Non-Criminal Sanction for Lack of Cooperation of Third Persons at Determination of Bankrupt’s Property within Bankruptcy Proceedings

*de lege ferenda*

Malitiis non est indulgendum.
Indulgence is not to be shown to the malicious desires.
Publius Iuventius Celsus

The Sanction for Unlawful Conduct within and outside the Criminal Procedure

The unlawful conduct represents a socially dangerous activity, however, the state’s response within the criminal procedure is not always required. Unlike the previous times, the criminal law today falls under the scope of ius publicum and, within the meaning of the theory of sanctions, is thus characterized by sanctions having repressive character. Repression does not result in reformation of the wrongful state itself but causes intentional harm to the party responsible with the behavioural purpose pro futuro. Taking into consideration the scope of exhaustive enumeration of types of sanction (including the statutorily stipulated rate of punishment), it is possible to consider criminal law a legal discipline most intensively exploiting the state monopoly to repression.

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2 We understand sanction as a secondary duty of a legal person as “an adverse consequence resulting from the fact that a legal person did not act in compliance with the valid laws”. M. Večeřa, A. Gerloch, H. Schlosser, K. Beran, S. Rudenko, *Teória práva*, 4th ed., Eurokódex, Bratislava 2011, p. 240. Namely the connection between sanction and unlawful conduct excuses the interference of state into the private sphere of an individual.
However, it is necessary to note that sanctioning of the unlawful conduct solely by the means of criminal rules is not acceptable under the material rule of law. It is mainly due to the principle of proportionality reflected in criminal law in the axiom of *ultima ratio*. It represents its derivative in consequence of the specifics of the criminal procedure. Nevertheless, also the rules of other legal disciplines *ius publicum* serve the repressive function, and make it possible to ensure more moderate (more reasonable) and thus fairer punishment for less serious forms of legally reprobate conduct. The repression against an offender must be exercised via primarily non-criminal rules, if the main purpose, i.e. to procure the satisfaction of the criterion of effectivity of sanction, can be met. Even though it represents the sanction through the means of non-criminal rules, the requirement of severity of negative consequence associated with the legally reprobate conduct of the offender cannot be resigned to.

In general, it can be stated that the intensity of repression should equal the seriousness of the wrongful act. The insufficient punishment of unlawful conduct not only negatively impacts on the conditions protecting the civil society (i.e. protection of the broadest scope of social relations), but also results in the loss of trust in and certainty of the just and fair course of insolvency proceedings (loss of legal certainty).

Thus, the effect and purpose of sanctioning of the unlawful conduct must be retained also outside the criminal law framework including cases, when coordination is not provided to the official receiver at determination of the property under bankruptcy. The sanctions are possible under the Act No. 7/2005, Coll. on Bankruptcy and Restructuring (hereinafter referred to as the “BRA”), or under the Act No. 300/2005 Coll. Criminal Code (hereinafter referred to as the “CC”) due to the seriousness of the offence.

Necessity of Cooperation in Reaching the Purpose of Bankruptcy Proceedings

The settlement of property relations of a bankrupt represents the purpose of the bankruptcy proceedings. It can be understood also as a special instrument through which the creditor enforces its claim – subjective right to consideration from the debtor – against the bankrupt. BRA imposes some
duties related to the said proceedings on various legal persons, including the duty to provide cooperation at determination of the bankrupt’s property\textsuperscript{4}.

The official receiver is responsible for determination of property throughout the bankruptcy proceedings. For this reason, several legal persons are under the cooperation duty. Under Section 74 and Section 74(a), the aforementioned duty relates to the bankrupt, and further to the statutory body or a member of the statutory body of the bankrupt, the procurator of the bankrupt, the professional representative of the bankrupt responsible for its entrepreneurial activities, the bankrupt’s liquidator, the bankrupt’s administrative receiver, and the bankrupt’s statutory representative; should the legal person without any statutory body be in the position of a bankrupt, the coordination duty relates also to the person exercising the function of a statutory body or a member of a statutory body as the last one.

Except for the aforementioned persons, the said duty relates also to the third parties. The Section 75 of BRA is designated the Cooperation Duty of the Third Parties. The cooperation duty is imposed on the following persons upon a written request:

– the courts, other state authorities, municipal bodies, other civil authorities, notaries public and judicial enforcement authorities,
– the police corps – to provide protection under the Act No. 171/1993 Coll. on Police Corps,
– the state and other authorities and legal entities, who are officially authorized to maintain the statistics of persons and their property,
– any person in disposal of records or documents on the property under bankruptcy, or in disposal of the property under bankruptcy itself – is under the statutory duty to inform the official receiver on the same without undue delay after they became aware of issuance of the bankruptcy order, as well as to allow for their inspection, and, upon written request, also to hand them in, or take any measures required by the official receiver to secure the same,
– all persons in disposal of deeds or other items which can serve as evidence at determination or securing of the property under bankruptcy, are under the editorial duty,
– the financial institutions (banks, branches of foreign banks) are under the duty to mandatorily disclose the account numbers of the bankrupt, the state and any changes on its accounts, information on deposit of securities and passbooks,

\textsuperscript{4} See §§ 73-75, BRA. From the authenticity of interpretation perspective, it can be stated that the purpose of the regulation of the pertinent duty is to procure satisfaction of the purpose of the (whole) bankruptcy proceedings. Explanatory Memorandum to BRA, Section 75.
the providers of universal postal service, telecommunication providers, carriers, publishers and insurance companies within the meaning of Section 75 (7-11), BRA.

It is obvious that a large extent of legal persons are under the duty to facilitate the official receiver in his efforts to attain the goal of the bankruptcy proceedings. The success in his endeavours is conditioned by the fair determination of the bankrupt’s property. If the person concerned does not respond to receiver’s requests, it commits a wrongful act, however, not necessarily a crime.

In the criminal law perspective, the omission of coordination duty owed to the official receiver can fall within the scope of interference with the bankruptcy and composition procedure under the Section 242 (1)(a), CC which is a misdemeanour in its merits. Pursuant to the merits of the case, the prosecution is not related to any breach of duty, only to those which interfere or interfered with the attainment of the purpose of the pertinent procedure. There must be a proximate causation between the consequence incurred and the breach of statutory duty. The omission to be cooperative during the determination of the bankrupt’s property is unequivocally capable to amount to interference and default in attainment of the purpose of the said proceedings.

The liability assessment in the case at hand must inevitably rely on the idea that the criminal prosecution should be invoked “ultimately only in the most serious cases. The criminal law should represent the ultima ratio instrument (instrument of last resort)”8. The aforementioned principle is achieved also through the substantively formal understanding of the misdemeanour concept. The institute of substantial corrective falls under the amendment of the legal definition of crime under Section 8, Criminal Code. Thus, a minute wrong (omission of statutory duty), or a small one, in case of minors, do not constitute a crime of interference with the bankruptcy or composition procedures. The modus operandi, its consequences, the circumstances

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6 A person interfering with the bankruptcy proceedings, composition, restructuring or debtor’s discharge omits its statutory duty governing the said procedures, it will be sentenced to a prison term from 6 months to five years.
7 Whereby a substantive relation between the state and a person omitting its cooperation duty was constituted.
8 I. Mencerová, [in:] I. Mencerová, L. Tobiášová, Y. Turayová et al., Trestné právo hmotné. Všeobecná časť, Heuréka, Šamorín 2013, p. 21. The subsidiarity of criminal repression should be achieved also through the procedural regulation. The broad scope of derogation should ensure that the courts would not hear petty offence cases. The aforementioned is confirmed also in the Explanatory Memorandum to the CC.
9 Crime can be defined as a wrongful act having the characteristics enshrined in this statute, unless provided hereby otherwise.
es under which the act was committed, the standard of guilt, and the motivation of the offender represent the assessment criteria for determining the gravity of the act.

Even in cases when lack of cooperation with the official receiver does not qualify for the merit of the pertinent crime (relying on the substantively formal understanding hereof), it is not possible to resign to the requirement of more reasonable, however, still very effective repressive measure of the said wrongdoing. In the material rule of law, it is not possible to do nothing, if the breach of legal duty has been established.

The mechanism of the pursuit of the third parties is set forth in Section 75(12) of the pertinent statute. Pursuant hereof, these persons are under the duty to provide cooperation without undue delay and free of charge. In case of breach, a financial penalty – i.e. a fine up to the amount of EUR 3,300 imposed by a court’s resolution on the advice of an official receiver – follows. The pecuniary sanction represents a general sanction, even though it relies on the presumption that the relevant person is in disposal of certain property, which sometimes in reality, is a mere fiction.

The resolution is appealable by the authorized person against whom the sanction was applied within 30 days of receipt. The proceeds from the fine represent the income of general basis; the claim for the payment of the fine is stated by the official receiver. The lawful resolution on the imposition of a fine represents an enforcement title. Should the fine be imposed outside the bankruptcy proceedings, the proceeds represent the income of the state budget.

Is it possible to consider the de lege ferenda regulation sufficient to represent an effective measure against the breach of the statutory duty of cooperation within the bankruptcy proceedings by the said persons? The standard case law of the European Court of Human Rights does not recognize deferred justice as justice in its very sense, and thus, the axiom of expeditious procedure represents a derivative of the constitutional principle of justice which must be strictly followed within the bankruptcy proceedings. The said proceedings result in serious legal consequences for the proprietary integrity, inter alia, of the creditors. The speedy attainment of the goal of the proceedings depends on the expeditious character of and success in the determination of the bankrupt’s property also due to cooperation of the third parties.

**The Sanction Mechanism under Section 75(12), BRA**

Pursuant the pertinent provision, if the obliged person, upon the court’s request, fails to (1) provide the statutorily required cooperation to the official receiver, the court is authorized, through resolution, to (2) impose a penalty
in the amount of EUR 3 300 on the advice of the official receiver (3). The resolution on imposition of penalty which is appealable within 30 days of delivery is not published in the Commercial Journal. Nevertheless, it represents a legitimate enforceable title\textsuperscript{10}. We must not forget that the proceeds from the penalty represent the income of general basis and the claim for its payment is stated by the official receiver\textsuperscript{11}.

It can be stated, that the penalty represents an universal sanction which interferes with the proprietary integrity of the person liable for the wrongful act. Objective law presumes that a legal person is in disposal of certain property which can be, at least partially, subject to enforcement of the resolution on imposition of penalty. The universal character of the penalty has been confirmed also by the legislator in the area of administrative punishment – referring to Section 13(1), Act No. 372/1990, Coll. on Misdemeanours.

However, the imposition of penalty (liability for the wrongful act), \textit{de lege lata}, enjoys only facultative character. Unlike the case when cooperation is not provided by the bankrupt under section 74(5), BRA, the imposition of penalty is not related to the preceding failure of the court’s request. Moreover, the sanction is defined only by its highest limit, comparable with the case when the duty is breached by the bankrupt.

Is it then possible to consider the state of \textit{de lege lata}, to ensure the due and timely provision of cooperation by the third parties within the bankruptcy proceedings, sufficient? Legal authority is retained through the threat of sanction. When the threat of sanction has only facultative character, it becomes less effective in view of the attainment of the purpose – to ensure expeditious, lawful and efficient determination of the bankrupt’s property. Is it also possible to consider the differentiation of the amount of the pecuniary fine reasonable?

\textbf{De lege ferenda proposals}

Taking into account the serious character of the alleged proceedings, it seems proper to amend the pertinent regulation so that the imposition of fine, on the motion for its imposition, achieves obligatory character and must be applied by the court. The authors’ are aware of the fact that the duty of

\textsuperscript{10} However, it represents a specific enforcement title. Under Section 41 (1), Act No. 233/1995 Coll. on Enforcement Officers and Enforcement Procedures (hereinafter referred to as “EP”), the enforcement title represents an enforceable court decision, if it awards a right, imposes a duty, and covers the property, although Section 75(12), BRA stipulates that for the court ruling to achieve the enforcement title, its lawfulness is required.

\textsuperscript{11} The fine represents an income to the state budget only in cases if it is imposed outside the bankruptcy proceedings.
the third parties to provide cooperation at determination of the state of the bankrupt’s property enjoys only subsidiary character when compared to the said duty of the bankrupt. Nevertheless, the obligatory pursuit of a stipulated reprobation conduct seems to be beneficial and welcome to ensure the due course of a specific phase of the bankruptcy proceedings. The obligatory character would motivate the legal persons to responsible provision hereof, and thus facilitate determination of the bankrupt’s property. The necessity to punish the lack of activity would be derived directly from the substantive regulation. Also in view of the serious character and consequences of the said behaviour, it seems to be proper and effective to pay attention to the consistent alertness the legal persons.

At the same time, it is recommended, that imposition of the fine would, in exceptional cases, fall within the discretion of the authority responsible for application of law. However, it would have to be cases worth special attention – whereby there would be space given to equity and ideal of fairness in exceptional situations which the legislator, in their legislative activities, could not have generally presumed. Thus, the court would not find itself in the position of a person subjected to automatic conduct but, in compliance with the model of legal and reasonable application of law, it would have discretion to consider several constitutional principles and social values enshrined within. Unlike de lege lata situation, the primary obligation to impose a fine would be set forth, and only in legitimate cases (justified by the factual merits of the case), there would be more lenient application of law possible (dura lex, sed lex rule). Some space to avoid excessive and unacceptable formalism would thus be granted to the court. The holding of the court would have to be sufficiently reasoned for the purpose of its affirmation within a potential judicial review.

The constitutional principle of proportionality is reflected also in the issue of statutory differentiation of a sanction – i.e. the fine. While the debtor and the persons stipulated in Section 74(2), BRA in case of breach of the said

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12 Without prejudice to the principle ignorantia iuris non excusat.
13 The importance can be confirmed also through the provision of the protection within the criminal law. Under the application of the ultima ratio principle, the criminal law should protect only the selected and most important legal relationships. By the creation of a new cause of action, the legislature shows its interest to provide for a due and speedy procedure in question.
14 “The excessive formalism means such an interpretation of a provision, where the strict insistence on the formal aspects of law does not fulfil any reasonable function, conversely, it defies its the very sense”. The Resolution of the Constitutional Court of January 12th, 2012, file number iv. ÚS 19/2012-13. “It is namely the extreme injustice which represents the most important factor for the Constitutional Court to define the limits of the legal formalism, which it otherwise considers acceptable as it reflects the principle of legal certainty” – M. Turčan, K myšlienкам Ústavného súdu SR o právnom formalizme. [in:] Právní formalismus. Sborník příspěvků sekce teorie práva, přednesených na mezinárodní vědecké konferenci Olomoucké právnické dny 2014. Iuridicum Olomoucense, Olomouc 2014, p. 83.
duty can face the fine amounting to EUR 165,000, in case of the third persons the highest limit of fine is set at EUR 3,000.\textsuperscript{15} It is mainly because of the fact that the duty of coordination provided by the third parties enjoys only subsidiary relevance in comparison to the same provided by the bankrupt, and the capacity to endanger the successful attainment of the purpose of the bankruptcy proceedings in case of the pertinent breach by third parties is much lower.

The motivation factor of the sanction mechanism in both of the aforementioned cases could be made more effective, if a reasonable scope of fine\textsuperscript{16} would be set forth, i.e. the statute would set not only the its highest but also its lowest limit. Pursuant introduction of the scope of fine, the persons under the duty of cooperation would thus become aware of the possible minimal impact on their proprietary integrity, should they not respond to the request of the official receiver. Equally, the parallel with the statutory differentiation of the prison term under Section 242(1) (a), CC would be retained. The sanction is equally determined by its lowest, as well as by its highest limit, i.e. from six months to five years of imprisonment in the form of general criminal sanction. The lowest limit of the statutory differentiation should reflect the relevance of the pertinent bankruptcy proceedings and specification of the subsidiary duty of the third parties at determination of the bankrupt’s property subjected to bankruptcy. It could be stipulated at a fixed amount (e.g. EUR 250) or a variable one, in reference to some legal institutes. The determination of the limit would be derived from the minimal wage and represent its x-multiplication, from the minimal standard of living, or from other variable, thus providing for the reasonableness of the minimal fine in view of the changes in the social reality (the positive change of social standards). However, if the facts related to the breach of duty (especially fault) indicated the need to impose a more severe penalty, the court would be obliged to determine a proportionate amount of fine. Nevertheless, under Section 3 (1) Act No. 301/2005, Coll., Civil Procedure Rules, the judge would still be obligated to inform the prosecuting and adjudicating bodies on the fact of lack of cooperation, if, upon assessment of the request of the official receiver on imposition of a fine, s/he would believe that there is a possibility to charge persons having the cooperation duty under Section 242 (1)(a), CC.

Equally, it is necessary to recognize also the positive impact of the \textit{de lege ferenda} proposals. The income from the fine within the bankruptcy pro-

\textsuperscript{15} In relation to the legal regulation of the disciplinary fine enshrined in Section 102, Act No. 160/2015, Coll., Rules of Civil Contentious Procedure, it represents \textit{lex specialis}.

\textsuperscript{16} The fine is usually defined by its highest level, however, at some causes of action, also by its lowest one. If both levels are present, we can speak about the so called scope of fine. More on this see in: M. Srebalová, [in:] M. Srebalová et al, \textit{Zákon o priestupkoch. Komentár}, C.H. Beck, Bratislava 2015, p. 67 and foll.
ceedings represents the income of general basis. The consistent focus on the awareness of the legal persons together with the strict but fair determination of liability would result in the increased success in the enforcement of the creditors’ claims in the pertinent procedure. In relation to the occurrence and gravity of the wrongful conduct, there would arise also the possibility to increase the number of satisfied claims\textsuperscript{17}. It is necessary to note that frequently these claims represent the claims of the state or public bodies.

Even though the pertinent proposal tightens the repressive measures against persons under the cooperation duty, it does not represent an inadmissible move as the said measures only respond adequately to wrongful act committed by those persons. Therefore, a reasonable scope of fine can serve as a legitimate tool to attain the pursued goal – i.e. to ensure a speedy and effective course of bankruptcy proceedings, which substantially depends on the determination of the property available to creditors to satisfy their claims.

The Legal Regulation of the Cooperation Duty within the Insolvency Proceedings in the Czech Republic in Comparative Perspective

In the Czech Republic, the insolvency proceedings are regulated by the Act No. 182/2006, Coll. On Bankruptcy and the Ways of its Solution (Insolvency Act) (hereinafter referred to as “IA”).

The legal regulation at hand is, in relation to the Act No. 99/1963, Coll. Civil Procedure Rules (hereinafter referred to as “CPR”), the \textit{lex specialis}, and thus the legal regulation of the disciplinary action under IA enjoys precedence within the application practice. Section 81(1), IA directly refers to the regulation of the disciplinary fine under Section 53 CPR. The cooperation duty of the bankrupt and third parties is also stipulated in Sections 209-216, systematically designated \textit{Determination of the State of Property (Zjišťování majetkové podstaty)}.

Under Section 211, IA: “If the insolvency receiver or the interim receiver cannot determine the state of property due to lack of required cooperation, they shall notify the insolvency court thereof, and propose requisite measures”. The special scope (legal differentiation) of sanction is, however, not set forth in the \textit{lex specialis}, and thus, it is necessary to rely on Section 53, CPR – a person who grossly interferes with the progress of the procedure, inter alia, by [...] failing to obey the court order [...] will be imposed a disciplinary

\textsuperscript{17} The lawfully imposed and paid or enforced fine thus enjoys (at least partially) compensatory effect in favour of the proprietary integrity of the outstanding creditors of the bankrupt.
fine up to the amount of CZK 50 000 (according to the exchange rate valid on April 15, 2017, it represents EUR 1872,38). In comparison with the Slovak legal regulation, it represents a less severe sanction and the scope of fine (including the lowest level of statutory differentiation) is not stipulated. We consider the retained option, i.e. to have the already imposed fine waived, negative. Disciplinary fines represent an income of the state budget.

In view of the purpose of the disciplinary penalty, we would like to point at the resolution of the High Court in Prague of February 23, 2012, file no. VSPH 678/2011-B-46: “The purpose of the imposition of the disciplinary fine is to influence the conduct of the person fined in such a way, so that their activities or omissions which gave rise to the fine would not be repeated in the future”. The remedial action directed at the legal person *pro futuro* must thus be exercised through some form of harm or, alternatively, repressive measure. It can be considered a “corrective slap in the face” done by the state which, upon its conferred monopoly of violence\(^{18}\), ensures the compliance of separate legal rules and duties enshrined therein.

In comparative perspective, there exists a possibility to open a debate on the due and timely provision of cooperation at determination of the bankrupt’s property within the insolvency proceedings through toughening of repressive measures against persons who breach the alleged cooperation duty. Such measures would be reasoned by the importance of the insolvency proceedings, as well as by relevance of the consequences, real or potential, that can arise, if the statutorily designated persons default on their duties.

**Conclusion**

A human being is sometimes surprisingly irresponsible in relation to fulfilment of his critical duties, including the ones encompassed in the concrete jurisdiction. In a material rule of law, the fulfilment of such duties must be enforced by adequate, however, just and fair repression. The collapse of morality and higher incidence of socially unwelcome moods and beliefs result in the situation, where the person responsible is no longer afraid of the adverse consequences he might face outside the legal framework (e.g. negative public opinion), and is thus not deterred from committing wrongful acts. What ultimately motivates people to be proactive in fulfilment of their statutory duties (for the benefit of the whole society) is the threat of sanction – harm, which is proximately and subjectively experienced by them in their

\(^{18}\text{Taking into account several legal institutes, e.g. the ones immune from criminal liability (e.g. urgent need, urgent defence), it is possible to speak more precisely about oligopoly almost amounting to monopoly to violence.}\)
ordinary lives\textsuperscript{19}. Still, a human being is a free person and can voluntarily assume the negative consequences arising from a wrongful act. For this reason, the consequence following the wrongful act should always be stricter in comparison to the “price” or sacrifice suffered at fulfilment of the statutory duty.

The mechanism of sanctions under BRA is very specific because the consideration acquired upon payment of the fine is used to satisfy the outstanding creditors’ claims, and the standard of law enforcement in the pertinent procedures is thus increased.

The bankruptcy proceedings bear serious legal consequences and their speedy and lawful course should therefore represent the common interest of the participants. It is thus necessary to be diligent in cooperation duty provided to the official receiver, as its omission can cause delay and failure of satisfaction of the creditors’ claims.

Reasonably strict repressive measures must also be applied outside the criminal law sanction mechanism used to pursue the said unlawful conduct, however, not amounting to the standard of crime. Their obligatory application and predictability of minimal scope of financial penalty could result in the general and preventive effect on the persons stipulated in Section 75, BRA. The considerations on the proper course of the said phase of the insolvency procedure through application of stricter repressive measures (the obligatory application and the minimal rate of punishment) seems to be relevant also in comparative perspective relating to the Czech jurisdiction.

\section*{Literature}

Kurilovská L., Základné zásady trestného konania. Účel a základná limitácia, Heuréka, Šamorín 2013.  
Turčan M., \textit{K myšlienkom Ústavného súdu SR o právnom formalizme}, [v:] \textit{Právní

\textsuperscript{19} In this context, we point at the ruling of the Supreme Court of the Slovak Republic as of June 2 2011, file number 8 Sžo 163/2010 which reads: „In view of the defendant charged with misdemeanour, the fine imposed should not only have the educational but also repressive effect, and pursue the wrongful conduct; therefore it should relevantly impact the proprietary status of the same. This fine must not be minute, otherwise its purpose wouldn’t be served“. We identify ourselves with this standpoint also in relation to the fine imposed not only in misdemeanour procedures.
Summary

Key words: sanction, imposition, compliance with law pro futuro.

The authors consider the possibility to use potential repressive measures in order to foster the motivation of the third parties (within the meaning of the Act No. 7/2005, Coll. on Bankruptcy and Restructuring) to provide the official receiver with all the due and timely cooperation at determining the state of bankrupt’s property. The success in establishing the aforementioned conditions the satisfaction of creditors’ claims within the insolvency proceedings. Any mistake at this point can lead to general failure in the purpose of the proceedings. At this stage, outside the scope of criminal procedure, the obligatory interference into the proprietary integrity of the persons under the duty to provide the official receiver with necessary cooperation seems to be a pertinent instrument. The threat of sanction should motivate the relevant persons to provide the necessary cooperation duly and timely and, should the sanction be imposed fairly (i.e. liability found), the person in issue should be brought to behave in compliance with law pro futuro. The attainment of this goal depends on the adequacy of sanction, its severity and obligatory force. In their article, the authors comparatively refer to the Czech statutory regulation de lege lata.