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CONSIDERATION OF THE EFFECTIVENESS OF FLAT-RATE COMPENSATION FOR DAMAGE IN INSOLVENCY PROCEEDINGS*

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Abstract. Damage to property is a socially undesirable phenomenon that also occurs in insolvency proceedings. The parties involved in such proceedings do not comply with their obligations under the applicable law due to different motives. Such misconduct not only undermines the proper performance of insolvency proceedings, but also threatens or violates the property integrity of another party, especially creditors. This article analyses the importance of flat-rate compensation for damage and the extent of its preventive effect on parties who consider and weigh the effects of their possibly unlawful conduct when they are aware of the amount of monetary compensation for immaterial damage that will have to be provided to the injured party in the event of their breach of an obligation imposed or stipulated by law. Although the Act on Bankruptcy and Restructuring does not regulate flat-rate compensations for damage; we analyse the purpose pursued by legislators, considering the fact that such compensation is laid down in several laws valid and effective on the territory of the Slovak Republic, and we provide supporting arguments favouring the idea to introduce flat-rate compensations for damage also in insolvency proceedings, as this can reduce the rate of offences related to the insolvency of the bankrupt.

Keywords: insolvency, compensation for damage, flat-rate, prevention, persuasive methods of action

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1. Brief Review of Legal Liability (in lieu of an introduction)

Responsibility is a considerably wider category than **legal liability.** The former also includes responsibility for disregarding non-legal standards of behaviour which fall under non-legal normative systems in a society. Non-

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legal responsibility may include responsibility for violating religious or moral standards. In the following text we will use the term *liability* as legal liability which can be understood in a narrow and broader context.
According to the **narrow context,** liability is equated with a sanction within the three-article structure of the rule of law, while in the **broader context** it implies the obligation of an objectively or subjectively liable legal entity for which the legal conditions of liberation or exculpation are not fulfilled; wherein the legal entity is to incur consequences associated with the conduct forbidden by law. In this text we will continue to use the broader concept of understanding the legal institute of liability.

Liability in this understanding must be exercised in the context of a particular legal relationship. The liability-based relationship arises on the basis of a legal fact - either **unlawful conduct** (a subjective legal fact) or an **unlawful situation** (an objective legal fact). From this point of view, we agree with the definition of legal liability as a special form of relationship in which a new legal obligation - of a sanction nature - arises as a result of a breach of legal obligation (VEČEŘA, M. et al., 2013, p. 249). A breach of a legal obligation may be of a **commissive** or **omissive** nature. We also agree with the assertion that legal liability (all its sub-categories) includes both an element of anticipated adverse legal consequences and an element of enforcement by the state, which is an excellent feature of a legal standard and thus qualitatively separates it from other types, systems of standards. (VEČEŘA, M. et al., 2013, p. 249). Legal liability (accountability) fulfils **reparative**, **satisfactory**, **repressive** functions (which cannot be neglected even in private law sanctions), as well as **preventive** or **other** functions (signalling, comparative etc.) (M. m. VEČEŘA, M. et al., 2013, p. 251).

At the same time, it is necessary to realize that **liability is not only a legal category, but also a moral, ethical, political and social category.** The type of liability that will arise depends on the kind of obligation that has been breached or has not been respected. In particular, the moral consequences of holding a particular person accountable contribute to the fulfilment of the principal purpose and objectives pursued by this act. Moral consequences cause the internal shame of the responsible persons, thereby reinforcing their decision to refrain from unlawful conduct in the future.

2. Liability for damage caused

Liability for damage is one of the types of liability under private law and forms a subcategory of legal liability. Liability for damage is derived as part of a specific offense-based legal relationship between at least two entities; whereby this legal relationship constitutes the right of the injured party to compensation and the obligation of the responsible party to provide such compensation.

The mere occurrence of damage to the property integrity of another person does not automatically constitute a liability-based legal relationship. The first necessary aspect for the creation of such relationship is the commissive or omissive conduct of an entity which is against the law (*contra legem, in fraudem legis* or *contra bonos mores* conduct) and the second aspect is the damage itself. These are two separate aspects, and a liability-based relationship arises provided that these aspects (cause and effect) are linked by a causal relationship (causal nexus).

Damage can generally be defined as harm to a legal entity in its property domain - property integrity. Damage can then be separated into *actual damage* and *lost profits*.

Real damage, in our understanding and in accordance with the court's interpretation, is damage which results in the diminution of the property of the injured party in comparison with the state before the damage causing event, such diminution representing the value in property which is necessary to bring the subject matter back to the previous state. (Judgment of the Supreme Court of the Slovak Republic, file no. 3Cdo 234/2007). As regards its characteristic features, we also emphasize the court's interpretation, according to which the damage equals **harm which 1. occurred in the property domain of the injured party, 2. is objectively expressible in money and 3.**

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may be remedied by providing a material benefit, mostly by pecuniary performance. (Judgment of the Supreme Court of the Slovak Republic, file no. 5 Cdo 126/2009).

Lost profits also represents harm to the injured party, but this is because "***the injured party did not experience an increase in their assets as a result of the event causing the harm, although this could have been expected with regard to the regular course of things. Lost profits is not manifested by a diminution in the property of the injured party (loss of assets, as in the case of actual damage), but by the loss of an expected benefit (yield).***"(*Decision of the Supreme Court of the Slovak Republic, file no. 4 M Cdo 23/2008, also the Judgment of the Supreme Court of the SR, file no. 2 Cdo 198/2007 and related case-law*).

A **causal link,** which is an essential prerequisite for damage liability to arise, is an objective condition which cannot be presumed but must be demonstrated by the injured party (who bears both the burden of assertion and the burden of proof) in order to succeed in exercising their right (claim) to compensation for damage. *"Causality itself is inexhaustible. It is always necessary to identify only the cause which the law can take into account when classifying the violation of the law. In order to recognize certain behaviour of a person as being the cause of an emerging fact, such behaviour must be a prerequisite to such fact (conditio sine qua non)."* (OSINA, P., 2013, p. 111).

However, one cannot confuse a causal link only with a temporal link and a connection; in other words, the "**ante hoc, propter hoc" principle does not apply.** (Finding of the Constitutional Court of the Slovak Republic, file no. I. ÚS 177/08-31; § 16). The *ante hoc, propter hoc* principle means "*before this, because of this*", and/or the "*Ante hoc, ergo propter hoc"* variant can be mentioned here which means *"before this, therefore because of this"*. The foregoing describes a logical fallacy inferring the existence of a causal relationship between two separate events due to their temporal succession. (Judgment of the Supreme Court of the Slovak Republic, R 21/1992). The phenomena preceding other phenomena in time may be, but are not necessarily the reason of these phenomena which occur at a later time. The temporal link is only helpful in the assessment of the factual link. (M. m. Judgment of the Constitutional Court of the SR, file no. I. ÚS 177/08-31).

All the above assumptions of the origin of a liability-based relationship (cause, effect, causal nexus) must be fulfilled in a cumulative manner, otherwise the public authority is not liable for damage (due to the absence of facts establishing the liability-based relationship).

The application of the rule of law is linked with the attributes of rationality and fairness of content of legal norms (see Finding of the Constitutional Court of the Slovak Republic, file No. PL. ÚS 15/98) and the above-mentioned attributes form the baseline for values and ideas of the law. Commutative justice demands that illegitimate interference in the property rights of another party be remedied by providing certain performance - compensation for damage. Such compensation should be fair and proportionate in relation to the damage and to the circumstances in which the damage arose, and only by providing appropriate compensation will the imaginary scales of justice achieve equilibrium.

Liability for damage consists primarily of imposing a reparative or restitutive sanction which compensates the injured party for interference in their property integrity, even though public sanctions may be imposed with a primary repressive function (punishment, administrative sanctions, etc.), depending on the severity of the act resulting in the said damage. As a result of this interference with a peaceful condition, the value of the property of the injured party has diminished or has not increased to such an extent as it would have if the responsible person had fulfilled their obligation by law or if they had refrained from certain reprobate actions. If non-material damage is caused, a satisfactory sanction may be imposed together with these sanctions. Although based on the theory of sanctions, reparative, restitutive and satisfactory sanctions are provided for by private law, the

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obligation to provide compensation for damage or non-material damage always includes a repressive effect, even though this is not the primary function of such sanctions.

The above discussion, naturally, does not avoid insolvency proceedings in which the collective emergency arrangement of the bankrupt's property rights (his/her adverse property situation) is taking place. Due to their material substance, insolvency proceedings fall under the guarantee provided by Art. 6 par. 1 of the Convention on the *Right to a Fair Trial*, which represents a concept consisting of individual procedural rights and obligations of the parties to proceedings where *civil rights, obligations* or *criminal charges* are decided upon.

The purpose of the given set of procedural rights is to protect *other* rights and freedoms. They do not constitute an objective per se, but a means to achieve the protection of other rights; as a result, Article 6 has instrumental value (Ľalík, T., 2015, p. 1383 et seq., as well as Svák, J., 2011, p. 5).

Thus, justice should represent not only the reparative, restitutive or satisfactory sanction imposed on the responsible party, but it should also represent the procedure that precedes the provision of such performance (i.e. including enforcement proceedings).

In the ideal state of a substantive rule of law, which is also characterized by the existence of a civil society (a conscious, committed and informed society), members of society should not be involved in unlawful conduct at all or to the least extent possible. However, the social reality shows that, notwithstanding the constitutional proclamation of a democratic state governed by the rule of law (Art. 1 (1) of the Constitution of the Slovak Republic), conduct prohibited by law is quite frequent, wherein the entities subject to legal regulation do not fulfil their obligations arising from this regulation and they do so for various reasons.

Although, in reality it is impossible to achieve the ideal state where reprobate actions are not committed at all (or only at the cost of the unacceptable interference in the fundamental human rights and freedoms of members of society), withdrawal from such effort and from attempts to approach as close as possible this ideal and utopian state is not an option.

In their operation (within the scope of their delegated powers and defined responsibilities) public authorities and primarily state authorities must ensure not only the fulfilment of the protective function of the law by punishing unlawful deeds, but in exercising public power they must also adopt effective measures with a preventive and educational impact on society (stimulation role). Preventive and educational impact means that the competent authorities, in exercising public power, seek to achieve a preventive effect on society, with the aim to prevent the occurrence of unlawful deeds *pro futuro* while, at the same time, ensuring the education of the members of society so that they understand the necessity of the behaviour prescribed by law, internalize socially recognized values protected by law and, in general, increase their level of legal socialization to be able to lead the life of law-abiding citizens in the future. However, the educational impact on society is also related to building and preserving the legal culture of a civil society, as it is only a society with a certain level of culture (including legal culture) which can legitimately call itself a civil society. To this end, Prusák aptly states that "*the law of democratic society without legal and political culture cannot do much.*" (Prusák, J., 2001, p. 166).

The achievement in the exercise of public power of these objectives fulfilling the functions of the state and law in society (see more details in Fábry, B., Kasinec, R., Turčan, M., 2017, p. 39), depends on the methods selected to achieve such objectives - which also applies to the methods selected to ensure the proper conduct of insolvency proceedings.

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3. On general methods of legal regulation of social relations

A method is defined as a means to get from the starting point to the final point and in reaching this final point the purpose being pursued by a certain meaningful action is achieved. In this context, Knapp sees the method as a sort of orderly procedure. (Knapp, V., 1993, p. 65). This is a theoretical category.

Methods in general consist of persuasive and coercive methods. We agree with Škrobák that *"The intensity and frequency with which persuasion and coercion methods are used are based on a fundamental assumption in which the use of persuasion methods is primary, and the use of coercive methods is secondary..."* (Vrabko, M. et al., 2012, p. 188). The above also results from the principle of graduality as a derivative of the constitutional principle of proportionality.

Škrobák (Vrabko, M. et al., 2012, p. 188) classifies and characterizes these general methods as follows:

- *Persuasion methods* - require demanding systematic action in terms of organization and time; they must act over a long timeframe, while achieving the goal - the desired result - may be uncertain, although if achieved, it is more valued and appreciated. Depending on how the addressee is persuaded, they can be divided into direct persuasion methods and indirect persuasion methods.

- *Coercion methods* - they are also divided into direct coercive methods and indirect coercive methods. When adopting direct coercive methods, deviations are removed in direct contact with the managed entity and the desired state is established immediately. Indirect coercive methods do not immediately address the current state or desired deviation - rather, they consist of follow-up actions so that the methods prevent repeating in future.

The choice of methods to regulate social relations is a purposeful and meaningful human activity, whereby the competent authority (its personal substrate, and, obviously enough the legislator), should choose such methods of acting on social and legal relations as to achieve the pursued goal in the selected area as effectively as possible.

The right choice of legal regulation methods is a prerequisite for achieving the purpose of the law, which subsequently ensures its legitimacy in society. In this context, Melzer aptly states the following: The law is not an end in itself and the existence of a purpose is a prerequisite to legitimate creation of law. Any legal regulation (both general and individual; note) is an interference with freedom and must therefore be justified by a specific purpose which, in addition, must be legitimate. If the regulation did not serve such purpose, it would constitute the inadmissible (arbitrary) will of the legislator under the rule of law. (Melzer, F., 2011, p. 160).

The correct choice of legal regulation methods also affects the extent of damage and how the accountability for damage is derived in connection with insolvency proceedings in progress. With the correct choice of regulatory methods in this area we can achieve fewer offenses causing damage to the parties involved in this proceedings, especially to creditors (*ex-ante* prevention), while, at the same time, this choice may have an impact on the fairness in the process of reparation for the injured parties. It goes without saying that a disproportionately complex procedure for claiming, proving and subsequently providing compensation for damages may discourage injured parties from claiming compensation for damage. Therefore, justice should also represent action preceding such compensation; these actions should enable adequate monetary compensation for immaterial damage, as well as the timely award of compensation.

As we will point out further below, in order for the ideal of justice to be fulfilled, as a fundamental constitutional principle (core constitutional standard) being applied across all legal branches, it would be helpful if the injured

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parties in insolvency proceedings could, in certain cases, demand monetary compensation for immaterial damage, **using a flat rate sum (amount).**

4. Flat-rate compensation and their purpose in insolvency proceedings

In claiming compensation for damage, both the burden of assertion and the burden of proof are borne by the injured party and, unless they can bear this burden of proof, they cannot succeed in the proceedings in such case; in other words, the compensation for damage caused by the injuring party cannot be awarded. In general, the injured party may receive compensation for damage in the amount of the actual damage incurred or at a fixed, flat-rate amount (if foreseen by law).

When requesting compensation for the actual amount of damage one must present due evidence of the total costs necessary for restoration to the original state and their appropriateness, otherwise the compensation for damage cannot be awarded as requested. In the case of a flat-rate amount of compensation, the injured party shall only be obliged to prove the illegality of the (un)action of the responsible person resulting in the damage to their property integrity, whereby the conclusion can be drawn from the facts of the objective nature. The actual amount of damage is not relevant in such a case, as it is compensated by a uniform amount. This can be presumed fair in individual cases, especially if the compensation award is governed by the principle of disposition (with the possibility of proving the actual amount of the damage), as otherwise the injured party would not request the flat-rate compensation.

In general, one can accept the opinion that the purpose of the flat-rate compensation is to "*quantify reasonable costs in an abstract way* (or wider costs; note)..." (Suchoža, J. et al, 2016, p. 905). It is true that the flat-rate amount stipulated by law should account for the nature and amount of costs which are reasonably expected to be incurred and proving such expenditure thus appears as superfluous. At the same time, these could be the costs which may only be proven with disproportionate difficulty and thus the injured party is relieved from the administrative burden of exercising their claim. Thus, it is only the flat-rate amount of compensation determined in this way which can be subsequently regarded as fair compensation reflecting the average amount of the harmful effect which can be reasonably expected to arise. If it is disproportionately low, it is to the detriment of the injured party and if it is disproportionately high, it benefits the injured party at the expense of the person obliged to provide it.

In accordance with the principle of legality, the amount of such "lump sum" must be determined legally and, by payment thereof, the liability-based legal relationship between the injured party and the liable party will cease to exist.

The purpose of flat-rate compensations is to achieve the **effectiveness of reparation** for the injured party which also entails a repressive effect on the liable party, since as a result of their unlawful conduct/omission they are to compensate the other party for damage suffered with the repressive effect of forced diminution of the liable person's property by the (flat-rate) amount of compensation for damage. However, the advantage of flat-rate compensation lies not only in an effective reparative function, but it also serves the purpose of prevention and education, whereby the potential perpetrators are motivated to comply, in a proper and timely manner, with their obligations under the relevant legislation (even before imposing a flat-rate reparation sanction). Indeed, if the compensation for damage is determined by a fixed amount which is legally known and the entities which may be affected by the unlawful conduct are known, everyone can realise in advance and calculate the probable economic impact of the breach of obligation stipulated by law or imposed by an individual legal act. Obviously, our considerations are based on the presumption of rationality of the entities involved - in our case, entities involved in insolvency proceedings (creditors, debtors or third parties).

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Therefore, if we take into account the fact that the consequences of unlawful conduct are to constitute a threat which should discourage the offender from unlawful conduct in the future, they must signal to the offender the disadvantage of unlawful conduct also in association with the collective arrangement of the bankrupt's property relations. This also applies to the imminent consequences, not just those that were actually inferred. If prevention is to account for the imminent consequences, it is also necessary to take into account the legal awareness and knowledge of the persons concerned as determinants of the effectiveness of legal regulation.

Most entities involved in insolvency proceedings (whether they are creditors, debtors, or persons obliged to provide assistance for the purposes of such proceedings) are legal entities and natural persons conducting business or entities of public law for which (in the case of legal entities these are their personal substrates), the rationality and professionalism of their conduct may be legitimately presumed, along with their higher level of legal awareness and their being informed.

The commercial law principle of professionalism may be highlighted especially in the case of commercial companies and cooperatives. For the purpose of their position, this principle can be interpreted in such a way that "*these entities (entrepreneurs), due to their nature, shall act in an active and professional manner [...]. An entrepreneur is in better position to understand the nature and conditions of a relationship into which they enter* (this also applies to offense-based legal relationships; note by the authors)." (Ovečková, O., Žitňanská, L. et al, 2013, p. 37). **The position of these entities is thus sufficiently specific in order to be able to presume the rationality of their actions and their sufficient knowledge of the applicable law, including the imminent consequences of infringement.** Consequently, these entities are able to adequately assess the (dis)advantages of forbidden behaviour in connection with the insolvency proceedings in progress. In this context, it is also relevant to take into account the instructive duty of the court and the administrator in terms of Act No. 7/2005 Coll. *on Bankruptcy and Restructuring*, (hereinafter referred to as the *"BR Act"*), which helps in informing about the rights and obligations in relation to the insolvency proceedings in progress. Thus, the instructive duty could, *pro futuro* include an instruction on the flat-rate compensation for damage caused in the insolvency proceedings.

Hence, these entities may be reasonably expected to act in line with the theory of rational choice, the creation of flat-rate compensations can therefore be reasonably perceived as an effective persuasive method for such entities and the desired objective may be achieved even in the absence of an element of coercion.

The theory of rational choice, however, does not rely on the complete rationality of subjects as it admits the effects of several internal or external factors. On the other hand, the theory is based on the presumption that before the unlawful conduct an individual weighs the pros and cons associated with such conduct. The behaviour of legal entities can therefore be influenced by the following:

a) **increase in costs (cons) associated with a criminal offence;**
b) **increase in benefits (pros) associated with not committing a criminal offense;**
c) **reducing the benefits of committing the offence;**
d) **reducing the cons of compliance with applicable law.**

Thus, acceptance of the rational choice theory can also significantly contribute to the suppression of unlawful conduct in the area of insolvency proceedings. Therefore, if the magnitude of the consequences for the breach of legal obligation and their inevitable nature are known, the level of willingness to infringe upon the applicable law is reduced. As the party to insolvency proceedings presumably acts rationally, they are aware that the application of flat-rate compensation for damage maximizes the likelihood of liability (as there is no need to prove actual damage and the administrative procedure for setting the liability is simplified). At the same time, the party is aware of the impact of this liability on their property integrity. The benefits associated with unlawful conduct are reduced and the disadvantages associated with such conduct are increased. Being aware of these facts thus

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motivates the perpetrator to fulfil, in a due and timely manner, their legal obligations in connection with insolvency proceedings, thus preventing damage to the property integrity of the parties to insolvency proceedings.

It can be concluded that by choosing the option of flat-rate compensation, entities are encouraged to behave in the desired way because they are aware of the imminent consequences of their unlawful conduct. We will not speculate on the specific amount of flat-rate compensation for damage which would be appropriate for insolvency proceedings. In any case, such compensation should certainly account for the costs of the injured party which can be objectively presumed and the actual amount of such compensation should be high enough to become a relevant variable in the considerations of the parties to the insolvency proceedings, as regards the extent of compliance with the established or imposed orders or prohibitions in such proceedings.

The BR Act lays down the liability for damage caused in connection with insolvency proceedings in several provisions, e.g. in § 11 par. (4) which regulates the creditor's liability for damage incurred in relation to the effects of the opening of insolvency proceedings and where the insolvency proceedings were terminated due to the insolvency certificate; in § 11a par. 1, which regulates the liability of the person responsible for filing bankruptcy on behalf of the debtor regarding the damage caused by a breach of this obligation; in § 32 par. 5 which regulates the liability for damages caused by the denial of a claim which was subsequently confirmed by the court; in § 87 par. 9 which regulates the liability of the administrator for damage caused by the ineffective or unreasonable costs of the administration or realization of assets or the operation of the company. Also, a reference could be made to §109 par. 4 and 5 which regulate the liability for damage caused by recommending or not recommending restructuring, although the conditions for doing so were fulfilled at the time of preparing an expert opinion, or § 167 par. 4 which regulates the liability of the administrator for a damage caused by the illegal distribution of the proceeds.

Thus, the BR Act does not regulate the flat-rate compensation for damage; rather the compensation is based on the actual damage for which sufficient evidence must be presented. Only in the event of liability for failure to file a bankruptcy petition shall it be presumed, unless proven otherwise, that the damage corresponds to the extent to which a creditor's claim has not been settled after the insolvency proceedings was terminated due to the debtor's lack of property, or after the winding up or other enforcement proceedings was terminated due to a lack of property.

Based on the above arguments, it is possible to conclude that flat-rate damages are also beneficial for insolvency proceedings, in particular due to the preventive effect on the parties involved in such proceedings who are aware that their property integrity is likely to be disturbed and, therefore should consider, whether or not they will breach the established obligations in connection with the insolvency proceedings. The flat-rate compensation for damage as such ensures the proper conduct of such proceedings by excluding (minimizing) the occurrence of such acts which would obstruct the proper conduct of the proceedings. However, when considering the adoption of this proposal, it is still necessary to make a choice as to whether each of the creditors (or the entities concerned) would be entitled to receive a flat-rate reparation sanction or whether it would be paid out as a collective reparation sanction which would then form part of the relevant insolvency estate and would be proportionally distributed among the creditors as part of the scheduled proceeds. The first alternative seems fairer.

On the other hand, the appropriateness of flat-rate compensation for damage (increased negative effects of unlawful conduct) must be perceived in a wider context, i.e. as an instrument to minimize public offences, especially insolvency crime and related criminal offences (for the doctrinal aspects of insolvency crime and related criminal offences, see more details in Beleš, A., 2017). As regards Slovak criminal law, it is possible to specifically mention the crime of *obstructing bankruptcy or settlement proceedings* pursuant to § 242 and 243 of Act No. 300/2005 Coll. *Criminal Code*, the aim of which is the interest of the society to achieve the regular and undisturbed course of insolvency proceedings which achieves the goal of the collective satisfaction of creditors

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from the existing assets of the debtor - bankrupt. In order to maximize the preventive effect also on the bankrupt (natural person), it would subsequently be appropriate for these claims for damage compensation to become intact claims (§166c of the BR Act), which do not become null and void, not even in the process of debt relief on the part of the bankrupt.

Although the award of flat-rate compensation is not regulated in the BR Act, it is not new in Slovak law. In the following sub-chapter we will describe several laws, valid and effective on the territory of the SR, which regulate these flat-rate compensations, and we will identify the legislative reasons for introducing those laws.

5. Comparative considerations of the flat-rate compensation in the Slovak law

Flat-rate compensations are not new in Slovak law; the awards of flat-rate compensations had been regulated in numerous laws which we will discuss here in terms of authentic and doctrinal interpretation. We will follow the identification of the objective pursued by the specific law (their purposefulness and benefits), while focusing on flat-rate compensation in Act No. 233/1995 Coll. *on Bailiffs and Enforcement (the Enforcement Code)* (hereinafter referred to as "EC") regarding the flat-rate reimbursement of costs related to the enforcement of a receivable under the Act no. 513/1991 Coll. *Commercial Code* and for the flat-rate reimbursement of procedural costs under the Code of Administrative Procedure and Act No. 301/2005 Coll. *the Code of Criminal Procedure* (hereinafter referred to as the "CP").

Flat-rate compensation of costs according to EC

The amendment of the EC by Act No. 2/2017 Coll. *amending and supplementing Act No. 233/1995 Coll. of the National Council of the Slovak Republic on Bailiffs and Enforcement (the Enforcement Code) and on amending and supplementing other acts, as amended, and amending and supplementing certain acts,* introduced a flat-rate reimbursement of expenses incurred by a court bailiff during enforcement proceedings. The introduction of a "flat rate" was prompted by the problems of the enforcement courts existing before the amendment was adopted.

Pursuant to § 197 par. 1 EC (with effect from 1 April 2017) "*In accordance with this Act, the bailiff shall be entitled to a fee* ***and reimbursement of flat-rate expenses and unavoidable expenses*** *connected with the proceedings* ***which are not covered by flat-rate expenses****. The amount of the bailiff's fee in their enforcement of the right to pecuniary performance shall be determined as a percentage of the recovered performance and may not exceed the amount of the recovered claim according to the existing state at the date of issue of the enforcement order."*

Enforcement courts (before the enforcement agenda was assigned to the District Court of Banská Bystrica) were notoriously overloaded, and, with the increased number of cases they focused more on issuing decisions in the early stages of the enforcement proceedings (specifically enforcement authorisations). Time permitting, decisions on the cessation of enforcement and awarding compensation to the court bailiff was carried out in addition to the above actions. The primary cause behind this was the understaffing of the courts. In some cases, the parties waited for several years for the enforcement to be terminated, with an enormous number of restoration files. Following the termination of the enforcement proceedings or at the time when the decision on termination was issued, it was also necessary to decide on the expenses incurred by the court bailiff, which included an itemised check of the costs incurred, as regards their purpose and assessment whether or not some items (compensation for purchases of file covers, office supplies, etc.) were not already included in the bailiff's fee. Taking into account the overall volume of this agenda (millions of files), it was precisely this activity that thwarted the proper and timely termination of the enforcement.

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The flat-rate reimbursement of enforcement costs sought to speed up that procedure. The authentic interpretation of the above amendment reads that "...a flat-rate fee is introduced where the court bailiff shall be entitled to a **known, clearly defined and hence predictable flat-rate fee and flat-rate expenses** *so that the entitled party knows from the very start of the enforcement "how much the enforcement will cost them"*. This will also relieve the courts of the enormous number of cases where it is currently necessary to decide on the expenses of the enforcement. *[...]* New legislation will help reduce the number of court procedures in enforcement proceedings, concentrate the proceedings and help redraft the defences of the party liable to enforcement." At the same time, we find out that *"the new law on enforcement costs is designed so as to be enforceable without the necessity of court rulings in many cases."*

Therefore, the intention of the flat-rate reimbursement of expenses was to (1) increase the legal certainty of the legal entities affected by the enforcement procedure (entitled party, liable party, court bailiff) regarding the amount of enforcement expenses (their traceability) and (2) speed up enforcement by relieving the courts of the burden of deciding on the amount of the enforcement expenses in the event of the termination thereof (which costs, of course, had to be demonstrated).

Predictability is a determinant of legal certainty (for a doctrinal interpretation of legal certainty from a legal-theoretical and value point of view and its determinants, see Mrva, M., 2013, Mrva, M., Turčan, M., 2016, And Vaculíková, N., 2009) and therefore the injured party should also be able to anticipate the amount of the minimum claim for damage compensation that can be recovered in a simplified administrative procedure (without having to present evidence).

Flat-rate reimbursement of costs associated with the recovery of a claim pursuant to the Commercial Code

Pursuant to § 369c of Act No. 513/1991 Coll., the *Commercial Code,* in the event of the debtor's delay, the creditor, shall be entitled to receive a **flat-rate reimbursement of costs associated with the recovery of a claim** without the need for delivering a separate notification to the debtor. This provision is further specified in an implementing regulation - Decree No. 21/2013 Coll. of the Government of the Slovak Republic *implementing certain provisions of the Commercial Code.* The amount of the flat-rate compensation for the costs relating to the recovery of a claim is established in § 2 at a **one-off payment of EUR 40**, irrespective of the length of the delay. This shall not apply in cases where the obligation arises from a consumer contract and the debtor is the consumer. This reimbursement was incorporated into the Commercial Code by Act No. 9/2013 Coll. *amending Act No. 513/1991 Coll., the Commercial Code, as amended, and amending and supplementing certain acts* (effective from 1 February 2013). This amendment transposed Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on *combating late payments in commercial transactions*, which states in point 21 of the Preamble that the Directive "*should be without prejudice to the right of Member States to provide for fixed sums for compensation of recovery costs which are higher and therefore more favourable to the creditor, or to increase those sums, inter alia, in order to keep pace with inflation.*"

The authentic interpretation (explanatory memorandum) reads that the flat rate compensation of costs associated with the claim recovery *"represents compensation of the **administrative internal monitoring costs** incurred when checking compliance with contractual obligations."*

*"This is the reimbursement of administrative internal monitoring costs incurred when checking compliance with contractual obligations (costs of keeping records of debts, **costs related to the delivery of reminders to the debtor by phone or in writing,** although this is not a condition for entitlement to flat rate reimbursement of costs)*" (i.a. Judgment of the District Court in Vranov nad Topľou, File No 8 Cb 44/2015). In combatting delayed payments, stricter sanctions are imposed for delays in fulfilling an obligation, using the institute of flat rate compensation for the costs of claim recovery. This claim arises from the very fact that the debtor is in delay **without the need to**

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prove the real costs associated with the claim recovery. In the context of general methods for the regulation of social relations, this institute can be seen as a persuasive method of action, when, through the imminent interference with the property integrity, the party to the business obligation relationship shall be motivated to fulfil, in a timely manner, their obligations arising from this relationship; it also has a compensatory role.

The flat rate reimbursement of these administrative costs seeks to simplify the reimbursement of those costs which can be reasonably and legitimately assumed to exist in connection with the creditor's delay, and, therefore, presenting relevant evidence would be objectively redundant.

As regards the purposefulness of the above, legal doctrine arrived at the same conclusion: *"The flat rate reimbursement of costs should reimburse the costs incurred by the creditor due to the debtor's delay (the salary of the administrative employee processing the reminder, postage costs for the delivery of the reminder, etc.). By establishing administrative costs (...), there is no need to separately prove the costs actually incurred and, given the internal nature of these costs,* ***this would often not be possible.*** *On the contrary, external costs (involvement of an external lawyer, court fees) are relatively well demonstrable and therefore the compensation of such costs goes beyond the scope the flat rate reimbursement.*" (SUCHOŽA, J. et. Al., 2016, p. 905).

Since this is the transposition of a directive (secondary law) of the European Union, it can be established that the question of the purpose and effectiveness of flat rate compensation in the appropriate amount is also accepted in certain cases at the international level. In addition to eliminating the administrative burden in favour of the creditors, the general preventive effect of the present law can be perceived as one which aims at minimizing debtors' delays using persuasion with a focus on the economic impact of a potential delay in fulfilling the obligation.

Flat rate compensation of costs in infringement proceedings and criminal proceedings

During infringement proceedings, the flat rate costs of the proceedings are due by the offender and, if applicable, by the petitioner, if the proceedings initiated on the basis of the petition were terminated pursuant to § 76 par. 1 a), b), c) or j) of the Act on Offenses. (The offence in question did not materialize or is not classified as an offence; the person charged with the offence did not commit the offence; the offence in question was not proved to them or the petitioner withdrew their proposal to initiate the proceedings or failed to show up at the hearing without due excuse or reason, even if summoned in due time.) The obligation to pay the costs of the proceedings does not apply to the ticket or order proceedings.

In these cases, the costs of the proceedings are to be reimbursed by a flat rate amount in accordance with Decree No. 411/2006 Coll. of the Ministry of the Interior of the Slovak Republic *establishing the flat rate costs of infringement proceedings,* namely EUR 16 (general amount of compensation) or EUR 33 (when an expert in fields other than psychiatry is recruited) and EUR 49 (when a psychiatric expert is recruited). The question of the appropriate amount of such compensation can be considered, as their amount was fixed on 1 July 2006 and the implementing regulation has not been amended since then. The real cost has undoubtedly increased over the period of 13 years, at least by the statistical rate of inflation.
In criminal law, we can highlight § 555 par. 1 and § 556 par. 1 CP. If the defendant is found guilty, in addition to the costs of imprisonment, imprisonment and the fee and compensation to the appointed lawyer and to the appointed representative of the lawyers (except in the case of free defence or defence at a reduced compensation rate), he or she is obliged to reimburse, other costs borne by the State - at a flat rate.

The amount of this flat rate compensation is determined by Decree No. 93/2012 Coll. of the Ministry of Justice of the Slovak Republic *establishing the flat rate amount of costs in criminal proceedings and the amount and method of reimbursement of increased costs in criminal proceedings.* The amount of the flat rate compensation depends on the course of the criminal proceedings and on whether or not an expert opinion was presented - if the

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offender was found guilty, the flat rate amount is set at EUR 60 on the basis of a criminal order, EUR 80 in the case of a plea bargain and in the case of a judgment issued after the main trial, the amount of compensation is set at EUR 120. These amounts are increased by EUR 150 with the addition of one expert and by EUR 200 with the addition of more experts.

Pursuant to § 556 par. 1 of the CP, the flat rate compensation of the costs in state proceedings shall be applied in the event of a totally unsuccessful appeal or a retrial; the amount thereof is set at EUR 200. The legal doctrine states that *"The law prevents the unjustified submission of proposals for extraordinary remedies by imposing the obligation to reimburse the costs incurred in connection with the hearing of a manifestly unfounded application [...] this shall apply to any party who has applied for extraordinary remedy... "* (ČENTÉŠ, J et al., 2015, p. 943). Considerations of the ineffective assessment of some costs are also applicable to criminal proceedings.

Conclusion

In their reasoning, the authors concluded that a flat-rate compensation for damage caused in association with insolvency proceedings would be an effective tool in minimizing unlawful acts resulting in damage to the property integrity of the parties to the insolvency proceedings. The knowledge of a predictable sanction (in our case these are sanctions of a reparative nature) leads to the awareness of the negative effects associated with certain unlawful conduct and, as a consequence, rationally the more appropriate option for such a party is to comply with the orders or prohibitions laid down by the applicable legislation. To this end, a relevant variable is also the irreversibility of a sanction achieved by, inter alia, elimination of the administrative burden of the process preceding the imposition of such sanction. The rationality of parties to the insolvency proceedings can be legitimately presumed (also on the basis of the principle of professionalism in commercial companies) and therefore it seems appropriate to rely on the conclusions of the theory of rational choice for the purposes of achieving an effective preventive impact on the social relations associated with the insolvency of the bankrupt. Flat-rate compensation for damage would facilitate the reparation of the injured parties, although it should be ensured that the compensation is established at an appropriate level. These considerations were examined in the context of the purpose of flat-rate compensations in specific legislation linked to the BR Act. Also, in the context of the presented reasoning, we have arrived at the conclusion that the flat-rate compensation for damages was beneficial in justified cases. Insolvency proceedings represent an emergency collective arrangement of the bankrupt's property and, therefore, it is essential to prevent any behaviour which could jeopardize (obstruct) its proper progress. Flat-rate reparation sanctions would motivate all stakeholders to fulfil their statutory or individual legal obligations in a due and timely manner, while at the same time, the sanctions (in conjunction with the instructive duty of the court and administrator) would manifest the adverse economic impact of the failure to fulfil obligations associated with the insolvency proceedings in progress. However, the conclusions deserve closer attention to empirical research.

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