change of charges may be filed at any stage of the trial up to the stage when judges withdraw to the conference room. A number of changes that may be introduced by the public prosecutor on behalf of the state are not limited by the effective laws.

If the public prosecutor arrives at the conclusion that charges need to be changed, he shall compile the bill of indictment, in which such changed charges are stated and grounds behind such decision made by the public prosecutor are set out. Such new bill of indictment containing changed charges shall be filed by the public prosecutor (save the Prosecutor General of Ukraine) with the public prosecutor of a higher rank. If the

public prosecutor of a higher rank fails to approve the bill of indictment containing changed charges, he shall deny the participation of the public prosecutor who initiated such changes, and shall be able to independently participate in such proceedings in the capacity of the public prosecutor, or shall assign another public prosecutor to participate in the aforesaid proceedings.

In order to safeguard the accused party's rights, the court shall explain to the accused party that it is to defend in court against new charges and shall postpone the respective trial for no less than 7 days so that the accused party and its attorney could prepare for defense against new charges. This period of time may be either shortened, or prolonged subject to the plea from the defense party. The compiled bill of indictment whereby the charges were changed, shall thereupon determine the scope of trial in criminal proceedings.

If the bill of indictment containing the changed charges includes the issue of application of the law of Ukraine regarding criminal liability for less severe offence or reduction of volume of charges, then the injured party shall be vested with the right to press the charges in their initial volume. If the complainant decides to exercise such right, during the prolonged trial she/he shall be defending from both charges and court shall deliver a judgment based on all established circumstances and their verification on the basis of respective evidence.

Only when the public prosecutor failed to exercise its right to change charges during court trial or failed to change the same in accordance with the facts established during court trial court (in the instances when there are factual and (or) legal grounds for change changes, established during the trial) may change charges at its own initiative. The court may, for the purpose of delivering a fair judgment and protecting human rights and fundamental freedoms, independently go beyond the scope of the charges set out in indictment, though the court is able only to change legal qualification of the criminal proceedings if such action leads to improvement of the position of the person against whom criminal proceedings are initiated (Article 337 of the Code of Criminal Procedure of Ukraine). Thus, the court is deprived of the possibility to undertake any actions with respect to charges. In its judgment, court may amend the charges only towards mitigation (to apply the law regarding a less severe crime, to exclude qualifying circumstances, one or two episodes of criminal activities having joint qualification with other criminal episodes, etc.).

4. The public prosecutor's bringing supplemental charges in criminal proceedings at the first instance court and initiating proceedings against a legal entity

As to the institute of bringing supplemental charges, it constitutes a novelty for the criminal procedure of Ukraine. Bringing supplemental charges does not constitute a change in the initial charges, nor does it mean consolidation of criminal proceedings. It is a separate independent institute of criminal proceedings in Ukraine. The grounds for bringing supplemental charges by the public prosecutor mean that during a court trial the public prosecutor receives certain information (applications from the interested parties; notifications from the investigative bodies, mass media organs; testimony from the persons who were interrogated during the court trial; other data received by the court or by the pre-trial investigation bodies) on possible commitment by the defendant

of another criminal offence, with respect to which no charges were brought. Such supplemental charges should be closely linked with the initial ones and severed trials in connection with such charges are deemed as impossible due to objective reasons.

Upon receipt of such information, the public prosecutor must comply with the requirement stipulated by the Code of Criminal Procedure of Ukraine, governing the procedure whereby the public prosecutor shall seek approval of supplemental charges which may be brought, by the head of the public prosecutor's office in which the public prosecutor is holding his office. Thereupon, the public prosecutor shall have the right to file with court a plea seeking bringing supplemental charges during the same proceedings which were initiated as a result of initial charges.

In case of satisfaction of the prosecutor's plea regarding bringing supplemental charges, the court shall be obliged to postpone a trial for a period of time required for preparation for defense from supplemental charges and for compliance by the public prosecutor with all procedural requirements stipulated by the effective laws; however, a trial may be postponed for no more than 14 days. If the new bill of indictment appears to be complicated, the defendant's attorney may file its plea with the court, seeking prolongation of the period of time required for preparation for defense against new charges.

Within a time limit set by the court and provided that the sufficient evidence is available, the public prosecutor shall prepare a written notice of suspicion in commitment of criminal offence and serve it on the defendant within one day. Date and time of the notice of suspicion, legal qualification of the criminal offence with reference to the specific article (part thereof) of the law of Ukraine regarding criminal liability shall be forthwith entered by the public prosecutor into the Unified Register of Pre-Trial Investigations.

Upon acknowledgment of the collected evidence as sufficient for bringing supplemental charges and preparation of the new bill of indictment, the public prosecutor shall notify the defendant, the defendant's attorney and lawful representative, injured party, the injured party's attorney and lawful representative, civil claimant, the civil claimant's attorney and lawful representative, civil defendant and the civil defendant's attorney, of the procedure for opening materials to the parties and provision of access thereto.

Once the parties complete their review of the materials, the access to which was opened for them, and review of additional materials received prior to, or during, the court proceedings, that they provided to each other, the public prosecutor shall compile a new bill of indictment containing supplemental charges, along with the initial ones, and file the same with the court.

Upon completion of preparation for defense against the supplemental charges, within a time limit determined by the court, the court proceedings shall commence with the status hearing, during which the presiding judge shall establish the parties' opinions regarding possibility to appoint hearings in the case. The necessity of subsequent examination of the evidence which had been examined by the court prior to the date when the supplemental charges were brought, may be implemented only if the court acknowledges such necessity or on the basis of the parties' respective pleas.

It should be emphasized that the newly introduced institute of bringing supplemental charges during court proceedings, constitutes, to a certain extent, an implicit form of supplementary investigation which was known yet at the time of the 1960

Soviet Code of Criminal Procedure⁵ of (it was in full force and effect until the year of 2012). The aforesaid institute is particularly dangerous for both the person and system of administration of justice. It is due to the fact that such Code provided for two concurrent prosecution processes against the person: one process was associated with the criminal proceedings initiated by the public prosecutor as a result of his filing a bill of indictment with the court; and the second criminal proceedings were conducted officially (with entering respective data into the Unified Register of Pre-Trial Investigations), though absolutely secretly from such person, by collecting evidence against the person (mainly, as a result of carrying out confidential investigative actions) and without serving a notice of suspicion against such person. The provisions of the Code of Criminal Procedure allowed such processes; moreover, they were allowed on lawful grounds for the following reasons: once the data are entered into the Unified State Register of Pre-Trial Investigations and notice of suspicion is served on the person, the period of investigation is unlimited; given denial of the category of "criminal case" at the pre-trial stage and availability of the under-table practice for collection of evidence for the public prosecutor, it is possible to have any secret evidential base whatsoever against anyone. Therefore, it is obvious that such institute must be reformed as the institute violating the rights and freedoms vested with the individual.

In order to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine, in 2013 the Supreme Council of Ukraine (Verkhovna Rada) passed the Law "On introduction of amendments into certain legislative acts of Ukraine to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine, in connection with responsibility of legal entities"⁶. On the basis of the aforesaid Law, the amendments were introduced into the Criminal Code⁷ and Code of Criminal Procedure of Ukraine. Such amendments determined a specific list of crimes, the commitment of which may lead to application of sanctions under the criminal laws with respect to the legal entity's authorized representative; such amendments also determined certain procedures to be applicable when the proceedings are initiated against a legal entity concurrently with the proceedings against the individuals who committed a criminal offence on behalf, or in the interests, of such legal entity.

Pursuant to such amendments, the public prosecutor was granted the right (provided that the results of criminal proceedings conducted in the court show sufficient grounds for application of the criminal law sanctions against the legal entity) to file with the court a substantiated plea seeking initiation of proceedings against the legal entity. The procedures applicable with respect to initiation of such proceedings are similar to those governing the process of bringing supplemental charges during proceedings in court.

⁵ Code of Criminal Procedure of Ukraine: Verkhovna Rada of Ukraine, Law dated 28.12.1960. Bulletin of the Verkhovna Rada of Ukrainian SSR (official gazette), 1961, № 2.

⁶ On introduction of amendments into certain legislative acts of Ukraine to implement the Action Plan for liberalization by the European Union of visa regime for Ukraine: Verkhovna Rada of Ukraine, Law dated 23.05.2013. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2014, № 12.

⁷ Criminal Code of Ukraine: Verkhovna Rada of Ukraine, Law dated 05.04.2001. Bulletin of the Verkhovna Rada of Ukraine (official gazette), 2001, № 25-26.

5. Implementation by the public prosecutor of the powers regarding refusal to support the charges brought by the prosecution on behalf of the state in court

The public prosecutor who is participating in the court hearings as the public prosecutor on behalf of the state must be confident in the defendant's guilt. Otherwise, he/she is not capable of performing his/her duty vested pursuant to the procedural laws.

The procedural laws of Ukraine provide for the following: if based on the results of court hearings the public prosecutor arrives at the conclusion that the charges brought against the person fail to be proved, such public prosecutor shall refrain from supporting the charges brought by the prosecution on behalf of the state (Article 340 of the Code of Criminal Procedure of Ukraine). In such case, the prosecutor's refusal to support the official prosecution is a duty of the prosecutor, rather than his/her right.

The public prosecutor's refusal to support the charges brought by the prosecution on behalf of the state is, in fact, the public prosecutor's declaration, his/her appealing to the court, whereby the public prosecutor objects, in part or in full, against the availability of substantiated charges and explains the inability to support them; in fact, the public prosecutor ceases, in full or in part, the continuity of prosecution activities against such person.

In case of the prosecutor's refusal to support the official prosecution in court, the chairman shall explain to the complainant his/her right to support the charges in court. If the complainant refuses to exercise his/her right to support the charges in court, the criminal proceedings shall be closed by the court.

If the complainant expresses his/her consent to support the charges in court, the chairman shall provide a certain period of time for the complainant, necessary for preparation for the trial. The complainant, who agreed to support the charges in court, shall exercise all rights vested with the prosecution party during a court trial. Though the law contains the word combination "all rights vested with the prosecution party", the complainant is not vested by the law with the right to enter into a plea-bargaining arrangement in criminal proceedings; the law also deprives the complainant of the possibility to change charges during court trial in criminal proceedings and to bring supplemental charges.

Based on the respective charges, criminal proceedings acquire the status of private ones and are to take place under the private charges procedure.

6. Conclusions

Research into the nature of fundamental powers vested with the public prosecutor in connection with criminal proceedings at the first instance court pursuant to the effective laws of Ukraine, enabled to establish the following facts: adoption of new Code of Criminal Procedure of Ukraine resulted in material amendment of the public prosecutor's status in the proceedings and his/her powers for ensuring real (rather than the declared one) equality of opportunities for parties in the criminal proceedings, fair balance between the interests of the state and those of the person who is to be held

liable under the criminal laws. Certain provisions of the Code of Criminal Procedure of Ukraine, in particular, those relating to the public prosecutor's powers to bring supplemental charges against the person during criminal proceedings at the first instance court, are perceived as capable of violating the rights and freedoms of the individual and citizen. Nevertheless, one should appreciate general intentions behind such new regulations of the Code of Criminal Procedure of Ukraine: securing the guarantees of human rights, affording the individual with opportunities to protect his/her rights, freedoms and interests in the criminal proceedings.