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Legal instruments for the protection of creditors' interests, in particular with regard to economic crime

Theses of the PhD dissertation

Miskolc

2024

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Dissertation closing date: 25. August 2024.

I. The subject and aim of the dissertation

The subject of my thesis is the legal situation of creditors in Hungary, with particular attention to the criminal law instruments available to them, including primarily economic crimes.

Creditors are those persons who have a claim against the debtor on the basis of property law, the aim of which is typically not reorganisation but the satisfaction of their claims. Given the fact that credit is an integral part of economic life, strengthening the confidence of creditors and protecting their interests is a key issue, as a lack of confidence leads to a reduction in the willingness to enter into contracts and has a negative impact on the efficient functioning of the market. Creditor protection is available to the party with a claim to property, irrespective of whether it is a private or public claim, whether the claim is recognised or not, and whether the creditor's private claim arises from a contractual or non-contractual relationship. Its legal basis may be based on a civil law, company law or bankruptcy law provision. Putting creditor protection on the back burner leaves room for abuse. Those who, in order to gain an advantage, violate the laws that ensure the proper functioning of the economy and thus harm the interests of creditors, face various adverse legal consequences. The protection of creditors is ensured by the legislator through various legal instruments, but in view of the ultima ratio nature of criminal law and the close relationship between criminal law rules and private law provisions in relation to creditor protection, I consider it essential to present not only criminal law instruments but also civil law, company law and bankruptcy law instruments.

As we approach the turn of the millennium, the role of the economy has changed and the protection of creditors' interests has become more important. The state was obliged to guarantee a new form of economic protection, which it also had to seek through criminal law. This called for a new approach to criminal law that would ensure the protection of both the new forms of company and creditors.

Therefore, in addition to civil law instruments, the protection of creditors is also guaranteed by criminal procedural and criminal substantive law rules, since if a person in the position of a debtor in a private legal relationship fails to fulfil his/her obligations

under the law or a contract and, in the context of this legal relationship, engages in conduct that violates Act C of 2012 on the Criminal Code (hereinafter: the Criminal Code), thereby infringing the interests of creditors, his/her conduct may result in the initiation of criminal proceedings.

The Criminal Code provides for the protection of creditors primarily, but not exclusively, in Chapter XLI, Offences against the orderly management of the economy. However, taking into account that the aim of criminal proceedings for the commission of an offence prejudicial to creditors' interests is not primarily to convict the accused but to repair the damage to property, particular care must be taken to locate and secure the assets derived from the offences, for which the Criminal Code provides. General Part of the Criminal Procedure Code and Act XC of 2017 on Criminal Procedure (hereinafter referred to as the Criminal Procedure Code).

The aim of this thesis is to provide de lege ferenda proposals on the criminal law provisions directly ensuring the protection of creditors, following a legal history review, an examination of the existing legislation providing for the protection of creditors, as well as the English, German and Slovakian legislation, and a review of the relevant literature.

II. Structure of the dissertation

In order to achieve the above objective, the paper discusses the most important areas of the legal position of creditors in 8 chapters.

In order to get a complete picture of the legal situation of creditors in the country, it is necessary to briefly describe the civil, company, bankruptcy and criminal law instruments that protect their claims. Therefore, following the introductory reflections, in Chapter 2 I will first present the private law instruments and then, within the same chapter, I will also examine the criminal law instruments. Thus, my thesis will touch upon the provisions of the Be. and the Btk. which provide protection for creditors and which fall outside the scope of economic crime.

The aim of Chapter 3 is to present economic crime in general and to explore its links with the offences that protect creditors' interests, the path to which is through a clarification of the concepts of economic regulation, economic crime, economic crime and white-collar crime.

For a critical examination of the current legislation, it is necessary to review the changes in the provisions, as this may help to make well-founded proposals for the future, so the presentation of the history of the Hungarian legislation on the economic criminal law provisions serving the protection of creditors' interests, which will be presented in Chapter 4, cannot be omitted. The legal history of the development of the protection of creditors under criminal law in Hungary, the changes in the legislation and the historical context in which the existing legislation was created from the beginning of the 19th century are described.

In Chapter 5, the main emphasis is on a detailed legal, analytical, critical and jurisprudential analysis of the offences providing direct protection of creditors' interests, which are covered in the chapter of the Criminal Code entitled Offences against the orderly management of the economy. The offences of bankruptcy, debt defraudment, impairment of own capital and breach of the accounting rules are critically analysed. In order to gain insight into the domestic criminal law regulation of the protection of creditors' interests and the jurisprudence, I will conduct an empirical research on the criminal proceedings pending at the Miskolc District Court after the entry into force of

the new Act on the Protection of Creditors' Interests, which are the subject of the offences I have previously examined in detail.

In chapter 6, I will examine the international perspective of the criminal law of creditor protection in other countries, such as the English legal environment, which is very different from the domestic one, the German legal environment, which has had a great influence on domestic jurisprudence for centuries, and last but not least the Slovak legal environment of another post-socialist country.

Finally, in Chapter 7, before concluding, I will briefly summarise the possible shortcomings of the most important torts that ensure the protection of creditors, and I will summarise the de lege ferenda suggestions that I have identified, thus making useful and well-founded recommendations for future domestic criminal law.

III. Methods used in the research and evaluation of the topic in the literature

Given the nature of the legal instruments that protect creditors, my thesis was written using a multidisciplinary approach and several research methods.

In my thesis, I primarily use descriptive, analytical and critical research methods, but I also use the historical method to examine the development of the legal position of creditors and to explore the path leading to the current situation in Hungary. In presenting the theoretical foundations and the legislation in force, I use the dogmatic and normative method, and in interpreting the various legal provisions I also carry out a grammatical and logical interpretation of the legal provisions, and in many cases I resort to the method of critical analysis.

I consult the relevant domestic and foreign literature, books, textbooks, commentaries, monographs, articles, studies, domestic PhD theses, as well as domestic court decisions and case law published in the Criminal Law Judicial Register relating to the protection of creditors' interests.

In the historical overview and the analysis of the current legislation, I will use the Ministerial Explanatory Memoranda related to the Codes, and I will pay particular attention to the related Criminal Court decisions and Constitutional Court decisions, using the methodology of logical and theoretical analysis.

In Chapter 5 of the thesis, I will elaborate on the cases collected during the empirical research conducted at the Miskolc District Court, and draw conclusions on the basis of the final court decisions regarding the classification of the offences and the sanctions applied.

Following the exploration and interpretation of the available legislation, an in-depth analysis of the literature and the application of the research methods mentioned above, I will formulate the final conclusions and recommendations of the dissertation.

IV. Summary of the research results and its utilization

A recurring question in relation to the protection of creditors' interests is where to place offences against creditors' interests. Proponents of placing criminal provisions in the bankruptcy law justify this view by arguing that it is easier for both the judge involved in the bankruptcy proceedings and the creditors and debtors to perceive and apply the criminal rules and legal consequences if they are placed in the same place as the bankruptcy law. In my view, however, it is in the public interest that the most serious, punishable conduct should always be dealt with in the current criminal code, and it is essential, in view of the requirement of legal certainty, to establish uniform rules of criminal law. It is a fact that the assessment of offences that protect creditors' interests often poses a serious challenge for the professionals involved, since in addition to the criminal law rules, knowledge of the statutory law is also required, but this cannot depend on where the offences are located by the legislator.

The central issue of my thesis is the examination of the criminal law provisions directly ensuring the protection of creditors' interests, which can be found in Chapter XLI of the current Criminal Code, entitled Offences Violating the Order of Management. In the current Code, the legislator had a more differentiated legal construction in mind than before, and divided the Special Part into chapters based on the narrower scope of the protected legal subjects, but did not divide the chapters into further titles. In my view, in order to make economic offences easier to identify, it would have been appropriate to follow the solution of the previous Criminal Code and separate the offences that could be classified under this heading by title within the chapter, thus making it clear that the offences belong to one category. However, this approach is not in line with the legislator's intention to emphasise the importance of the protected subject-matter. However, in view of the intention to place offences which provide protection for the same legal objects in a single chapter, the chapter on offences against the economic order is, in my view, too broad, since many of the offences fall within this chapter, but the legal objects of the offences are different. Therefore, bearing in mind the legislative objective, I would consider it conceivable to regulate the offences of

protection of creditors and security of lending in a separate chapter, which would include the offences of bankruptcy, debt deprivation and impairment of equity.

Regarding the legal regulation of bankruptcy offences, the question of the extent to which criminal liability should depend on the bankruptcy and liquidation proceedings, or whether it would be advisable to make it independent of them, is often a matter of debate. The existing legislation provides for an objective criminal liability criterion, which in my view is justified, since its omission would better serve the interests of creditors, but would result in an unjustified extension of criminal liability. Instead, the provision should be clarified in order to prevent the declaration of insolvency from being prolonged. As far as bankruptcy proceedings are concerned, it is a fact that, since the request for them to be opened also opens up the possibility of criminal prosecution, it is not common for them to be initiated by debtors. I believe that consideration should be given to the possibility of removing the bankruptcy turn from the objective criminalisation criteria or to modifying it in such a way as to promote a positive change in the debtor's attitude towards bankruptcy.

Another significant issue to be highlighted in relation to bankruptcy offences is the possibility of decoupling criminal substantive law from the Bankruptcy Act, which would significantly simplify the situation of law enforcers, since in many cases the terminology of a completely different field of law cannot be incorporated into the application of criminal substantive law. This could be achieved by creating specific interpretative provisions, which would be the surest way to create specific provisions in criminal law, but would probably increase the number of criminal provisions considerably. Another option is to bring bankruptcy and criminal law into line through a comprehensive reform of the Bankruptcy Act. In my view, the law is ripe for a complete overhaul, as it has been amended several times since its entry into force and many of its rules are not able to fulfil their original purpose effectively. The bankruptcy offence is currently subject to frequent amendments to the Bankruptcy Act, which does not take account of aspects of criminal law. Although it is not to be expected that bankruptcy law should primarily take into account the specific features of criminal law other than bankruptcy law, I believe that if the legislator were to make an effort in this direction, the rules of bankruptcy law and criminal law could be brought closer together

and brought into line with each other in the course of the recasting process, while bearing in mind the specific features of the different areas of law.

In the course of the investigation of the bankruptcy offence, I have also dealt in detail with the question of the perpetrators of the offence. Under the rules in force, in addition to those who have the right to dispose of assets, those who have the means to do so can also be held liable. The Criminal Code. The Ministerial Explanatory Memorandum notes that the law was intended to extend the scope of criminal liability to cases where the owner representative can no longer legally dispose of the assets, but still has the possibility to do so. However, the present solution, contrary to the original intention, has essentially removed the special legal personality. In order to ensure this again, I believe that it would be advisable to clarify the facts and to list in a taxatised form the persons whom the legislator wishes to make punishable. It is also worth mentioning the liability of shadow managers, and the legislator's consideration of introducing an express provision in the law to make them criminally liable, which would define precisely the category of persons to whom they would apply, so that a person who is largely responsible for the commission of an offence but who does not have the necessary powers of disposal to be criminally liable does not go unpunished.

In relation to the issue of the facts of debt forfeiture, the question of the scope of the grounds for decriminalisation should be highlighted. Already in 1987, Act III of 1987 provided that the offender could not be punished if the debt was "settled" before the court of first instance had delivered its judgment, a provision which remained unchanged until the entry into force of the Criminal Code. In contrast, the current legislation states that the offender cannot be punished for the deprivation of the security for the debt if the debt is "settled" by the time the indictment is filed. Thus, while the wording of the 1978 Criminal Code makes it clear that the offender does not necessarily have to settle the debt, the word "settle" implying that anyone can do so, even against the knowledge and will of the accused, the current rules only allow the accused to do so. Although I share the views which, in view of the importance of this legal instrument, seek to link the termination of criminal liability to the person of the debtor, I consider that, from the point of view of creditors, whose interests are paramount, it is appropriate that the reason for the termination of criminal liability should be to promote the

discharge of the debt by not limiting it to the offender. The current rule of the Criminal Code, which provides for the application of a ground for non-criminalisation only in the event of payment by the offender, is contrary to the legislature's intention to give priority to the interests of creditors over the punishment of the offender.

In the context of reducing equity, the legislator should ensure that all legal persons are protected, which could be achieved by avoiding the tax list. I also believe that the scope of offenders should be extended, as it is not only directors and members who can deprive companies of their assets. On the other hand, the fact that the offence of misappropriation of own capital is often overridden by the fact that it is covered by several offences against property, such as embezzlement or fraud, and that if the misappropriation of own capital results in partial or total non-payment of creditors, the offence of bankruptcy can be established. In view of the very low incidence of this offence in judicial practice, consideration should be given to decriminalising the misuse of own funds and making the offender's conduct, such as the diversion of the company's own funds, punishable only if the other elements necessary to establish the other offences are present.

The legislator expressly provides for the punishability of the failure to supervise or control the executive officer in connection with bribery and budgetary fraud, but the current rules of the Criminal Code do not punish this failure in other cases. However, it is debatable whether it is necessary to extend this form of liability to other offences. One argument against criminalisation is that the offence-participant form is suitable for sanctioning different types of behaviour within the organisation, and the fact that neither the special form of managerial liability for active bribery nor that for budgetary fraud has any practical significance, since the entry into force of these provisions, no case has been prosecuted or brought to trial. However, as a kind of legal history, I would like to point out that in the case of offences against creditors' interests, the Hs. proposal intended to punish as a misdemeanour the failure, whether intentional or negligent, of persons entrusted with the management of the business to fulfil their supervisory or control duties, although this provision has not entered into force.

V. List of publications related to the dissertation

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4. A csődbűncselekmény elkövetése miatt folyamatban lévő büntetőeljárásban bejelentett polgári jogi igényre vonatkozó szabályok, Studia Iurisprudtiae Doctorandorum Miskolciensium – Miskolci Doktoranduszok Jogtudományi Tanulmányai Tomus 22., 2021/2.

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11. A vezető tisztségviselő büntetőjogi felelősségének egyes magánjogi vonatkozásai, különös tekintettel a csődbűncselekmény kérdéskörére, Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXXVII/1., 2019.

12. A nemzetközi bűnügyi együttműködés, különös tekintettel az európai közösség pénzügyi érdekeinek védelmére, Miskolci Jogtudó – Hallgatói Online Jogtudományi Folyóirat 2019/1.

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18. A versenyt korlátozó megállapodás tilalmának jogtörténeti előzményei az 1931. évi XX. törvénycikk tükrében, Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXXVI/1., 2018.

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