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# DISAGREEMENTS BETWEEN THE PUBLIC PARTICIPANTS IN THE PROCEEDINGS IN THE PROCEDURE FOR INITIATING CRIMINAL PROCEEDINGS AND THE INITIATION OF CRIMINAL PROCEEDINGS AS A SEPARATE, EXCLUSIVE POWER OF THE INVESTIGATOR

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**Abstract.** The article examines the problems concerning the relationship between the competences of the public participants in the proceedings and the disagreements arising between them in the procedure for initiating criminal proceedings. Considering the initiation of criminal proceedings as a separate and exclusive procedural power vested in the investigator, the author first addresses the legal significance of the transition from the model of "instituting a criminal case" to the mechanism of "initiating criminal proceedings" and the lawful prerequisites for the commencement of proceedings.

Subsequently, on the basis of a combined analysis of the legal nature of the prosecutor's report and their instruction to initiate criminal proceedings, the author substantiates that a prosecutorial instruction, as a means of supervisory influence, cannot independently replace the occasion prescribed by law for initiating criminal proceedings. In this context, it is proposed to establish legislatively that such an instruction must comply with the requirements prescribed for a prosecutor's report or be accompanied by the corresponding report.

The procedural procedure applicable when an investigator discovers indications of another alleged crime during the preliminary investigation is discussed separately. Through an analysis of the relationship between Articles 41, 173 and 177 of the Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as the Code), the author identifies the normative uncertainty between the power to initiate new proceedings immediately and

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the requirements for submitting a report of a crime. It is proposed to recognise such discovery as an independent lawful occasion for initiating criminal proceedings. At the same time, it is substantiated that, until the legislative elimination of the aforementioned uncertainty, following any of the possible interpretations of the competing regulations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against the investigator.

**Keywords -** *initiation of criminal proceedings, public participants in the proceedings, investigator's exclusive power, procedural independence, prosecutorial supervision, instruction, proper report of an apparent crime, occasion for initiating proceedings, conflict of norms.*

## 1. Introduction

The legal mechanism for initiating criminal proceedings is one of the central issues of criminal procedure, since it determines the commencement of the state's procedural response to information about a crime. The significance of that mechanism is not limited to establishing the formal conditions for commencing a preliminary investigation; it directly concerns the distribution of competences among the public participants in the proceedings, their procedural independence and their responsibility for the decisions adopted. Therefore, the content of the power to initiate criminal proceedings cannot be fully revealed without examining the interrelations between the investigator, the prosecutor and the head of the investigative body.

The replacement, under the Criminal Procedure Code of the Republic of Armenia, of the former model of "instituting a criminal case" with the mechanism of "initiating criminal proceedings" has given new significance to the questions of the occasions for the commencement of proceedings and the competence to assess them. The establishment of the investigator's duty to initiate proceedings upon receiving a proper report requires a clear distinction between the direct competence to initiate proceedings and prosecutorial supervision over its exercise. This distinction is particularly important in cases where the investigator's and the prosecutor's legal assessments of the prerequisites for initiating proceedings do not coincide. The resolution of such disagreements cannot be based solely on official subordination or the binding nature of an instruction, disregarding the legislative allocation of the power in question and the mandatory conditions for its exercise.

In this context, the relationship between the prosecutor's report and their instruction to initiate criminal proceedings is problematic. While the report is regarded as a lawful occasion for initiating proceedings, the instruction is a means of procedural influence between public participants. Equating their legal

significance may lead to a violation of the boundaries between the supervisory power and the direct competence to initiate proceedings. It is therefore necessary to clarify the conditions under which a prosecutor's instruction may ensure the initiation of proceedings while preserving both the effectiveness of prosecutorial supervision and the content of the investigator's exclusive power.

A separate problem also arises when an investigator discovers indications of another alleged crime during the preliminary investigation. The relationship between the norms regulating the direct power to initiate new proceedings and the requirements concerning the form and content of the investigator's report requires clarification as to whether such discovery itself constitutes a sufficient lawful occasion or whether a separate report must be drawn up. This issue has not only theoretical but also practical significance, since it concerns the legality of the initiated proceedings, the possibility of their termination and the limits of the investigator's disciplinary liability.

The purpose of the article is to reveal the content of the separate and exclusive power vested in the investigator to initiate criminal proceedings, distinguish it from prosecutorial supervisory influence and assess the uncertainties existing between the relevant regulations. For this purpose, the regulations concerning the occasions for the commencement of proceedings, the prosecutor's report and instruction, and the investigator's direct discovery of indications of another crime are examined in order to propose solutions ensuring legal certainty and the functional separation of public participants.

## 2. Main Text of the Article

The initiation of criminal proceedings is one of the central institutions of criminal procedure, since it is from that moment that the state's criminal procedural response acquires a specific procedural form. Therefore, it cannot be regarded as a purely technical action; it is an independent procedural process that predetermines the legal basis of the subsequent preliminary investigation and directly concerns the questions of the delimitation of powers, independence and responsibility of public participants.

In this context, the question of the relationship between the competences of public participants in connection with the initiation of criminal proceedings acquires fundamental significance. Its resolution requires distinguishing, on the one hand, the competence to adopt a specific procedural decision and, on the other hand, the powers of supervision or oversight over the legality of that decision. Equating these legal functions may lead to a situation in which the supervisory

power of a public participant effectively becomes a means of exercising or replacing the decision-making competence vested by law in another participant.

Particularly problematic are cases where the legal assessments of the investigator and another public participant concerning the existence or absence of grounds for initiating proceedings do not coincide. Such a disagreement cannot be regarded merely as an internal organisational or official disagreement, since its subject directly concerns the emergence of a criminal procedural legal relationship and the allocation of the corresponding procedural power. Consequently, the mechanism for its resolution must derive not only from the logic of hierarchical subordination but, first and foremost, from the principles of the functional separation of the participants in criminal procedure and the legislative delimitation of their competences.

From this perspective, characterising the initiation of criminal proceedings as a separate and exclusive power of the investigator implies not the exemption of that power from oversight, but clarification of the subject in whom it is vested. In other words, if the initiation of the process in question is legislatively vested in the investigator, supervisory influence over it must not turn into the transfer or replacement of the primary decision-making competence. It is precisely the determination of this boundary that makes it possible to reveal the actual content of the investigator's procedural independence during the initiation of criminal proceedings and assess the lawfulness of the existing mechanisms for resolving disagreements arising between public participants.

Thus, according to the criminal procedure scholar Malikova, criminal procedural relationships begin when a report of a crime being prepared or already committed is registered in the manner prescribed by law and is regarded as a sufficient ground.[1]

According to Vlasova, the stage of instituting a criminal case begins from the moment the competent body receives and records information about a crime.[2]

It should first be noted that the Code has substantially transformed the legal mechanism of the initial stage of pre-trial proceedings. Under the former Code, it was constituted as an independent procedural stage of "instituting a criminal case," within which information about a crime could be preliminarily verified through the adoption of corresponding procedural decisions. The Code has abandoned that classical model, replacing it with the mechanism of "initiating criminal

[1] Malikova L. N. Improvement of Criminal Procedure Legislation at the Stage of Instituting a Criminal Case // Society and Law. 2008. No. 3, p. 24.
[2] Vlasova N. A. Pre-trial Proceedings in Criminal Procedure. Moscow, 2000, p. 68.

proceedings."[3] Moreover, the Code already defines criminal proceedings as a procedure beginning from the moment of being properly informed of an apparent crime, while establishing the investigator's duty to initiate criminal proceedings upon receiving a proper report. Thus, as a result of the legislative reform, the emphasis has shifted from the preliminary verification of "sufficient grounds for instituting a criminal case" to the immediate initiation of criminal proceedings on the basis of a proper report and the clarification of the corresponding factual circumstances within the proceedings themselves.

Similar positions concerning the concept of an occasion for instituting a criminal case[4] exist in the theoretical literature, which makes it possible to generalise it by citing several main approaches.

Thus, according to Strogovich, these are the sources prescribed by law that provide the inquiry body, the investigator and the prosecutor with information about crimes and oblige them to decide whether a criminal case should be instituted or not.[5] Timushkin has also expressed a similar view.[6]

The approach developed by the Court of Cassation of the Republic of Armenia is also of considerable significance. Its analysis shows that the occasion for instituting a criminal case was not, in itself, sufficient to resolve the question of instituting a criminal case. The information received had to contain at least such data as indicated the existence of signs of a possible crime. It was precisely the existence of such information that necessitated its further verification by the competent body and, as a result, the adoption of a procedural decision to institute a criminal case or refuse to institute it.[7]

In this context, it is necessary to consider the power vested in the investigator to initiate criminal proceedings not only as a separate competence deriving from their procedural status but also from the perspective of its place in the system of interrelations between the public participants in the proceedings. Such an approach is due to the fact that, although the exercise of the aforementioned power is directly

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[3] H. Ghukasyan et al., "The Practical Guide to the Interpretation of the Conceptual Solutions, Innovative Approaches and Main Institutions of the New Criminal Procedure Code of the Republic of Armenia," Council of Europe, 2022, pp. 268–270.

[4] It should be noted that, comparatively, the theoretical discussions of this concept may, to some extent, be extended to the institution of initiating criminal proceedings, since, substantively, as the commencement of proceedings, they have significant features of the same nature.

[5] Strogovich M. S. Course of Criminal Procedure. Vol. II. Procedure in Criminal Cases under Soviet Criminal Procedure Law. Moscow, 1970, p. 13.

[6] Criminal Procedure Law of the Russian Federation / Responsible editor P. A. Lupinskaya. 3rd edition, revised and supplemented. Moscow, 2000, p. 270.

[7] Decision No. VB-133/07 of the Court of Cassation of the Republic of Armenia of 13 July 2007. https://arlis.am/hy/acts/38640/print/act_changes.

vested in the investigator, legal interactions with the supervising prosecutor, the head of the investigative body and other public participants may arise in the process of its exercise. Consequently, the content and limits of the investigator's power to initiate criminal proceedings cannot be fully revealed by isolating it from the supervisory, organisational and instructional relationships existing between public participants. It is precisely in the context of those relationships that it is possible to assess the extent to which the power in question actually expresses the investigator's procedural independence and within what limits the influence of another public participant may be regarded as lawful without replacing or narrowing the content of the competence vested in the investigator by law.

When examining the power vested in the investigator to initiate criminal proceedings in the context of the interrelations between the public participants in the proceedings, particular attention should be paid to the role of the prosecutor, including the superior prosecutor. On the one hand, the Code has vested the duty to initiate criminal proceedings exclusively in the investigator, establishing that the latter, within the limits of their competence, is obliged to initiate criminal proceedings upon receiving a proper report of an apparent crime. Moreover, among the possible sources of such a report, the prosecutor's report in connection with the exercise of their powers is also expressly provided for.[8] Separate formal and substantive requirements are also prescribed for the prosecutor's report: it must take the form of a duly authenticated official letter, an email or another accepted form of report and disclose, among other things, the power during the exercise of which the fact of an apparent crime became known to the prosecutor.[9]

At the same time, the Code provides a special mechanism for the superior prosecutor to respond to the discovery of indications of an apparent crime. Thus, where the superior prosecutor discovers indications of an apparent crime while exercising their powers during pre-trial proceedings, they immediately instruct the supervising prosecutor to take measures towards initiating criminal proceedings and commencing a preliminary investigation.[10] The supervising prosecutor, in turn, upon discovering indications of an apparent crime while exercising their powers, is entitled to instruct the investigator immediately to initiate criminal proceedings and commence a preliminary investigation.[11] Thus, in relation to the same legal fact—the prosecutor's discovery of indications of an apparent crime during the exercise of their powers—the Code provides two mechanisms that, at first glance, are

[8] Article 173, paragraph 1, subparagraph 4 of the Code.
[9] Article 177, paragraphs 1 and 2 of the Code.
[10] Article 37, paragraph 1, subparagraph 1 of the Code.
[11] Article 38, paragraph 1, subparagraph 2 of the Code.

interconnected but differ in their procedural nature: the prosecutor's report as an occasion for initiating criminal proceedings and the prosecutor's instruction as a means of procedural influence between the public participants in the proceedings.

In our opinion, the comparison of the aforementioned regulations creates a need to clarify their relationship. Particularly problematic is the question of whether the superior or supervising prosecutor's instruction to initiate criminal proceedings can independently replace the occasion prescribed by law for initiating criminal proceedings. A systematic analysis of the Code does not provide sufficient grounds for such a conclusion. The range of occasions for initiating criminal proceedings is established by Article 173 of the Code, while an "instruction" is not provided for within that range as an independent occasion. Moreover, the Code expressly prohibits initiating criminal proceedings where information about a crime has been obtained from a source not provided for by Article 173, including an unknown or undisclosed source.[12] Consequently, the prosecutor's instruction, being a procedural directive binding on the investigator in the cases prescribed by law, must not, in itself, eliminate the requirement for the existence of a legislatively prescribed occasion for initiating criminal proceedings.

This conclusion is particularly significant in view of the fact that the legality of the occasion for initiating criminal proceedings does not have merely formal significance but is directly connected with the subsequent legal fate of the initiated proceedings. Under Article 13, paragraph 1, subparagraph 2 of the Code, criminal proceedings are subject to termination if they have been initiated, among other things, in violation of the conditions prescribed by Article 173, paragraph 6.[13] In other words, if criminal proceedings have been initiated on the basis of information obtained from a source not prescribed by law, the legislature regards that violation not as an abstract procedural defect but as a circumstance determining the termination of the entire criminal proceedings. Therefore, the investigator cannot initiate criminal proceedings solely on the basis of the fact of an instruction from the superior or supervising prosecutor if the corresponding lawful occasion prescribed by Article 173 of the Code is absent.

From this perspective, it would be more consistent to provide, in the event of the superior prosecutor's discovery of indications of an apparent crime, a mechanism under which their instruction would not replace but would be accompanied by or include a prosecutor's report complying with the requirements of Article 177 of the Code. Under the opposite approach, the investigator is obliged

[12] Article 173, paragraph 6 of the Code.
[13] Article 13, paragraph 1, subparagraph 2 of the Code.

to initiate criminal proceedings on the basis of the prosecutor's instruction, whereas that instruction is not independently recognised by Article 173 as an occasion for initiating criminal proceedings. Such legal regulation may create not only a theoretical problem concerning the relationship between individual norms but also a practical contradiction, simultaneously imposing on the investigator, on the one hand, the duty to execute the prosecutor's instruction and, on the other hand, the duty to initiate criminal proceedings exclusively on the basis of an occasion prescribed by law.

Thus, it is appropriate to regard a prosecutorial instruction not as an independent legal fact replacing the occasion for initiating criminal proceedings but as a means of prosecutorial influence exercised over the investigator where a lawful occasion already exists. Such an interpretation makes it possible to preserve simultaneously both the effectiveness of prosecutorial supervision and the legal certainty of the power vested in the investigator to initiate criminal proceedings, as well as the completeness of the mandatory prerequisites established by the Code for the commencement of criminal proceedings.

A systematic analysis of the above regulations makes it possible to conclude that the prosecutor's instruction to initiate criminal proceedings cannot independently replace the occasion for initiating proceedings prescribed by the Code, since the commencement of criminal proceedings is conditional on the existence of a proper report or another lawful occasion established by Article 173, whereas an instruction, by its legal nature, is a binding means of influence applied in the interrelations between the public participants in the proceedings. Consequently, where the superior or supervising prosecutor discovers indications of an apparent crime, the possibility of initiating proceedings solely on the basis of an instruction creates an inconsistency between the exhaustive regulation of the occasions for the commencement of criminal proceedings and the instruments of prosecutorial supervision. Therefore, we propose legislatively clarifying the aforementioned mechanism by providing that the prosecutor's instruction to initiate criminal proceedings must simultaneously comply with the requirements established by Article 177 of the Code for the prosecutor's report and, in that case, be regarded as a proper report of an apparent crime or, alternatively, that the corresponding prosecutorial report must be attached to the instruction. Such a solution will ensure both the effective exercise of prosecutorial supervision and the unequivocal existence of the lawful occasion necessary for the investigator to exercise the power to initiate criminal proceedings.

Where the investigator discovers indications of an apparent crime, the legislature has provided a regulation different from the mechanism applicable to

the prosecutor. Although Article 173 of the Code regards both the investigator's and the prosecutor's reports as possible sources of information about an apparent crime,[14] the procedural consequences of their discovery of such information are not identical.

Thus, if the investigator discovers the fact of the commission of another alleged crime during the preliminary investigation, new criminal proceedings are initiated in each such case, and the materials of the proceedings confirming the corresponding fact are attached to the record on the initiation of criminal proceedings.[15] That is, in the investigator's case, the legislature has provided a direct procedural connection between the discovery of the fact of a new crime and the initiation of new proceedings. The investigator, being the subject competent to initiate criminal proceedings, does not need an additional instruction or the intervention of another public participant in that case.

At the same time, the investigator's power to initiate new criminal proceedings cannot be perceived as an independent[16] action carried out outside any oversight. After drawing up the record on the initiation of proceedings, the investigator immediately sends copies of it and the attached materials to the supervising prosecutor, enabling the latter to exercise prosecutorial supervision over the legality of the pre-trial proceedings.[17]

Moreover, if the investigator who initiated criminal proceedings is not competent, under the rules of investigative jurisdiction, to conduct the preliminary investigation in those proceedings, then, after performing the necessary procedural actions dictated by the situation, they send the record on the initiation of proceedings and the materials of the proceedings to the supervising prosecutor.[18]

Consequently, although the investigator's discovery of the fact of a new crime and the initiation of proceedings are carried out within the framework of their direct procedural power, they are simultaneously included in the general mechanism of prosecutorial supervision and compliance with investigative jurisdiction.

The comparison of Article 41, paragraph 1, subparagraph 3 of the Code with Articles 173 and 177 creates a certain uncertainty concerning the applicable procedural form where the investigator discovers indications of another alleged

[14] Article 173, paragraph 1, subparagraph 4 of the Code.
[15] Article 178, paragraph 7 of the Code.
[16] In practice, it is often asserted that, when following this approach, the investigator acts arbitrarily and remains outside oversight, which, in our opinion, is by no means particularly well-founded.
[17] Article 178, paragraph 3 of the Code.
[18] Article 178, paragraph 6 of the Code.

crime during the preliminary investigation. Specifically, Article 41, paragraph 1, subparagraph 3 directly empowers the investigator, in such a case, to draw up a record on the initiation of criminal proceedings, immediately informing the supervising prosecutor thereof in writing.[19] Meanwhile, Article 173, paragraph 1, subparagraph 4 of the Code provides for the investigator as a subject submitting a proper report of an apparent crime, while Article 177 also establishes the formal and substantive requirements for the investigator's report.[20] Consequently, on the one hand, the legislature provides a direct power to initiate proceedings where the investigator directly discovers indications of a crime and, on the other hand, regards the same investigator as a subject submitting a report, without clarifying whether, in the case provided for by Article 41, paragraph 1, subparagraph 3, the preparation of a separate report in accordance with Article 177 is also required.

The aforementioned uncertainty is particularly significant in the context of the regulation under Article 13 of the Code. Article 173, paragraph 6 of the Code excludes the initiation of criminal proceedings if information about a crime has been obtained from a source not provided for by that Article, including an unknown or undisclosed source, while Article 13, paragraph 1, subparagraph 2 regards proceedings initiated in violation of the requirements of Article 173, paragraph 6 as a ground for terminating criminal proceedings.[21] Therefore, the relationship between the investigator's power prescribed by Article 41, paragraph 1, subparagraph 3 and the regulations concerning reports does not have merely theoretical significance; it directly concerns the legality of the initiation of proceedings and the possibility of their subsequent continuation.

Professor Ghambaryan has expressed a distinct view on this issue, according to which "an investigator who has discovered indications of another crime during the preliminary investigation must not immediately draw up a record on the initiation of criminal proceedings; they must prepare a report of an apparent crime and submit it to the head of the investigative body, since otherwise the initiation of proceedings may be based on an occasion not prescribed by law."[22]

The solution proposed by Professor Ghambaryan,[23] according to which an investigator who has discovered indications of another crime during the preliminary investigation should not immediately initiate new proceedings but

[19] Article 41, paragraph 1, subparagraph 3 of the Code.
[20] Article 173, paragraph 1, subparagraph 4 and Article 177, paragraphs 1 and 2 of the Code.
[21] Article 173, paragraph 6 and Article 13, paragraph 1, subparagraph 2 of the Code.
[22] Ghambaryan A., Initiating Criminal Proceedings (Scientific and Practical Commentaries), Yerevan, "Tigran Mets," 2022, p. 31.
[23] It should also be frankly noted that legal practice has developed precisely in this direction in order to avoid the problem of subsequently putting the proceedings at risk.

should draw up a report and submit it to the head of the investigative body, is a logical option for overcoming the internal contradiction in the legal regulation. Nevertheless, in our opinion, it too cannot be regarded as a final solution to the problem, since Article 41, paragraph 1, subparagraph 3 of the Code directly obliges the investigator to draw up a record on the initiation of criminal proceedings upon discovering indications of another alleged crime, whereas the combined application of Articles 173 and 177 may provide a basis for the approach of first preparing a report. Under these conditions, what exists is not the unequivocal unlawfulness of the investigator's conduct but a problem of interpreting mutually competing legislative regulations. Consequently, in our opinion, the fact of following any of the aforementioned conflicting regulations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against the investigator until the legislature has clearly established the applicable procedural procedure. The opposite approach would effectively place on the investigator the risk of the consequences of uncertain legal regulation, which is difficult to reconcile with the requirements of legal certainty and of linking a person's liability only to the violation of a clearly established duty.

## 3. Conclusion

Taking the foregoing into account, it may be concluded that the initiation of criminal proceedings is a separate and exclusive procedural power vested in the investigator, whereas an instruction issued by the prosecutor, including the superior prosecutor, must be regarded as a means of supervisory influence and cannot independently replace the lawful occasion for initiating proceedings prescribed by the Code. Therefore, it is appropriate to clarify legislatively that such an instruction must either comply with the requirements prescribed for the prosecutor's report or have the corresponding report mandatorily attached to it.

At the same time, where the investigator discovers indications of another crime during the preliminary investigation, there is normative uncertainty between Article 41, paragraph 1, subparagraph 3 and Articles 173 and 177, which must be eliminated by recognising such discovery as an independent lawful occasion for initiating criminal proceedings. Until that conflict of norms is resolved legislatively, in our opinion, the investigator's following any of its possible interpretations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against them.

**Conflict of Interests**

The authors declare that there are no ethical issues or conflicts of interest in this research.

**Ethical Standards**

The authors confirm that this research did not involve other people as research participants.

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