

The Role of the Public Prosecutor in the Investigation

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The study describes the prosecutor's role in the initiation phase of the criminal procedure: in the preparatory procedure, the powers, tasks, management and supervision activities authorised by the Criminal Procedure Act are presented in detail. In the investigative stages following the preparatory procedure, the study includes an overview and precise delimitation of the conditions under which we can speak separately about the preliminary investigation and the inspection stage. This section emphasises the differences concerning the relationship between the investigating authority and the prosecutor's office, depending on whether it is a preliminary investigation or an inspection phase. At the end of the study, the prosecutor's guidance typical of the inspection phase will be described. Precisely fixing the specific powers of the Criminal Procedure Act, determined for the prosecutor to carry out the management tasks of the investigation effectively.

Keywords: prosecutor, investigation, preparatory procedure, preliminary investigation, inspection, investigative authority

Introduction

The prosecutor's task is to represent the public interests of the State in the administration of justice. This is more than a criminal law function since the prosecutor also monitors and improves conditions of life that cannot be measured by criminal law.² While recognising this, the prosecutor has always been and still is a critical player in applying criminal law. Based on the principle of officiality, the prosecutor's office also does this *ex officio*, independently of the will of others, in particular the victim, even if this is against the law, and to ensure that no one is unlawfully prosecuted, deprived of their liberty or subjected to unlawful deprivation, restriction or harassment.³

The public prosecutor's office conducts preparatory procedures to establish suspicion of a criminal offense in the cases specified in the Be. and supervises the legality of prior proceedings of other bodies. The prosecution oversees the legality

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² SZENDREI 2005: 23.

³ LICHTENSTEIN 2018: 19–32.

of preliminary inquiries to establish the conditions for indictment, as defined in the Be., conducts inspections, and in some instances conducts prosecution investigations or conducts investigations with the investigating authority.⁴ In the course of the review, the prosecutor's office disposes of the case and the tasks to be carried out during the investigation to conduct the criminal proceedings efficiently and as quickly as possible. During the preliminary investigation and the inquiry, the prosecutor's office, in the exercise of its rights as defined by law, takes all necessary measures to ensure that the preliminary investigation body or the investigating authority lawfully performs its activities, with respect for human rights, and in a manner suitable for determining the suspicion of a criminal offense or deciding on the question of prosecution. The public prosecutor's office is responsible for the measures regarding the preliminary investigation and the inspection, for the validity and legality of the procedural acts it performs, the actions it takes, and the decisions it makes.⁵ The Public Prosecutor's Office shall examine any appeal lodged in the course of an investigation that falls within its remit. It ensures that the rights of the persons involved in the criminal proceedings are respected during the study. The activities of the Public Prosecutor's Office thus cover the whole spectrum of the investigation, from the opening of the case to the supervision of the legality of the execution of the sentence.⁶

The role of the prosecutor in the preparatory procedure and his/her relation to the initiating of criminal procedure

Unlike its predecessors, the Be. regulates the preparatory procedure as a separate part (Part Nine) and nine sections.⁷ The initial procedure is a part, if you like, of the criminal proceedings as a separate section but not part of the investigation.⁸ Before the investigation is ordered but already within the legal framework of the criminal proceedings, the provisions of the Be. allow for a short preliminary analysis. In contrast, both overt and covert measures of criminal procedure may be used to establish or terminate the suspicion of a criminal offense.⁹ Therefore, the preparatory procedure may only be conducted if the available information is not sufficient to confirm the suspicion of a criminal offense and there are reasonable grounds to believe that the conduct of the preparatory procedure will lead to a decision as to whether a suspicion of a criminal offense exists.¹⁰

The following bodies may condense the preparatory procedure:

⁴ This is the supervision of the investigation. Ütv. § 2 (1) a).

⁵ Ütv. § 17 (1) (a).

⁶ VÖKÓ 2006: 412.

⁷ Be. § 339–347.

⁸ NYÍRI 2018: 8.

⁹ TÓTH 2018: 61.

¹⁰ POLT 2018: 29–38.

- the prosecutor's office
- the investigating authority
- the police department responsible for internal crime prevention and preparatory procedure
- the police counter-terrorism unit¹¹

The legal grounds for initiating the preparatory procedures are as follows:

- a) the authorities have become aware of it of its motion
- b) rejection of the complaint
- c) following the collection of secret information under the Ütv., the Act on the Police, the Act on the National Tax and Customs Administration, or the Act on National Security Services, may be ordered based on information contained in an initiative of the body conducting the collection of secret information¹²

From the prosecution's side, the rejection of the complaint is relevant, since only the case where the investigating authority finds that there is no suspicion and therefore does not order an investigation can be accepted as a ground for the preparatory procedure, for example, if there is no criminal offense or other grounds for excluding criminal liability, this cannot be a ground for the initiation of the preparatory procedure.¹³ If the investigating authority informs the prosecution about the order of preparatory procedures, it must be clarified whether the rejection of a complaint preceded it, and the documents of the complaint must be obtained. Presumably, the legal ground for the rejection of the complaint was not that cases,¹⁴ i.e. the lack of suspicion, the authorisation to request data or use of covert means must be refused, and the preparatory procedure must be terminated.¹⁵ In the event of a refusal to file a complaint, the body which refused the complaint shall immediately decide to order preparatory procedures based on the information contained in the complaint if it has the power and competence to conduct preparatory procedures. The initiation and continuation of the preparatory procedure shall not be precluded if a complaint has been lodged against the rejection of the rebuke. Thus, if the prosecutor's office does not intervene in time, it is not lawful to order preparatory procedures. On the other hand, the prosecutor must screen out cases that are not suitable for prosecution for substantive or procedural reasons or do not require prosecution before a court.¹⁶

The prosecutor's office will generally only decide on a complaint made to the investigating authority if the investigating officer is not entitled to decide. Such a case is one where the person reasonably suspected of having committed a criminal offense cooperates in the preparatory procedure and evidence of the case or other

¹¹ Be. § 339 (2)–(3).

¹² Be. § 340 (3).

¹³ Basic Instruction on the Supervision of Investigations, § 35 (1).

¹⁴ Be. § 381 (b).

¹⁵ NYER. § 95 (2).

¹⁶ JÁRMAI 2007: 57.

criminal case to such an extent that the national security or law enforcement interest in such cooperation outweighs the good in prosecuting the person reasonably suspected of having committed the offense.¹⁷ In all other cases, the prosecutor's office will judge the decision of the investigating authority based on a complaint against a complaint lodged by an investigating officer that has been independently examined and rejected. It will exercise its right of appeal. The public prosecutor's office, therefore, acts correctly if it sends the complaint directly to the investigating authority which has the power and competence to examine it, with the investigating officer informing the persons entitled to do so of the outcome of the examination.¹⁸ It may also decide that the complaint needs to be supplemented, in which case the note shall contain the order to increase the complaint, the name of the person responsible for completion, and the deadline for completion.¹⁹ In addition, the note on the charge of the investigation shall indicate the offense which, in its opinion, is suspected.²⁰ If he decides to supplement the complaint, the purpose, content and means to be used for the tasks to be carried out,²¹ shall be specified in a separate transcript for the investigating authority. In the manner of its choice, the public prosecutor's office shall verify whether the investigating officer has lawfully ordered the investigation or the rejection of the report. If the decision is in breach of the law, the public prosecutor's office will take action following the law. Preparatory procedures cannot be pursued for the act that is the subject of the supplement to the denunciation or the investigation, and the two are therefore mutually exclusive. The investigating authority may still reject the complaint after the supplementary report and decide to order preparatory procedures on that basis, but the two cannot be conducted in parallel.

As can be seen from the above, the preparatory procedure starts relatively without prosecutorial intervention, except in the case of a complaint.²² The head of the body conducting the preparatory procedure decides on ordering the preparatory process and makes a record of it. The preliminary investigation is initiated by the performance of a procedural act that cannot be delayed. The authorised head of the body conducting the preparatory process shall record the initiation of the preparatory procedure within twenty-four hours. During the preparatory stage, it shall be clarified whether or not there is a suspicion that a criminal offense has been committed. It may not be possible to reach a clear decision on this question because the available information is insufficient to establish suspicion of a criminal offense. A suspicion of a criminal offense can be confirmed if, based on the information available and the facts communicated or observed, it is likely that a criminal offense has been committed. At this stage of the investigation, the evidence is

¹⁷ Be. § 382.

¹⁸ Following Be. § 375 (3) and § 381 (2).

¹⁹ In addition to the provisions Be. § 361 (2).

²⁰ Basic Instruction on the Supervision of Investigations, § 33 (5).

²¹ Be. § 380 (2).

²² NYER. § 96 (1).

based on probability-based logical judgments, which are induced by the suspicion of a crime, and the investigating authority draws probability inferences from cause to effect by working backward along the thread of causality and by searching for and analysing evidence in this context. If suspicion exists, preparatory procedures cannot be initiated, but an investigation must be ordered. It is not excluded that prior proceedings may be requested for reporting an anonymous caller, but in such a case, increased care must be taken in analysing and evaluating the information received on the data obtained.²³ At the same time, information that is likely to lead to the commission of a criminal offense must come to the attention of the authority, which information must be verified. To achieve the objectives, not all means available in the investigation may be used, just as, for example, the bodies concerned by request are subject to restrictions.²⁴

Where the available data originate from the collection of classified information, the bodies competent to conduct the preliminary investigation must decide within seventy-two hours of receiving the initiative from the body which has undertaken the collection of classified information, whether to order the prior procedure. When data have been obtained from other sources, the body competent to call the preliminary investigation shall not be bound by any time limit for ordering it. To establish suspicion of a criminal offense, the preliminary procedure may involve disclosing means or the gathering of information. The body conducting the preparatory process may use its powers to establish suspicion of a criminal offense. Thus, the preparatory procedure body takes steps:

- to cooperate in secret, to collect and verify information on the offense while keeping the real purpose of the proceedings secret²⁵
- to conduct covert surveillance, monitor payment transactions, employ undercover investigators, and use a covert instrument subject to a court order
- may make a false purchase to obtain an object or a specimen of an object or a service that is likely to be connected with the offense²⁶

The body conducting the proceedings conducts the preparatory procedure independently. Still, the investigating authorities, the National Defence Service (hereinafter: NVSZ), and the Counter Terrorism Centre (hereinafter: TEK) must inform the prosecution within twenty-four hours of the order of the preparatory process of the data on which the procedure is based and the means of disclosing the intended use of the planned procedural acts. If the authority becomes aware of information that gives rise to suspicion of a criminal offense, investigation must be

²³ NF. 1559/2019/11 point 15, Guidelines of the Investigation Supervision and Pre-Trial Preparation Division of the Office of the Prosecutor General (hereinafter: NF) and the Criminal Court Division (hereinafter: BF).

²⁴ Be. § 341–342.

²⁵ Be. § 64 (i) provides that in order to protect, involve and control a person cooperating with the police in secret, the police may collect information in secret.

²⁶ NYESTÉ 2019: 85–116.

ordered.²⁷ Mihály Tóth interprets both the concepts of *legality and officiality* as two sides of the principle of *ex officio* procedure, stating that while legality implies an obligation (the duty to enforce the state's criminal claim in the case of a suspected offense), *officiality* implies a right (whereby the state gives the investigating authority, the prosecutor and the court the power to enforce its criminal claim in the case of a suspected offense). The resulting files and data must be handed over to the investigating authority or prosecutor's office with jurisdiction and competence if an investigation is ordered.²⁸ The use of covert means in preparatory procedures, subject to judicial or prosecutorial authorisation, may be continued after the evidence has been collected without the need to apply for new approval. The duration of their use shall then be determined based on the date of the order in the preparatory procedure.

The preparatory procedure can usually last up to 6 months (for offenses where a covert instrument subject to judicial authorisation can be used, the time limit is nine months). If the public prosecutor's office does not carry out the preparatory procedure, the body informs the public prosecutor's office within 24 hours of the preparatory procedure being ordered:

- the data justifying the need for the preparatory procedure
- the covert means to be used, and
- the planned procedural steps (and informs the prosecution at least every two months after that)

If the information obtained during the preparatory procedure leads to the suspicion of a criminal offense, the investigation must be ordered. In such cases, the documents and data must be handed over to the competent investigating authority or prosecution without delay. The disclosed means used in the preparatory procedure, subject to judicial (prosecution) authorisation, may continue to be used without further approval.²⁹

The preparatory procedure shall be terminated if:

- there is no suspicion of a criminal offense based on the information obtained
- no result is expected from the continuation of the preliminary investigation, or
- the deadline for the preliminary investigation has expired

In such cases, the data obtained cannot be used as evidence in criminal proceedings.

²⁷ NYESTE 2019: 93.

²⁸ TÓTH 2017: 57.

²⁹ FANTOLY-BUDAHÁZI 2020: 74–102.

Prosecutorial oversight in the preliminary investigation

Apart from the preparatory procedure, criminal proceedings start with an investigation. When there is a suspicion of a crime, the investigation must obtain and collect evidence, carry out the evidentiary procedures, and, based on these, establish whether a crime has been committed and who committed it.³⁰ The evidentiary process aims to clarify the factual issues, which can naturally be divided into two parts: those relating to the material aspect of the offense on the one hand and those relating to the subject matter on the other. The preliminary investigation aims to establish the content and personal grounds for suspicion and find and secure the means of proof. During the inspection (if necessary, by obtaining and examining evidence), the prosecution decides whether to close the investigation (terminate the proceedings or charge the offender). The interrogation of suspects separates the two phases of the investigation. The preliminary investigation aims to ascertain what crime has been committed, how it was committed and who is suspected of having committed it.³¹

The investigation shall be initiated based on information coming to the knowledge of the prosecutor's office or the investigating authority in the exercise of their official powers or the prosecutor or a member of the investigating authority in their official capacity.³² The investigating authority's official powers relate to law enforcement and investigation. In contrast, the official capacity of a member of the investigating authority covers all activities referred by law to the investigating authority's responsibilities. The official capacity may therefore be used to obtain information, for example, in connection with the case under investigation, based on the data it contains. In contrast, the official capacity may be used to obtain information, for example, by carrying out control, searching clothing, or a vehicle. It may also be based on a report.

In the Hungarian criminal law system, as a general rule, anyone can report a prosecutable crime on public charges. Any submission to the authorities which contains allegations of facts suggesting that a criminal offense has been committed is considered a denunciation. It is irrelevant where the complainant's knowledge of the crime comes from (e.g. whether it is based on his perception or on what another person has said, or on what has appeared in the press, etc.), and it is also irrelevant whether the facts as described in the complaint correspond to the reality of the facts. The latter is precisely the task of the investigation. Generally speaking, the right to report and the obligation to report only exist if the failure to report is punishable by the Be. Thus, according to the provisions of the Be., the member of the authority, the official, and, if the law so provides, the public body are obliged to report the

³⁰ TREMMEL 2006: 32.

³¹ For the codification of the current Criminal Procedure Act, the Government has submitted to Parliament on 14 February 2017 Draft Bill No. T/13972 on the Code of Criminal Procedure (hereinafter: Bill).

³² Under Be. § 375 (1).

offense which they become aware of within their jurisdiction and which is to be prosecuted. Failure to report the crime will render them liable to disciplinary action by any of these persons. The report may be made in writing, orally, by telephone, or by technical means.

In the context of investigations, one of the most important conceptual innovations of the Be. is the distinction between the preliminary investigation and inspection phases and the separation of prosecutorial roles along these lines. The investigating authority acts independently during the preparatory investigation and the preliminary investigation.³³ In contrast, during the inspection, it operates under the direction of the prosecution.³⁴ The content of independence is defined in the Be., for the inspection phase under the leadership of the prosecution office in that the investigating authority is obliged to report to the prosecution office afterward on the procedural steps carried out independently. It follows from the obligation to report ex-post that the prosecution service is – as a general rule – not informed in advance of the investigative acts carried out in the course of the independent procedure. The same approach can be read in the explanatory memorandum of the Minister, which states that “[...] the prosecution exercises legal supervision over these independent investigative acts of the investigating authority, which [...] involves ex-post intervention, either as a result of legal remedies or as a result of the prosecution’s control, but in any event. A further essential element of the supervision of legality under the law is that this ex-post intervention is typically based on the initiative of the persons involved in the criminal proceedings (complaint, objection, etc.) and may take the form of establishing possible violations of the law, or of annulling the decision that has infringed the law”.

Therefore, the majority of cases are initiated by the investigating authority based on a complaint or its initiative. The investigating officer shall, in the course of the preliminary inquiry, examine in particular the facts relating to the material and substantive aspects of the offense, the facts necessary to establish the identity and whereabouts of the perpetrator, and the facts of particular relevance for the application of the legal penalty.³⁵ The investigating authority must therefore report to the prosecutor every six months on the state of the investigation. The investigating officer draws up an investigation plan in cases involving complex factual and legal issues in the event of establishing a joint investigation team or based on a decision by the head of the investigating authority authorised to do so. In such cases, it shall send it to the prosecution service to fulfil its reporting obligations. The report must contain a brief description of the historical facts of the offense under investigation, following the legal elements of the crime, and the classification of the offense under the Be., as well as a description of the scope, context and level of detail of the facts to be clarified. This has the specific character of probative value. The probative value

³³ According to Be. § 31 (2).

³⁴ Be. § 392 (5).

³⁵ According to § 133 of the NYER.

is the property of the means of proof under which it can influence the conviction of the prosecutor or the court.³⁶

The prosecutor's office is therefore also entitled in its supervisory power to order an investigation for the investigating authority or to call it in itself. In such cases, the case files are sent to the investigating officer.³⁷ He considers the rules governing the powers and jurisdiction of the investigating authority, with the provision that the investigation documents are to be presented to the prosecutor. The documents of the investigation should be presented to the prosecutor after the detection of the perpetrator and the communication of the well-founded suspicion, failing which the deadline indicated by him, but no later than six months.³⁸ The management and supervisory powers of the public prosecutor's office and the autonomy of the investigating authority's proceedings are not affected if the public prosecutor's office itself carries out specific procedural steps in the investigation. Moreover, the public prosecutor's office may call in the inquiry in any case. The public prosecutor shall exercise the rights which belong to the public prosecutor's office where the public prosecutor is acting. The performance of a procedural act may be prohibited only by the senior prosecutor of the prosecuting authority. As explained above, the prosecutor cannot control the preliminary investigation but must assess its legality and effectiveness. Supervision, therefore, implies that the prosecutor must evaluate the results of the investigation so far, take a position on the necessary investigative measures and assess the effectiveness of the investigating authority's action concerning them. If this is not satisfactory, the prosecutor's intervention is mandatory.³⁹ This approach is reinforced by the presence of the procedural acts provided.⁴⁰ The law also ensures the possibility of participation in the progress of the proceedings during the preliminary investigation. This possibility of presence is contrary to the view that the prosecutor's role in the preliminary investigation is limited exclusively to post-intervention and the decision on formal legal issues. The prosecutor is thus obliged to intervene in the preliminary investigation by stating his legal position in all cases where the investigating authority acts in violation of the law (e.g. lack of competence or jurisdiction, witnesses' testimony is verbatim or immunity has not been established, the act is not a crime or is otherwise qualified).⁴¹

Traditionally, the first custodian of forensic expertise is the investigating authority, while the other authorities (prosecution, court) are responsible for inspecting the legality and probative value of the evidence.⁴² For this reason, it is advisable to carry out the procedural steps that are important from a criminal investigation point of view, such as the measures to identify the perpetrator, the obtaining of data

³⁶ MÓRA 1960: 664.

³⁷ Be. § 26 (2).

³⁸ Basic Instruction on the Supervision of Investigations, § 36.

³⁹ Be. § 26 (2) (e).

⁴⁰ Be. § 26 (2) (i).

⁴¹ Basic Instruction on the Supervision of Investigations, § 37 (2).

⁴² BÓCZ 2010: 71.

and documents, their seizure, the questioning of witnesses and victims, with less intervention by the prosecutor, at the preliminary investigation stage. Many coercive measures are also taken at this investigative stage, such as searches. All of these are carried out at the discretion of the investigating authority and are independent of the direction of the prosecutor, both in terms of planning and execution. There are, of course, many forms of action that are subject to the authorisation of the prosecutor, in which case the cooperation between the investigating authority and the prosecution is flexible and takes into account the objectives of the criminal proceedings. In particular, the prosecution acts with caution when authorising concealed devices subject to a prosecutor's license.⁴³ The obtaining of authorisations subject to judicial approval should only arise in the preliminary investigation stage about covert means because coercive judicial measures involving deprivation of personal liberty are already in the inspection stage since they can only be taken after the suspect has been questioned. In the preliminary investigation stage, it is possible but not the aim to seek to preserve all evidence, because this might be done in an unjustified, self-serving manner and might lead to a significant prolongation of the proceedings (Ministerial Explanatory Memorandum). Thus, the data covered by the testimony of witnesses and expert opinions can typically be clarified by less formal methods, data gathering activity, ties, data and collection, based on which the suspect can be questioned. These activities usually fall within the scope of preliminary investigation.⁴⁴ Depending on the suspect's defence, the preservation of evidence for court proceedings may also be initiated in justified cases.

There may also be a case when the prosecution establishes that the investigating authority ordered the investigation that violated the law. The subsequently obtained data do not allow the continuation of the investigation and call upon the investigating officer to terminate the proceedings, and if this is unsuccessful, end proceedings.⁴⁵

The prosecution generally checks the legality of preliminary investigation, including the procedural acts performed, when and in respect of which the head of the investigative body or other participants in the criminal proceedings has initiated the action of the prosecution. The prosecutor's office reviews the case files submitted to verify whether the decisions and measures of the investigating authority comply with the legal provisions.⁴⁶

During the preliminary investigation, the prosecutor and the investigating authority may make a written record of the procedural act, sometimes a continuous audio or video recording, and a note of the action. In criminal proceedings, only those records may be used as evidence that other authorities consider being no more than documentary evidence.⁴⁷ It specifies the investigative acts on which the prosecution

⁴³ Basic Instruction on the Supervision of Investigations, § 17 (2).

⁴⁴ Kovácsy 2003: 32.

⁴⁵ Be. § 26 (2) and 398 (1).

⁴⁶ According to Be. § 351 (2).

⁴⁷ FRECH 1999.

and the investigating officer must decide. These can be formal matters (e.g. referral), decisions on the merits (e.g. dismissal of a complaint, suspension or termination of proceedings), and decisions on coercive measures and handling a complaint.⁴⁸

Regarding the purpose and means of the investigation, there is no clear distinction between the preliminary investigation and the inspection phase, as there is between the investigation and the judicial procedure. The effectiveness of the investigation presupposes, in addition to a clear distinction of responsibilities and decision-making powers, continuous cooperation between the investigating authority and the prosecution, following the needs of the proceedings. The Bill does not rule out the possibility of such collaboration and suggests the need for it through the provisions mentioned above.⁴⁹ Precisely because the investigation is a complex profession requiring detailed knowledge and activities, which cannot be carried out on the side, alongside other public prosecution tasks, it is part of the dynamics of the investigation that, once the suspect has been questioned, the investigating authority must continue the procedure and continue to carry out its task.⁵⁰ This is necessary irrespective of the provision on the transmission of case files or the commencement of prosecutorial management.

The preliminary investigation ends with sending the investigation file to the prosecutor's office, which has eight days to respond. Based on the suspect's questioning, cooperation with the accused is possible. The investigating authority will report this to the prosecution service separately, or if there are difficulties in sending the case files before the investigation. The specific information on the possibility of the suspect's cooperation is intended to ensure that the means of expediting the proceedings are applied without delay. Concerning the institutions for cooperation in the inspection stage, the prospect of a decision or measure by the prosecution and, the plea bargain, the possibility has expressly created the *Be.*,⁵¹ for these to be used during the initial questioning of the suspect by the investigating authority.

Contrary to the clear rigid delimitation, this presupposes flexible cooperation between the prosecution and the investigating officer, including the period before the initial questioning of the suspect, to ensure the practical application of the cooperation institutions. The legal instrument of plea bargaining remains fundamentally different from the Anglo-Saxon plea bargain. The facts of the case and the classification of the offense cannot be the subject of the agreement.⁵² However, the prosecutor must still decide based on the evaluation and collation of the evidence gathered during the investigation. The law does not place the process and the possible content of the plea bargain as a separate procedure but within the

⁴⁸ *Be.* § 362.

⁴⁹ Proposal for a new Code of Criminal Procedure (hereinafter: Proposal) uploaded on 3 June 2016 and its Explanatory Memorandum Proposal, § 26.

⁵⁰ *LÁNG* 2003: 27.

⁵¹ *Be.* § 405 (3) and § 407 (2).

⁵² *SZAKTOR* et al. 2022: 1157–1175.

general practice rules, expressing that a plea bargain is possible in any case and for any offense.⁵³

Prosecutorial direction in the inspection

In the investigation, the scope of the inspection is narrower. It is a statutory series of measures that involve establishing facts in cases of existing suspicion and the discovery of evidence relevant to the accused.⁵⁴ Four models of the relationship between the prosecutor and the investigating authority were known in the former Hungarian criminal procedural law:⁵⁵

1. the investigating authority investigates independently, the prosecutor supervises the legality of the investigation
2. the prosecutor may also supervise the independent investigation of the investigating authority⁵⁶
3. the prosecutor conducts the investigation⁵⁷
4. the prosecutor conducts the investigation himself⁵⁸

The most significant change in the Be. concerning the investigation is undoubtedly the subdivision of the investigation into a preliminary investigation and an inspection.⁵⁹ Under the Be., the investigation is the inspection stage following the preliminary investigation. This takes place after the suspect has been questioned. If based on the procedural steps taken during the preliminary investigation, a person is identified as a person who is suspected of having committed a crime. The investigating authority will question the suspect. This also means that the suspicion of the offense, which already existed when the investigation was ordered, i.e. that the facts as disclosed are such that, given the reality of the information available, the offense is likely to have been committed, are both clearly confirmed and has already been established. It is, therefore, a well-founded personal suspicion, the essence of which is that a link, supported by evidence, can be found between the offense which is the subject of the proceedings, and a specific individual, which gives rise to a substantial degree of probability – a reasonable suspicion – that that individual committed the crime.

⁵³ KOVÁCS 2015: 138–154.

⁵⁴ TÓTH 2010: 304–305.

⁵⁵ FANTOLY–GÁCSI 2014: 17.

⁵⁶ This model is not regulated in the Act, but in the LÜ Instruction 11/2003 (ÜK. 7); therefore, enhanced supervision is nothing more than a special case of legality supervision outside the Act.

⁵⁷ If, in connection with the investigation, he/she has exercised the rights specified in Be. § 28 (4) (a), i.e. ordered an investigation or a supplementary report, instructed the investigating authority to conduct the investigation, ordered it to carry out an investigative act, to conduct a further investigation or to complete the investigation within a specified period of time.

⁵⁸ Prosecutorial dominance was most pronounced in this case. One subtype is the optional case under Be., § 28 (4) (e), i.e. where the prosecutor has taken the investigation into his own hands, and the other, mandatory case is the investigation of offences falling within the scope of exclusive prosecutorial investigation under § 29.

⁵⁹ LICHTENSTEIN 2017: 121.

The rights of a person who is reasonably suspected of having committed a criminal offense depend or not the suspicion has already been communicated.

In the course of the inspection, the investigating authority shall examine in particular the suspect's conduct in committing the offense, the suspect's state of consciousness at the time of the crime, the facts characterising the danger to society, the incriminating and exculpatory circumstances of the suspect, as well as aggravating and mitigating circumstances. The investigating authority may disregard the execution of the requests for evidence contained in the suspect's defence regarding evidence that is relevant to the evidence and which is already available to it. With the consent of the prosecution, the obtaining of further evidence may be waived in respect of facts that are the subject of the suspicion and the truth of which is accepted by the suspect in his statement and, if a defence counsel is involved in the proceedings, by the defence counsel. The investigating authority shall obtain the means of evidence and carry out the procedural steps in time to allow the prosecution at least three months to decide whether to close the investigation or suspend the proceedings. The investigating authority cannot complete its investigation within this period. Consequently, the prosecution shall, unless otherwise provided for, submit a proposal for an extension of the investigation's time limit together with the investigation plan's submission.⁶⁰

In some cases, the case is quickly transferred to the inspection phase (because if the suspect is taken into custody, they must be questioned within 24 hours, and the documents must be sent within eight days). In the case of having a suspect, the preliminary investigation stage can essentially be omitted unless the perpetrator has just been the subject of a thorough preliminary inquiry. The catching in the act presupposes the detection of the offense; and, concerning that, the apprehension of the offender who has just committed the crime. Catching the perpetrator in the act of committing an offense is understood to occur when the crime is executed in full view and sight of the witnesses, in such physical proximity that they have a realistic opportunity to gain access to the offense, to reach and to pursue the perpetrator. All this constitutes the hot trace and offers the possibility of pursuit without losing time.⁶¹

The relationship between the prosecution and the investigating authority is transformed after the suspects are questioned. During the preliminary investigation, the investigating officers have to form their convictions. For this reason, the choice of criminal tactics, including interrogation tactics, is a competence of the investigating authority.⁶² By contrast, if the prosecution appears to be justified, the prosecution must determine the scope and method of obtaining evidence during the inspection, bearing in mind the requirements of the evidentiary procedure to be followed in the judicial proceedings following the indictment. In the inspection phase, the

⁶⁰ NYER, § 150 (4).

⁶¹ Decision of criminal principle No. 13/2013 (ECJ 2013.B.13).

⁶² KATONA 1990: 246.

prosecutor's office is therefore in a leading role, not supervising but determining the course and direction of the proceedings. Direction is a managerial activity exercised by the higher-level body towards the lower-level body, the effect of which is transmitted to the body being directed through direct management. The controller is outside the controlled organisation, above it. The controller exercises a fundamental influence on the managed organisation.⁶³

As mentioned above, the relationship between the public prosecutor's office and the investigating authority will change, with the supervisory power becoming a management power.

Within the framework of management powers, the public prosecutor's office has the following specific powers toward the investigative authority:

- a) take the measures specified in the scope of supervision
- b) order the investigating authority to carry out a procedural act
- c) prohibit the performance of a procedural act
- d) alter or annul the decision of the investigating authority
- e) order the investigating officer to make a decision
- f) may instruct the investigating officer to prepare the findings of the public prosecutor
- g) drive the performance of a procedural act or the taking of a decision subject to prior approval
- h) require the investigating authority to give an account⁶⁴

After questioning the suspect, the prosecutor's office examines the investigation file and may decide to proceed as follows:

- possible subject separation, merging, or transfer (not a decision on the merits)
- procedural acts must be carried out within the framework of the inspection
- may decide that a "diversion" is possible, i.e. that the proceedings are not pursued in the traditional criminal procedure (suspension of proceedings for a prosecution measure or decision, initiation of a settlement, suspension of proceedings for mediation, conditional suspension by the prosecutor)
- the procedure must be terminated
- charges must be brought

The time limit for the investigation is two years from the date of the suspect's interrogation (§ 351), which may be extended by the prosecutor's office (by the decision not subject to appeal) for a maximum of 6 months. The defence must be allowed to review the documents and influence the course of the investigation in a meaningful way during the investigation. To this end, the Be. provides that access to the case file must be granted at least one month before the end of the investigation

⁶³ NYIRI 2018: 12.

⁶⁴ Be. § 26 (3).

(but the defence may waive this right). This period may be shortened or waived (§ 828).

During the inspection, the Be. regulates the right to be present at procedural acts more broadly. Since the well-founded suspicion has already been communicated and the suspect has already been questioned, the rights of the defence to be present are also opened up as:

- the suspect and his lawyer may be present at the hearing of the expert, at the inspection, at the attempt to take evidence, and at the presentation for examination
- the defence counsel may be present at the examination of a witness they (the suspect they are defending) propose to examine and at the evidentiary hearing with such a witness

Even in these cases, the defence does not have to be notified if justified by urgency or other essential interests (e.g. the protection of a witness). Still, the defence must be informed within eight days of the procedural act so conducted.

The revival of the management role of the prosecutor's office should not mean that the investigating authority cannot carry out the necessary procedural acts. The investigating officer continues to conduct the investigation independently during the inspection until the prosecution has begun to exercise its powers of control. The investigating authority conducts the review following the measures taken by the prosecution in the exercise of its powers of control.⁶⁵ After questioning the suspect, the investigating officer shall, unless otherwise ordered by the trial, independently carry out the procedural steps already proposed and deemed necessary. In any case, the possibility of acting independently is preserved, i.e. no authorisation from the public prosecutor is required in cases where there is an urgent reason for doing so, such as issuing a warrant or a search warrant, or even a search operation. It can also act independently if it is necessarily linked to a procedural act ordered by the prosecution, i.e. one procedural act leads to another, for example, the questioning of witnesses following targeted data collection. The investigating authority must inform the public prosecutor's office of such a procedural act carried out independently during an inspection within eight days at the latest. The investigating authority shall inform the prosecution of the procedural act carried out independently during the inspection by sending the investigation plan unless otherwise provided by the prosecutor.⁶⁶

In many cases, it is possible to separate offenses that have already been investigated from those in which only preliminary investigations are still being made into other offenders or other acts of the suspect. Therefore, the investigating authority carries out the procedural act independently during the inspection if it does not concern the

⁶⁵ Be. § 392 (1).

⁶⁶ NYER. § 151.

subject of the suspicion or is directed at the preliminary investigation of another perpetrator of the offense, which is the subject of the suspicion. In such cases, the prosecutor's office must report to the public prosecutor's office as ordered, but within three months at the latest. In the course of the inspection, the prosecutor's office will determine the scope of the investigation if the investigation carried out so far requires so. If necessary, it will indicate the means of evidence and the evidentiary acts to be obtained or carried out in further investigation. It shall give instructions to make the case file available in its entirety and to send it if the facts have already been discovered suitable for a decision on the case's merits.⁶⁷ The time limit for the inspection of the file shall be fixed in such a way as to enable the public prosecutor's office to examine the case every two months.⁶⁸ To decide on the merits, the prosecution shall set a time limit for the investigating authority to send the case file so that it can be made available to the suspect and his defence counsel and the decisions referred to in the Be.⁶⁹ If the public prosecutor's office upholds the complaint against the suspicion, it shall continue to exercise its powers of supervision of the preliminary investigation. In the course of the investigation, in addition to the above mergers of preliminary investigation and inspection, it is not excluded that the inspection is transformed entirely into a preliminary investigation. If the investigation has been terminated concerning the suspect, but only for the suspect, or if the suspect has ceased to be a suspect under the provisions on complaints against suspicion, the investigating authority will again act under the rules of preliminary investigation without prosecutorial guidance in the absence of other suspicions that could have given rise to the inspection. During the inspection, the prosecution continuously checks whether the case is suitable for a substantive conclusion or suspension, in the course of which it investigates:

- whether the facts of the offense have been subject to a preliminary investigation and proven
- whether the circumstances relevant to the imposition of the sentence or the application of the criminal measure have been established
- whether the legal provisions on the acquisition of evidence have been respected
- whether the rights of the suspect and the defence have not been unlawfully restricted
- whether a prosecution measure or decision should be envisaged⁷⁰

The prosecutor's decision to terminate the proceedings is part of the investigation. There is no appeal against the prosecutor's decision, which is reached at the prosecutor's discretion.⁷¹ According to some theories, for those working in

⁶⁷ Be. § 352 (1).

⁶⁸ Basic Instruction on the Supervision of Investigations, § 40 (2).

⁶⁹ Be. § 391 (1); § 351 (3) and (4).

⁷⁰ Basic Instruction on the Supervision of Investigations, § 36.

⁷¹ HACK 2014: 5.

a hierarchical model characteristic of the continental legal system, discretionary power is merely a means of easing the workload but does not express autonomy.⁷² His decision or failure to decide cannot be held against him, as he has no freedom. Given that the indictment is one of the ways of completing the investigation, the prosecution's decision to indict is also part of the investigation in procedural terms. The accusation is not an independent stage, nor is the investigation a separate stage from the charging stage, nor is it a different institution for the ordering of a further investigation. The investigation is closed by a decision after the investigation, not by a separate investigative decision to close the investigation. In the event of a conviction, the investigation is ongoing until the prosecution has brought charges, so no particular order for further investigative measures is required. At the same time, this allows the prosecutor to decide on the conclusion of the proceedings very quickly, immediately after learning of the cooperation of the investigating authority and after having access to the case file, without any further formal procedural steps. The end of the investigation is limited in time by the mandatory statutory rule on access to the file. The investigating authority must allow the suspect and the defence counsel to inspect all documents in the case file in their entirety at least one month before the indictment and to make their motions and observations.⁷³ However, the investigating authority may at any time request the suspect and the defence counsel to make a statement as to whether they agree to shorten or waive the one month.⁷⁴ This right of access to the case file generated after the consent shall be granted unless the suspect and the defence counsel also consent to the shortening or waiving of the period in respect of these case files.⁷⁵

Summary

As mentioned earlier, the investigation consists of a preliminary investigation and inspection. The difference between them is that preliminary investigation involves delineating the facts of an event of criminal interest. In contrast, the inspection consists of establishing the reality of the facts involved. The two types of investigative work, considered in the context of evidence, are that an investigation must verify the truth of the point to be proved and the integrity of the alleged cause of proof. In particular, in the investigation phase, tasks may fall within the competence of the prosecutor or the court.⁷⁶ As the investigating authority conducts the investigation, the need for these becomes apparent. Among other things, this may be the use of disguised means, as defined in Section 214 (4)

⁷² HACK 2010: 21.

⁷³ Be. § 352 § (1).

⁷⁴ NYER. § 55 (1).

⁷⁵ Be. § 352 (1)–(2).

⁷⁶ BÓCZ 2010: 12.

of the Be., which is subject to the authorisation of the prosecutor, as well as the use of disguised means, which is subject to the approval of the judge. Suppose the investigating authority deems it necessary to carry out a procedural act or to issue a decision within the competence of the prosecution or the court. In that case, the authorised head of the investigating authority shall submit a proposal to the trial. In the course of the investigation, the prosecution supervises its legality [§ 25 (2)]; in this context, it checks the legitimacy of the investigating authority's procedure, may set aside decisions that violate the law, call upon the investigating authority to remedy the violation of the law, adjudicate on applications for legal remedies, etc. [§ 26 (2)]. In the course of the inspection, the prosecutor's office not only supervises but also directs [Art. 25(2)]: it may take all supervisory measures, but in addition, it may expressly order the investigating authority to carry out or prohibit a procedural act, it may also change the decision of the investigating authority, or order the investigating authority to take a decision, require it to report, etc. [§ 26 (3)]. In addition to the above, the prosecutor has the right to issue instructions when conducting the investigation himself. In this case, he can instruct any investigating authority to carry out a procedural act in his jurisdiction and request the crime prevention and counter-terrorism authorities to carry out a procedural doing. As explained in the study, the Be. has made a significant distinction between the two investigative phases, particularly regarding the roles of the prosecutor and the investigating authority.

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