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**(Prawnokarna ochrona wierzycieli. Zagadnienia teorii i praktyki)
(Legal and criminal protection of creditors. Issues of theory and
practice)**

SUMMARY

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The objective of this doctoral dissertation is to give an answer to the question whether the present solutions provided under art. 300–302 of Criminal Code are sufficient for legal and criminal protection of creditors. This has required the analysis of features of prohibited acts as described in art. 300–302 of Criminal Code, which can be used in practice and which give grounds for effective legal and criminal protection of creditors against actions of dishonest debtors.

In order to answer a question about completeness of legal and criminal protection of creditors, in chapter I of the dissertation the analysis of protection offered to creditors is discussed by making the presentation of historical development of legal protection instruments back to the oldest regulations, which did not make a clear distinction between criminal and civil protection, until the adoption of present solutions in Polish criminal law. This part of the dissertation presents available data on legal instruments that creditor may use in order to claim the performance from a debtor. Personal responsibility of the debtor, and next its transformation into debtor's material responsibility, are discussed beginning from the Mosaic law, Greek and Roman laws, to Middle Ages law. Also, protection of creditors in lands of Poland has been presented, with a particular attention being put to criminal protection measures under Criminal Code of 1932, which gave grounds for further regulations, and in particular for those in the Act on Business Trading Protection and Change in Certain Provisions of Criminal Law of 12 October 1994, which next became the starting point for provisions of 1997 Criminal Code.

There are also indications as to legal solutions regarding criminal protection of creditors in the economic system adopted after 1945, which were binding as long as the end of 1969, when another Criminal Code came into force with its provisions in effect until the end of 1994, when the Act on Business Trading Protection and Change in Certain Provisions of Criminal Law of 12 October 1994 was enacted, where more complete protection of creditors was introduced. Differences in provisions of 1932 Criminal Code and those in effect since 1945 were substantial and initially came down to legal elimination of provisions regarding protection of creditors due to the economic system change, in which a bankruptcy of state-owned enterprises was not even recognized, and protection involved mainly court rulings, also State Treasury as a creditor of child maintenance payments. Also, criminal laws, which are introduced based on the Act on Business Trading Protection and Change in Certain Provisions of Criminal Law of 12 October 1994, are considered as those originating from

1932 Criminal Code and effective until 1997 to become the basis for those adopted in Criminal Code, which is in effect at present.

Chapter II of the doctoral dissertation presents some general notions such as "economic offence", "business trading", "business activity", "entrepreneur", "debtor", "creditor" as their interpretation affects the explanation of features of prohibited acts committed to the detriment of creditors. Among above-mentioned notions "business trading" is of crucial importance as it defines the protection object by nature. A controversial issue of the State Treasury and prosecutor as creditors, i.e. aggrieved parties in crimes to their detriment, has been addressed. Also, an issue of outstanding payments, their amounts, including a question whether interest should be included when determining the damage amount in criminal proceedings, has been considered. The analysis of the meaning of some prohibited acts indicated in art. 300-302 of Criminal Code, which raise most doubts at the level of their explanation and practical use, has been made.

Such features of prohibited acts as the feature of "many" creditors under art. 300 § 3 of Criminal Code, the feature of "a new business entity" under art. 301 § of Criminal Code, also the feature of "bringing about its bankruptcy or insolvency" under art. 301 § 2 of Criminal Code are presented. Considerations also regard "wasting asset components of the property" and "contracting liabilities or concluding transactions openly contradicting principles of good management" under art. 301 § 3 of Criminal Code. The requirement of satisfying creditors equally under art. 302 § 1 of Criminal Code, also the notion of material profit under art. 302 § 2 and 3 of Criminal Code, are given an assessment.

In the course of the analysis of features of prohibited acts notions relating to neighbouring fields of law such as bankruptcy law or civil law have been presented. At the same time, differences in the meaning of certain notions, which cannot be referred to in terms of a criminal law, have been discussed. Objections as to the content of features of prohibited acts have been indicated with an attempt to interpret them by making a reference to numerous Polish rulings and legal doctrine views. The *lex certa* principle has been presented taking into account Polish laws and judicature of Constitutional Tribunal, Supreme Court, views of Polish legal doctrine as well as European Union and international laws. These considerations are aimed at giving an answer to the question whether the legislator, when passing certain laws on legal and criminal protection of creditors, has not violated this principle, i.e. whether it is possible to use in practice those criminal provisions, which regard in particular, bringing about insolvency or bankruptcy, and favouring creditors.

Chapter III of the doctoral dissertation gives an assessment of the above indicated criminal provisions regarding the protection of creditors in the context of general provisions of Criminal Code, including among other, a basic condition of responsibility, i.e. determination of a higher than negligible harm of debtors' conduct to the detriment of creditors. Legal considerations also regard circumstances, excluding unlawfulness, which are most controversial such as a necessity, a business risk and a separate everyday risk, which is not subject to extensive theoretical considerations in the doctrine, and which is of crucial importance in terms of business run by natural persons and entities of various legal forms, which may become potential debtors.

Also, guilt excluding circumstances have been presented, including the inability to recognize the act to be unlawful, which when combined with multitude and changeability of non-criminal legal regulations, indeterminacy of some features of prohibited acts to the detriment of creditors, may be of substantial practical importance, especially in the context of proving non-criminal unlawfulness as a basis for accepting illegality of prohibited acts to the detriment of creditors in crimes against business trading. Possible modifications of the statutory degree of penalty for potential debtors, including partial or entire damage redress, have been presented. As in case of economic offences damage done is of crucial importance, therefore possible criminal and compensation measures to be used against dishonest debtors have been analysed.

Multitude of acts committed by debtors in so called economic offences to the detriment of not only creditors but also other entities, which result in a breach of legally protected goods, accounted for a discussion on issues of the act, singleness and multitude of acts, furthermore, the concurrence of legal rules not only under art. 300-302 of Criminal Code but also the concurrence of these provisions with other provisions of Criminal Code, also, with non-code criminal provisions.

It is characteristic for economic offences that when determining the singleness of an act, a breach of many legally protected goods, and therefore a breach of many criminal provisions occur. Moreover, perpetrators of economic offences undertake many actions in a definite time interval, which in terms of a criminal law are defined as many acts that cannot be easily separated in time, they frequently overlap and are in a breach of different legally protected goods. This causes problems as to the determination of a number of prohibited acts and a breach of criminal provisions by each of them. Thus, a problem of either singleness, or multitude of acts, cumulative qualification of provisions is best visualized in economic offences, including those committed to the detriment of creditors. What is

important, is the fact that in judicial decisions and in doctrine there is no consent as to cumulative qualification of provisions, and it is practically necessary to take in each and every case a decision as to what provisions have been violated by the debtor, provided the debtor has committed a single act and when more than one act, which particular provision or provisions have been violated by such a debtor. Consequently, these issues have become the object of chapter IV of the doctoral dissertation.

In chapter V of the doctoral dissertation the discussion continues on the subject and object-related legal regulations, which have been adopted in international law and European Union law in the areas, which are strictly related to the use of criminal law and regard non-criminal protection of outstanding payments in business trading. The analysis of the notion of "an economic offense" in international law has been carried out, including the presentation of protection types in international and European laws, more specific regulations regarding common formal requirements of establishing businesses, formation of entities, including such requirements as the amount of capital necessary for running a specific business, requirements as to the organizational structure of entities involved in businesses, and transborder bankruptcy law. Although in their very essence these regulations govern the creation of a law to become common for business activities in various countries, their objective is still the provision of protection in the foreground of a criminal law by setting down certain formal requirements, which when failed to be satisfied, provide grounds for an assessment in terms of non-criminal unlawfulness and general prevention. The chapter also contains a presentation of such solutions that have laid foundations for enacting criminal laws or for their interpretation with an objective to protect creditors against dishonest debtors.

The presentation of interrelated legal regulations is aimed at indicating to what probable extent a change in the interpretation of features of prohibited acts may occur under Polish Criminal Code, and whether imprisonment for debts is possible. The chapter provides a review of criminal provisions in criminal codes of some selected countries such as Federal Republic of Germany, Republic of Austria, French Republic, Russian Federation, Czech Republic, Slovak Republic, Ukraine, Republic of Belarus and Republic of Lithuania to indicate differences, also to find out whether provisions under art. 300-302 of Criminal Code are complete.

Already a preliminary analysis of these regulations indicates that even within the same economic system, and seemingly within a congenial legal system, there are significant differences in the formation of features of prohibited acts to the detriment of creditors. This

also regards legislations serving as benchmarks for solutions adopted in Polish criminal law. The presentation includes – as worth mentioning - types of qualified particular categories of prohibited acts and a type of the qualifying feature; this is done in order to indicate whether the only feature of "many creditors" being the qualifying feature from provisions regarding legal and criminal protection of Polish creditors under Polish Criminal Code has been adopted in any other legislations, and whether it is justified and most appropriate for complete criminal protection of creditors.

It has to be said that in many criminal codes other economic criteria are applied as the qualifying feature, which is more reasonable in terms of harm done to creditors. Legislations in other countries find gradable damage in property as a decisive feature of an increased statutory risk. Furthermore, such a crucial and decisive feature of a qualified type of a prohibited act is to bring another entity to bankruptcy. It seems that these qualifying features are more appropriate from the point of view of damage done to creditors. In this chapter also statutory risks have been indicated, and considerations to this extent are focused on showing not only differences in a sanction but to give mainly an answer to the question whether other types of sanctions may be introduced in Polish Criminal Code.

In the last chapter VI of the doctoral dissertation typical problems of practice are discussed based on the analysis of 30 cases in the venue of jurisdiction of Regional Prosecutor's Office in Łódź. Factual circumstances of cases and content-related decisions taken, including their substantiation, are presented. The selection of cases has been made from among those already directed to Court with indictments and those still at the stage of examination and preliminary proceedings. It was important to select such cases that may illustrate doubts as to the interpretation of features of prohibited acts to the detriment of creditors as earlier presented. National statistics of proceedings pending has been presented with a division into particular provisions of Criminal Code in order to illustrate which of them have been most frequently applied, and which are rarely or not at all adopted for legal qualification. An attempt to indicate reasons for this has been also made in this dissertation.

In general, multidimensionality of analyses made has finally led to the answer to the question of completeness of Polish regulation, and thus a possibility to use it in practice and the presentation of the *de lege ferenda* proposal for more complete and more effective protection of creditors in criminal law. Among the *de lege ferenda* desiderata those having an effect on imperfection of the entire regulation adopted have been presented as first, and those that result from imperfection of solutions in particular criminal provisions as next. The chapter also provides examples of features with their interpretations being highly

doubtful as to their compliance with the principle of determinacy of features of prohibited acts, it also presents contradictions between particular criminal provisions regarding legal and criminal protection of creditors.

To sum up, the dissertation identifies an objective with a focus on theoretical considerations involving one of most serious crimes in business trading, in terms of their direct effect exerted on creditors and in terms of their indirect effect on other participants of business trading, which are illustrated by definite examples of cases, and the intention is to indicate whether criminal protection of creditors is sufficient and what legislative as well as practical actions should be taken to provide as good protection as possible.

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