

## OBJECT OF THE CRIME OF A CREDITOR'S BRIBERY

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DOI 10.2478/in-2024-0011

### ABSTRACT

The article is of a scientific and research nature, and its subject matter covers the object of the crime of a creditor's bribery (Article 302 § 2 of the Criminal Code). The article aims to resolve the doubts it raises. The author presents its development in Polish criminal law and analyses the features specified in the provision: a creditor, financial benefits, means of granting them, a promise to grant such benefits, acting to the detriment of other creditors, a relationship between a creditor's action and an insolvency proceeding or a proceeding aimed at preventing bankruptcy, an insolvency proceeding, and other proceedings aimed at preventing bankruptcy. The interpretation of all these notions is proposed in the article based on doctrine and case law.

Keywords: bankruptcy, bribery, creditor, debtor, financial benefit

### INTRODUCTION

The importance of economic and civil transactions for economic and social development requires their special protection, ensured by the norms of various branches of law, in particular civil and administrative law. Equally important, although as an *ultima ratio*, are the norms of criminal law. Particularly significant is the criminalisation of granting a financial benefit or promising it to a creditor for acting to the detriment of other creditors in connection with bankruptcy proceedings or proceedings aimed at preventing bankruptcy, as stipulated by Article 302 § 2 of

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the Criminal Code (CC). This provision aims to protect the economy.<sup>1</sup> Its purpose is to ensure the proper functioning of economic transactions, undisturbed by unfair and dishonest activities during ongoing bankruptcy proceedings or proceedings aimed at preventing bankruptcy.<sup>2</sup> It safeguards the proper functioning of economic transactions and the related individual interests of the parties involved, as well as the supra-individual economic interests of society and the principles of satisfying creditors from the debtor's assets as evenly as possible and sharing losses proportionally.<sup>3</sup>

Combating pathologies in a free market economy requires comprehensive and holistic legal protection.<sup>4</sup> It is rightly stated in the literature that: 'Corruption in the private sector is an attack on the social and economic foundations of trade, i.e., reliability, honesty and equal opportunities for entities operating in the market economy. Bribery in the private sector is equally, or perhaps even more harmful to the national economy than the corruption of public officials.'<sup>5</sup>

## DEVELOPMENT OF THE OBJECT OF THE CRIME OF A CREDITOR'S BRIBERY

The crime of a creditor's bribery was specified in Article 69 § 2 of the Regulation of the President of the Republic of Poland on preventing bankruptcy of 23 December 1927.<sup>6</sup> This applied to granting special subsidies or benefits by a debtor or a person acting on his behalf, personally or through third parties, to any of the creditors, in addition to the terms of the preventive agreement, to induce that creditor to vote in favour of the adoption of the preventive agreement. The perpetrator did not have to act to the detriment of creditors; his action was an attack on the sincerity of voting.<sup>7</sup>

Article 279 § 1 CC of 1932 provided for criminal liability for granting or promising to grant a financial benefit for acting to the detriment of other creditors during a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy. The crime specified in Article 302 § 2 of the Criminal Code of 1997 differs from the one specified in Article 279 § 1 CC of 1932; currently, the modal feature is the connection of benefits granted with a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy, while Article 279 § 1 required that the perpetrator's action took place during such proceedings.

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<sup>1</sup> Bill, J., 'Korupcja w biznesie jako zagrożenie bezpieczeństwa ekonomicznego państwa', *Kultura Bezpieczeństwa. Nauka – praktyka – refleksje*, 2014, No. 15, pp. 33–34; Patora, K., 'Analiza korupcji', *Studia Iuridica Toruniensia*, 2018, Vol. XXII, p. 261.

<sup>2</sup> Nowakowski, K., 'Teoretyczne i prawne aspekty korupcji w sektorze prywatnym', *Ekonomia i Prawo – Economics and Law*, 2010, No. 1, p. 356.

<sup>3</sup> Gałązka, M., in: Grzeškowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, pp. 1452–1452; Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Część szczególna, Komentarz. Art. 222–316*, Vol. II, Warszawa, 2017, p. 955.

<sup>4</sup> Płońska, A., 'Istota prawnokarnej ochrony obrotu gospodarczego', *Acta Universitatis Wratislaviensis – Przegląd Prawa i Administracji*, 2015, No. 2, p. 583.

<sup>5</sup> Nowakowski, K., *Teoretyczne i prawne aspekty...*, op. cit., p. 345.

<sup>6</sup> *Journal of Laws of 1928*, No. 3, item 20.

<sup>7</sup> Makarewicz, J., *Kodeks karny. Komentarz*, Lwów, 1938, p. 636.

The Criminal Code of 1969 did not provide for this type of crime. Economic changes and the need to restore, *inter alia*, the system of business law resulted in an urgent need for legal protection of business activities, which was reflected in the Act of 12 October 1994 on the protection of economic transactions and amendments to some provisions of criminal law,<sup>8</sup> which criminalised bribery in Article 8 § 2 as well as Article 302 § 2 CC.

*Prima vista*, it might seem that Article 8 § 2 of the Act of 12 October 1994 on the protection of business transactions and amendments to some provisions of criminal law was a model for the current regulation, as its content was the same as that of Article 302 § 2 CC. However, the similarity in wording results from the literal transfer of the content of Article 302 § 2 of the Bill (edited in 1994) to the Bill of the current Criminal Code.

Criminal conduct specified in Article 302 § 2 CC consists in granting or promising to grant financial benefits to a creditor for actions detrimental to other creditors in connection with bankruptcy proceedings or proceedings aimed at preventing bankruptcy.

## GRANTING A FINANCIAL BENEFIT

The word 'granting' [in Polish: *udzielenie*] means 'providing somebody with something, lending something for use, giving something to somebody',<sup>9</sup> and the verb 'grant' [in Polish: *udzielić*] means '(a) give, provide, lend for use; (b) make it possible to obtain something, ensure something; (c) give consent, award something.'<sup>10</sup> From the linguistic point of view, the constituent element includes the transfer of a financial benefit. The form of this transfer is not specified, which indicates that it may take any form. It is rightly assumed in the doctrine that granting a benefit includes all forms of direct or indirect transfer of financial benefits, regardless of the form; it is adjusted to the needs of the person bribed.<sup>11</sup>

## PROMISE TO GRANT A FINANCIAL BENEFIT

The word 'promise' means: 'what has been promised; assurance that something will be done, sorted out.'<sup>12</sup> A promise to grant a financial benefit is an assurance that the benefit will be transferred, e.g., money will be handed over, a specific

<sup>8</sup> Journal of Laws of 1994, No. 126, item 615.

<sup>9</sup> Zgółkowska, H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 41, Poznań, 2003, p. 34.

<sup>10</sup> Dubisz, S. (ed.), *Uniwersalny Słownik Języka Polskiego PWN*, Vol. 4, Warszawa, 2003, p. 209; Szymczak, M. (ed.), *Słownik Języka Polskiego PWN*, Vol. 3, Warszawa, 1998, p. 540.

<sup>11</sup> Górniok, O., in: Góral, R., Górniok, O., *Przestępstwa przeciwko instytucjom państwowym i wymiarowi sprawiedliwości. Rozdział XXIX i XXX Kodeksu karnego. Komentarz*, Warszawa, 2000, pp. 91–92.

<sup>12</sup> Zgółkowska, H. (ed.), *Praktyczny słownik...*, op. cit., Vol. 24, p. 464.

amount will be transferred to an account, or a donation will be made.<sup>13</sup> It does not have to contain a precisely defined financial benefit and a precisely determined deadline. It is important that the perpetrator externalises his intention to grant it.<sup>14</sup> For the occurrence of this crime, it is not necessary to precisely define and specify the promise to grant a financial benefit; it is important that a perpetrator externalises his intention to grant it.<sup>15</sup> Article 302 § 2 CC does not limit the verbal feature by specifying the manner or form of externalising the intention to make a promise. It may be expressed in any way, expressly or implicitly, e.g., by making a gesture. The movement of fingers can be helpful in expressing thoughts.<sup>16</sup> It is rightly pointed out in the literature that it does not concern the common reception of a given gesture; a promise to grant a benefit may be expressed with a gesture understandable to a specific group of people, even though it would not be clear to others. The crime of bribery involves discretion and embarrassment on the part of the perpetrator, who does not know how the person to whom he wants to promise a benefit will react.<sup>17</sup>

The court shall assess *in concreto* whether a gesture expressed such an intention of the perpetrator and whether its addressee could understand the information transferred this way as a promise to grant benefits.<sup>18</sup> As the Supreme Court rightly notes:

- ‘Not only a precisely defined, but also a vague promise is punishable, provided that, due to the accompanying circumstances, it may be considered to be a promise of financial or personal benefits.’<sup>19</sup>
- ‘A promise to grant benefits, as the Supreme Court rightly notices, may be expressed in any way, including a gesture, because the provisions of Article 241 CC [current Article 229 – note by R.A.S.] do not limit the verbal feature in terms of the manner or form of externalising the intention to make a promise. The adjudicating court shall assess *in concreto* whether the gesture expressed such an intention of the perpetrator and whether the addressee could understand the information passed this way as a promise to grant benefits.’<sup>20</sup>

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<sup>13</sup> Stefański, R.A., ‘Przestępstwo czynnej płatnej protekcji (art. 230a k.k.)’, *Prokuratura i Prawo*, 2004, No. 5, p. 9; Opala, A., *Ochrona obrotu gospodarczego*, Warszawa, 1995, pp. 56–57.

<sup>14</sup> The Supreme Court judgment of 20 November 1972, III KR 209/72, OSNKW 1973, No. 4, item 48.

<sup>15</sup> The Supreme Court judgment of 20 November 1972, III KR 209/72, OSNKW 1979, No. 4, item 48.

<sup>16</sup> Kopaliński, W., *Słownik symboli*, Warszawa, 1990, p. 296.

<sup>17</sup> Satko, J., ‘Glosa do wyroku SN z dnia 5 listopada 1997 r., V KKN 105/97’, *Orzecznictwo Sądów Polskich*, 1998, No. 6, item 117.

<sup>18</sup> The Supreme Court judgment of 5 November 1997, V KKN 105/97, OSNKW 1998 No. 1–2, item 7.

<sup>19</sup> The Supreme Court judgment of 12 April 1934, 3 K 293/34, *Zbiór Orzeczeń SN*, 1934, No. X, item 228.

<sup>20</sup> The Supreme Court judgment of 5 November 1997, V KKN 105/97, OSNKW 1998, No. 1–2, item 7 with an approving gloss by Satko, J., *Orzecznictwo Sądów Polskich*, 1998, No. 6, item 117 and similar comments by Zabłocki, S., ‘Przegląd orzecznictwa Sadu Najwyższego – Izba Karna’, *Palestra*, 1998, No. 1–2, p. 170.

## FINANCIAL BENEFIT

A financial benefit is a means of corruption, unlike a personal benefit, which cannot be used in this context, as seen in other types of bribery (Article 229 § 1, Article 230a, Article 296a § 2 CC). The omission of personal benefits in Article 302 § 2 CC is clearly inconsistent with the scope of liability for the venality of a creditor who, in accordance with Article 302 § 3 CC, is liable for accepting a benefit, including a personal benefit. Due to the lack of specification of the nature of the benefit referred to in the latter provision, the correct conclusion is drawn in the doctrine that it may be any benefit, i.e., both financial and personal.<sup>21</sup>

The argument for this distinction, based on the fact that Article 302 § 3 CC protects the solidarity of creditors, who should support each other and not act against each other, is not convincing.<sup>22</sup> The statement that 'directives of functional interpretation, including, first of all, the criminally and politically justified need to maintain a specific symmetry between the systems of features specified in Article 302 § 2 and § 3, also in terms of the object of bribery, strongly support the narrowing of the meaning of the word 'benefit' used in Article 302 § 3 only to financial benefits'<sup>23</sup> is not convincing either. It does not explain why the briber should not be liable for granting or promising to grant a personal benefit. Respect for the clear wording of Article 302 § 2 CC dictates that the opinion should be approved although, due to the consistency of statutory solutions, *de lege ferenda*, it is necessary to amend the provision by extending the scope of benefits to include personal ones.

Financial benefits have a measurable economic value and constitute an addition to property or avoidance of losses or burdens on that property, i.e., an increase in assets or a decrease in liabilities.<sup>24</sup> The ability to satisfy material needs is an important feature of each financial benefit.<sup>25</sup> The Supreme Court is correct in stating that:

'Since the achievement of a financial benefit is connected with both an increase in assets or a reduction in liabilities on the property and the avoidance of its reduction, obtaining this benefit may occur not only by means of theft (increment consisting in the inclusion of someone else's property in the perpetrator's property with the provision of the ability to use it as one's own), but also in a variety of forms, e.g., accepting unfair payment,

<sup>21</sup> Górniok, O., *Prawo karne gospodarcze. Komentarz*, Toruń, 1997, p. 73; Buczkowski, K., *Przestępstwa gospodarcze*, Warszawa, 2000, pp. 82–83; Zawłocki, R., in: Zawłocki, R. (ed.), *System Prawa Karnego. Przestępstwa przeciwko mieniu i gospodarcze*, Vol. 9, Warszawa, 2015, p. 682.

<sup>22</sup> Skorupka, J., 'Typy przestępstw korupcyjnych po noweli kodeksu karnego z 13.06.2003 r.', in: Bogunia, L. (ed.), *Nowa Kodyfikacja Prawa Karnego*, Vol. XV, Wrocław, 2004, p. 152.

<sup>23</sup> Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Komentarz do art. 278-363 k.k.*, Vol. III, Warszawa, 2022, p. 837; Oczkowski, T., in: Konarska-Wrzošek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1404; Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, p. 1477; Gałazka, M., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny...*, op. cit., p. 1461; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 995.

<sup>24</sup> The Supreme Court ruling of 30 May 2017, II KK 156/17, LEX No. 2298294.

<sup>25</sup> Judgment of the Appellate Court in Lublin of 17 April 2007, II AKA 81/07, LEX No. 314605.

obtaining property rights, being released from debt, waiving claims, obtaining an interest-free or low-interest loan.<sup>26</sup>

The form it takes does not matter; it may take the form of money, a legal act, or a benefit in kind. Granting it may take the form of handing over cash or transferring an amount to a creditor's bank account, donation, unjustified advantageous exchange, purchase of movable property or real estate at a low price, release from debt, waiver of the statute of limitations, assignment of receivables, interest-free or low-interest loan,<sup>27</sup> transfer of rights from a bill of exchange, concluding a more favourable contract with conditions better than typically found in business transactions,<sup>28</sup> or concluding and implementing a contract commissioning the performance of specific activities provided that the terms of the contract significantly and clearly differ from the standard values of services that are commonly adopted.<sup>29</sup>

A financial benefit is to be undue, unlawful and not based on a legal title.<sup>30</sup>

A perpetrator may grant a financial benefit personally or through a third party.

It may be a benefit for both a bribed creditor and somebody else (arg. ex. Article 115 § 4 CC). A bribed creditor does not have to be the beneficiary of the financial benefit.<sup>31</sup> Since the financial benefit may be granted to anybody, it does not matter whether and what benefit the bribed person gained and what benefit other persons obtained.<sup>32</sup>

Granting or promising to grant a financial benefit may occur before or after a creditor takes action. In the former case, it is aimed at inducing the creditor to take action to the detriment of other creditors; in the latter case, it is a form of remuneration for taking this action.<sup>33</sup> It is not required that the perpetrator persuade

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<sup>26</sup> The Supreme Court judgment of 16 January 2009, IV KK 269/08, OSNwSK 2009, No. 1, item 173.

<sup>27</sup> The Supreme Court judgment of 24 April 1975, II KR 364/74, OSNKW 1975, No. 8, item 111.

<sup>28</sup> Adamus, R., Lubelski, M.J., *Karnoprawna ochrona wierzycieli w postępowaniu naprawczym, Prokuratura i Prawo*, 2009, No. 4, pp. 46–47.

<sup>29</sup> Judgment of the Appellate Court in Wrocław of 24 May 2012, II AKA 87/12, LEX No. 1238690.

<sup>30</sup> The Supreme Court judgment of 17 May 1972, III KR 67/72, OSNKW 1972, No. 10, item 157; resolution of 7 judges of the Supreme Court of 15 February 1977, VII KZP 16/76, OSNKW 1977, No. 4–5, item 34; resolution of the whole Criminal Chamber of 30 January 1980, VII KZP 41/78, OSNKW 1980, No. 3, item 24; Górniok, O., *Prawo karne...*, op. cit., p. 71; idem, in: Górniok, O., Hoc, S., Kalitowski, M., Przyjemski, S.M., Stenkiewicz, Z., Szumski, J., Tyszkiewicz, L., Wąsek, A., *Kodeks karny Komentarz*, Vol. II, Gdańsk, 2005, p. 470; Zawłocki, R., in: idem, *System Prawa Karnego...*, op. cit., p. 679; idem, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny...*, op. cit., p. 693; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, pp. 1888–1889.

<sup>31</sup> The Supreme Court judgment of 17 April 2014, WA 11/14, LEX No. 1482488; judgment of the Appellate Court in Warsaw of 21 December 2018, II AKA 397/18, LEX No. 2609039.

<sup>32</sup> Judgment of the Appellate Court in Wrocław of 13 June 2018, II AKA 397/18, LEX No. 2718727; Judgment of the Appellate Court in Kraków of 24 May 2017, II AKA 51/17, LEX No. 2660429; judgment of the Appellate Court in Łódź of 24 July 2013, II AKA 105/13, LEX No. 1356552.

<sup>33</sup> Ratajczak, A., *Ochrona obrotu gospodarczego. Praktyczny komentarz*, Warszawa, 1994, pp. 81–82.

the creditor to take predetermined and specific action. It may concern ensuring the creditor's goodwill, which will be expressed in taking actions to the detriment of other creditors, suitable for the situation developed, e.g., in the way adjusted to the course of the creditors' meeting.<sup>34</sup>

A creditor's actions taken in order to obtain the largest possible refund of debts from the debtor do not exhaust the features of the crime, provided that they do not involve obtaining a financial benefit or a promise to receive one, even if they are taken to the detriment of other creditors. A creditor is allowed to take any possible action to have his claims settled, even if they are to the detriment of other creditors.<sup>35</sup>

## CREDITOR

Undoubtedly, a creditor is a natural person, a legal entity, or a so-called defective legal entity entitled to demand settlement of claims by the debtor (arg. ex. Article 353 § 1 of the Civil Code), i.e., a creditor within the strict civil law meaning. A financial liability is a legal relationship in which one person (a creditor) is entitled to demand that the other person (a debtor) settle this liability.<sup>36</sup> Due to the fact that the act of granting a financial benefit or promising to grant it to a creditor should be connected with a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy, the concept should be understood within the meaning given to it in Article 189 of the Act of 28 February 2003: Bankruptcy Law,<sup>37</sup> in accordance with which a creditor is anybody entitled to seek settlement of liabilities from the debtor's assets even if the liability does not have to be reported. A creditor is a person who holds receivables, even if they do not have to be reported, and is repaid from the debtor's assets regardless of whether the receivables arose before reporting the insolvency of the debtor or after reporting the insolvency of the bankrupt.<sup>38</sup> It is rightly pointed out in the literature that it does not only concern a creditor claiming liabilities that arose before the announcement of insolvency, regardless of whether the liabilities are subject to reporting in accordance with the mode laid down in Article 236 of the Bankruptcy Law or are listed as liabilities *ex officio*, but also a creditor claiming liabilities that arose after the announcement of insolvency in connection with the actions taken by the official receiver. It is a person who has a claim against the debtor or the bankrupt. It is a personal creditor of the bankrupt, a creditor of the debtor's assets, a person entitled to hand over an item of the property that does not belong to the bankrupt, a person who is entitled to and has personal rights and claims to

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<sup>34</sup> The Supreme Court judgment of 15 November 1971, IV KR 35/71, OSNKW 1972, No. 3, item 53.

<sup>35</sup> Peiper, L., *Komentarz do kodeksu karnego*, Kraków, 1936, p. 600.

<sup>36</sup> Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Vol. III, Warszawa, 2018, p. 31.

<sup>37</sup> Journal of Laws of 202, item 1520, as amended.

<sup>38</sup> Jakubecki, A., in: Jakubecki, A., Zedler, F., *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2010, p. 610.



real property of the bankrupt, and the entitled person for whom the bankrupt is only a debtor in possession.<sup>39</sup>

The status of a creditor may be granted to a specific person in the course of an insolvency proceeding even though there is no financial liability relationship between him/her and the debtor, e.g., the debtor mistakenly regarded him/her as one. In the doctrine, it is assumed that in such a situation the feature is matched, because formally exercising the rights of the creditor, he/she can influence the course of the insolvency proceeding, *inter alia*, by participating in the creditors' meeting with the right to vote (Article 195(1) of the Bankruptcy Law), being a member of the creditors' council (Article 201(1) and (2) of the Bankruptcy Law), whose consent is required for some activities of the receiver (Article 206(1) of the Bankruptcy Law).<sup>40</sup> This view is difficult to agree with because the requirement for criminality of the act in question consists in the fact that the person accepting a financial benefit or its promise has the features of a creditor in the material sense and not only the formal sense. Its adoption would lead to the infringement of the principle of the crime determination. Therefore, the opinion that the bribed person must be a real creditor, not a fictitious one, deserves approval.<sup>41</sup>

In accordance with this provision, a person cannot be recognised as a creditor if, based on a legal provision, a decision of a competent authority, a contract or actual performance, he/she is involved in the property affairs of a natural person, a legal person, a group of people or an entity without legal personality being a creditor. Although in Article 308 CC these persons are added to the list of entities that are creditors liable for crimes specified in Chapter XXXVI of the Criminal Code, it applies to a creditor who is a perpetrator of a crime, and he is an object of crime under Article 302 § 2 CC. In this context, it is assumed in the literature that there is a criminalisation loophole because, in the event of granting a financial benefit or promising to grant it to an entity on whose behalf someone else acts, e.g., to a limited company, the features of the crime are matched, and when this is a proxy for a company, the act goes unpunished.<sup>42</sup> In addition, it is pointed out that the interpretation excluding penalisation of bribery of a person dealing with the creditor's property matters leads to a lack of symmetry between liability for bribery and venality because in the case of venality the person involved is liable.<sup>43</sup>

Such interpretation of Article 302 § 2 CC is a manifestation of extended interpretation and infringes the principle: *nullum crimen sine lege*. Nevertheless, it is

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<sup>39</sup> Janda, P., 'Pojęcie wierzyciela w postępowaniu upadłościowym', *Przegląd Sądowy*, 2006, No. 6, p. 43 et seq.

<sup>40</sup> Peiper, L., *Komentarz...*, op. cit., p. 600; Wiśniewski, M., *Prawnokarna ochrona wiarygodności majątkowych uczestników obrotu gospodarczego*, Kraków, 2000, pp. 97–98.

<sup>41</sup> Makarewicz, J., *Kodeks...*, op. cit., p. 635; Zawłocki, R., in: idem, *System Prawa Karnego...*, op. cit., p. 679; idem, in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny...*, op. cit., p. 962.

<sup>42</sup> Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny...*, op. cit., p. 1254; Zawłocki, R., *Przestępstwa przeciwko wierzycielom. Rozdział XXXVI Kodeksu karnego. Artykuły 300–302. Komentarz*, Warszawa, 2001, p. 136.

<sup>43</sup> Iwański, M., *Odpowiedzialność karna za przestępstwa korupcyjne*, Kraków, 2015, (doctoral dissertation), p. 468–469; [https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/41726/Iwanski-Odpowiedzialnosc\\_karna\\_za\\_przestepsa\\_korupcyjne\\_2015.pdf?isAllowed=y&sequence=1](https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/41726/Iwanski-Odpowiedzialnosc_karna_za_przestepsa_korupcyjne_2015.pdf?isAllowed=y&sequence=1) [accessed on 11 December 2023].



an irrational solution and, therefore, a *de lege ferenda* proposal is that Article 302 § 2 CC should also cover corruptive conduct targeting persons who, based on a legal provision, decision of a competent authority, contract or actual performance, deal with the property affairs of another legal person, a natural person, a group of people or an entity without legal personality.<sup>44</sup>

## ACTING TO THE DETRIMENT OF CREDITORS

A financial benefit or a promise to grant it is to be offered to a creditor for acting to the detriment of other creditors. It is not a requirement because, as rightly pointed out in the literature, this is not directly articulated in Article 303 § 2 CC,<sup>45</sup> but this is what the conduct in fact aims at. It does not matter whether a creditor has actually taken action to the detriment of other creditors<sup>46</sup> or caused a loss,<sup>47</sup> as well as whether the claim was satisfied in whole or in part.<sup>48</sup>

Such action may manifest itself in the threat of losing the possibility of satisfying claims in whole or in part by other creditors, or in delaying settlement, or failing to obtain security for their receivables.<sup>49</sup> A relationship between a financial benefit or a promise to grant it and an action to the detriment of creditors is required. It concerns the risk of loss in creditors' receivables and not just in any property.

The feature 'acts to the detriment' does not exactly mean to cause a loss.<sup>50</sup> It is sufficient that the perpetrator's conduct can cause a loss; it concerns the possibility of its occurrence. Thus, the conduct is aimed at causing a loss. It aims to expose a party to a financial loss, which is demonstrated in the loss of the possibility to satisfy claims in whole or in part by other creditors or to obtain by some of them proportionally less than others.<sup>51</sup>

Acting to the detriment of creditors consists in the perpetrator's conduct creating a possibility of causing a loss to them. It is inadmissible to assume that every action of a creditor who accepted a financial benefit or a promise to get it means acting to the detriment of other creditors. Such a creditor may in fact take

<sup>44</sup> *Ibidem*, p. 469.

<sup>45</sup> *Ibidem*, p. 470.

<sup>46</sup> Sitek, P., *Łapownictwo urzędnicze, polityczne oraz gospodarcze w świetle prawa karnego*. Skrypt. Analiza przypadków bankowych, Józefów, 2013, pp. 91–92;

<sup>47</sup> Ratajczak, A., *Ochrona...*, op. cit., p. 82; Opala, A., *Ochrona obrotu...*, op. cit., p. 57; Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 95; Wojciechowski, J., *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa, 1997, p. 536; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 845; Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny...*, op. cit., p. 1477; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny...*, op. cit., p. 1923.

<sup>48</sup> Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 83; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy o ochronie obrotu gospodarczego*, Warszawa, 1995, p. 181; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny...*, op. cit., p. 995.

<sup>49</sup> Górniok, O., *Prawo karne gospodarcze...*, op. cit., p. 7.

<sup>50</sup> Wojciechowski, J., *Ustawa o ochronie obrotu gospodarczego z komentarzem*, Warszawa, 1994, p. 49.

<sup>51</sup> Peiper, L., *Komentarz...*, op. cit., p. 601; Górniok, O., *Ustawa o ochronie obrotu gospodarczego z komentarzem*, Warszawa, 1995, p. 37; Górniok, O., *Prawo karne...*, op. cit., p. 71.

actions that are advantageous to other creditors, even against the briber's assertion that the conduct was advantageous to him and to the detriment of other creditors.

The emphasis that it concerns 'other creditors' in Article 302 § 2 CC proves that these are creditors of the same debtor.<sup>52</sup> The specification of creditors in the plural form means that the action should be to the detriment of at least two other creditors,<sup>53</sup> and thus there must be at least three creditors (including the bribed one) in a given case. Therefore, acting to the detriment of one creditor does not match the feature of the crime. The phrase 'other creditors' also indicates that it is not required that the bribed creditor's actions affect all creditors; this would be the case if the legislator had used the word 'all'.<sup>54</sup>

The crime is committed the moment a financial benefit is granted or promised to the creditor.<sup>55</sup> It is the moment when the benefit reaches the person for whom it was intended.<sup>56</sup> The view that it is not sufficient to accept a promise of a benefit is unfounded<sup>57</sup> because it is contrary to the literal wording of the provision. It is not possible to share the view that it is committed the moment a benefit is received because the crime of bribery has a multi-personal configuration and its commission requires the cooperation of two parties: one granting a financial benefit and the other receiving it.<sup>58</sup> This view is rightly criticised because, in accordance with the Polish conception, liability for the crime of venality is not accessory in relation to bribery, and its commission does not in any way depend on the activeness of the person being bribed.<sup>59</sup> It is also erroneous to state that the commission of this crime occurs also when a creditor refuses to accept a financial benefit or a promise to grant it.<sup>60</sup>

<sup>52</sup> Wojciechowski, J., *Ustawa o ochronie...*, op. cit., p. 51; Wojciechowski, J., *Kodeks karny...*, op. cit., p. 536; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 844.

<sup>53</sup> Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 838.

<sup>54</sup> Adamus, R., Lubelski, M.J., *Karnopravna ochrona...*, op. cit., p. 47; Piaczyńska, A., 'Glosa do wyroku SN z dnia 27 listopada 2015 r., II KK 216/15', *Prokuratura i Prawo*, 2017, No. 5, p. 135.

<sup>55</sup> Adamus, R., Lubelski, M.J., *Karnopravna ochrona...*, op. cit., p. 47; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny...*, op. cit., p. 995.

<sup>56</sup> Siewierski, M., in: Bafia, J., Mioduski, K., Siewierski, M., *Kodeks karny. Komentarz*, Vol. II, Warszawa, 1987, p. 397; Surkont, M., 'Glosa do wyroku SN z dnia 12 września 1986 r., Rw 655/86', *Nowe Prawo*, 1988, No. 10–12, pp. 261–263; Surkont, M., *Łapownictwo*, Sopot, 1999, p. 85; Wojciechowski, J., *Kodeks karny...*, op. cit., p. 407; Skorupka, J., *Ochrona interesów majątkowych Skarbu Państwa w kodeksie karnym*, Wrocław, 2004, pp. 84–85; Palka, P., *Sprzedajne nadużycie funkcji publicznej. Studium z prawa karnego*, Olsztyn, 2011, pp. 455–456; Górniok, O., in: Góral, R., Górniok, O., *Przestępstwa przeciwko instytucjom...*, op. cit., p. 93; Wiatrowski, P., 'Łapownictwo czynne i warunki niekaralności jego sprawcy w prawie karnym', *Prokuratura i Prawo*, 2008, No. 7–8, p. 58; the Supreme Court judgment of 7 November 1994, WR 186/94, OSNKW 1995, No. 3–4, item 20; the Supreme Court ruling of 14 March 2007, III KK 248/06, *Prokuratura i Prawo*, supplement, 2007, No. 10, item 4.

<sup>57</sup> Siewierski, M., in: Bafia, J., Mioduski, K., Siewierski, M., *Kodeks karny...*, op. cit., p. 428.

<sup>58</sup> The Supreme Court judgment of 12 September 1986, Rw 655/86, OSNKW 1987, No. 5–6, item 47; Marek, A., *Kodeks karny. Komentarz*, Warszawa, 2010, p. 508.

<sup>59</sup> Surkont, M., 'Glosa...', op. cit., pp. 261–263.

<sup>60</sup> Ratajczak, A., *Ochrona...*, op. cit., p. 82; Wojciechowski, J., *Ustawa o ochronie...*, op. cit., p. 50; Wojciechowski, J., *Kodeks karny...*, op. cit., p. 536; Michalska-Warias, A., in: Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 630.

It is a formal crime, because causing a loss is not required and its commission occurs the moment a prohibited act is performed.<sup>61</sup> It might seem that the phrase 'acts to the detriment' indicates a consequential nature of the act,<sup>62</sup> and the consequence consists in the occurrence of a specific risk of loss; thus the crime is characterised by its result. It does not have this character, because the act to the detriment does not apply to the perpetrator but to the creditor as an object of the crime.

## RELATIONSHIP BETWEEN A CREDITOR'S ACTION AND AN INSOLVENCY PROCEEDING OR A PROCEEDING AIMED AT PREVENTING BANKRUPTCY

The requirement for liability under Article 302 § 2 CC is a relationship between a creditor's venal conduct and an insolvency proceeding or a proceeding aimed at preventing bankruptcy (administration). Granting creditor a financial benefit or promising to grant it should be connected with any of those proceedings. The occurrence of such a link indicates that the bribery of a creditor is an action to the detriment of other creditors, which is within the limits of a creditor's rights in an insolvency proceeding or one aimed at preventing bankruptcy.<sup>63</sup> This means that a creditor should be able, within his powers, to influence the course of an insolvency proceeding or one aimed at preventing bankruptcy.<sup>64</sup> His action does not have to influence the course of those proceedings directly but can have an indirect impact.<sup>65</sup>

There is no normative justification for the opinion that the relationship with an insolvency proceeding or a proceeding aimed at preventing bankruptcy applies mainly to the conduct of a perpetrator and not a bribed creditor, supported by the statement that a different interpretation would render the considered circumstance useless for the recognition of the crime considered.<sup>66</sup> The wording of Article 302 § 2 CC clearly stipulates that the relationship applies to a creditor, and moreover, a creditor may have influence on the decisions regarding receivables in an insolvency proceeding while the perpetrator of the crime, who is a debtor or another person, does not have such possibilities.

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<sup>61</sup> Wojciechowski, J., *Ustawa o ochronie...*, op. cit., p. 50; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy...*, op. cit., p. 188; Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 92; Zakrzewski, R., 'Przestępstwa na szkodę wierzycieli', *Prokuratura i Prawo*, 1999, No. 7–8, p. 34; Adamus, R., Lubelski, M.J., *Karnoprawna ochrona...*, op. cit., p. 47; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 845; Bojarski, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 1623; Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny...*, op. cit., p. 963; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny...*, op. cit., p. 995; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny...*, op. cit., p. 1223.

<sup>62</sup> Sarkowicz, R., *Wyrażanie przyczynowości w tekście prawnym (na przykładzie Kodeksu karnego z 1969 r.)*, Kraków, 1989, p. 76.

<sup>63</sup> Makowski, W., *Kodeks karny. Część szczególna*, Warszawa, 1933, p. 644; Opala, A., *Ochrona obrotu...*, op. cit., pp. 57–58.

<sup>64</sup> Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 96.

<sup>65</sup> Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., pp. 854–845.

<sup>66</sup> Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny...*, op. cit., p. 964.

It is not required that the proceedings should be underway. This observation is reinforced by historical interpretation, because Article 279 § 1 CC of 1932 referred to the action 'in the course of an insolvency proceeding or a proceeding aimed at preventing bankruptcy'. The comparison of these features means that, by using a different definition of the feature in Article 302 § 2 CC, the legislator gave it a broader sense. The concept of the relationship with a proceeding is rightly interpreted more broadly in the doctrine, where it is assumed that it also concerns a situation in which no proceeding is taking place but it is probable that it can be instigated at any time and that is why a perpetrator undertakes a criminal action,<sup>67</sup> e.g., a debtor anticipates the announcement of his bankruptcy soon or intends to apply for opening a debt restructuring proceeding.<sup>68</sup> It is obvious that granting a financial benefit or promising to grant it may also concern actions undertaken in the course of a proceeding. An insolvency proceeding includes a proceeding aimed at declaring insolvency, starting with an effective submission of an insolvency petition, and the proper insolvency proceeding instigated by the issuance of a decision declaring insolvency. The insolvency proceeding ends in the event of effective insolvency, which primarily occurs when the creditors are paid off. The court declares the termination of an insolvency proceeding after the division schedule has been implemented and all creditors have been satisfied. A prohibited act must be committed during the proceeding, because if the proceeding is terminated, a creditor cannot act to the detriment of other creditors and his action cannot be related to such proceedings.<sup>69</sup>

## BANKRUPTCY PROCEEDING

Bankruptcy proceedings are special proceedings that are in the nature of universal enforcement targeting all the assets of a debtor who has become insolvent as a result of his debts.<sup>70</sup> In accordance with insolvency law, it includes a phase concerning the matter of insolvency, a discovery phase following the declaration of insolvency, in which a list of receivables is established, and an execution phase, in which claims against the bankrupt are settled. It concerns not only the bankruptcy of insolvent debtors who are entrepreneurs, but also the bankruptcy of natural persons not

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<sup>67</sup> Górniok, O., *Ustawa o ochronie...*, op. cit., p. 37; idem, *Prawo karne...*, op. cit., pp. 71–72; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy...*, op. cit., p. 188; Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 96; Michalska-Warias, A., in: Bojarski, T. (ed.), *Kodeks karny...*, op. cit., p. 630; Marek, A., *Kodeks...*, op. cit., p. 652; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 749; Zawłocki, R., in: idem, *System Prawa Karnego...*, p. 680; idem, in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny...*, op. cit., p. 964; Bojarski, M., in: Filar, M. (ed.), *Kodeks karny...*, op. cit., p. 1622; Gałazka, M., in: Grzeškowiak, A., Wiak, K. (eds), *Kodeks karny...*, op. cit., p. 1461; Oczkowski, T., in: Konarska-Wrzošek, V. (ed.), *Kodeks karny...*, op. cit., p. 1486.

<sup>68</sup> Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 845.

<sup>69</sup> Ratajczak, A., *Ochrona...*, op. cit., p. 82; Wiśniewski, M., *Prawnokarna ochrona...*, op. cit., p. 97.

<sup>70</sup> Siedlecki, W., in: Siedlecki, W., Świeboda, Z., *Postępowanie cywilne – zarys wykładu*, Warszawa, 1998, p. 29.

engaged in business activities, the so-called consumer bankruptcy that enables insolvent customers to benefit from debt relief (Article 491<sup>1</sup> Bankruptcy Law). What supports the idea of including this proceeding within the scope of Article 302 § 2 CC is the generic object of protection under Chapter XXXVI of the Criminal Code, which is complex and covers both economic transactions and property interests in civil law transactions.

## OTHER PROCEEDINGS AIMED AT PREVENTING BANKRUPTCY

Other proceedings aimed at preventing bankruptcy include any proceedings provided for by law that are intended to prevent a debtor's declaration of bankruptcy.<sup>71</sup> A debt restructuring proceeding is an example of such a proceeding. Its aim, articulated in Article 3 of the Act of 15 May 2015: Restructuring Law,<sup>72</sup> is to prevent a declaration of a debtor's bankruptcy by enabling him to restructure debts by concluding an agreement with creditors, and in the case of administration, also by carrying out restructuring activities while securing the legitimate rights of creditors. The scheme of arrangement can be concluded after a list of receivables is prepared and approved (Article 3(4)(1) RL). A restructuring proceeding enables a debtor to undertake remedial activities and to conclude the scheme of arrangement after a list of receivables is prepared and approved, and it covers legal and actual actions aimed at improving the debtor's economic situation and restoring his ability to fulfil his obligations while he is protected against debt execution (Article 3(5) and (6) RL).

## CONCLUSIONS

1. The crime of a creditor's bribery specified in Article 302 § 2 CC, consisting of granting a financial benefit or promising to grant it to a creditor for acting to the detriment of other creditors in connection with an insolvency proceeding or another proceeding aimed at preventing bankruptcy, plays, as an *ultima ratio*, an important role in the protection of economic and civil law transactions and economic and social development.
2. The means of this crime commitment is a financial benefit (Article 302 § 3 CC), and the means of a creditor's venality is an economic or personal benefit (Article 302 § 3 CC). Such a distinction of those benefits regarding the same object and in the same editorial unit has no criminal or political grounds, because it leads to a clear dysfunction in the construction of those offences; it is necessary to supplement the scope of Article 302 § 2 CC with personal benefit.
3. For the determination of a creditor within the meaning of Article 302 § 2 CC, its definition laid down in Article 189 of the Bankruptcy Law is important. In

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<sup>71</sup> Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny...*, op. cit., p. 844.

<sup>72</sup> Journal of Laws of 2022, item 2309, as amended, hereinafter 'RL'.

accordance with this, it is every person entitled to satisfaction from the debtor's assets even if the liability does not require reporting, which is supported by the relationship between granting a financial benefit or promising to grant it and an insolvency proceeding or a proceeding aimed at preventing bankruptcy.

4. Article 302 § 2 CC applies not only to the bankruptcy of insolvent debtors who are entrepreneurs but also to the bankruptcy of natural persons not involved in business activities, the so-called consumer bankruptcy that enables insolvent customers to benefit from debt relief (Article 4911 of the Bankruptcy Law).

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**Cite as:**

Stefański R.A. (2024) 'Object of the crime of a creditor's bribery', *Ius Novum* (Vol. 18) 2, 22–36.  
DOI 10.2478/in-2024-0011