

THE FORMS OF ECONOMIC CRIME IN A BANKRUPTCY PROCEEDINGS

ABSTRACT: In modern conditions of business conduct of economic entities, the importance of bankruptcy and a bankruptcy proceedings is unambiguously emphasized. The conditions preceding to bankruptcy as an institute of economic law are a consequence of the economic and financial position of a certain economic entity. At the very beginning, the paper gives a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper rests on the forms of economic crime in a bankruptcy proceedings, which in part includes a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime. Having in mind the main subject of the paper, the valid criminal legislation of Republic of Serbia envisages two criminal offenses against the economy which can be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

Keywords: *bankruptcy, bankruptcy proceedings, economic crime, Bankruptcy Law*

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1. Introduction

A large number of business entities establish various debtor-creditor relations in their day-to-day operation, such as taking loans from banks, buying on lease, settling debt using credit cards, deferred payment, etc. In this light, a debt to the bank or some other entity does not have a negative connotation for as long as the debt is settled (through due installments) regularly (i.e. when due) and all creditor claims are duly and completely settled. As Dragojlović and associates (2019) point out, “in modern conditions of business conduct, debts have become an inseparable part of economic life and a significant source of financing of economic activities” (p. 18).

The institute of bankruptcy becomes very interesting and important in situations when the conditions for the implementation of provisions of the Bankruptcy Law (2009) are cumulatively met. According to Radović (2017), “there are two necessary and fundamental assumptions for the implementation of specific bankruptcy law rules – plurality of creditors and financial difficulties for the debtor” (p. 30).

Taking the first condition in closer consideration, the essence of the implementation of the institute of bankruptcy becomes apparent, and that is a larger number of creditors. Bankruptcy in itself has no justification if there was only one creditor in a specific situation. Guided by the principles of collective settlement of creditor claims and their equal treatment, bankruptcy becomes an unavoidable institution when a large number of creditors’ claims in specific circumstances cannot be settled due to an unfavorable economic situation of the debtor (which is in fact another condition for the implementation of the institute of bankruptcy). Namely, “in such situations, when the debtor becomes insolvent, and no other option of settling a creditor’s claims is adequate enough (because it, for example, provides settlement of only one, but not other creditors), the institute of bankruptcy is of great importance since it provides the possibility to secure settlement of all debtor’s creditors through the procedure stipulated and regulated by law” (Rašević, 2022, p. 99).

At the very beginning, the paper shall provide a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper shall rest on the forms of economic crime in bankruptcy proceedings, which shall in part include a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime.

2. Conceptual definition of bankruptcy

There are numerous theoretical definitions (as well as divisions) of bankruptcy in legal theory which essentially refer to the possibility, or more precisely, the impossibility of settling creditors' claims.

In principle, as Čolović and Milijević (2004) state, "bankruptcy is a condition declared by the court in which there is a debtor, on one hand, who has suspended payments or whose assets are insufficient to settle the claims of all creditors and, on the other hand, a group of creditors whose claims are jeopardized by the suspension of payment or over-indebtedness of their joint debtor" (p. 27).

According to Jovanović-Zattila (2003), bankruptcy is "an institution of joint, proportionate and simultaneous settlement of creditors on the property of the bankruptcy debtor. It protects creditors from each other and the debtor from creditors who attempt to settle their claims at any cost" (p. 3).

Thus, "the debtor due to insolvency or over-indebtedness is not able to settle its due financial obligations" (Rašević, 2022, p. 101). According to Milosavljević (2016), "insolvency is manifested by the debtor's suspension or interruption of payment of due obligations, while over-indebtedness represents a special condition of assets of the debtor in which its total assets are not sufficient to settle its debts. In both cases, the debtor manifests an inability for payment" (p. 57).

Kozar and Đukić-Mijatović (2015) emphasize that "bankruptcy as an institution should be distinguished from bankruptcy proceedings as a set of legal rules which regulate the conduct of participants in the proceedings" (p. 1).

Also, bankruptcy and bankruptcy proceedings should be distinguished from bankruptcy process relations which "arise from the opening of the previous bankruptcy proceedings and last until the end of the bankruptcy proceedings. Bankruptcy process relations arise between the bankruptcy judge and other entities involved in the bankruptcy proceedings" (Milosavljević, 2016, p. 58).

According to Cvetković (2004), "an efficient bankruptcy system is a necessary part of market economy because it provides security to creditors, recovery of companies with financial difficulties and faster return of blocked funds to use." In a quality bankruptcy procedure, everyone wins –the creditors the employees and the society as a whole. Bankruptcy proceedings result in the recovery of the company and therefore, through efficient redistribution of seized funds, it constitutes a prerequisite for faster and more successful recovery of the entire economy " (p. 2).

Pursuant to the provisions of Article 1 of the Bankruptcy Law (2009), “bankruptcy is carried out by bankruptcy or reorganization. Bankruptcy means settling creditors from the value of the entire property of the bankruptcy debtor, i.e. the bankruptcy debtor as a legal entity. Reorganization entails settling creditors according to the adopted reorganization plan, in particular by redefining debtor-creditor relations, status changes of the debtor or otherwise as stipulated by the reorganization plan.” Article 2 of the Bankruptcy Law (2009) stipulates that the goal of bankruptcy is “the most favorable collective settlement of bankruptcy creditors by realizing the highest possible value of the bankruptcy debtor, i.e. its property”.

It is very important to mention the principles of bankruptcy which are regulated by the provisions of Articles 3-10 of the Bankruptcy Law (2009). Legislative treatment of the status concept of bankruptcy includes the following principles: “the principle of protection of bankruptcy creditors (bankruptcy enables collective and proportional settlement of bankruptcy creditors); the principle of equal treatment and equality (in bankruptcy proceedings, all creditors receive equal treatment and equal position of creditors of the same payment order or class in the reorganization procedure); the principle of economy (bankruptcy proceedings are conducted in such a way as to enable the realization of the highest possible value of the bankruptcy debtor’s property and the highest possible degree of settlement of creditors in the shortest possible time and with the least possible costs); the principle of judicial conduct of the procedure (after the opening, the bankruptcy procedure is conducted by the court *ex officio*); the principle of imperativeness and preclusive effect (bankruptcy proceedings are conducted in accordance with the provisions of the Bankruptcy Law. For issues which are not specifically regulated by this legal text, relevant provisions of the law governing civil proceedings apply accordingly); principle of urgency (bankruptcy proceedings are urgent. Delays and interruptions are not allowed in bankruptcy proceedings); the principle of two degrees (bankruptcy proceedings are two-degree unless the law excludes a legal remedy); the principle of publicity and information (bankruptcy proceedings are public and all participants in bankruptcy proceedings have the right to timely access the data related to the conduct of the proceedings, except for the data which constitute a trade or official secret)”.

In accordance with the above, “the main indicators of efficiency of bankruptcy proceedings are the degree of settlement, duration and costs of bankruptcy proceedings” (Zimmermann, Obućina & Milovanović, 2015, p. 11).

However, regardless of the fact that the state has regulated by the appropriate law the conditions and manner of initiating and conducting

bankruptcy proceedings before the appropriate court, various forms of crime in this area still arise in practice. This is where the specific form of criminal behavior comes to the fore, which we collectively call economic crime. As the issue of the forms of economic crime is important for the area of bankruptcy, before the analysis of how and in what way it is possible to commit abuse in the bankruptcy procedure, the conceptual definition and basic characteristics of economic crime shall be mentioned.

3. The concept and characteristics of economic crime

Criminal behavior of individuals and groups can, in principle, be defined as the gravest social deviation.

According to Bjelajac (2013), “crime is a term which denotes a typical example of social deviation and reflects a collective name for violation of positive legal social norms and behaviors which are accompanied by sanctions.” The formal aspect of crime is embodied in human activity, and the material aspect of crime, i.e. its content, implies jeopardizing social values. The social reaction to a crime is manifested through criminal sanctions” (p. 29).

Crime is a “very complex phenomenon which is equally detrimental in all societies and at all levels of development. To understand the concept of crime, it must be considered in a multidisciplinary manner, i.e. by applying knowledge from different theoretical disciplines” (Matijasevic, 2012, p. 52). In this statement, it must be emphasized that “multidisciplinary approach to considering crime is not a matter of choice and instead represents a necessary approach to this complex social phenomenon” (Bjelajac & Matijašević, 2014, p. 534).

Economic crime is a complex form of crime characterized by a multitude of conceptual definitions and different approaches regarding the number and type of crimes covered by this area. Thus, the basic characteristic of economic crime is great phenomenological diversity conditioned by the diversity of cultural, economic and legal aspects in different epochs, in the territory of different countries, as well as continents.

It can be said that economic crime in Serbia in recent decades is characterized by complex crimes, especially in the areas of finance, accounting, banking, bankruptcy, international trade, as well as in the privatization process. Although often referred to as the modern form of crime, economic crime is not a new form of criminal behavior. Still, what certainly makes it modern is the legislative and scientific treatment which the area of economic crime has received only in recent years. Namely, economic crime has long been considered a general crime and even a part of property crimes.

It should be emphasized that globalization and availability of modern technologies have over time led to an increase in the number of forms of economic crime, as well as modifications of the content of existing forms, which has made it even more complex and socially dangerous.

The modern definition by Banović (2002) defines economic crime as “a set of all delinquent behaviors (acts or omissions) which occur in economic relations and in connection with those relations, by legal and natural persons, which, as subjects of these relations, have appropriate powers over the property on which those relations are based, and which delinquent behaviors directly damage the property and injure or jeopardize economic relations” (p. 28).

Bošković and Marković (2015) state that “economic crime is a type of delinquency and a typology of criminal phenomena conditioned by violations of regulations in economic and financial business conduct. In their opinion, it is a phenomenon which is subject to different definitions, depending on the criteria for the classification of crime and scientific-methodological approach. Some concepts start with the provisions of criminal law regarding the acts against the economy and others with the object of protection by criminal law, i.e. from acts aimed towards abuse and other types of illegality related to the organization and functioning of the economic system and financial operations. This includes only acts which represent a criminal act and feature as a factor of delinquency within the economic organization and system. Undoubtedly, different approaches to this concept and phenomena mostly stem from the diversity of political and economic systems in the world. The other aspect of the problem arises because economic crime signifies different types of crimes, both those against the economy and those against official duties, and partly also crimes against property” (p. 209).

Although there is a great phenomenological diversity in the area of economic crime which makes it difficult to determine a single definition which would correctly define all the characteristics and conceptual determinants of this type of crime, an especially important area for different types of abuse is precisely the area of bankruptcy. As previously mentioned, regardless of the fact that the state has regulated the conditions and manner of initiating and conducting bankruptcy proceedings before the appropriate court through an appropriate legal text, various forms of crime in this area still arise in practice, as shall be discussed in the next chapter of the paper.

4. Forms of economic crime in bankruptcy proceedings

In practice, there are various forms of criminal activity in and related to bankruptcy proceedings. Among typical forms of abuse, Bošković (2009) lists: “devaluation of capital, its incorrect evaluation or incorrect presentation of real value; an agreement between individuals from the bankruptcy authorities and persons participating in the bankruptcy proceedings as potential buyers; by agreement of individuals from the bankruptcy authorities, valuable assets are separated from the bankruptcy estate, allowing purchase at lower prices; concluding transactions harmful for the property of a company in bankruptcy” (p. 123–124).

According to the opinion of a majority of theorists, economic crime mainly consists of crimes against the economy and crimes against official duties (Carić & Matijašević, 2017). Crimes against the economy are “those activities that mean attacking or jeopardizing the economy as the basis of social relations and further building of society” (Čejović & Kulić, 2014, p. 463). The economy as a protective object of criminal acts “means the immediate process of performing an economic activity. It follows that criminal acts from this group mean an attack on the economy as a daily economic activity, as a production process” (Matijasević-Obradović & Kovačević, 2019, p. 178).

Our Criminal Code (2005) envisages two criminal offenses against the economy which may be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

Article 232 of the Criminal Code incriminates the criminal offense of Causing Bankruptcy as follows: “Whoever in a business entity which has the status of a legal entity causes bankruptcy and thus damages another by irrational spending of funds or their alienation at an unjustifiably low price, excessive borrowing, assuming disproportionate obligations, reckless conclusion of contracts with insolvent persons, failure to timely collect claims, destruction or concealment of property or other actions which are not in accordance with conscientious business conduct shall be punished by imprisonment for a term of six months to five years.”

According to the legal definition, a criminal offense is committed by a person who intentionally causes bankruptcy by committing one of the alternatively prescribed actions. The act of a criminal offense may include activities prescribed by law:

- 1) irrational spending of funds or their alienation at an unjustifiably low price,

- 2) excessive borrowing,
- 3) assuming disproportionate obligations,
- 4) reckless conclusion of contracts with insolvent persons,
- 5) destruction or concealment of property,
- 6) committing other acts which are not in accordance with conscientious business conduct and which may also include default, i.e. non-fulfillment of obligations the perpetrator is obliged to perform (e.g. on grounds of legal or contractual obligations, etc.).

In the provision of Article 232, default was formulated through an alternatively prescribed criminal act - failure to timely collect the claims.

The perpetrator of this criminal offense can only be a responsible person in the company or another business entity which has the status of a legal entity. The consequence of the criminal offense consists in causing bankruptcy and thus causing damage to the company or another business entity which has the status of a legal entity. At the time of initiating bankruptcy proceedings, the criminal offence is considered completed. The punishment prescribed by the legislator for this criminal offence is imprisonment for a term of six months to five years.

Article 232a of the Criminal Code criminalizes the criminal offense of Causing False Bankruptcy as follows: “(1) Whoever in a business entity which has the status of a legal entity, in an intention for the entity to avoid payment of obligations causes bankruptcy of that entity by an apparent or actual reduction of its assets, by:

- 1) concealing, falsely selling, selling below market value or assigning free of charge all or a part of the property of the business entity;
- 2) concluding fictitious debt agreements or recognizing non-existent claims;
- 3) concealing, destroying or altering business records which the business entity is legally obliged to keep in such a way that they cannot show business results or the state of assets or obligations or presenting this state it as such that bankruptcy can be initiated thereon by making false documents or otherwise, shall be punished by imprisonment for a term of six months to five years.

(2) If, due to the acts from the previous paragraph, severe consequences occurred for the creditor, the perpetrator shall be punished by imprisonment for a term of two to ten years.”

According to the legal definition, the basic form of a criminal offense is committed by a person who intentionally, in view of avoiding settlement of

obligations by a company or another business entity which has the status of a legal entity, causes bankruptcy of that entity by apparent or actual reduction of its property, by committing one of alternatively legally stipulated actions:

- 1) concealing, falsely selling, selling below market value or assigning free of charge all or a part of the property of the business entity;
- 2) concluding fictitious debt agreements or recognizing non-existent claims;
- 3) concealing, destroying or altering business records which the business entity is legally obliged to keep in such a way that they cannot show business results or the state of assets or obligations or presenting this state as such that bankruptcy can be initiated thereon by making false documents or otherwise.

The act of committing the basic form of the act consists in committing (concealment of property, false sale of property, its free assignment, conclusion of fictitious debt agreements, recognition of non-existent claims, concealment or destruction of business books, making false documents, etc.).

The perpetrator of this criminal offense can only be a responsible person in a company or another business entity which has the status of a legal entity. The consequence of the criminal offense consists in causing false (apparent) bankruptcy by false or actual reduction of its property. The punishment prescribed by the legislator for the basic form of the criminal offense is imprisonment for a term of six months to five years.

The provisions of paragraph 2 of this Article of the Criminal Code also stipulate a graver form of crime. The graver form of the act exists if the commitment of the basic form of the act has caused severe consequences for the creditor. In case of a graver form of the crime, the perpetrator shall be punished by imprisonment for a term of two to ten years.

5. Conclusion

In the modern conditions of business conduct for economic entities, the importance of bankruptcy and bankruptcy proceedings is unambiguously emphasized. The conditions which precede bankruptcy as an institute of economic law are a consequence of the economic and financial condition of a certain economic entity. Therefore, it is understandable that the most significant consequences of bankruptcy actually by nature have a character of property law - they affect both the debtor's property (because an insolvent debtor is eliminated from business by bankruptcy proceedings) and the property of all

creditors (because one of the basic principles of bankruptcy is proportional settlement of all creditors from a specific debtor-creditor relation).

At the very beginning, the paper gives a brief overview of the conceptual definition of bankruptcy and its goals. The primary focus of the paper rests on the forms of economic crime in bankruptcy proceedings, which in part include a brief overview of the concept and characteristics of economic crime as an extremely complex and important form of modern crime.

The main characteristic of economic crime is its great phenomenological diversity which is conditioned by the diversity of cultural, economic and legal aspects in different epochs, in the territory of different countries, as well as continents. Economic crime mainly consists of crimes against the economy and crimes against official duties. In practice, however, various forms of crime appear in this area.

Having in mind the main subject of the paper, the valid criminal legislation of the Republic of Serbia envisages two criminal offenses against the economy which can be committed in connection with and/or relating to bankruptcy. These are causing bankruptcy (from Article 232) and causing false bankruptcy (from Article 232a).

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OBLICI PRIVREDNOG KRIMINALITETA U STEČAJNOM POSTUPKU

REZIME: U savremenim uslovima poslovanja privrednih subjekata, nesumnjivo se ističe značaj i važnost stečaja i stečajnog postupka. Uslovi koji prethode stečaju kao privrednopravnom institutu posledica su ekonomskog i finansijskog stanja određenog privrednog subjekta. U radu je, na samom početku, učinjen kraći osvrt na pojmovno određenje stečaja i njegove ciljeve. Primarna pažnja u radu usmerena je na oblike privrednog kriminaliteta u stečajnom postupku, što je jednim delom

obuhvatilo i kraći osvrt na pojam i karakteristike privrednog kriminaliteta, kao izuzetno složene i značajne forme savremenog kriminaliteta. Imajući u vidu osnovnu temu rada, aktuelnim krivičnim zakonodavstvom Republike Srbije predviđena su dva krivična dela protiv privrede koja se mogu učiniti u vezi i/ili povodom stečaja. Reč je o prouzrokovanju stečaja (iz člana 232) i prouzrokovanju lažnog stečaja (iz člana 232a).

Ključne reči: stečaj, stečajni postupak, privredni kriminalitet, Zakon o stečaju.

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