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A SUMMONS BY AN INVESTIGATOR, PROSECUTOR, A SUBPOENA AND BRINGING TO COURT: PROCEDURAL ISSUES OF AN APPLICATION AND THE WAYS OF THEIR SOLUTION

Particularities of summons by an investigator, prosecutor, a subpoena and bringing to court have been characterized. The conditions of a summons handing are concretized. The separate offers for improvements of Ukraine's Criminal procedural Code (CPC) are offered. The norms of the CPC regulating the order of bringing accomplishment, that are in system connection with norms regulating accomplishing such a measure of ensuring of criminal procedure as a summons by an investigator and prosecutor, are characterized. despite the positive experience of implementation of measures of ensuring of criminal procedure, the question of using a procedural summons and bringing are not fully solved and need creation of legislative regulations taking into account both scientific works and practical needs.

The reform of the criminal procedural law of 2012 caused an essential change of the essence and mechanisms of the measures of procedural compulsion in criminal process application. A summons by an inquisitor, prosecutor, a subpoena and a reason occupy a special place among the criminal procedural institutions, which have undergone some essential changes.

Thus, a summons by an investigator and prosecutor at a prejudicial inquiry is applied without an additional legal permission in contrast to other measures of criminal process ensuring (except a temporary confiscation of property and arrest in custody of a person). So the question about the lawfulness of the additional legal permission depends on an inquisitor and prosecutor.

It is necessary to agree with a thought about the incorrectness of "a summons by an investigator, prosecutor and a subpoena" inclusion to the measures of criminal process ensuring. It is necessary to realize the presence of sanctions for rules of behaviour non-fulfilment by a subject. The analysis of the measures of criminal introduction ensuring given in article 131 of the Criminal procedural code of Ukraine (the CPC of Ukraine) indicates that all of them (except summons) have elements of compulsion in their names. A summons cannot be a measure of compulsion, because it provides its voluntary fulfilment by a subject of a process. A compulsion ensues only after a default without legitimate reasons of a party to a trial when summoned and only then bringing to court is applied as a compulsory measure.

Thus a summons of a subject of a criminal process to participate in legal proceedings corresponds with a system of measures and actions

directed to their informing about the necessity of appearance to an investigator, prosecutor with obligatory instructions of a procedural status the summoned individual is in, time, date and a place of their arrival, investigating action in the participation of which the individual is summoned and the consequences of their default. Bringing to court is a compulsory precaution measure to an accused, suspect and witness who had been summoned by an investigator, prosecutor or court, but did not appear without legitimate reasons at a fixed place and time. It is applied by appropriate units of domestic affairs bodies, security services, bodies that carry out the control of tax legislation observance or bodies of state investigation bureau.

A chain of works by leading scientists in the theory of criminal practice in particular Y.Alenin, R.Blaguta, Y.Hroshevyi, O.Gumin, V.Zelenskyi, H.Kozhevnikov, V.Nor, M.Pohoretskyi, O.Tatarov, L.Udalova, O.Shylo is dedicated to the research of institution of measures of criminal process ensuring. At the same time the research of legal and organizational practical questions of a procedural summons and bringing to court taking into consideration the modern criminal procedural doctrine and the investigating practice require additional analysis.

Article 133 of the CPC of Ukraine states that an investigator, prosecutor have the right to summon a suspect, witness, victim or another subject of a criminal process in prescribed by the CPC of Ukraine cases for questioning or to participate in legal proceedings at the time of prejudicial inquiry.

Taking into consideration the absence of a definition to "another" subject of a criminal process among the terms in article 133 of the CPC of Ukraine, the issue about a list determination of such subjects is decided vaguely. O.Shulo states that an expert, criminalist, specialist, civil plaintiff, civil defendant, a legal representative of a suspect etc. can be "another" subject of a criminal process.

The analysis of the CPC of Ukraine norms (including point 25 part 1 article 3 of CPC of Ukraine) affirms a wide list of "other" subjects of a criminal process: parties of a criminal process, a victim's representative and a legal representative of a victim, a civil plaintiff, their representative and a legal representative, a civil defendant and their representative, a representative of a legal person to whom a process is carried into practice, a complainant, a witness's lawyer, an identifying witness, a bailor, an interpreter, an expert, a specialist.

At the same time the criminal procedural law does not determine a procedural status of an individual after return in the procedure of article 314 of the CPC of Ukraine to a prosecutor of a crime bill which does not meet the requirements of the CPC of Ukraine. Thus, neither summons,

nor bringing to court can be applied to such a person. In our opinion, an individual's status after returning a crime bill to a prosecutor has to be determined as a suspect. All actions with this individual have to be done as with a suspect including a summons and bringing to court, legal proceeding fulfilment and precautions application. The designated issue needs to be clearly settled in the CPC of Ukraine.

The analysis of the Code gives a possibility to affirm that an investigator or a prosecutor determine participants in an investigation (detective) and procedural actions according to the norms of criminal procedural law. Thus, an interpreter can be present at a questioning if it is necessary (part 3 article 224 of the CPC of Ukraine), a doctor at a questioning and other investigation (detective) actions with a juvenile or under age individuals including a suspect under age (part 1 article 226, part 1 article 227, part 1 article 491 of the CPC of Ukraine), a specialist for an identification fixation with the help of technical means, a psychologist, teacher and other specialists (part 8 article 228 of the CPC of Ukraine), a specialist while dwelling search and other possession by a person, examination (part 1 article 236, part 3 and 7 article 237 the CPC of Ukraine), a specialist, a suspect, a victim, a witness, a defender, a representative (part 2 and 3 article 240 of the CPC of Ukraine), a medical assessor or a doctor to examine an individual (part 2 article 241 of the CPC of Ukraine).

An investigating magistrate during a prejudicial inquiry or a law court during court proceedings has a right to realize a juridical summons of a specific individual because of their personal initiative and because of an investigator, prosecutor, suspect, accused, their defendant, victim, and their representative's notice of motion. Reasons for an individual's summons by an investigator, prosecutor and a summons by a court practically coincide – availability of enough reasons to think that an individual can give evidence which is relevant to a criminal process or their participation in a legal proceeding is obligatory.

A direct order in a law about an obligatory participation of an individual during legal proceedings realization or an admission of an individual's participation to be obligatory by an investigator, prosecutor (investigating magistrate, law court) are referred to the reasons of a summons.

A procedure of a summons in a criminal process is described in article 135 of the CPC of Ukraine. An individual is summoned to an investigator, prosecutor, investigating magistrate, law court by giving a summons, by post, by e-mail or fax, phone call or telegram.

A summons of a person by an e-mail, fax and phone is a modern means of a summons. At the same time it is necessary to confirm that

this summons really took place and a person knew about it. A report can be made about o summons of a person be means of an e-mail, fax or telephone, but it will not be an absolute guarantee of a summons authenticity.

Therefore, it is believed to be obligatory during a summons of a person: by fax – to add a facsimile machine report concerning an actual summons sending; by e-mail – during a summons sending to set up the function of 'confirmation about reading' and such a report needs to be printed out and add to a summons of a person report. Moreover, according to part 2 article 136 by the CPC of Ukraine, if a person has warned an investigator, prosecutor, law court or court about their e-mail address in advance, the summons sent to such an address is considered to be received in case of a confirmation of receiving it be a person with a corresponding e-mail.

A way of a summons registering and a confirmation of receiving it by telephone are not mentioned in the CPC of Ukraine. But it is possible to confirm a summons by ordering some information about telephone calls from an operator, which contains numbers of incoming/outcoming calls, duration of a talk etc. For example, each subscriber of mobile phone operator PJSC 'Kievstar' has an opportunity to use the function 'My 'Kievstar' with the help of which a pobile phone number owner can get data about their telephone talks at any time of a day (a subscriber's number with whom a talk took place, duration of a talk, its price etc.).

At the same time, the mentioned possibility to get a call detailing does not give an absolute confirmation of a person's summons (because it may be another call theme). That is why it is necessary to add article 136 of the CPC of Ukraine with such provisions, which will give a possibility to identify the fact of a person's summons: "An investigator, prosecutor after a person's summons by telephone make a report where they put a date, time, duration and a point of a call, data about a person who is being summoned, identification of a used contact method". The mentioned call is recorded with the help of technical equipment of audio recording.

Nevertheless, as an analysis of judicial practice shows, investigating magistrates, while analyzing an application about bringing of a person who is summoned with the help of a telephone call, do not grant the application because they consider this method of summons to be additional. Thus, with the decision of Sevastopol city Leninskiy district court investigating magistrate, an investigator's application about a witness's summons was not granted because a default of a summoned by telephone person cannot be considered to be a reason to summons application to this person

In such a case it is necessary to pay attention to the Constitutional Court of Ukraine decision in a case after the constitutional giving of 54 people's deputies of Ukraine according to the Ukrainian Constitution (constitutionality) separate positions Law of Ukraine 'About the juridical system and status of judges', Criminal Code of Practice of Ukraine, Economic procedure code of Ukraine, Civil Procedure Code of Ukraine, Code of the administrative rule-making of Ukraine from December, 13, 2011 № of 17-pn/2011 the message of text of notice by an e-mail, faxgram (by fax, by a telefax) is obligatory only for the subjects of imperious plenary powers, and in relation to other persons – exceptionally after their choice. Id est a legislator in this case did not limit a judicial right for personality on receiving message about subpoenaing, and vice versa extended maintenance of this right, setting additional possibilities of a person to get such a report.

Taking into account the aforesaid, it is possible to come to the conclusion that if a person reported their e-mail, phone number or fax themselves (and it is noted in proper procedural documents), a person can be summoned by such means, I other cases – only by post.

A person's signature about getting a summons including a signature on a post notice, video of giving a summons to a person, any other data confirm the fact of giving a summons to a person or an acquaintance of its content.

Article 135 of the CPC of Ukraine concretizes the conditions of a summons handing, namely:

– In case of temporal absence of a person at a place of residence a summons for a transmission is handed to them under s receipt to the adult family of a person's member or another person that lives with them, to housing operational organization domiciliary if a person or administration at the place of their work. It is Important that persons who are handed with a summons must have a real opportunity to transfer it to the addressee. Thus, they have to be explained the obligation to hand a summons as soon as possible. If a person is studying, as it is suitably established, a summons can be handed with the help of a studying place administration.

– A summons is handed to a person by an employee of the postal authority, law enforcement authority workers, investigator, prosecutor, and also by a secretary of the judicial meeting, if such handing takes place in the apartment of court (part 6 article 135 of the CPC of Ukraine). Thus, the postal authority employees are authorized to hand a summons (letter, telegram) to the addressee with a mark about a receipt;

– A person that is under a guard is summoned through administration of a confinement place (part 3 article 135 of the CPC of Ukraine). In this

case the time and possibility of delivery to an investigator, prosecutor court are taken into account and also delivery terms, conveyance possibilities, time of the day, terms of procedure action with a person etc. are determined.

– A summons of a minor person is handed to their parents or tutors (part 4 article 135 of the CPC of Ukraine); a summons of a special disability person to their trustee (part 5 article 135 of the CPC of Ukraine); a person that lives abroad, – under the international agreement on a legal aid, a consent to obligatoriness of that is given by Verkhovna Rada of Ukraine, and in default of such – by means of diplomatic (consular) representative office (part 7 article 135 of the CPC of Ukraine).

It is necessary to agree with the idea of Y.Lukyanchykova that the ways of transferring of information to a person who is summoned depend on procedural status, age characteristics, residence and citizenship of a person. Thus, an investigator, prosecutor court or investigating magistrate has to take into account all the factors which can influence time constraints of a summoned person arrival.

Higher specialized court of Ukraine dealing with consideration of civil and criminal cases informs that a list of summons ways is set in article 135 of the CPC of Ukraine. It is not exhaustive and persons can be informed in another way. We consider that this position is not fully right because it can lead to criminal procedure participants' rights limitation and give a possibility to side of prosecution at a necessity to abuse application means of criminal procedure providing. This question needs to be resolved in the CPC of Ukraine.

An important condition of a summons in criminal procedure is terms of handling a summons (part 8, article 135 of the CPC of Ukraine). A person must get a summons or be informed about it in another way not later than three days before the day, when they are to arrive. In case of determination of terms of procedural actions accomplishment in the CPC of Ukraine that do not allow to carry out a summons in the indicated term, a person is to get a notice about a summons or be informed about it in another way as soon as possible. But in any case they are to be given time for preparation and arrival.

First of all, the last one concerns an accomplishment of those procedural actions, delaying of informing about which can lead to a person's freedom and rights violation. For instance, a summons of a person for a notice about suspicion delivery, a summons of a suspect for a copy of a solicitation about accomplishment of preventive measure delivery, a summons of a suspect for a copy of a solicitation about prolongation of a term of pre-trial investigation delivery etc. It is necessary to pay attention that according to article 111 of the CPC of Ukraine participants

of criminal procedure are informed about accomplishment of procedural actions in cases if their participation in such actions is not obligatory.

It is necessary to pay attention to the factor of suddenness in a practical activity on determining place and time of conducting of certain investigative (detective) actions. S.Pitertsev and A. Stepanov indicate that not taking into account the factor of suddenness may damage results of interrogation of unconscientious, interested in hiding the truth witness therefore they recommend to interrogate such a witness at their work place at their work time and at their place of living without noticing about it.

An important part of a notice of a summons is a content of a notice about a summons which among others ought to contain a title (a number) of criminal procedure, within the limits of which a summons is accomplished, and a procedural status in which a summoned person is. Thus an accomplishment of a procedural summons is possible only within the limits of criminal procedure and only as to a person who has a certain procedural status. Due to it investigators sometimes have difficulties to determine in a notice a status of some categories of persons correctly (for instance, a person that is guilty of car accident committal who has not been informed about suspicion yet or a person for whom a notice about suspicion is made but not delivered etc.) therefore such a summons is considered to be unjustified.

The consequences of default when summoned ought to be pointed in a notice about a summons too. Lawmaker determined pecuniary penalty, accomplishment of bringing and another fixed by law responsibility to the consequences of default when summoned (article 139 of the CPC of Ukraine).

It is necessary to point out that imposition of pecuniary penalty may be applied to a suspect, accused, witness, victim, civil defendant, a representative of a legal person to whom a procedure is accomplished, bringing may be applied to a accused, suspect or witness; administrative responsibility provided in article 185-4 of The CUaAI for a consistent default to pre-trial investigating body or prosecutor may be applied to a witness, victim, expert, interpreter. The analysis of the above mentioned shows that default of a row of above mentioned participants of criminal procedure in fact remains unpunished. Taking this into account part 1 of article 139 of the CPC of Ukraine ought to be added with responsibility for default when summoned of ‘other participants of criminal procedure’.

An important thing is that negative legal consequences take place exactly due to default when summoned. For instance, an investigator applied to the Krasnoarmiyskyy town and district court of Donetsk region with a solicitation about imposition of pecuniary penalty on a

representative of a victim and the victim themselves, motivating this with the fact that they had been delivered notices about the necessity to summon to the investigator to become acquainted with the materials of the criminal procedure. The investigating magistrate refused to grant the solicitation because according to article 111 of the CPC of Ukraine a notice is a procedural action with the help of which an investigator informs a certain participant of criminal procedure about accomplishment of procedural action or about a take procedural decision or accomplished procedural action. A notice is accomplished in a case when participation of a person in such actions is not obligatory. In this case the investigator accomplished a usual notice, which did not lead to having responsibility itself, instead of a summons, the violation of which led to pecuniary penalty.

In such circumstances bringing is used in cases of default of a suspect, accused, witness when summoned, which was accomplished in the right order according to criminal procedural legislation, and default of summoned persons leads to appearance of significant and sometimes insuperable obstacles to an efficient investigation.

Important guarantees for a participant of criminal procedure about abidance of right to be informed about accomplishment of investigative (detective) action with their participation are demands of criminal procedural law about a necessity of proper confirmation of fact that a person got a notice of a summons or became acquainted with its content in another way on time.

Thus the norms of the CPC of Ukraine regulating the order of bringing accomplishment are in system connection with norms regulating accomplishing such a measure of ensuring of criminal procedure as a summons by an investigator and prosecutor. Their summons according to order established by the CPC of Ukraine including demand that a person must get a notice about a summons or be informed about it in another way not later than three days before the day when they must arrive according to the summons must be before bringing of a suspect, accused or witness.

Information about appropriate notice of an accused, suspect, witness about a summons must be in criminal procedure. A person must not have a sound reason for default when summoned. Thus according to article 138 of the CPC of Ukraine sound reasons are: detention, remanding in custody or servicing of sentence; restriction of freedom of movement due to law action or court decision; force majeure (epidemics, military events, natural disasters or other similar circumstances); absence of a person at a place of residence during a long time due to a business trip, trip etc.; a serious illness or being at a hospital because of getting treatment

or pregnancy under condition of impossibility to leave this institution temporarily; a death of close relatives, members of a family or other close persons or a serious danger of their life; receiving a notice about a summons not in proper time; other circumstances which objectively make a person's appearance when summoned impossible.

If mentioned sound reasons exist, investigating magistrates refuse to grant solicitations about bringing in case a person who was properly informed about a summons, got it, informed pre-trial investigating body about reason due to which they aren't able to arrive when summoned. Investigating magistrates take the same decision when during investigation of solicitation it is established that a suspect, accused or witness being summoned according to the order fixed by the CPC of Ukraine did not come to an investigator or prosecutor due to sound reasons, however due to objective reasons were not able to inform about reasons of their default (a serious illness, being at place where communication services are absent.

Bringing of a witness cannot be accomplished to underage person, a pregnant woman, 1st and 2nd group of disabled, a person who brings up children under 6 or disabled children on their own, and also persons who cannot be interrogated as witnesses according to article 65 of CPC of Ukraine. At the same time the CPC of Ukraine does not have obligation for a person who apply with a solicitation about bringing accomplishment to prove that a witness concerning whom bringing has to be accomplished is not a pregnant woman, 1st and 2nd group of disabled or is not a person who brings up children under 6 or disabled children on their own. That is why refusal in granting a solicitation about bringing due to an investigator or prosecutor did not draw to documents proving, for instance, absence of disability of a person etc. is unreasonable.

At the same time restriction of the circle of persons to which bringing can be applied complicates accomplishment of investigation. For instance, with the aim of counteracting an investigation cases to avoid appearance of a civil defendant, representative of a legal person, to whom a procedure is applied, legal representatives of suspect, accused are widely used. In connection to this it is necessary to bring amendments into the CPC of Ukraine which would create a possibility of using bringing for such category of participants of criminal procedures.

Thus despite the positive experience of implementation of measures of ensuring of criminal procedure, the question of using a procedural summons and bringing are not fully solved and need creation of legislative regulations taking into account both scientific works and practical needs.