

INFORMATION NOTE ON INQUIRY OF PERPETRATOR DURING THE INVESTIGATION PHASE OF OFFENSES SUBJECT TO COMPLAINT

I. SUMMARY

In this information note, explanations will be provided regarding the definition of “offense subject to the complaint” in order to be investigated and prosecuted, whether it is mandatory to specify the actual perpetrator when filing the complaint, and finally, whether the actual perpetrator will be inquired into by the prosecutor during the investigation phase in case the complaint is against the incorrect party.

II. INTRODUCTION

1. What is an offense subject to complaint?

Offenses for which victim or persons harmed by the offense are required to file a complaint in order to be investigated or prosecuted, are called offenses subject to complaint. Offenses subject to complaint are explicitly regulated under Turkish Criminal Code No. 5237 (the “TCC”) and other laws. Unless it is explicitly stated in the respective law that prosecution of an offense is subject to complaint, offenses shall be subject to *ex officio* investigation and prosecution by the prosecutor and the court.

The right to file a complaint by the victim of an offense or the person harmed by the offense in order to have the offense to be investigated by the prosecutor or prosecuted by the court, is a public law right that is strictly bound to the individuals. The procedure for filing a complaint is regulated in Article 158 of Code of Criminal Procedure No. 5271 (“CCP”) titled “Denunciation and Complaint” and denunciation and complaint regarding the offense can be made by the victim of the offense or the person harmed by the offense to the chief public prosecutor's office or law enforcement authorities.

2. Is it mandatory to specify the perpetrator in the complaint application?

When filing a complaint or reporting an offense, the victim or the person harmed by the offense can specify not only the act but also the perpetrator in their complaint application. The offenses that are subject to complaint for investigation and prosecution are regulated under Article 73 of the TCC, and the first subparagraph of the relevant article states that “*the authorized person **for the offense**, which is subject to complaint for investigation and prosecution...*”, thereby indirectly underlining that the complaint is related to the offense or the act itself, in other words, it is not mandatory to specify the perpetrator in the complaint. Therefore, the victim/the person harmed by the offense is not obliged to name a specific individual as the perpetrator of the offense. Even if the complainant does not indicate any perpetrator in the complaint petition or even if some of the perpetrators are missing, the complaint will cover all the perpetrators who participated in the offense. For this reason, the fact that the victim of the offense in the complaint application or petition does not indicate, fails to indicate or incorrectly indicates the perpetrator who allegedly committed an offense against the victim, the prosecution of which is subject to complaint, will not constitute a deficiency for the prosecution authority. The prosecutor will initiate a criminal investigation regarding the act in question and determine the perpetrator or perpetrators (*Ceza Avukatının Başvuru Kitabı, Seçkin Yayıncılık, 2022, p.134*). In the established precedents of the Court of Appeals, it is stated that it is not mandatory to indicate the perpetrator in the complaint, and if the perpetrator is not specified, the complaint will be deemed to have been made against the perpetrator to be revealed at the end of the official investigation:

“As explained in the decision of the Criminal General Assembly of the Court of Appeals dated 10.02.1992 and numbered 77351-55, it is sufficient to specify the action in the complaint, and it is not obligatory to indicate the perpetrator of the offense. Complaints in which the perpetrator of the offense is not specified or in which someone other than the actual perpetrator is indicated as a suspect are **deemed to be made against the offender to be revealed as a result of the official investigation.**” (15th Criminal Chamber of Supreme Court, 24.10.2021, 2011/5335 M., 2011/5621 D.)

3. What is the investigation phase? Is it possible for the Public Prosecutor to investigate the perpetrator of the offense during the investigation phase?

During the investigation phase, as soon as the public prosecutor was notified of or otherwise became aware of a situation that gives the impression that an offense is committed, the prosecutor is obliged to immediately investigate the reality of the matter in order to decide whether there is a ground to file a criminal case. The purpose of the investigation phase is to ensure that the material truth is reached at the prosecution phase by collecting the evidence, both in favor and against the suspect (*Ceza Muhakemesi Kanunu, Ankara 2006*).

The principle that requires competent authorities to immediately initiate a preparatory investigation upon receipt of the notification of the occurrence of an act is referred to as the "principle of the obligation to investigate" (*4th Criminal Chamber of Supreme Court, 22.11.2021, 2021/30772 M., 2021/2712 D.*). In accordance with this principle, during the investigation stage, the public prosecutor is required to thoroughly investigate all aspects of the case to determine whether there is "sufficient suspicion" that would justify proceeding with the investigation.

The reason is that Article 160 of the CCP does not grant the public prosecutor any discretion in deciding whether or not to conduct an investigation and imposes an obligation to conduct an investigation. Therefore, the decision of the public prosecutor will be incomplete if the investigation is not conducted despite the possibility. In other words, the public prosecutor, as the subject of the investigation, may investigate into the offense and the perpetrator in order to clarify the facts during the investigation phase and may collect evidence that will enable the material truth to emerge.

Furthermore, it is not legally possible to decide on non-prosecution on the grounds that the perpetrator cannot be identified despite there is sufficient suspicion that an offense is committed. Since it is not always possible to identify the perpetrator during the investigation stage, a method called "permanent search warrant" is used to continue the investigation. In order for a criminal case to be filed, the identity of the perpetrator must be determined and this must be stated in the indictment (Article 170/3-a of the CCP). Indeed, a verdict is only given regarding the act and perpetrator of the offense whose elements are indicated in the indictment.

The public prosecutor is required to conduct inquiries to identify the perpetrator during the statute of limitations, and if the perpetrator cannot be found during the statute of limitations, a non-prosecution decision must be given on the grounds of the statute of limitations and the lack of a possibility of prosecution (*Cumhuriyet Savcısının Soruşturma Yapması Sonucu Verdiği Kararlar, Temmuz 2012*).

In other words, following the investigation, the public prosecutor must either issue an indictment to initiate a public prosecution or make a decision not to prosecute due to the expiration of the statute of limitations, meaning that there is no opportunity for prosecution. If there is insufficient evidence to create sufficient suspicion, a decision not to prosecute can be given. Insufficient evidence to create sufficient suspicion generally occurs in cases where the incident is found to be fabricated by the complainant, where there is clear evidence that the suspect is not the perpetrator despite the presence of an offense, or in cases where the offense cannot be committed.

In summary, it is possible for the public prosecutor to make a decision not to prosecute due to the inability to identify the actual perpetrator of the act that raised suspicion of an offense, as the suspect named in the complainant's complaint cannot be identified as the actual perpetrator. Since it is not always possible to identify the perpetrator during the investigation, a method called the "permanent search warrant" is used to continue the investigation. The purpose of the permanent search procedure is to attempt to identify the real perpetrator of the offense until the investigation is completed.

III. CONCLUSION

Within the framework of the provisions of the CCP and the TCC, whether an offense is subject to a complaint or not, the public prosecutor has an obligation to gather evidence in favor of the suspect and to protect the rights of the suspect during the investigation phase. During the investigation phase, the prosecutor will be able to determine whether the suspect is unfairly accused of by the complainant, in other words, the suspect being the addressee of the complaint is not the actual perpetrator of the offense.

Although Article 160 of the CCP mentions "condition that gives the impression that an offense is committed", in order for the investigation against a certain suspicion of an offense to continue through the suspect indicated by the complainant, there must be an initial suspicion of such offense. If there is no initial suspicion that the relevant offense is committed by the suspect indicated in the complaint, the prosecutor may conduct inquiries to identify the perpetrator during the statute of limitations. If the prosecutor is unable to identify the actual perpetrator within the framework of the inquiries carried out by the prosecutor during the investigation phase, the investigation process will continue with a permanent search warrant. If the perpetrator cannot be identified by the public prosecutor until the end of the statute of limitations, in other words, until the end of the permanent search warrant, a decision will be rendered for non-prosecution.

Should you have any queries on the above, please do not hesitate to contact us.

Contact

Can Güner
Founding Partner
can.guner@bicerguner.com

Elif Şatır
Senior Associate
elif.satir@bicerguner.com

Attorneys-at-Law