ZBIGNIEW MICZEK

Criminal Liability of a Member of the Board of Directors of a Housing Cooperative for Failure to File a Bankruptcy Petition in a Timely Manner

Abstract

The article discusses the question of the applicability of the criminal provisions contained in the Cooperative Law to members of the board of directors of housing cooperatives, in particular the possibility of imputing criminal liability to them for failure to file a bankruptcy petition in a timely manner.

KEYWORDS: bankruptcy, housing cooperative, criminal liability, board member

ZBIGNIEW MICZEK, MA in law, ORCID 0009-0002-7041-579X,
e-mail: zbyszekmcz@gmail.com

1 Introduction

Housing cooperatives are entities that straddle the line between social and market housing. Their role is changing, but they are still a significant group of specialized and diverse managers and owners of very large housing stock, as well as green and public areas[1]. As of February 9, 2024, there

1 Hanna Milewska-Wilk, *Działalność i znaczenie spółdzielni mieszkaniowych w Polsce, Badania Obserwatorium Polityki Miejskiej, Instytut Rozwoju Miast i Regionów*. Warsaw-Krakow 2023. https://doi.org/10.51733/opm.2023.23. [accessed: 23.03.2024].

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were 3509 housing cooperatives in Poland, while 86 such cooperatives were established between 2014 and 2024[2]. The insolvency and bankruptcy of housing cooperatives is a significant problem, as 11 such cooperatives were declared bankrupt between 2010 and 2021, while 164 cooperatives were subject to ex officio proceedings for dissolution without liquidation and deletion from the National Court Register of Housing Cooperatives[3]. Related to the issue of bankruptcy of legal entities is the liability of members of their bodies (boards of directors) for failure to file bankruptcy petitions within the legal deadlines, which can take the form of civil (compensation), public (prohibition from conducting business and acting as members of legal entity bodies) and criminal liability. It is the latter type of liability that is the subject of this study in the case of housing cooperatives.

2 Cooperatives and housing cooperatives

The basic regulation governing the operation of cooperatives in Poland is the Act of September 16, 1982 – the Cooperative Law (CL)[4], originally contained in Title II „Special provisions for agricultural production cooperatives, agricultural cooperatives, work cooperatives and housing cooperatives", Section IV „Housing cooperatives", regulations for housing cooperatives. On December 15, 2000, the Law on Housing Cooperatives (LHC)[5], which partially repealed and partially amended the provisions of the Cooperative Law concerning housing cooperatives Section IV of the CL was repealed by Article 3 item 3 of the law of December 19, 2002, on amendments to the Law on Housing Cooperatives and certain other laws[6], with the result that

2 Raport Centralnego Ośrodka Informacji Gospodarczej, https://www.coig.com.pl/wykaz_lista_spoldzielnie-mieszkaniowe_w_polsce.php – data odczytu 23.03.2024 r.

3 Katarzyna Królikowska, *Postępowanie upadłościowe spółdzielni mieszkaniowych* (Warsaw: Institute of Justice, 2021), 185-201. https://iws.gov.pl/wp-content/uploads/2021/11/IWS_Krolikowska-K._Postepowanie-upadlosciowe-wobec-spoldzielni-mieszkaniowych.pdf. [accessed: 23.03.2024].

4 i.e. OJ. 2021, item 648 as amended. – Hereinafter as: p.co.

5 i.e., OJ. 2023, item 438 – hereinafter referred to as LHC.

6 OJ. 2002, no. 240, item 2058 as amended.

these matters are now regulated in the LHC[7]. The regulation of the LHC is not complete, because according to its article 1, paragraph 7, to the extent not regulated by the Act, the provisions of the CL shall apply, subject to sections 8 and 9. It should be noted, however, that the final content of this provision was formed under Article 1.1 of the Act of July 20, 2017 amending the Law on Housing Cooperatives, the Code of Civil Procedure, and the Cooperative Law[8], so this proviso did not exist from the beginning of the existence of LHC.

3 Reference in Article 1, paragraph 7 of the LHC vs. criminal provisions

According to the recognized principles of jurisprudence, reference may be made directly and appropriately to other provisions. The reference contained in Art. 1, para. 7 of the CL does not contain the proviso that it is a matter of the appropriate application of the provisions of the CL, so the provisions of the CL apply directly to the extent that they are not regulated by the LHC[9]. The doctrine argues that the scope of the exclusion of the application of the provisions of the CL on shares raises significant interpretation doubts, and in particular the following provisions of the CL on shares are not applicable in a housing cooperative: Art. 5 § 1 item 3 (content of the statutes), Art. 16, 17 § 2, art. 19 § 1 and Art. 20 § 1 (admission to the cooperative), art. 30 (register of members), Art. 76 and 77 § 3 and 4 (balance surplus, which does not exist at all in a housing cooperative), Art. 90 § 2 (advance payment of shares to cover losses), Art. 125 § 5a (liquidation of the cooperative – see Art. 125 § 5b) and Art. 135 (bankruptcy of the cooperative)[10]. It is also stated that the provisions of the LHC do not

7 Krystyna Kwapisz, *Prawo spółdzielcze. Komentarz praktyczny* (Warsaw: Lexis Nexis, 2011), 269.

8 OJ. 2017, item 1596 as amended.

9 Adam Doliwa, *Komentarz do ustawy o spółdzielniach mieszkaniowych* (Warsaw: C.H. Beck, 2021, Legalis), kom. do art. 1, nb. 33.

10 Krzysztof Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz* (Warsaw: C.H. Beck, 2018, Legalis), kom. do art. 1, nb. 15.

directly cover all issues related to cooperatives and housing cooperatives, and to that extent the remaining provisions of the Cooperative Law apply. (Part I, Title I, Sections I-XII and Part II)[11]. The difficulties of applying the provisions of the CL to housing cooperatives by reference are also pointed out, using the example of the mechanism for challenging resolutions of the general meeting of cooperatives, arguing that this is permissible only if it finds a basis in a specific provision of the law[12]. It should be noted that the criminal provisions of the Cooperative Law are contained in another part of the law, namely Part IIa. Among these criminal provisions is Article 267b, which stipulates that whoever, as a member of the board of directors or liquidator of a cooperative, fails to file a petition for the cooperative's bankruptcy, despite the existence of conditions justifying the cooperative's bankruptcy, shall be punished by a fine, restriction of liberty or imprisonment for up to one year.

With regard to the views of the doctrine expressed on the basis of the criminal provisions contained in the CL, one opinion points out that, in addition to the criminal provisions contained in the LCH, all cooperatives are also bound by the criminal provisions contained in articles 267b-267d of the CL[13]. However, most of them do not deal with the problem of their application to housing cooperatives[14], and it is only on the basis of Article 267c of the CL that it is pointed out – rightly, it seems – that the impossibility of reproducing the normative content of the said provision, the absence of rules for carrying out a division in the absence of entitled members, but also the absence of a separate part of the cooperative property to which the rights and obligations of the entitled persons are linked, undoubtedly prejudices its incompatibility with Article 2 of the Constitution[15]. It is precisely the application of the provisions concerning the conditions for declaring bankruptcy (Articles 130-137 of the Cooperative Law), that gives

11 Doliwa, *Komentarz do ustawy o spółdzielniach mieszkaniowych*, kom. do art. 1, nb. 34.

12 Anna Zbiegeń-Turzańska in: *System Prawa Prywatnego*, Vol. XI, *Prawo* spółdzielcze, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020), 216-217 and the views presented there.

13 Ewa Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz* (Warsaw: Wolters Kluwer, 2023), 691.

14 Magdalena Błaszczak, Anna Zientara in: *System Prawa Prywatnego*, Vol. XI, *Prawo* spółdzielcze, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020), 1105-1106.

15 Piotr Pałka in: Dominik Bierecki, Piotr Pałka, *Prawo spółdzielcze. Komentarz* (Warsaw: C.H. Beck, 2024), 392-393.

rise to divergences in case law[16] and legal science[17] as to how they should be understood, but these considerations go beyond the scope of this study, the purpose of which is to analyze the question of whether the criminal liability referred to in Article 267b of the Cooperative Law also applies to the members of the board of directors of a housing cooperative.

Article 1 § 1 of the Law of June 6, 1997 – the Criminal Code[18] – states that criminal liability shall be imposed only on a person who commits an act prohibited by the law in force at the time of its commission. *The principle of nullum crimen sine lege* is widely recognized as the foundation of modern criminal law. However, the translation „there is no crime without a law", which expresses the order of legal typification of criminal acts, does not exhaust its content. Traditionally, four postulates are distinguished:

1. that the act is specified in an act having the rank of a law enacted by the legislature*nullum crimen sine lega scripta*),
2. that the law establishing the sanction for the act in question was previously (i.e., before the act was committed) introduced into the legal system (*nullum crimen sine lega praevia*),
3. that the offense is precisely and clearly defined for the individual (*nullum crimen sine lega certa*),
4. hat the provision of the law defining such an act be strictly construed, excluding broad interpretation and inference per analogiam (*nullum crimen sine lega stricta*)[19].

In the reasoning of the judgment of April 4, 2000[20], the Supreme Court pointed out that the basic principle of criminal liability – *nullum crimen sine lege* – contained in Article 1 of the Criminal Code, requires that a criminal act be defined in detail by law and prohibits the use of analogy and expansive interpretation in criminal law to the detriment of the offender.

16 Np. uchwała Sądu Najwyższego z dnia 4.12.1998 roku (sygn. akt III CZP 398/98) i powołane tam orzecznictwo.

17 Np. Mirosław Gersdorf in: Mirosław Gersdorf, Jerzy Ignatowicz, *Prawo Spółdzielcze. Komentarz* (Warsaw: Wydawnictwo Prawnicze-Wydawnictwo Spółdzielcze, 1984), 212; Kwapisz, *Prawo spółdzielcze. Komentarz praktyczny*, 214; *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz* (Warsaw: Wolters Kluwer, 2018), 242-243.

18 i.e. Dz.U. 2024, item 17 – hereafter referred to as: k.k.

19 Aleksandra Rychlewska, „Zasada nullum crimen sine lege na tle współczesnej idei prawa" *Czasopismo Prawa Karnego i Nauk Penalnych*, No. 3 (2017): 95-96.

20 Ref. II KKN 335/99, Legalis No. 47834.

On the other hand, the Supreme Court, in the reasoning of its decision of February 24, 2010, stated that from the supreme principle of *nullum crimen sine lege*, established in article 42 § 1 of the Constitution and in article 1 § 1 of the Criminal Code, derive not only the rules of legislation, but also its interpretation, while in article 115 § 1 of the Criminal Code, the legislator indicated that a prohibited act is conduct with the characteristics specified in the Criminal Code, and these are the constitutive features of the punishability of conduct of a certain type. In the doctrine it is pointed out that from the above-mentioned principle results the prohibition of analogy and expansive interpretation to the detriment of the convicted person[21].

In view of the general principles of criminal liability outlined above, the view that the provisions of Article 267b of the CL can be applied as a criminal sanction to members of a housing cooperative by way of Article 1 § 7 of the LHC is untenable, as such a way of understanding and applying these provisions is contrary to Article 1 of the Criminal Code.

4 Criminal provisions in the CL and LHC

Criminal provisions did not exist in the CL from the beginning of the legislation. The introduction of criminal provisions in the CL was planned earlier. In 2001, the Cooperative Law was passed, which repealed a significant part of the CL and included criminal provisions in Section X. The President of the Republic of Poland refused to sign this law and asked for it to be reconsidered. One of the reasons for the President's veto was that it extended criminal liability to ordinary cooperative members in addition to members of the cooperative's authorities. The law was not reconsidered because the Sejm's term had ended. Recognizing the need to introduce criminal provisions into the Cooperative Law, in the next term of the Sejm, in 2003 and 2004, two draft amendments were submitted containing a request to introduce criminal provisions into the law. As can be seen from the government's explanatory memorandum, the purpose of introducing criminal law provisions into the Cooperative Law was to protect the

21 Robert Dębski, *Pozaustawowe znamiona przestępstwa. O ustawowym charakterze norm prawa karnego i znamionach typu czyny zabronionego nie określanych w ustawie* (Lodz: Publishing House of the University of Lodz, 1995), 19.

members of cooperatives from damages caused by mismanagement of the cooperative's assets. At the same time, the explanatory memorandum of the draft clearly stated that the proposed criminal provisions were based on the provisions of the Commercial Companies Code (CCC). According to the drafters, this was done to ensure the internal consistency of the legal system[22]. They were added – only – by the Act of June 3, 2005, amending the LHC and certain other acts[23], and they are very visibly modeled on the criminal provisions of the CCC. In the explanatory memorandum of the law, the normative, organizational and functional similarity of conducting business in the form of cooperatives and in the form of commercial companies was pointed out, as well as the need for consistency within the legal system[24].

The provisions of the LHC as originally enacted did not include criminal provisions. It was only on the basis of the Act of June 14, 2007 amending the Law on Housing Cooperatives and on amending certain other laws[25] that *Chapter 31 Criminal Provisions*, was added, consisting of three provisions. Thus, when there were no criminal provisions in the LHC, it could be argued that, by virtue of the reference in Article 1 § 7 of that law, the criminal provisions of the CL would apply to the criminal liability of a member of the board of directors of a housing cooperative. However, since Article 7(1) of the LHC uses the phrase "to the extent that it is not regulated by law", and since criminal liability is regulated by that law, it is not correct to say that it is permissible to refer to the C and parts of its criminal provisions. Acknowledging such a possibility would lead to a situation where a member of the board of directors of a housing cooperative would be subject to the criminal provisions of the LHC, followed by those of the CL, and finally the provisions of the Criminal Code. Such a method of regulation is contrary to the provisions of the Ordinance of the Prime Minister on „Principles of Legislative Techniques" dated July 20, 2002[26]. According to §2 of the Appendix to this Regulation, a law should regulate a given field of matters comprehensively and not leave important parts of this field outside the scope of its regulation, while its §28 indicates that criminal provisions

22 Magdalena Błaszczak, Anna Zientara in: *System Prawa Prywatnego*, Vol. XI, 1105-1106.

23 OJ. 2005, No. 122, item 1024.

24 Szymon Pawelec in: *Prawo spółdzielcze. Komentarz*, 6th ed., ed. Boguslaw Lackoroński (Warsaw: C.H. Beck, 2022, Legalis), kom. do art. 267b.

25 OJ. 2007, No. 125, item 873.

26 i.e. OJ. 2016, item 28 hereinafter as: Rules.

are included only if the violation of the provisions of the law does not qualify as a violation of the Criminal Code, the Fiscal Penal Code or the Code of Petty Offenses, and the act requiring the threat of punishment is related only to the content of this law. When assessing the legal nature of the principles, the Supreme Administrative Court, in the reasoning of the judgment of May 16, 2023[27], pointed out that the principles of legislative technique are not classical directives of a normative nature, and even the fact that they are established in the form of a normative act (regulation) does not change the fact that they have only the nature of guidelines (recommendations); they are a set of instructions addressed to the legislator, indicating how to correctly express legal norms in legal regulations and how to group them in normative acts. Therefore, it can be assumed that they do not serve to assess the validity of the law in force, and their violation does not constitute an inconsistency of regulations with the law to the extent that would justify the total or partial annulment of the regulated acts. On the other hand, it is pointed out in the legal science that the principles of legislative technique primarily serve the purpose of the correct drafting of legal texts, but they are also useful in their subsequent interpretation or in the subsumption of the law[28]. The assumption of the completeness of the legal system, which determines the recognition that a rational legislator does not allow axiological gaps in the law, since any behavior is qualified by legal norms as obligatory or indifferent, while the assumption of the non-existence of structural gaps, the occurrence of which should be eliminated not by interpretation, but by applied legislative additions to texts, is not accepted[29]. In particular, the application of the principles of legislative technique should ensure the coherence and completeness of the legal system and the clarity of the normative texts of legal acts, taking into account the achievements of science and the experience of practice[30]. Therefore, there is no reason to assume that the legislator has not regulated criminal liability in the LHC to the extent that it is necessary to refer to the criminal provisions of the CL.

27 Ref. II OSK 1392/20, Legalis 2970722.

28 Kamil Stępniak, „Relacje między Zasadami Techniki Prawodawczej a Zasadami Poprawnej Legislacji w procesie stanowienia prawa" *Przegląd Prawa Konstytucyjnego*, No. 1 (2017): 218.

29 Maciej Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki* (Warsaw: LexisNexis, 2002), 284.

30 Kamil Stępniak, „Zasady techniki prawodawczej w Polsce i Unii Europejskiej" *Acta Universitatis Wratislaviensis. Law and Administration Review*, No. 105 (2016): 199.

5 Criminal provisions in other cooperative laws

The Law of April 27, 2006 on Social Cooperatives[31] does not contain any penal provisions, but its article 1, § 2 states that the provisions of the Cooperative Law shall apply to social cooperatives in matters not regulated by this Law

The Law of October 4, 2018 on Farmers' Cooperatives[32], contains Article 3, which states that the provisions of the Cooperative Law shall apply to farmers' cooperatives in matters not regulated by the provisions of this Law. At the same time, Chapter 5 of the Law on Farmer's Cooperatives contains criminal provisions, including Article 18 (1), which states that whoever, as a member of the board of directors of a farmers' cooperative or as a liquidator, fails to file a petition for the bankruptcy of a farmers' cooperative, despite the emergence of conditions justifying the bankruptcy of the cooperative, shall be punished by a fine, restriction of liberty or imprisonment for up to one year.

The analysis of the above cases shows that the legislator is not consistent in regulating the criminal liability of members of different types of cooperatives, since:

(a) there is no such regulation at all in the legislation governing social cooperatives;
(b) there are partial criminal provisions in the laws regulating housing cooperatives, but there is no equivalent to Article 267b of the Cooperative Law;
(c) in the laws regulating farmers' cooperatives there are criminal provisions that are practically identical to those contained in the Cooperative Law, as they differ only in their wording, including the equivalent of Article 267b of the Cooperative Law.

A comparison of the criminal provisions contained in the LHC with the criminal provisions of the CL leads to the conclusion that when the legislator wishes to regulate criminal liability in a law concerning a particular type of cooperative, it does so in a positive manner, introducing unambiguous criminal provisions in a given law, which leads to the conclusion that the criminal provisions contained in the CL do not apply to housing cooperatives.

31 i.e., OJ. 2023, item 802 – hereinafter referred to as u.o.s.s.
32 i.e. 2024, item 372 – hereinafter: u.o.s.r.

In the Law of July 22, 2006 on the European Cooperative Society (ECS)[33], in the provisions governing the organs of such a cooperative society under the monist system, Article 21(1) states that, unless otherwise provided by law, the provisions of the Cooperative Law and of separate laws on the management board and supervisory board of cooperatives and their members shall apply to the administrative board of the SCE and its members. In case of doubt as to whether the provisions on the management board or the supervisory board apply to the administrative board and its members, the provisions on the management board and its members shall apply. Paragraph 2 of this provision, on the other hand, enumerates the provisions of the CL that do not apply. The ECS contains Title IV. Order and Penal Provisions, which contains a number of provisions relating to criminal liability. In particular, Art. 105 of the ECS provides that whoever, being a member of the board of directors, a member of the administrative council or a liquidator of an SCE, publishes false data or presents them to the organs of the SCE, to State authorities, to the members of the SCE or to the auditor, shall be punished by a fine, restriction of liberty or imprisonment for up to two years, and Art. 108, according to which whoever, being a member of the management board, a member of the administrative board or a liquidator of an SCE, is required to file a petition for the declaration of bankruptcy of the SCE and fails to do so despite the existence of conditions justifying the bankruptcy of the SCE, shall be punished by a fine, restriction of liberty or imprisonment for up to one year. It is pointed out in the doctrine that article 108 ECS corresponds to Article 586 of the Commercial Companies Code and Article 267b of the CL[34].

An analysis of these provisions leads to the conclusion that, despite the reference in Article 21 of the ECS to the Cooperative Law with regard to the members of the administrative council of the SCE, criminal liability for failure to file for bankruptcy is also regulated. It should be noted that this provision has a subjective scope, referring to members of the administrative council to whom the provisions on members of the cooperative's board of directors apply, and is therefore stricter than the subjective scope found in Article 1 § 7, of the LHC, which refers to cooperatives in general. Nevertheless, the legislator considered it appropriate to introduce Article 108 of the ECS, which establishes a criminal sanction for failure to file for bankruptcy. This means that the legislator did not consider it

33 i.e., OJ. 2018, item 2043 – hereinafter: u.o.s.c.e.

34 Błaszczak, Zientara in: *System Prawa Prywatnego*, Vol. XI, 1174.

possible to apply Article 267b of the Cooperative Law to the members of the administrative council by reference to Article 21 of the ECS, even though the reference refers to the members of the body and not to the SCE itself. The doctrine points out that a law should precisely define the relations it regulates and the entities to which it applies (the scope of the subject and object of the law), and the rule that a law should not contain provisions that would normalize matters beyond the scope of the subject or object it designates, and therefore it has been assumed that a law cannot amend or repeal provisions that normalize matters that do not belong to or do not relate to its subject matter. Such provisions should lead to the conclusion that the law contains only provisions that fall within its subject and object scope, and that in the course of interpretation there can be no situation in which rights or obligations are determined by provisions of the law that fall outside its subject and object scope[35]. If this is the case, it is all the more reason to assume that the reference contained in Article 1, § 7 of the LHC cannot lead to the application of Article 267b of the Cooperative Law to members of the board of directors of a housing cooperative.

6 The problem of (in)compliance with the Constitution

The Constitutional Court has repeatedly addressed the issue of the formulation of legal provisions. In the reasoning of the judgment of October 30, 2001[36] the Court stated that the vague and imprecise wording of a legal provision causes uncertainty among its addressees as to the content of their rights and obligations, especially if it leaves excessive freedom (or even discretion) of interpretation to the bodies applying the provision, which – in the context of those issues which the legislator has regulated

35 Robert Piszko, Zasady techniki prawodawczej w praktyce wykładni prawa" *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 4 (2002): 34, przy czym pogląd ten wyrażono na gruncie § 2 ust. 1 i 2 Załącznika do uchwały nr 147 Rady Ministrów z 5.11.1991 roku w sprawie zasad techniki prawodawczej (M.P. 1991 r., nr 44, poz. 310), którego treść praktycznie pokrywa się z § 2 i § 3 ust. 2 Zasad obecnie obowiązujących.

36 Ref. K 33/00, OTK 2001, no. 7, item 217.

in an unclear and imprecise manner – may lead to the imitation of the legislator or to his substitution. Thus, the legislator may not, by vaguely formulating the content of the provisions, leave excessive freedom in the determination of their subject and object scope to the bodies that are to apply them. This premise can be generally described as the principle of definiteness of legislative interference in the sphere of rights and obligations of the addressees of a legal norm. Exceeding a certain degree of vagueness of legal regulations may be a sufficient condition for establishing their incompatibility with the principle of the rule of law expressed in Article 2 of the Constitution. On the other hand, in the grounds of the judgment of February 24, 2003[37], the Constitutional Court pointed out that the principle of the rule of law expressed in Article 2 of the Constitution imposes an obligation on the legislator to observe the principles of correct legislation. This order is functionally related to the principles of legal certainty and security and the protection of confidence in the state and the law. The principles of good legislation include the requirement that laws be sufficiently specific. They should be precise, clear and linguistically correct. The requirement of clarity means the obligation to create provisions that are clear and understandable to their addressees, who can expect a rational legislator to create legal norms that leave no doubt as to the content of the obligations imposed and rights granted. In relation to clarity, the precision of the provision should be manifested in the concreteness of the obligations imposed and rights granted, so that their content is obvious and allows their enforcement. It is also necessary to quote the views expressed by the Constitutional Court in the reasoning of the judgment of March 18, 2010[38], where, while examining the constitutionality of a provision referring to another law on the basis of its previous case law and doctrinal views, it constructed the principles of correctness of referring provisions and stated that:

1. The principle of correct legislation expresses an aspect of the principle of the rule of law contained in Article 2 of the Constitution. It is functionally related to the principles of legal certainty and security and the protection of confidence in the state and in the laws it enacts. These principles dictate that laws should be formulated in a precise and clear manner, and that lawmaking should take place in a logical

37 Ref. K 28/02, OTK Series A, 2003, No. 2, item 13.
38 Reference K 8/08, OTK Series A, 2010, No. 3, item 23.

and consistent manner, respecting system-wide principles and proper axiological standards. It follows from the previous jurisprudence of the Constitutional Court that the desirability and possible legitimacy of the implementation of given legal regulations cannot be an excuse for making laws in a chaotic, haphazard or defective manner;

2. One of the guidelines of correct legislation is the principle of the definiteness of the law. The determinateness of the law is also an element of the principle of protection of the citizen's trust in the state and the laws enacted by it, which is derived from Article 2 of the Constitution. It is also functionally related to the principles of legal certainty and legal security. Thus, the requirement of legal certainty finds its constitutional basis in the principle of the democratic rule of law. It applies to all regulations that (directly or indirectly) determine the legal position of the citizen;
3. In the jurisprudence of the Constitutional Court, the „determinateness of the law" functions in a broad sense, meaning both the precision of the provision and the clarity of the law, which should be understandable and communicable to the largest possible number of subjects. The requirement to maintain the precision of a legal regulation has the character of a system-wide directive, which obliges the legislator to optimize it in the legislative process. The legislator should strive to implement the requirements of this principle as far as possible. For the above reasons, the legislator is obliged to create legal regulations that are as specific as possible in terms of both content and form. Thus, the degree of specificity of certain regulations is subject to relativization in each case with regard to the factual and legal circumstances surrounding the regulation to be undertaken. This relativization is a natural consequence of the vagueness of the language in which legal texts are drafted and the diversity of the matter to be normalized.

The Constitutional Court has repeatedly pointed out in its jurisprudence that three assumptions are important for assessing the conformity of the wording of a particular provision with the requirements of correct legislation:

- any provision restricting constitutional freedoms or rights should be formulated in such a way that it is possible to determine unambiguously who is subject to the restriction and in what situation,

- the provision should be sufficiently precise to ensure uniform interpretation and application,
- the provision should be drafted in such a way that the scope of its application includes only those situations in which a reasonable legislator actually intended to introduce rules restricting the exercise of constitutional rights and freedoms;

1. The precision of a legal regulation should be understood as the ability to decode unambiguous legal norms (as well as their consequences) from the provisions by means of the rules of interpretation accepted on the basis of a particular legal culture. In other words, the precision of legal regulation should be understood as the requirement to formulate regulations in such a way that they provide a sufficient degree of precision in determining their meaning and legal consequences, and the precision of a regulation is manifested in the concreteness of the regulation of rights and obligations, so that their content is obvious and allows their enforcement;
2. The clarity of a norm is the guarantee of its communicability to the addressees, which means the comprehensibility of the norm on the basis of the common language. The vagueness of the provision in practice means uncertainty of the legal situation of the addressee of the norm and leaving its formation to the bodies applying the law, and according to the established jurisprudence of the Constitutional Court, the enactment of vague, ambiguous provisions that do not allow the citizen to predict the legal consequences of his behavior is a violation of the Constitution.

The Constitutional Court, in the justification of the judgment of February 27, 2014, in which it examined the constitutionality of a penal provision referring to another law, stated, on the basis of its previous jurisprudence, that:

1. The principle of definiteness of a criminal (repressive) legal regulation does not exclude the possibility of including the elements of a prohibited act in another law (normative act), as well as the use by the legislator, in a limited scope and strictly defined limits, of general clauses or general norms, although the use of the latter instrument of criminal law regulation should be exceptional and occur only when,

from the point of view of a rational legislator, it is not possible to apply the full norms within the provisions of criminal law;

2. The evaluation of *carte blanche* provisions should be carried out, as a rule, taking into account those provisions which, by specifying the elements of the prohibited act, are intended to specify the content of the criminal law norm, because only as a result of the reconstruction of the criminal law norm, which consists, in addition to the *carte blanche* provision, also of the provision defining the elements of the act, it is possible to recognize whether the provision containing the sanction is in conformity with the Constitution;
3. Criminal (repressive) provisions of a blanket nature, which comply with the guarantees provided for in Article 42.1 of the Constitution, should specify the basic elements, i.e. the subject, the elements of the criminal offence and the nature and amount of the penalty, and refer to separate provisions only for the purpose of specifying some of these elements.

It should also be noted that the systematics of criminalizing provisions uses a number of terms and distinguishes between: complete provisions, incomplete provisions, cross-reference provisions, *carte blanche* provisions sensu stricto, complete *carte blanche*, incomplete *carte blanche*, static cross-references, and dynamic cross-references[39]. A discussion of all types of references is beyond the scope of this study, but it should be noted that none of them apply to the present case. This is because it is not a question of determining the conditions for criminal liability, in particular the condition of insolvency referred to in Article 267b of the Cooperative Law, but rather the question of subjective referencing as it applies to members of the boards of directors of housing cooperatives.

In view of the jurisprudence and doctrine presented above, it should be pointed out that even if it were assumed that the reference of article 1 § 7 of the LHC to members of the boards of directors of housing cooperatives is to Article 267b of the CL, such a regulation would be contrary to the Constitution, since it would not meet the test of a reasonable regulation, especially since it concerns a matter of civil rights and liberties such as criminal liability. In a situation where the LHC has its own special criminal provisions, it is impossible to assume that special criminal provisions other

39 Aleksandra Kustra, „Blankietowość norm prawnokarnych jako problem konstytucyjny" *Forum Prawnicze*, No. 2 (2012): 21 and literature cited there.

than those set forth in the criminal provisions of the Code will apply. Since any provision limiting constitutional freedoms or rights should be formulated in such a way that it is possible to determine unambiguously who is subject to the limitation and in what situation, such a way of understanding the provisions puts the addressee of this legal norm in an uncertain and unpredictable situation, since the provision on criminal liability for failure to file a bankruptcy petition on time is missing:

a. in the LHC as the basic law for housing cooperatives;
b. in the Insolvency Law (IL) as the primary law for insolvency regulation;
c. in the CC as a criminal law.

It should be noted that in the Criminal Code there is Chapter XXXVI „Crimes against economic turnover and property interests in civil law transactions", in which are indicated crimes related to insolvency, the so-called three-sixes[40], among which there is no provision criminally sanctioning

40 Article 300 § 1. Whoever, in the event of threatened insolvency or bankruptcy, prevents or depletes satisfaction of his creditor by removing, concealing, selling, donating, destroying, actually or ostensibly encumbering or damaging his assets, shall be subject to the penalty of deprivation of liberty for up to 3 years. § 2. Whoever, in order to frustrate the execution of a decision of a court or other state authority, frustrates or depletes the satisfaction of his creditor by removing, concealing, disposing of, donating, destroying, actually or ostensibly encumbering or damaging his assets seized or threatened with seizure, or removing seizure marks, shall be subject to the penalty of deprivation of liberty from 3 months to 5 years. [...] Article 301 § 1. Whoever, being a debtor to several creditors, prevents or restricts the satisfaction of their claims by the fact that he creates, based on the provisions of the law, a new business entity and transfers his assets to it, shall be subject to the penalty of deprivation of liberty from 3 months to 5 years. § 2. Whoever, being a debtor to several creditors, brings about his bankruptcy or insolvency, shall be subject to the same punishment. § 3. Whoever, being indebted to several creditors, recklessly brings about his bankruptcy or insolvency, in particular by squandering constituent parts of his assets, incurring liabilities or entering into transactions obviously contrary to the principles of economy, shall be subject to a fine, restriction of liberty or imprisonment for up to 2 years. Article 302 § 1. Whoever, in the event of threatened insolvency or bankruptcy, being unable to satisfy all his creditors, pays or secures only some of them, thereby acting to the detriment of the others, shall be subject to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years. § 2. Whoever gives or promises to give a creditor a financial benefit for acting to the detriment of other creditors in connection with bankruptcy proceedings or aimed at preventing bankruptcy,

the failure to file a bankruptcy petition in time. In the provisions of the IL which is the basic law governing insolvency, there are provisions providing for civil liability for damages (Article 21(3) of the IL) and public liability related to prohibition of participation in business (Article 373(1)(1) of the IL) for failure to file a bankruptcy petition on time, and although there is a *Part Five. Criminal Provisions*, there is no provision introducing criminal liability for failure to file a bankruptcy petition. This means that the legislator did not adopt the general principle of introducing criminal liability for failure to file a bankruptcy petition against all legal entities with bankruptcy capacity, but chose to introduce it in individual laws regulating specific legal entities. This must lead to the conclusion that if there is no provision in such a law introducing criminal liability for failure to file a bankruptcy petition, it cannot be inferred from other provisions, in particular on the basis of a reference to another law.

7 Summary and conclusions *de lege ferenda*

The foregoing considerations lead to the conclusion that the criminal provisions contained in Articles 267b-267d of the Cooperative Law, including Article 267b of the Cooperative Law, which sanctions the failure of obligated persons (members of the cooperative's management board) to file a bankruptcy petition in a timely manner, do not apply to housing cooperatives by virtue of the reference in Article 1 § 7 of the Law. This means that, apart from the legitimacy of the introduction of a criminal sanction for failure to file a bankruptcy petition in time, the legislator, for unjustified reasons, differentiates the legal situation of the members of the management boards of different types of cooperatives and introduces uncertainty into the rules of economic activity, one of the features of which is security, which is also sanctioned by criminal norms.

Due to the vagueness of the conditions for declaring bankruptcy and the difficulty of interpreting economic phenomena, one should generally ask whether it is reasonable to continue to maintain criminal provisions

shall be punished by imprisonment for up to 3 years. § 3. The same penalty shall be imposed on a creditor who, in connection with the conduct specified in § 2, accepts a benefit for acting to the detriment of other creditors or demands such a benefit.

for failure to file a bankruptcy petition in time. If so, such a provision should be included in the Criminal Code, as a code, and thus in the basic criminal regulation, or possibly in the provisions of the IL, which would be in accordance with the principles of correct legislation. Such a desirable change should be systemic and apply to all entities for which such a sanction is currently provided.

However, if the intention of the legislator was to introduce criminal liability for failure to file a bankruptcy petition by members of the board of directors, housing cooperatives (as well as others included in the provisions of the CL or the Law on Farmers' Cooperatives), it should introduce such provisions directly, because the application of criminal provisions included by reference in the CL is not possible due to the constitutional standards of a democratic state and the principles of criminal liability.

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