UDC 343.1
DOI https://doi.org/10.32849/2663-5313/2022.11.10

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Farynnyk, Vasyl, Shumeiko, Dmytro (2022). Substantiation of measures to ensure criminal proceedings as a specific legal institution. *Entrepreneurship, Economy and Law, 11*, 58–62, doi: https://doi.org/10.32849/2663-5313/2022.11.10

# SUBSTANTIATION OF MEASURES TO ENSURE CRIMINAL PROCEEDINGS AS A SPECIFIC LEGAL INSTITUTION

**Abstract.** ***Purpose.*** The purpose of the article is to substantiate scientifically measures to ensure criminal proceedings as a specific legal institution. ***Results.*** The article proves the statement that measures to ensure criminal proceedings are a specific institution of criminal procedure law. All participants in criminal proceedings shall comply with the procedural form of their conduct as prescribed by law, fulfil their duties and obey lawful decisions. After all, the solution of the tasks of criminal proceedings largely depends on the conscientious performance of procedural duties by its participants, which together creates the proper conditions for the administration of justice and the provision of judicial protection of the rights, freedoms and legitimate interests of individuals. However, in actual criminal proceedings, not all participants fulfil their procedural duties, and given the severity of possible punishment, they often evade pre-trial investigation and court. This explains the need to regulate the system of measures to ensure criminal proceedings in compliance with the standard of a reasonable time. ***Conclusions.*** It is concluded that measures to ensure criminal proceedings constitute an institution of criminal procedure law of Ukraine, which is confirmed by the compliance of the set of legal provisions regulating them with the features of a legal institution; as a legal institution, measures to ensure criminal proceedings are a system of relatively separate provisions, regulating the interdependent relations aimed at ensuring criminal proceedings by regulating the conditions, grounds and procedure for their application, the range of participants and the specifics of their legal status, as well as liability for violation of the established procedure and procedural duties imposed on them. When distinguishing measures to ensure criminal proceedings, the author substantiates the view that the application of these measures as an activity-based and practical process, during which implementing measures are taken in relation to the decision of the investigating judge or court to choose a measure to ensure criminal proceedings. From the theoretical perspective, the author proves the existence of features of a legal institution, such as: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation.

**Key words:** criminal procedure law, criminal proceedings, provisional measures, a set of features, legal institution.

**1. Introduction**

All participants in criminal proceedings shall comply with the procedural form of their conduct as prescribed by law, fulfil their duties and obey lawful decisions. After all, the solution of the tasks of criminal proceedings largely depends on the conscientious performance of procedural duties by its participants, which together creates the proper conditions for the administration of justice and the provision of judicial protection of the rights, freedoms and legitimate interests of individuals. However, in actual criminal proceedings, not all participants fulfil their procedural duties, and given the severity of possible punishment, they often evade pre-trial investigation and court. This explains the need to regulate the system of measures to ensure criminal proceedings in compliance with the standard of a reasonable time. By their legal nature, these measures

are not criminal punishment, some of them are a form of criminal procedural liability, but all of them ensure and focus on achieving a single goal of overcoming negative circumstances that impede or may impede criminal proceedings and ensuring their effectiveness. This focus makes them enforceable, as they are designed not only for specific cases of opposing the lawful activities of pre-trial investigation bodies, prosecutors, defence counsel, and courts, but primarily to prevent possible negative behaviour of a particular participant in criminal proceedings. In the structure of the domestic CPC, virtually all measures to ensure criminal proceedings are systematically and consistently regulated in Section 2 "Measures to ensure criminal proceedings". However, since the law previously in force did not provide for the concept of measures to ensure criminal proceedings at all, but only contained a system of preventive measures, in order to theoretically support the position of the legislator (which introduced such an institution in the CPC of Ukraine and included a number of other ensuring measures, among its components, in addition to preventive measures), this legal formation requires scientific substantiation of within the criminal procedure law as a specific legal institution.

The issue of application of "measures to ensure criminal proceedings" before the adoption of the CPC (2012) was not considered in the scientific literature, since even terminologically they were not provided for by the legislation in force at that time (Farynnyk, 2012, p. 4). Therefore, until 2012, most scholars focused exclusively on the study of measures of criminal procedural coercion. After the introduction of measures to ensure criminal proceedings into the criminal procedure, scholars identified these measures with measures of criminal procedural coercion, for example, L.D. Udalova and V.V. Rozhnova state that measures to ensure criminal proceedings are always associated with the use of criminal procedural coercion, since coercion is the key to ensuring that the application of measures to ensure criminal proceedings will achieve the goal set out in part one of Article 131 of the CPC, that is, effectiveness (efficiency) of proceedings (Udalova, Rozhnova, Savytskyi, 2013, pp. 118-119). S.M. Smokov (Smokov, Horelkina, 2012, p. 152) and M.A. Pohoretskyi (Pohoretskyi, Korovaiko, 2013, p. 238) argue that measures to ensure criminal proceedings and measures of criminal procedural coercion are identical. Some issues of application of measures to ensure criminal proceedings were considered by I.V. Hloviuk, H.K. Kozhevnikova, M. Myroshnychenko, V.V. Nazarova and others. These scholars considered the mechanism and peculiarities of regulatory mechanism for application of certain measures to ensure criminal proceedings, and the issue of their positioning as a specific legal institution has not been studied comprehensively and is of interest for research.

The purpose of the article is to substantiate scientifically measures to ensure criminal proceedings as a specific legal institution.

**2. Measures to ensure criminal proceedings as a procedural concept**

An objective prerequisite for the integration of legal provisions into an independent legal institution is the existence of a corresponding type of social relations (Krushynskyi, 2013, pp. 532-536). In this regard, the following are quite reasonably considered to be the features of a legal institution: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation (Alekseev, 2010, pp. 137-138).

The statement that the complex of these measures is an institution of criminal procedure law becomes reasonable if the general theoretical provisions on the general concepts and essence of a legal institution are extrapolated to the area of ensuring criminal proceedings. In practice, the focus of these measures on ensuring criminal proceedings (which is the reason for their title) is their essential feature and the grounds for their separation into a specific institution. However, of course, the tasks of criminal proceedings are also achieved through other procedural actions that do not belong to this group. This circumstance has logically led some scholars to deny the expediency of using the term "measures to ensure criminal proceedings" and to propose revisions to their system. For example, N.A. Sotnyk argues that, based on the content, the term "measures to ensure criminal proceedings" itself may be considered inappropriate, since criminal proceedings in general are ensured not only by them, but also by a whole arsenal of other measures, means and actions. Measures of criminal procedural coercion actually create conditions for the implementation of the tasks of criminal proceedings and ensure it compulsorily (Sotnyk, 2016, pp. 254-258). In this regard, the author even proposes to change the name of "measures to ensure criminal proceedings" to "measures of criminal procedural coercion", significantly changing their list in part two of Article 131 of the CPC, adding other measures provided for in the Code, and excluding the imposition of a monetary penalty and temporary access to things and documents. There is a certain logic in this, however, in our opinion, the specificity of these measures is determined by a number of other interrelated features, the combination of which allows to allocate such measures to a separate group of procedural actions, and their

main functional purpose (to ensure the solution of the tasks of criminal proceedings) terminologically determines their name, which quite successfully reflects their legal nature.

Like any other procedural concept, measures to ensure criminal proceedings have immanent features, the totality of which enables to formulate their scientific definition, since the thesaurus of Article 3 of the CPC of Ukraine does not contain their legal definition. In this regard, O. V. Firman, based on the classification developed by F.M. Kudin, divides all measures of criminal procedural coercion into: measures of prevention; measures of termination; provisional measures, and measures to ensure criminal proceedings, which, in his opinion, is only a group of measures of criminal procedural coercion applied on the basis, under the conditions and in the manner prescribed by the criminal procedure law, by state authorities and officials conducting criminal proceedings, and in some cases by other persons, against a suspect or accused, witnesses and victims or other persons to ensure the proper performance of their procedural duties, prevent possible or eliminate existing obstacles during criminal proceedings, obtain evidence, and enforce court decisions regarding the civil consequences of the case (Firman, 2014, pp. 231-234).

Therefore, in order to position these measures as a separate institution, it is necessary to clearly distinguish them as a separate group, which necessitates their comparison and determination of the correlation with other groups of measures that are related to the group of measures to ensure criminal proceedings by their content and role (performed by them in criminal proceedings). In particular, in the theory of criminal procedure, there are several approaches to resolving the issue of correlation between measures to ensure criminal proceedings and measures of criminal procedural coercion. The essence of the first approach is to equate these two concepts. For example, V.V. Nazarov, relying on the analysis of the definition of coercive measures in criminal proceedings, concludes that the measures to ensure criminal proceedings listed in Article 131 of the CPC, if applied, can ensure the fulfilment of the tasks of criminal proceedings. Moreover, agreeing with the views of V. Makhov and M. Pieshkov, who primarily refer to measures of criminal procedural coercion as preventive measures provided for by law, the author argues that the concepts of "criminal procedural coercion" and "measures to ensure criminal proceedings" are identical, as these measures enable to identify, collect and store evidence, prevent possible unlawful behaviour or exclude the possibility of a suspect or accused to evade investigation and trial (Nazarov and Lakhmanyk, 2013, pp. 102-106). This perspective is advocated by H.K. Kozhevnikov, who argues that the measures to ensure criminal proceedings provided for in Article 131 of the CPC can fulfil the main criminal procedural function, that is, to ensure proper behaviour of the participants in criminal proceedings, determined by the relevant provisions of the criminal procedure law (Kozhevnikov, 2012, p. 69).

The second approach to understanding the above correlation is that the concept of measures of criminal procedural coercion is broader in its content and covers measures to ensure criminal proceedings (Humin, 2013, p. 229). Indeed, it would not be entirely fair to refer only to preventive measures as measures of procedural coercion, since coercive nature is inherent in other procedural actions, including investigative actions (Nykonenko, 2014).

**3. Content of the institution of measures to ensure criminal proceedings**

In general, the theory of legal science has formulated various definitions of a legal institution, in particular, as a system of relatively separate and interrelated legal provisions that regulate a certain group of homogeneous social relations (Skakun, 2002, p. 249); as a part of a branch of law consisting of a set of legal provisions that regulate qualitatively homogeneous social relations (Kelman and Murashyn, 2006, p. 259); as a distinct set of legal provisions that are part of a branch of law and regulate a particular type of social relations (Khropaniuk, 1995, p. 292). Indeed, common to all these definitions is that an objective prerequisite for the integration of legal provisions into an independent legal institution is the existence of a corresponding type of social relations (Krushynskyi, 2013, pp. 532-536). In this regard, the following are quite reasonably considered to be the features of a legal institution: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation (Alekseev, 2010, pp. 137-138).

The homogeneity of the factual content is the fact that each legal institution is to regulate a strictly defined type of social relations (Alekseev, 2010, pp. 137-138). As regards the institution of measures to ensure criminal proceedings, its provisions regulate a set of social relations regarding the application of appropriate procedural measures in order to achieve the effectiveness of criminal proceedings. Furthermore, there is an obvious sign of homogeneity of factual content: the whole complex of these social relations is aimed at achieving the ultimate goal of solving the tasks of criminal proceedings formulated in Article 2 of the CPC. Indeed, each of the measures to ensure criminal proceedings

has its own purpose, which determines its specificity, grounds and procedure for their application, but the general purpose of all these measures is to ensure the solution of tasks and achievement of efficiency of a particular criminal proceeding (Articles 2, 131 of the CPC), but these tasks can usually be fulfilled only if the participants in criminal proceedings behave properly. Therefore, the legal nature of measures to ensure criminal proceedings is largely determined by the conditions of application of these measures (Lejst, 1981, p. 81), one of which is the failure to perform or improper performance of duties by participants in criminal proceedings, that is, the commission of a criminal procedural violation - this enables to assert that these measures are characterised by legal unity in achieving the goal and the means of achieving it. The legal unity of the institution of measures to ensure criminal proceedings lies in the fact that the rules that form it act as a single complex, an integral system of the branch of criminal procedure law, which comprise: provisions -principles defining the general principles of application of measures to ensure criminal proceedings (Chapter 10 of the CPC); provisions defining the procedure for application of certain measures to ensure criminal proceedings (Chapters 11-18 of the CPC); provisions that determine the procedure for applying provisional measures during special procedures of criminal proceedings (Articles 482, 492, 493, 508, 580, 582-586, 597 of the CPC), that is, the legislative separation of the institution of provisional measures in criminal proceedings means that its provisions are externally enshrined in the regulatory parts of the CPC in the form of independent sections and chapters.

**4. Conclusions**

Thus, measures to ensure criminal proceedings constitute an institution of criminal procedure law of Ukraine, which is confirmed by the compliance of the set of legal provisions regulating them with the features of a legal institution; as a legal institution, measures to ensure criminal proceedings are a system of relatively separate provisions, regulating the interdependent relations aimed at ensuring criminal proceedings by regulating the conditions, grounds and procedure for their application, the range of participants and the specifics of their legal status, as well as liability for violation of the established procedure and procedural duties imposed on them. When distinguishing measures to ensure criminal proceedings, we proceed from the understanding of the application of these measures as an activity-based and practical process, during which implementing measures are taken in relation to the decision of the investigating judge or court to choose a measure to ensure criminal proceedings.

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## ОБҐРУНТУВАННЯ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ЯК ОКРЕМОГО ПРАВОВОГО ІНСТИТУТУ

**Анотація.** ***Мета.*** Метою статті є наукове обґрунтування заходів забезпечення кримінального провадження як окремого правового інституту. ***Результати.*** У статті обґрунтовується твердження, що заходи забезпечення кримінального провадження є окремим інститутом кримінального процесуального права. Всі учасники кримінального провадження мають дотримуватися передбаченої законом процесуальної форми його здійснення, виконувати покладені на них обов'язки та підкорятися законним рішенням. Адже вирішення завдань кримінального провадження багато в чому залежить від сумлінного виконання його учасниками процесуальних обов'язків, що у сукупності створює належні умови здійснення правосуддя і забезпечення судовим захистом прав, свобод і законних інтересів осіб. Проте в реальному кримінальному процесі не всі учасники виконують свої процесуальні обов'язки, а з огляду на суворість можливого покарання досить часто ухиляються від органів досудового слідства та суду. Саме цим пояснюється необхідність унормування системи заходів, спрямованих на забезпечення можливості здійснення кримінального провадження з дотриманням стандарту розумного строку. ***Висновки.*** Зроблено висновок, що заходи забезпечення кримінального провадження становлять інститут кримінального процесуального права України, що підтверджується відповідністю сукупності правових норм, які їх регулюють, ознакам правового інституту; як правовий інститут заходи забезпечення кримінального провадження являють собою систему відносно відособлених норм, що регулюють взаємозалежні відносини, пов'язані із забезпеченням кримінального провадження шляхом регламентації умов, підстав і процедури їх застосування, кола учасників та особливостей їх правового статусу, а також відповідальності за порушення встановленої процедури та покладених на них процесуальних обов'язків. Під час виокремлення заходів забезпечення кримінального провадження як окремого інституту обґрунтовано думку, що застосування цих заходів це – діяльнісно практичний процес, під час якого здійснюються заходи реалізаційного характеру щодо рішення слідчого судді, суду про обрання заходу забезпечення кримінального провадження. А з теоретичної точки зору доведено наявність ознак правового інституту, а саме: однорідність фактичного змісту; юридична єдність (комплексність) норм; законодавча відособленість.

**Ключові слова**: кримінальне процесуальне право, кримінальне провадження, заходи забезпечення, сукупність ознак, правовий інститут.

*The article was submitted 18.07.2022*
*The article was revised 08.08.2022*
*The article was accepted 29.08.2022*