

LEGAL ASPECTS OF THE CRIMES COMMITTED IN INSOLVENCY PROCEEDINGS – COMPARISON OF CZECH AND AUSTRIAN LEGISLATION

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Abstract

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The subject of this paper is to compare the Czech and Austrian legislation considering offenses which entrepreneurs and other entities (natural person) may commit within the insolvency proceedings or which are related to the insolvency. Emphasis is placed on the comparison of Czech and Austrian legislation with regard cross-border relationships within the business environment and living between the Czech Republic and Austria.

Czech entrepreneurs and natural person in Austria can get into a situation where their debtor is located in Austria and finds himself insolvent or vice versa. Also the Czech entrepreneurs and natural person may do their business or live in Austria and may get into such a situation when they are close to the situation which can lead to their decline. This paper would be for them a practical recommendation on how to avoid potential criminal liability.

crime, insolvency proceedings, decline, payment inability, overindebtedness, gross negligence, conduct causing or leading to the decline

The used methodes: Analysis, comparison, conclusions, offers de lege ferenda.

In view of the fact that Czech companies are free to do business in the Republic of Austria and vice versa, is undoubtedly desirable for them to know each other legislation relating to their business. In particular, this issue will affect entrepreneurs who have their registered office or place of business in the border regions of Austria and Bohemia. However, the entrepreneurs can undoubtedly develop their business activities find themselves in a situation where they are forced to deal with the decline of either their own or their debtor's bankruptcy, when the creditor is the Austrian entity and the debtor Czech entity or vice versa. However, in practice it is possible to meet the fact that entrepreneurs are by their legal representatives fairly well informed regarding their commercial relations, particularly in the criminal law experts in commercial law lack sufficient knowledge and not seldom the client who is taking steps according to the advice of his lawyer,

eventually commits a crime. And in the context of insolvency proceedings there is associated a number of offenses which are committed by perpetrators.

However, the issue affects not only entrepreneurs, but also natural persons not engaged in business, as it often happens that a citizen of the Czech Republic permanently settled in Austria, has his property, lives and works there, or, conversely, the citizen of the Republic of Austria may settle permanently in the Czech Republic. Even these non-entrepreneurs may be then affected by the potential criminal consequences if committed any of the insolvency offense.

And although the issue of insolvency offenses will probably relate mainly to entrepreneurs, it is conceivable that it may have a criminal impact on non-entrepreneurs. It is thus essential that the legal awareness among general (not just business) public was right in this respect, because these crimes may be committed by Czech entities in Austria and vice versa.

The method used in this article is at first the collection of facts and the comparison of provisions in Austrian and Czech Penal Codes regarding the crimes committed or joined with the problematic of insolvency proceedings.

The aim of this article to find out the differences between the above stated legislation and find out if the austrian legislation may be used for improving the Czech legislation.

The first question in this context which comes into consideration is, how the decline is defined in Czech and Austrian legislation?

In the Czech Republic, the insolvency proceedings is governed primarily by Act No. 182/2006 Coll., about Bankruptcy and its solution, as amended ("IZ"). The provision § 3 paragraph 1 provides that the debtor is insolvent, if located in payment inability. State of payment inability occurs when the following conditions are met. The debtor has several creditors, the debts for a period of 30 days overdue and these commitments is unable to perform. The debtor in this case may be either a legal or natural person entrepreneur or a natural person not engaged in business. The second case, when the debtor enters decline, is the overindebtedness (§ 3, paragraph 3 IZ). The overindebtedness is if the debtor has several creditors and the sum of its liabilities exceeds the value of its assets. However, the Debtor in this case may be with regard to the specific wording of the Act only a legal entity or an individual entrepreneur, but not a natural person.

Insolvency law is governed in the Republic of Austria by RGBI Insolvency Regulations No. 337/1914, which come into force on 1 January 1915 (It's austrian designation is "Insolvenzordnung" and thus abbreviation "IO"). Unlike the Czech insolvency law will be the Austrian insolvency law in two years 100 years old – albeit significantly changed compared to its original adaptation – 100 years.

Similarly as in the Czech insolvency law decline in the IO is defined by two forms, both payment inability and overindebtedness. Provision of IO § 66 provides that insolvency occurs especially if the debtor stops payment of his debts. Overindebtedness is then defined in the provisions of IO § 67, which states that this form of decline should only be considered in registered partnerships, whose the unlimited liable partner is not a natural person, in legal persons and, in the case of the decendent's estate. The overindebtedness must be based on accounting documents of the debtor.

Also, as in the Czech legal system according to IO entities authorized to request the opening of insolvency proceedings are debtor and creditor. The provision of § 69 IO then determines that the debtor is obliged to file for insolvency within 60 days after the decline occurs. In the event of a natural disaster, this period is extended to 120 days.

In view of the fact that Czech companies may do in principle unlimited business on the territory

of the Republic of Austria, is undoubtedly desirable for them to know

The Czech law in connection with bankruptcy proceedings occur, the following offenses: breach of trust under § 220 of the Penal Code, breach of trust by negligence according to § 221 of the Penal Code, damage to the creditors according to § 222 of the Penal Code, preferring of creditor according to § 223 of the Penal Code, breach of the obligation to make a true statement of assets pursuant to § 227 of the Penal Code and in particular causing decline according to § 224 of the Penal Code, breach of obligations in insolvency proceedings under § 225 and machinations in insolvency proceedings under § 226 of the Penal Code.

Some of the above listed offenses are known in the Austrian Criminal Code (austrian abbreviation for Criminal Code is „StGB“). Even these crimes may be committed by offenders especially in the context of insolvency proceedings. Austrian Criminal Code provides for the following crimes: fraudulent bankruptcy (§ 156 StGB), Damaging foreign creditors (§ 157 StGB), Preferring of creditors (§ 158 StGB), Violation of creditors of gross negligence (§ 159 StGB), manipulation during the receivership composition proceedings or bankruptcy proceedings (§ 160 StGB).

Due to the fact that this issue is very complex and its thorough legal assessment would take perhaps the whole book, I deal in this article only whit the offense of causing decline according to the provisions of § 224 of the Penal Code, which patially correspond with the provision of § 159 StGB, which is a crime titled Violations interests of creditors of gross negligence.

In the Czech Criminal Code, ie Act No. 140/1961 Coll., Criminal Law, effective until December 31, 2009 existed with effect from 1 May 2000 a similar offense. This crime was called overindebtedness and was stipulated in § 256c of the Penal Code. Subject of this offense, however, could not be a natural person not engaged in business, because that person has with regard to the provisions of § 1, paragraph 3 of the Act. No. 328/1991 Coll. Bankruptcy, as amended, could not get into overindebtedness. Indebtedness could occur only for entrepreneurs or legal entities. Criminally responsible for the crime could be only a specific entity, namely the statutory body of a legal entity or natural person doing business.

But especially interesting is the fact that in the same year, ie in 2000, becomes also effective amendment StGB, which introduces at least a partial equivalent of this crime, and that the above-mentioned offense violations interests of creditors of gross negligence under § 159 StGB.

Equally interesting is the subjective aspect of both these crimes (both Austrian and Czech), thus the crime Causing the decline under the provisions of § 224 of the Penal Code and the crime of Violation of the interests of creditors of gross negligence under § 159 StGB.

Czech Criminal Code provides that for committing this offense is sufficient gross negligence. However, it may also be committed intentionally (cf. diction “even if by negligence”). Austrian legislature then anchored to the offender commits the offense by gross negligence. In both cases, the legislature speaks of subjective aspects in the form of gross negligence. What is gross negligence in the Czech Criminal Code, is stipulated by the provisions of § 16, paragraph 2 of the Penal Code. According to this provision is an offense committed with gross negligence, if the offender to request access due diligence indicates apparent recklessness of the offender to the interests protected by the Criminal Code. For completeness it is necessary to say that the previous Criminal Code (ie the above mentioned Act. No. 140/1961 Coll., Penal Code, as amended), the term “gross negligence” did not know. In Austrian Penal Code – as Breiter stated¹ – the concept of gross negligence was not known until the year 2000. Breiter states in this context that the explanatory memorandum declares that the gross negligence is if the perpetrator acts with an unusual and striking carelessness. So offender ignores and violates the basic rules of prudence that would be clear any reasonable person in the same position and under the same circumstances.

How is it modified the offense of causing decline according to the provisions of § 224 of the Penal Code?

The crime of causing decline according to § 224 of the Penal Code is committed by someone who even by gross negligence may cause a decline when he or she

- a) makes the expenditure which is grossly disproportionate to its relative wealth,
- b) manages their property in a way that is not imposed by law or contract assumed duties or is grossly disproportionate,
- c) uses the loan granted in contravention or grossly disproportionate to its purpose,
- d) provides of their property loans or credits to other parties, although it is grossly disproportionate to his wealth, or
- e) takes beyond normal commercial risk business or operation that does not belong to its regular business activities or is grossly disproportionate to his wealth.

The Act further in § 224 paragraph 2 of the Penal Code provides that the offense of causing decline commits a person who, even by gross negligence, shall establish a new commitment or pledge, although he knows that he is in decline and thus worsens the position of existing creditors.

Subject of this offense may be, with one exception (see below), having regard to the provisions of § 3 IZ, entrepreneurs or non-entrepreneurs, the statutory body of a legal person.

As stated in Šámal², the object of the crime, is the protection of property rights of creditors.

Stated offense has two merits – in the first case when the perpetrator acts some of exhaustively acts stipulated under provision 224/1 a)–e) and thereby induces a decline, while in the second case, there is the debtor already in a state of decline. This fact doesn't realize both only entrepreneurs, and also natural persons not engaged in business, who have generally no awareness, that there may be committed a crime in this way. The reason is simple, because this offense is usually associated particularly with the activities of entrepreneurs.

Inducing a state of decline Šámal³ characterizes as a condition when an offender has not been a debtor in bankruptcy, he deliberately or through gross negligence commences in relation to his property from any of the enumerated under letter a)–e) and in causal connection with this, he gets in a state of payment inability or overindebtedness.

Concerning the objective side of the offense, perpetrator fills it in the first place if he even through gross negligence will cause decline by making the expenditure of property grossly disproportionate to his relative wealth. No doubt it will be an act when the offender from his assets will be manage expenditure without any equivalent. Of course there must always be taken into account the financial circumstances of the offender. What for one offender is unreasonable property expenditure, it may be for another property expenditure entirely normal and appropriate. Another important feature is that such a disproportionate expenditure of the offender will cause decline. If the person even makes unreasonable property expenditure, but the decline on his part would not happen, then it can not be met the body of crime, in particular its objective side and such person can not commit a crime.

The objective side of the crime is also filled by one who induces decline that manages its property in a manner that does not correspond with the law or with the contract or obligations assumed by them in gross disproportion. It is therefore wasteful treatment of its own, not foreign property. He can not, therefore, commit bankruptcy trustee who manages the estate after the declaration of bankruptcy or liquidator, or the statutory representative of a legal person, because they don't manage their own property, but the assets of the legal person. Range of cases to which this objective side corresponds is

1 BREITER, G.: Die grob fahrlässige Beeinträchtigung von Gläubigerinteressen. Anwaltsblatt 2000/11. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH. 660 s. ISSN 1605-2544.

2 ŠÁMAL, P. a kol.: Trestní zákoník II. § 140 až 7421. Komentář. 1. vydání. Praha: C.H. Beck, 2009, 2029 s., ISBN 978-80-7400-178-9.

3 ŠÁMAL, P. a kol.: Trestní zákoník II. § 140 až 7421. Komentář. 1. vyd. Praha: C. H. Beck, 2009, 2031 s. ISBN 978-80-7400-178-9.

therefore quite limited. Šámal⁴ in this regard says the following example, the obligation of the debtor as pledgor, whose obligation is secured by a pledge, which is a house, and the debtor who is the owner of this house has a duty to refrain from doing anything which pledge to deteriorate to the detriment of the pledgee. As in the previous case, however, such behavior must cause the debtor's decline.

That offense also commits an offender, when he causes his decline by taking the loan granted in conflict or grossly disproportionate to its purpose. It will be such a case where the debtor uses the loan granted for purposes other than those for which the loan was granted to him.

Also as in previous cases, such a procedure must cause the debtor's decline. If the debtor's decline was not caused, and the perpetrator would take resources available to him under the loan in contrary to its purpose or grossly disproportionate to its purpose, he would commit an offense Loan fraud under § 211 of the Penal Code.

Another case when the offender commits this crime is an act when the perpetrator induces decline by providing loans or credits of his property to other persons, even if it is grossly disproportionate to his relative wealth. The perpetrator may act in this case either intentionally or through gross negligence. He provides thus due to his property options (and possibly anticipated earnings) such loans or credits that their volume or manner of return, for example, reduce or limit the recovery of these loans or advances, or acts of such loan or credits, the scope of which significantly interfere with the debtor's financial circumstances. Again, what is a gross disproportion of property rights a debtor may not be grossly disproportionate to the relative wealth of another debtors. It is therefore necessary to assess each case individually. Again, this crime may be committed by an offender only if the provision of such loan or a credit will cause decline.

The objective aspect of the crime fills the offender, who causes his decline by making beyond the normal commercial risk business or operation that does not belong to his regular business activities or is grossly disproportionate to his relative wealth. It is quite evident that the perpetrator of this crime, unlike the previous ones can be exclusively entrepreneur. Such conduct could commit such an entrepreneur who would completely without any legal reason made a guarantee of a bill of exchange issued by a third party, which didn't have any business to the entrepreneur, he was not even in its supervisory, control or statutory bodies, and there would be neither fulfillment of any obligation arising in the past between the entrepreneur and the

third party. Again, such conduct by the debtor must cause his decline.

Last but not least, the offense commits the debtor who already knows that he is in decline, and adopt or establish a new commitment or pledge, and this behavior will worsen the position of creditors. In my opinion, the decline in this case doesn't need to be stipulated by the bankruptcy court in insolvency proceedings, but there is sufficient a factual state of bankruptcy under § 3 IZ. This behavior can also be arranged for undue advantage of another creditor. If a debtor signs a pledge contract with one of his creditors, then this creditor pays in the event of insolvency proceedings advantageous position over other creditors. This creditor becomes to the secured creditor and will be satisfied under the conditions stipulated by IZ from the realization of secured property. Unsecured creditors are then satisfied in proportion to the amount of the acknowledged debts of the rest of the proceeds of the estate. If, for example secured property was the only property of the debtor, its value would be at such 2 000 000. CZK, the amount of the secured claim, for which it was pledged as security would be on a similar level, then the position of other creditors is undoubtedly worse.

As mentioned above, the Austrian equivalent of the offense of causing decline according to § 224 of the Penal Code is an offense Violations interests of creditors of gross negligence, which regulates the provision of § 159 StGB.

That provision replaced in 2000 the original offense of negligent infliction of decline ("fahrlässige Krida").

Subject of the offense Violations interests of creditors of gross negligence is the debtor who has at least one creditor⁵.

That offense can be committed by a person who of his gross negligence by a conduct causing or leading to the decline

- a) will induce his payment inability (§ 159 paragraph 1 StGB) or
- b) makes impossible or reduces the satisfaction at least one of his creditors, although it knows, or should know, that he is in a decline stand (§ 159 paragraph 2 StGB).

Furthermore, the stated offense may be committed by a person who damages by gross negligence by conduct causing or leading to the decline his economic situation so that there would become the payment inability if there was not made by one or more corporations immediate or mediated support comparable measures taken or support or comparable action by another person.

4 ŠÁMAL, P. a kol.: Trestní zákoník II. § 140–7421. Komentář. 1. vyd. Praha: C. H. Beck, 2009, 2032 s., ISBN 978-80-7400-178-9.

5 FUCHS, H., REINDL, S.: Strafrecht. besonderer Teil I. Delikte gegen den Einzelnen (Leib und Leben, Freiheit, Ehre, Privatsphäre, Vermögen. Zweite, vollständig überarbeitete und erweiterte Auflage. Springer-Verlag Wien 2007. 177 s., ISBN 13 978-3-211-70833-0.

As stated above, in all the above cases, the objective aspect includes the conduct of perpetrators leading to the causing of the decline. Acting or conduct leading to the causing the decline are understood negotiations exhaustively enumerated in § 159 paragraph 5 StGB. Decline acting under the cited provisions may be committed by a person who violates the principles of proper management. This perpetrator

- a) destroys, damages, makes useless, dissipates or donates a substantial portion of his assets. These negotiations are assimilated, and need only one of these aforementioned negotiations to commit this offense. But it will not be sufficient, for example, if the perpetrator only destroyed or damaged a portion of its assets without simultaneously inflicted payment inability or lessened or made impossible the satisfaction of the creditor in a situation where he already knows or should know that he is in decline. In that case, it would not be met the body of the crime, as it lacked the objective side of the offense. Besides, this is also true for all other following negotiations describing the objective side of this offense;
- b) makes a disproportionately high amount of the unusually risky business that does not belong to his usual business, or from gambling or betting. Fabrizio⁶ in this context refers to such acts which have in a particular situation the speculative nature based on extremely risky liabilities. These negotiations come into consideration in those cases when the breach of the obligation to act with proper care, having regard to the type of business is completely outside the proper operation of the enterprise. The game and the bet is then such negotiations, in which success depends in large degree by the chance;
- c) provides excessive spending in striking contrast with his property regime or his economic capabilities and possibilities. Fabrizio⁷ in this regard says that it is both the case in the private sector and in the business sector (eg, inadequate business edition, excessive expenditure on personal needs, advertising etc). In this case, the same as in the Czech legislation, it is necessary to assess the objective side individually, because

what is one subject considered inappropriate, it may be entirely in keeping with the adequacy of the body of another. As Bertel⁸ states, this objective side of this crime can be fulfilled, if the debtor makes such expenditure which are completely economically absurd and are used only for the debtor's satisfaction;

- d) fails to administer books or business records or leads so that it is considerably more difficult to have overview of the real estate, financial and earnings situation, or fails to take other appropriate and desirable control measures that allow such a statement to him.
- e) Fails to make out financial statements when it is his duty, or he executes them in such a manner or so late that it is much more difficult to have overview of the real estate, financial and earnings situation.

In the first case, the objective side of this crime is filled if the perpetrator's conduct causing the decline will cause payment inability. As stated Fabrizio⁹, it follows from settled case-law, the payment inability occurs when the debtor is unable to fulfill within a reasonable period and in terms of fair economy all his due payments in full (cf., Judge.SSt 55/76, 60/41, JBl 1991, 465 uva).

It should also be noted that the intentional causing of decline is stipulated by the Austrian Penal Code in provision § 156 StGB, according to which the offense is committed by a person who intentionally conceals, removes, disposes of or damages portion of its assets, or pretends or accepts a nonexistent liability or otherwise his property actually or seemingly reduces, and such conduct makes impossible or reduces satisfaction of his creditors, or at least one of them.

As states Fabrizio¹⁰, the perpetrator of this crime, unlike the crime of Violating the interests of creditors of gross negligence under § 159 StGB, debtor must have at least two creditors, while if the perpetrator commits the crime stipulated by the provision § 159 StGB, he may make impossible or reduce the satisfaction of at least one of its creditors. It doesn't matter if the creditor is a legal person, an entrepreneur or a natural person¹¹. In the case of the crime Intentional causing of decline the offender thus fulfills the objective side by hiding his assets,

6 FABRIZY, E. E.: Straßengesetzbuch. Kurzkommentar, 10., neu bearbeitete Auflage, Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH. 2010, 511 s., ISBN 978-3-214-08648-0.

7 FABRIZY, E. E.: Straßengesetzbuch. Kurzkommentar, 10., neu bearbeitete Auflage, Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH. 2010, 511 s., ISBN 978-3-214-08648-0.

8 BERTEL, CH., SCHWAIGHOFER, K.: Österreichisches Strafrecht. Besonderer Teil I. §§ 75 bis 168 b StGB. 12., vollständig überarbeitete Auflage, Wien: Verlag Österreich 2012. 307 s. ISBN 978-3-7046-6347-4.

9 FABRIZY, E. E.: Straßengesetzbuch. Kurzkommentar, 10., neu bearbeitete Auflage, Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH. 2010, 510 s. ISBN 978-3-214-08648-0; the same FUCHS, H., REINDL, S.: Strafrecht. besonderer Teil I. Delikte gegen den Einzelnen (Leib und Leben, Freiheit, Ehre, Privatsphäre, Vermögen. Zweite, vollständig überarbeitete und erweiterte Auflage. Springer-Verlag Wien 2007. 177 s., ISBN 13 978-3-211-70833-0.

10 FABRIZY, E. E.: Straßengesetzbuch. Kurzkommentar, 10., neu bearbeitete Auflage, Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH. 2010, 502 s., ISBN 978-3-214-08648-0.

11 BIRKLBAUER, A., HILF, M. J., TIPOLD, A.: Strafrecht. Besonderer Teil I. §§ 75–168e StBG, Wien: Facultas.wuv. 2011, 431 s., ISBN 978-3-7089-0624-9.

sells, donates, exchanges, brings the creditors into confusion in the sense that he hasn't had the property in his possession any more, reduces the content of his property, etc., but only on condition that simultaneously makes impossible or reduces satisfaction of his creditors, or at least one of them. As states Birklbauer¹², the offender can commit this crime by making his assets unknown to his creditors so that the insolvency administrator in an insolvency proceedings can not find out that this assets is a part of the debtor's property. He states further that the perpetrator may hide his earnings in that way that he asks his clients to point out the money to his personal account although this money belongs to the company. The attribute of this offense is not a payment inability or overindebtedness. If such acts of the offender, when the debtor removes a part of his assets without making impossible or reducing satisfaction of the creditors, then the objective side of the crime will not be filled. In terms of subjective side must be the crime committed intentionally, ie the offender knows that he can cause this consequence and in the case that this happens, it is aware. The perpetrator may be solely the debtor, which may be a natural person or an entrepreneur.

In summary, in the two republics, ie both the Czech and Austrian, occurs at the same time the

need to anchor in criminal laws similar criminal conduct. It is thus evident that the need to criminally punish these negotiations resulting from social phenomena. Entrepreneurs and non-entrepreneurs in their activities, they must be aware of the fact that the similar behavior can be punished by criminal law and it is necessary to strengthen their legal consciousness, which is according to my experience in this area relatively low, but necessary – with regard to the protection of their interests.

The both legislations in the above mentioned area are very similar and it can not be definitely said which legislation is better. The Austrian legislation in my opinion is stricter, at least in stipulating the crime Intentional causing the decline. This crimes commits the perpetrator if he for example hides his assets but it is not necessary that he is in the stand of decline or that this acting may lead to a his decline. This stricter provision could serve as a good example for the Czech recodification and could be de lege ferenda stipulated in the Czech legislation because it shelters the creditors of theirs debtors more then the Czech legislation. The next thing which is worth mentioning is that especially Austrian law can serve as a comparison of the relevant source of information and can be an interesting measure of decision-making practice of the Czech courts.

SUMMARY

The object of this paper is the comparison of two borders legislation – Czech and Austrian considering the committing crimes which are related to the insolvency and insolvency proceedings. The so called decline's crimes in both legislation are very similar. The main emphasis was given at the comparison of the conduct which may ground the criminal responsibility for causing decline. Both legislation have stipulated this kind of crimes at the same time which shows the necessity to regulate such behaviour which is beyond the criminal border and which may in a bad way threaten or harm the rights of creditors. The result of this comparison is that the Austrian legislation is slightly stricter than the Czech one, at least in stipulation of the crime Intentional causing the decline. The Austrian legislation could be the way how it is possible to regulate and criminalize the similar behaviour in the Czech republic so that the interests of creditors are more sheltered then they currently are.

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