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PROBLEMS OF DETERMINING TIME LIMITS FOR APPLICATION OF SOME MEASURES TO ENSURE CRIMINAL PROCEEDINGS AND WAYS TO SOLVE THEM

Abstract. ***Purpose.*** The purpose of the article is to identify the measures to ensure criminal proceedings both by the time limit and by the manner of establishing such a term. ***Results.*** In the article, it is emphasised that the procedure for terminating the property attachment in case of closure of criminal proceedings by the investigator (which we consider to be measures with an unspecified time limit) is also indeterminate. Such cases are common, in particular, in proceedings in which a decision is made to seize property "without a suspect", allowing for the provisions of Articles 98 and 170 of the CPC (when the property of any individual or legal entity is seized if there are sufficient grounds to believe that the property is not the property of a suspect), that it is a material object that was an instrument of a criminal offence, retained its traces or contains other information that can be used as evidence of a fact or circumstances established in criminal proceedings, including an item that was the target of criminal offences, money, valuables and other things acquired criminally or obtained by a legal entity as a result of a criminal offence). ***Conclusions***. The analysis of the practice of applying measures to ensure criminal proceedings reveals some problems in determining the time limit of some of them. It is determined that measures to ensure criminal proceedings differ both in the time limit and in the manner of establishing such time limit. In practice, they can be considered in three categories: measures which last for a clearly defined time and which may be extended (provisional restriction on the use of a special right, removal from office, preventive measures, permission to apprehend for the purpose of compelled appearance); measures that last for a clearly defined time and cannot be extended (detention of a person, provisional access to things and documents, provisional property attachment); measures that do not have a defined time limit (personal obligation, personal guarantee, bail, imposition of a monetary penalty, property attachment, lawful detention; summons; property attachment included in the list for which permission to search is expressly granted in the search warrant and not related to items seized from circulation by law). Shortcomings of the regulatory mechanism for time limits are revealed in the application of: measures with a clearly defined time limit and those which cannot be extended and measures the time limit thereof is not defined. The author suggests ways to eliminate the shortcomings arising from the lack of definition or unclear definition of the time limits of these measures.

Key words: criminal proceedings, provisional measures, terms of application, problems of definition, ways of solution.

1. Introduction

Measures to ensure criminal proceedings are a new institute of criminal procedure law (as compared to the previously applicable legislation of Ukraine), the five-year experience of application thereof has proved its usefulness and expediency. The regulatory model of the institution of measures to ensure criminal proceedings is

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the result of the implementation of European standards of human rights in the field of criminal proceedings, convergence of their procedural form in democratic countries, the development of legislation thereof is determined by making human rights and the rule of law fundamental. However, law application shows that many problems arise with regard to measures to ensure criminal proceedings due to a number of both objective and subjective factors. Every legal state seeks to ensure that the conditions for applying measures restricting human rights are clearly defined by law. After all, the application of such measures entails a restriction of constitutional rights and freedoms, so in each case it is necessary to carefully consider the time limit of this restriction. However, the institution of measures to ensure criminal proceedings is not clearly regulated in this part. Many of the regulatory shortcomings are related to gaps, conflicts and contradictions in some legal provisions governing the application of measures to ensure criminal proceedings, in particular, with regard to the time limit for their implementation. This makes it relevant to formulate scientifically sound proposals aimed at improving the current criminal procedure legislation in this part.

A number of scholars have considered the particularities of setting and observing time limits in the context of other components of the mechanism for applying measures to ensure criminal proceedings. V. M. Tertyshnyk argues that the time limits belong to the system of guarantees of human rights, as well as the entire criminal procedure - in this term, according to the scientist, any institution of criminal procedure law, any procedural document is a procedural guarantee of establishing the truth, proper investigation and resolution of criminal proceedings (Tertyshnyk, 1999, p. 13). Yu. M. Hroshevyi, V. Ya. Tatsii, A.R. Tumaniants refer to the terms as general rules of applying measures to ensure criminal proceedings, in the context of the provision on the indication of the time limit in the ruling on the application of these measures (Hroshevyi, Tatsii, Tumaniants, 2013, p. 370). The issue of observance of time limits when applying measures to ensure criminal proceedings is partially under focus in the works by O.M. Humin (2013, pp. 226-231), O.M. Bondarenko (2014, pp. 98-100), O.M. Mykolenko (2014, pp. 81-84), S.M. Smokov (2012, pp. 628-632), O.H. Shylo (2011) and others. However, this issue has not been studied in a comprehensive manner and is of interest for scientific research.

The purpose of the article is to identify the measures to ensure criminal proceedings both by the time limit and by the method of establishing such a term.

2. Particularities of application of measures to ensure criminal proceedings

The analysis of the practice of applying measures to ensure criminal proceedings reveals some problems in determining the time limit of some of them.

In particular, there are shortcomings in the regulatory framework for time limits when applying provisional access to things and documents (which we refer to as measures that cannot be extended). For example, in accordance with Articles 159 and 163 of the CPC, when granting permission for provisional access to things and documents, the investigating judge may grant permission for their attachment (removal). The CPC, Article 164, part 1, paragraph 7, only specifies the validity period of the ruling, which may not exceed one month from the date of its issuance. However, the legislator does not regulate the validity period of the ruling in respect of the actually seized property, which, accordingly, causes difficulties in application. Moreover, the property seized during provisional access is not considered to be temporarily seized property and, accordingly, is not subject to the procedural status of such property and the procedure for terminating provisional attachment (Article 169 of the CPC). That is why it would be correct to assume that the validity period of the ruling on provisional access to things and documents includes the time during which the investigator or prosecutor shall "dispose" of the property: return it to the owner or apply to the court for attachment (Articles 169, 171 of the CPC). Furthermore, according to Letter of the High Specialised Court of Ukraine No. 223-558/0/4-13 of 5 April 2013 "On some issues of judicial control by the investigating judge of the Court of First Instance over observance of rights, freedoms and interests of persons in the course of application of measures to ensure criminal proceedings", the expiry of the ruling on application of measures to ensure criminal proceedings indicates termination of such measures and restoration of rights and freedoms of the person in respect of whom they were applied or whose interests were concerned. However, practice reveals ambiguity in the application of these provisions. In our opinion, this issue should be resolved at the legislative level: by granting such property the status of temporarily seized after the expiry of the court ruling with the following relevant procedural effects. Thus, provisional access to things and documents should be attributed to measures with a clearly defined time limit (up to 30 days from the date of the ruling). In this regard, it is proposed to supplement Article 165 of the CPC with a new part as follows: "Things and documents seized

pursuant to the decision of the investigating judge or court, after the expiry of such decision, are considered temporarily seized property".

Moreover, the procedure for terminating the property attachment in case of closure of criminal proceedings by the investigator (which we consider to be measures with an unspecified time limit) is also uncertain. Such cases are common, in particular, in proceedings in which a decision is made to seize property "without a suspect", allowing for the provisions of Articles 98 and 170 of the CPC (when the property of any individual or legal entity is seized if there are sufficient grounds to believe that the property is not the property of a suspect), that it is a material object that was an instrument of a criminal offence, retained its traces or contains other information that can be used as evidence of a fact or circumstances established in criminal proceedings, including an item that was the target of criminal offences, money, valuables and other things acquired criminally or obtained by a legal entity as a result of a criminal offence). The CPC Code does not clearly define the procedure for cancelling the attachment of such property. That is why, in presence of grounds for closing the criminal proceedings, during the pre-trial investigation in the course thereof the property attachment has been applied, the decision to close the criminal proceedings shall be made by the prosecutor simultaneously with the revocation of property attachment (CPC, Article 174, part 3). In this regard, in our opinion, it is necessary to supplement the CPC, Article 284, part 4, subparagraph 2, with a provision according to which the investigator shall make a resolution to close the criminal proceedings if no person was notified of suspicion and/or property was not seized in these criminal proceedings. In addition, the CPC, Article 174, part 3, should stipulate that the revocation of the property attachment, if it is not subject to special confiscation, is the prosecutor's duty (and not his right, as it is now) in case he issues a resolution to close criminal proceedings.

3. Application of personal commitment, personal guarantee and bail as measures to ensure criminal proceedings

The issue of the time limit of such non-isolation measures as personal commitment, personal guarantee and bail (which we refer to as measures with an indefinite time limit) is also ambiguous. Unlike house arrest and detention (which we refer to as measures with a clearly defined time limit), the CPC does not specify the time limits and maximum (cumulative) periods for the application of these measures. In practice, these preventive measures are applied simultaneously with the obligations under Article 194 of the CPC. Moreover, such obligations may be imposed on the suspect or accused for a period not exceeding two months. If necessary, this period may be extended at the request of the prosecutor, and upon expiry of the period, including the extended period for which the suspect or accused was subject to the relevant obligations, the ruling to apply a preventive measure in this part ceases to be valid and the obligations are revoked. However, the CPC does not regulate whether in this case the preventive measure applied together with the obligations is terminated. This issue has not been resolved in the theoretical plane either. It becomes especially relevant when bail is applied, because after the termination of this measure of restraint, the bail that has not been turned into state revenue is returned to the suspect, accused, or pledgor. This forces investigators and prosecutors to continue applying procedural obligations to the suspect without filing a motion to extend the term of a non-isolation preventive measure (personal commitment, personal guarantee or bail). In our opinion, procedural obligations cannot be applied to a suspect separately from a non-isolation preventive measure (personal commitment, personal guarantee or bail). After all, compliance with these obligations is the main component of ensuring criminal proceedings by applying an appropriate preventive measure. Without such obligations, the measure itself is nothing more than a procedural "deception" or fiction and does not guarantee any prevention of the risks that gave rise to its application. Procedural obligations and preventive measures are inextricably linked elements of the same system. It is in these obligations that the essence of the measure is expressed. Moreover, the regulatory wording of these non-isolation measures contained in the CPC proves this: "personal obligation means an obligation to fulfil the duties assigned", "personal guarantee means a written undertaking that the person is vouched for the fulfilment of duties", "bail means a deposit to ensure the fulfilment of duties under the condition of the funds being returned". The termination of a preventive measure automatically entails the termination of procedural obligations imposed on the suspect. In this regard, the practice of the prosecution filing motions to impose procedural obligations under Article 194 of the CPC on the suspect without applying a preventive measure should be recognised as unreasonable.

The procedure for termination of measures to ensure criminal proceedings remains problematic: the CPC does not clearly specify whether it is necessary to issue a resolution (ruling) to terminate the application of a meas-

ure to ensure criminal proceedings or whether it is automatically cancelled upon expiry of its validity. In our opinion, the practice of issuing a ruling on the termination of a preventive measure contradicts the provisions of the CPC and its concept in general. Indeed, in accordance with Article 110 of the CPC, all decisions of the investigator and prosecutor shall be issued in the form of resolutions. Moreover, the decision to apply measures to ensure criminal proceedings (except for summons, provisional property attachment, detention of a person, preliminary property attachment) is made by the investigating judge or court. Therefore, an investigator or prosecutor is not entitled to issue a resolution to terminate a decision made by another party to criminal proceedings (except for the revocation of the property attachment by the prosecutor). In addition, in cases where measures to ensure criminal proceedings were applied on the basis of a decision of an investigator, prosecutor, authorised official, as well as with the consent of the prosecutor - the head of the Main Department (Office) of the SSU or the head of the territorial body of the NPU, the Director of the NABU (or his/her deputy), in case of loss of expediency of applying such a measure, should decide to terminate it, and in case of unreasonableness or illegality - to revoke it. This applies, in particular, to the provisional property attachment, detention of a person, preventive detention of a person, and preliminary property attachment. Such a decision shall be in the form of a relevant resolution.

In addition, it should be considered that, at the request of the prosecutor, the investigating judge may extend, in accordance with the term of the pre-trial investigation, the application of measures to ensure criminal proceedings, including removal from office, provisional restriction of the use of a special right and preventive measures. The latter can be extended within the pre-trial investigation for up to six months in criminal proceedings for minor or medium gravity crimes; up to 12 months for grave and especially grave crimes (except for house arrest, as according to the CPC, Article 181, part 6, the total period of keeping a person under house arrest during the pre-trial investigation may not exceed six months). In this regard, the situation is uncertain in cases where the maximum term of house arrest has expired and it is necessary to extend it beyond 6 months. Therefore, we make proposal to amend Article 181 of the CPC to determine that the total period of keeping a person under house arrest during the pre-trial investigation may not exceed six months in criminal proceedings for minor or medium gravity crimes and twelve months in criminal proceedings for grave crimes or crimes of special gravity.

4. Conclusions

Therefore, measures to ensure criminal proceedings differ both in the time limit and in the manner of establishing such time limit. In practice, they can be considered in three categories: measures which last for a clearly defined time and which may be extended (provisional restriction on the use of a special right, removal from office, preventive measures, permission to apprehend for the purpose of compelled appearance); measures that last for a clearly defined time and cannot be extended (detention of a person, provisional access to things and documents, provisional property attachment); measures that do not have a defined time limit (personal obligation, personal guarantee, bail, imposition of a monetary penalty, property attachment, lawful detention; summons; property attachment included in the list for which permission to search is expressly granted in the search warrant and not related to items seized from circulation by law). Shortcomings of the regulatory mechanism for time limits are revealed in the application of: measures with a clearly defined time limit and those which cannot be extended and measures the time limit thereof is not defined.

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ПРОБЛЕМИ ВИЗНАЧЕННЯ СТРОКІВ ЗАСТОСУВАННЯ ОКРЕМИХ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ТА ШЛЯХИ ЇХ ВИРІШЕННЯ

Анотація. ***Мета.*** Мета статті – виокремити заходи забезпечення кримінального провадження як за строком дії, так і за способом встановлення такого строку. ***Результати.*** У статті наголошено, що невизначеним є порядок припинення дії арешту майна у разі закриття кримінального провадження саме слідчим (що відноситься нами до заходів, строк дії яких не визначено). Такі випадки є поширеними, зокрема у провадженнях, в яких прийнято рішення про арешт майна «без підозрюваного» з урахуванням положень ст.ст. 98, 170 КПК (коли арешт накладено на майно будь-якої фізичної або юридичної особи за наявності достатніх підстав вважати, що воно є матеріальним об'єктом, яке було знаряддям вчинення кримінального правопорушення, зберегло на собі його сліди або містить інші відомості, які можуть бути використані як доказ факту чи обставин, що встановлюються під час кримінального провадження, в тому числі предметом, що було об'єктом кримінально-протиправних дій, грішми, цінностями та іншими речами, набутими кримінально-протиправним шляхом або отриманими юридичною особою внаслідок вчинення кримінального правопорушення). ***Висновки.*** Аналіз практики застосування заходів забезпечення кримінального провадження свідчить про виникнення певних проблем під час визначення строку дії деяких із них. Визначено, що заходи забезпечення кримінального провадження відрізняються як за строком дії, так і за способом встановлення такого строку. Практично їх можна розглядати у трьох категоріях: заходи, що тривають протягом чітко визначеного періоду часу і строк дії яких може бути продовжений (тимчасове обмеження у користуванні спеціальним правом, відсторонення від посади, запобіжні заходи, дозвіл на затримання з метою приводу); заходи, що тривають протягом чітко визначеного періоду часу і строк дії яких не може бути продовжений (затримання особи, тимчасовий доступ до речей і документів, тимчасове вилучення майна); заходи, строк дії яких не визначено (особисте зобов'язання, особиста порука, застава, накладення грошового стягнення, арешт майна, законне затримання; виклик; вилучення майна, яке входить до переліку, щодо якого прямо надано дозвіл на відшукання в ухвалі про дозвіл на проведення обшуку, та не належать до предметів, які вилучені законом з обігу). Недоліки регулювання строків відзначені під час застосування: заходів, що тривають протягом чітко визначеного періоду часу і строк дії яких не може бути продовжений, та заходів, строк дії яких не визначено. Запропоновано шляхи усунення недоліків, які виникають внаслідок відсутності визначення або нечіткого визначення строків зазначених заходів.

Ключові слова: кримінальне провадження, заходи забезпечення, строки застосування, проблеми визначення, шляхи вирішення.

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