

*Paulina Pawluczuk-Bućko*

University of Białystok

p.pawluczuk@uwb.edu.pl

ORCID: <https://orcid.org/0000-0003-1277-599X>

*Andrii Butyrskiyi*

Yuriy Fedkovych Chernivtsi National University

a.butyrskiyi@chnu.edu.ua

ORCID: <https://orcid.org/0000-0002-3225-7017>

## Criminological characteristics of crimes in bankruptcy

<http://dx.doi.org/10.12775/SIT.2021.012>

The bankruptcy institute has been known for a long time, because there were always persons who could not pay off their debts. The evolution of bankruptcy has shown a change in the priorities of this procedure – if in the first stages the influence of creditors was focused on the person of the debtor, then it came to the understanding that, for example, killing the debtor, the creditors will not have more money, in connection with which the creditors directed all their efforts on the debtor's property.

Economic instability, the volatility of the business environment, the increase in the number of economic crises have a huge impact on the financial stability and sustainability of organizations of various industries and forms of ownership.<sup>1</sup>

---

<sup>1</sup> N. Kozlovskiyi, S. Butyrskiyi, A. Poliakov, B. Bobkova, A. Lavrov, R. Ivanyuta, *Management and comprehensive assessment of the probability of bank-*

Bankruptcy is inextricably linked to a self-directed entity at its own risk. Since the early 1980s, policy and research have mainly focused on the “good” side of entrepreneurship. However, since the early 1990s, more research has attempted trying to shed light on entrepreneurship’s “dark sides”.<sup>2</sup> The beginning of the 1990’s was certainly a period of non-adjustment of the right to the social, economic and criminal situation of that time, which contributed to the flourishing of economic crime. As a consequence, the sharp rise in crime in the early 1990s, the documented indolence of law enforcement agencies, contributed to the search for various legal solutions aimed at combating specific categories of crime.<sup>3</sup>

Bankruptcy institute is universal because it aims to satisfy the interests of a wide range of participants in the bankruptcy case, including creditors, debtors, the state and society in general.<sup>4</sup> The content of bankruptcy is that creditors try to satisfy their claims through a special mechanism that allows them to change the debtor’s manager and put in his place a neutral person (trustee) who will work in the interests of the creditors. It is the replacement of the head of the debtor with the manager that distinguishes the bankruptcy procedure from the collection of debt from the debtor in the normal way, i.e. with the involvement of the executive service. In today’s world bankruptcy is a necessary attribute of a market economy that is designed to eliminate a debtor who is unable to recover its solvency, or to give a new life to the debtor through re-

---

*ruptcy of Ukrainian enterprises based on the methods of fuzzy sets theory, „Problems and Perspectives in Management” 2019, No 17 (3), pp. 370–381.*

<sup>2</sup> M. Box, K. Gratzner, X. Lin, *The Asymmetric Effect of Bankruptcy Fraud in Sweden: A Long-Term Perspective*, “Journal of Quantitative Criminology” 2019, No. 35, pp. 287–312, <https://doi.org/10.1007/s10940-018-9380-2>, <https://www.researchgate.net/publication/324687396> (access: 12.12.2020).

<sup>3</sup> E.M. Guzik-Makaruk, *Regulacje pozakodeksowe jako instrument zwalczania przestępczości zorganizowanej*, in: *Przestępczość zorganizowania*, E.W. Pływaczewski (ed.), Warsaw 2011, p. 279.

<sup>4</sup> A. Butyrskyi, *Концепція удосконалення законодавства про неспроможність* [Konceptija udoskonalennja zakonodavstva pro nespromozhnist’], „Pravo Ukrainy” 2018, No 6, pp. 86–97.

habilitation procedures. As noted in the scientific literature, “both the bankruptcy proceedings and reorganization proceedings should be conducted in a manner providing for the optimal satisfaction of the creditors, and – when rational – for the preservation of the debtor’s enterprise”.<sup>5</sup>

Therefore, bankruptcy is an effective mechanism aimed at meeting the demands of creditors. However, not all debtors are honest and some of them use bankruptcy to evade monetary obligations, which undermines the country’s economic life. Improvement of bankruptcy legislation is aimed, among other things, at the impossibility of abuse by the debtor, as well as the development of compensation mechanisms that will allow to recover damages caused by the wrongful acts of the debtor. Such mechanisms should include the subsidiary and joint and several liability of the participants and managers of the debtor, which is economic in its nature.

However, sometimes bankruptcy offenses are quite significant, which are classified as economic crimes. Bankruptcy fraud is one particular sub-form of white-collar crime, committed within the framework of a (formal) business activity.<sup>6</sup> Identifying the criminogenic factors of bankruptcy is not easy, which is a consequence of the complexity of the type of crime being analysed.<sup>7</sup> It is also worth noting that crime that is detrimental for creditors affects countries with different political, social and economic systems, and certainly correlates with all economic changes. Even during the period of the greatest economic crisis of the 1930’s, there were attempts being made to diagnose the criminogenic factors of economic crime. As an example, one can recall E. H. Sutherland, the author of *White Collar Crime*, who listed the perpetrator’s personality, his character and social position among the main factors favoring this type of

---

<sup>5</sup> M. Bińkowska, K. Niemirska-Fido, R.A. Walawender, *The bankruptcy and reorganisation law: bilingual edition*, Warsaw 2010.

<sup>6</sup> M. Box, K. Gratzer, X. Lin, op.cit.

<sup>7</sup> E.W. Pływaczewski (ed.), *Current problems of the penal law and criminology: Aktuelle Probleme des Strafrechts und der Kriminology*, Warsaw 2012, p. 446.

crime.<sup>8</sup> The indicated features were associated with crimes committed by white collar workers. Therefore, in criminology, crime committed to the detriment of creditors is attributed to a specific category of perpetrators. This is due to the recognition of the fact that people with a high level of intelligence and risk assessment skills have a predisposition to take unlawful activities concerning economic crime. These are not random cases, but rather people who are very well educated, who often have contacts within the business environment. It should be emphasized that crimes committed within the framework of bankruptcy require business experience and knowledge of current regulations from various branches of law. One of the decisive criminogenic factors is the need to preserve financial resources despite existing debts to debtors. Usually, the deterioration of the financial position of an economic entity increases the risk of people committing crimes connected to bankruptcy.<sup>9</sup> This state of affairs usually is a result of rising prices, inflation and the lack of financial liquidity among contractors.

The structure of bankruptcy crimes is quite broad, depending on the particularities of legal regulation that are inherent in a particular country. For example, in Ukraine, bankruptcy criminal liability comes before bringing to bankruptcy (Article 219 of the Criminal Code of Ukraine), in Russia these may be misconduct at bankruptcy, intentional or fictitious bankruptcy (Articles 195–197 of the Criminal Code of the Russian Federation), in Belarus criminal liability arises for intentional and fictitious bankruptcy, concealment of bankruptcy and preventing the repayment of losses to the creditor (Articles 238–241 of the Criminal Code of Belarus) and the like. The above crimes constitute a group whose subjects can only be persons connected with the debtor (participants and executives of the debtor). In Poland, the legislator envisaged various types of crimes in articles 300–302 of the Penal Code. According to

---

<sup>8</sup> J. Kraciuk, *Przestępstwa gospodarcze w przedsiębiorstwach i sposoby ich przeciwdziałania*, „Zeszyty Naukowe Uniwersytetu Szczecińskiego” 2012, No. 690, p. 803.

<sup>9</sup> O. Górniok, *Przestępczość gospodarcza i jej zwalczanie*, Warsaw 1994, p. 42.

the content of art. 300 of the Penal Code, the legislator provided for the basic type (§ 1) and qualified (§ 3) offenses of frustrating or reducing the satisfaction of creditors and the basic type of offenses for foiling enforcement (§ 2), then art. 301 of the Penal Code providing: to thwart or limit the satisfaction of its creditors' receivables by creating a new business entity under the law and transferring its assets to it (§ 1), willful bankruptcy or insolvency (§ 2), going bankrupt or insolvent in a reckless manner (§ 3) as well as art. 302 of the Penal Code specifying three types of offenses: favoring the creditor (§ 1), bribery of the creditor (§ 2) and undermining the creditor's credibility (§ 3). In addition, there are other provisions in the Polish legal system that regulate offenses which often occur in bankruptcy proceedings. To protect bankruptcy proceedings, the following articles are in place: art. 233 § 4 of the Penal Code – submission of a false opinion by an expert, art. 276 – hiding or destroying documents, art. 296 – abuse of trust, art. 303 – unreliable keeping of business records. In the Commercial Companies Code, one can use art. 586 – failure to file for bankruptcy, and in Bankruptcy Law, art. 522 (fulfills the role of the basic provision guaranteeing the accuracy of data and information provided by the debtor at the beginning of the pending proceedings).

However, other crimes in the bankruptcy procedure may be committed, the composition of which is not directly related to bankruptcy (fraud, bribery, forgery, etc.). These crimes also constitute a specific group whose subjects are large enough and are not limited to those associated with the debtor. In order to identify the causes of bankruptcy crimes, it is first necessary to determine the range of persons who may commit bankruptcy crimes. It is well known that the bankruptcy case starts from the moment of filing with the court with the relevant statement. However, even before the bankruptcy proceedings are opened, actions that may affect the debtor's financial position and which may show a crime are taken. In the light of the above, bankruptcy crimes can be divided into two groups, namely: 1) crimes committed prior to the opening of bankruptcy proceedings; 2) crimes committed during the bankruptcy proceedings. The subjects of the first group of crimes may be exclusively the officials and the head of the debtor, and the crimes

of the second group may be committed by a group of persons, the list of which is not limited to persons connected with the debtor.

Thus, the subject of bankruptcy crimes is inextricably linked to the number of participants in the bankruptcy case. There are quite different classifications of participants in bankruptcy proceedings and each of them is entitled to act on. So, bankruptcy participants are suggested to be divided into obligatory (main) and situational (minor); publicly-owned participants, debtor-related participants and other participants; participants with total competences, participants with partial competences and participants with limited competences; etc.<sup>10</sup> However, the analysis of bankruptcy legislation gives us the opportunity to identify a single, universal model of bankruptcy participants that can be schematically defined in the form of a rhomb, a so-called “bankruptcy rhombus”, which has the following form (diagram 1).

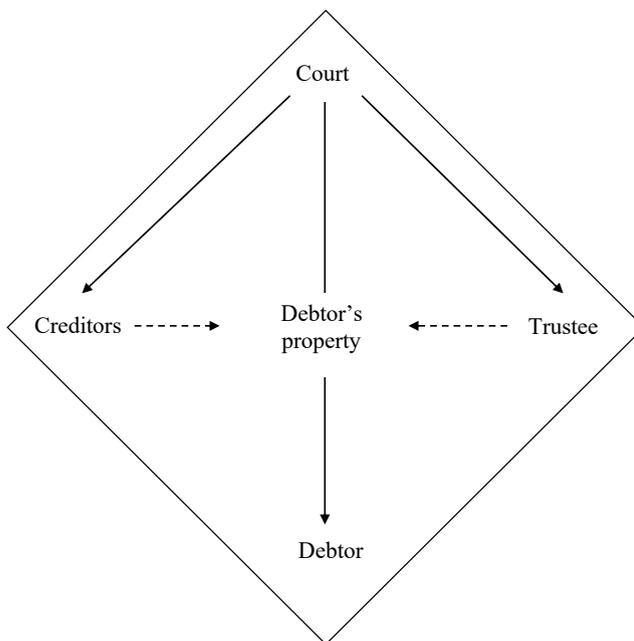


Diagram 1. Model of participants in the bankruptcy case

<sup>10</sup> I. Butyrська, *Правовий статус учасників справи про банкрутство* [Pravovyj status uchasnykiv spravy pro bankrutstvo], Chernivci 2017.

Bankruptcy rhombus is a schematic representation of the participants in the bankruptcy case and the directions of their interaction. Thus, the key to the bankruptcy case is the court located at the top of the rhomb, which affects all parties involved in the bankruptcy case (the court recognizes the creditors, examines the debtor's claims and declares its bankrupt, appoints the trustee). However, the court is not directly interested in the fate of the debtor's property and has no direct influence over it. In turn, creditors and the trustee are interested in the fate of the debtor's property and exert a direct influence on it (the lenders decide on the procedure for the sale of the debtor's property, and the trustee makes a direct sale of such property). The debtor in the bankruptcy case does not directly influence other participants in the bankruptcy case, does not affect the fate of his property.

That is, all participants in a bankruptcy case have different degrees of influence, different positions in the hierarchy of participants, but the decisive place in the bankruptcy case is occupied by the debtor's property (in this article the term "property" is used in a broad sense, including tangible and intangible assets) for the sake of which and there is a bankruptcy case.

There are, of course, many other participants in the bankruptcy case (representative of a state body, local self-government, a representative of the labor collective, etc.), but the mentioned participants are situational, that is, they may participate in the bankruptcy case and may not take part at that time. as the court, creditors, the governor and the debtor are always involved in the case.

The bankruptcy rhombus, which defines the composition and location of each of the participants in the bankruptcy case, is ideally suited to identify the subjects and object of the bankruptcy crime, as it allows you to see the degree of interest of the participants in the bankruptcy case and their hierarchy. Now let's consider the reasons for committing a crime by each participant separately, starting from the bottom of the rhombus – from the debtor.

The opening of the main insolvency proceedings entails significant interference with the procedural status of the bankrupt, but also interference with the bankrupt's personal status and family

situation, as well as a restriction, approved by law, of their fundamental rights (where the bankrupt is a natural person).<sup>11</sup>

The debtor is the most frequent subject of a bankruptcy crime because the whole case is developed in respect of his property. Unscrupulous debtors are not interested in parting with their property, but prefer to avoiding paying off debts. The criminal acts of the debtor can be: alienation of property at reduced prices, or in general free transfer of property; payment of overdue arrears; fictitious transfer of property to the authorized capital of other legal entities, etc. In addition, the debtor may pretend to create a high debt, for example, by guaranteeing a promissory note issued by a “strawperson” company, to a friend of the debtor’s creditor. On this basis, a number of steps may be taken to pay specific amounts that will ultimately reach the debtor. In such a situation, it may turn out that there is a lack of funds to satisfy “real” creditors. Loan agreements with the title of repayment of fictitious claims (which are to ultimately reach the creditor) are simulated for a similar purpose.

As noted above, the debtor may take illegal actions both before and after the bankruptcy case. In this case, before the opening of the bankruptcy case, he has significantly more opportunities to commit criminal acts, since in the case of bankruptcy the debtor withdraws from the management of business matters.

B. Poliakov examines the following two schemes for the debtor to default on his loans through the use of bankruptcy procedure:

Scheme No. 1. Liquidation of the debtor for the purpose of termination of both the principal obligation and the additional liability of a third party in the form of ordinary or pecuniary (mortgage) security.

Scheme No. 2. Liquidation of an ordinary or property guarantor for the purpose of withdrawing his property from banking control by way of sale.<sup>12</sup>

---

<sup>11</sup> A.J. Belohlavek, *Ordre Public and Cross-Border Insolvency: Especially in Relation to Council Regulation (EC), No. 1346/2000 on Insolvency Proceedings (March 27, 2015). Conference work paper, Joint conference of the WJA – World Jurist Association, Washington D.C. & WSM University Warsaw, Poland 2015, pp. 3–33.*

<sup>12</sup> B. Poliakov, *Правонарушения в сфере банкротства в Украине* [Pravo-

Although concealing assets or making false statements in a bankruptcy proceeding make up the majority of bankruptcy frauds, there are a number of fraud schemes that are more complicated or are primarily designed for reasons other than minimization the retention of assets in bankruptcy. Such schemes often use the automatic stay provided by the Bankruptcy Code to conceal an earlier crime, maximize profit from an ongoing fraud scheme or buy time while the perpetrator finds a way to avoid victims or leave town.<sup>13</sup>

The creditors are the next participants of the bankruptcy case who are interested in getting as much of the debtor's property as possible. Creditors are not interested in the future fate of the debtor and retain it as a business entity, but only ones are interested in the property of the debtor. In entering bankruptcy proceedings, creditors enter into a kind of competition, hence the historical name of bankruptcy cases – a competitive process. In fact, all creditors are competing with each other over who will “bite off a larger chunk” of the debtor's property. Criminal acts of creditors can be: artificial increase in the amount of their claims, unlawful influence on the trustee (usually by bribe), attempts to buy the debtor's property at reduced prices, unlawful removal of other creditors from the possibility of influencing the bankruptcy procedure (for example, by not notifying individual creditors about meeting of creditors), etc. Also, the criminal actions of the creditors are manifested in the commission of the raid, which is manifested in the illegal seizure of the debtor's property or the corporate rights of its participants. Lenders can act individually, in collusion with other lenders or with registrars, notaries, law enforcement agencies, etc. Lenders may also collude with a trustee who will act in their best interests.

Trustee is a professional bankruptcy participant with extensive knowledge of insolvency law. And the trustee can use this knowl-

---

narusheniya v sfere bankrotstva v Ukraine], “Sanacija ta bankrutstvo” 2016, No. 1–2, pp. 278–280.

<sup>13</sup> J.B. Brown, B. Netoles, S. Taliani Rasnak, M. Tighe, *Identifying Bankruptcy Fraud*, United States of America: Credit Research Foundation 1999, <https://www.yumpu.com/en/document/read/5100581/identifying-bankruptcy-fraud-credit-research-foundation> (access: 10.10.2020).

edge either for the benefit of the case (ensuring the recovery of the debtor's solvency and fair satisfaction of creditors' claims), or to the detriment of the case – by entering into a criminal collusion with other participants in the process or third parties. The conspiracy of the manager with the debtor is intended to leave the creditors essentially with nothing by maximizing the removal of the debtor's assets from the composition of the liquidation mass. The conspiracy of the trustee with anyone of the creditors, by contrast, is always directed against the debtor and aims to sell the property of the debtor at low prices. Sometimes there are situations where the trustee “plays his own game”, and his criminal acts harm the interests of the debtor and creditors. For example, when arranging an auction for the sale of the debtor's property and at reduced prices, he sells the debtor's property to third parties. Therefore, the trustee, who actually becomes the head of the debtor in the bankruptcy procedure, is endowed with a large amount of authority, which also carries out the sale of the debtor's property. The trustee acts not in their own interests, but in the interests of third parties (creditors, debtors and others).

The bankruptcy court usually rarely commits bankruptcy offenses, but such situations also occur. Crimes by a judge in a bankruptcy case are usually never individual in nature and are always committed by prior agreement with one of the participants in the process. This can be a criminal conspiracy with either the debtor or the creditor or the trustee. The purpose of committing such a crime is, as a rule, not directly the debtor's property, but some illegal remuneration received from the participants of the process for “legalization” of criminal schemes in bankruptcy. Such “legalization” can be manifested either in actions – by approving illegal documents in the case, granting the court permission for doubtful actions; or it may also be manifested in inaction – when the judge “closes his eyes” to the offenses committed by the participants in the trial and does not respond in any way.

Thus, most bankruptcy crimes are committed in complicity. The options for participation may be various, which is illustrated in Diagram 2.

Debtor		Trustee	
Debtor		Court	
Debtor	Trustee	Court	
Creditor		Creditor	
Creditor(s)		Trustee	
Creditor(s)		Court	
Creditor(s)	Trustee	Court	
Trustee		Court	

Diagram 2. Options for complicity in bankruptcy crimes

## Conclusion

It is well known that the bankruptcy case starts from the moment of filing with the court with the relevant statement. However, even before the bankruptcy proceedings are opened, actions that may affect the debtor's financial position and which may show a crime are taken. This is particularly characteristic for entrepreneurs of specific industries, e.g. construction, where at various stages of the investment, steps are taken to seemingly protect the company in the event of investment failure. "Controlled bankruptcy" belongs to one of them.

In the light of the above, bankruptcy crimes can be divided into two groups, namely: 1) crimes committed prior to the opening of bankruptcy proceedings; 2) crimes committed during the bankruptcy proceedings. The subjects of the first group of crimes may be exclusively the officials and the head of the debtor, and the crimes of the second group may be committed by a group of persons, the list of which is not limited to persons connected with the debtor. All participants in a bankruptcy case have different degrees of influence, different positions in the hierarchy of participants, but the decisive place in the bankruptcy case is occupied by the debtor's property for the sake of which and there is a bankruptcy case. The bankruptcy rhombus, which defines the composition and location of each of the participants in the bankruptcy case, is ideally suited

to identify the subjects and object of the bankruptcy crime, as it allows you to see the degree of interest of the participants in the bankruptcy case and their hierarchy.

## STRESZCZENIE

### Kryminologiczny obraz upadłości

Artykuł poświęcony jest analizie przestępstw w postępowaniu upadłościowym, którego celem jest zdiagnozowanie ich przyczyn i wskazanie: rodzajów przestępstw upadłościowych, podmiotów je popełniających, motywów ich popełniania, oraz ich charakterystyka na różnych etapach upadłości. Punkt wyjścia do niniejszych rozważań stanowiło opracowanie własnej koncepcji przez autorów, opartej na tzw. rombie upadłościowym. Diagram pozwala ukazać rolę podmiotów postępowania upadłościowego, jak i przedmiot przestępstwa upadłościowego. W toku badań wykorzystano różne metody poznawcze, wśród których można wyróżnić: dialektyczną, analizę systemową, formalno-logiczną, systemowo-strukturalną.

**Słowa kluczowe:** bankructwo; przestępczość; kryminologia; dłużnik; wierzyciel

## SUMMARY

### Criminological characteristics of crimes in bankruptcy

The article is devoted to investigating the problems of the causes of crimes in bankruptcy proceedings. The purpose of the article is to identify and analyze the causes of bankruptcy crimes achieved through the establishment of: types of bankruptcy crimes, subjects of bankruptcy crimes, motives for committing bankruptcy crimes, peculiarities of crimes at different stages of bankruptcy.

The theoretical basis of the study was the scientific work of scientists and practitioners in the field of criminology, criminal law and economic law. The authors have developed their own concept, which is based on the so-called bankruptcy rhombus, which defines the composition and location of each of the participants in the bankruptcy case, is ideally suited to identify the subjects and object of the bankruptcy crime, because it allows you to see the degree of interest of participants in the case bankruptcy and

their hierarchy. Now let's look at the causes of the crime each participant individually, starting from the bottom of the rhombus – from the debtor.

To achieve this goal and to solve it set of tasks during the study was used a set of various methods of cognition, among which can be distinguished: dialectical, systemic analysis, formal-logical, systemic-structural.

**Keywords:** bankruptcy; crime; criminology; debtor; creditor

## BIBLIOGRAPHY

- Belohlavek A.J., *Ordre Public and Cross-Border Insolvency: Especially in Relation to Council Regulation (EC), No. 1346/2000 on Insolvency Proceedings* (March 27, 2015). Conference work paper, Joint conference of the WJA – World Jurist Association, Washington D.C. & WSM University Warsaw, Poland 2015.
- Bińkowska M., Niemirska-Fido K., Walawender R.A., *The bankruptcy and reorganisation law: bilingual edition*, Warsaw 2010.
- Box M., Gratzner K., Lin X., *The Asymmetric Effect of Bankruptcy Fraud in Sweden: A Long-Term Perspective*, "Journal of Quantitative Criminology" 2019, No. 35, <https://doi.org/10.1007/s10940-018-9380-2>, <https://www.researchgate.net/publication/324687396> (access: 12.12.2020).
- Brown J.B., Netoles B., Taliani Rasnak S., Tighe M., *Identifying Bankruptcy Fraud*, United States of America: Credit Research Foundation 1999, <https://www.yumpu.com/en/document/read/5100581/identifying-bankruptcy-fraud-credit-research-foundation> (access: 10.10.2020).
- Butyrська І., *Правовий статус учасників справи про банкрутство* [Pravovyj status uchasnykiv spravy pro bankrutstvo], Chernivci 2017.
- Butyrskyi A., *Концепція удосконалення законодавства про неспроможність* [Konceptija udoskonalennja zakonodavstva pro nespromozhnist'], „Pravo Ukrainy” 2018, No. 6.
- Górniok O., *Przestępczość gospodarcza i jej zwalczanie*, Warsaw 1994.
- Guzik-Makaruk E.M., *Regulacje pozakodeksowe jako instrument zwalczania przestępczości zorganizowanej*, in: *Przestępczość zorganizowania*, ed. E.W. Pływaczewski, Warsaw 2011.
- Kozlovskiy N., Butyrskiy S., Poliakov A., Bobkova B., Lavrov A., Ivanyuta R., *Management and comprehensive assessment of the probability of bankruptcy of Ukrainian enterprises based on the methods of fuzzy sets theory*, "Problems and Perspectives in Management" 2019, No. 17 (3).
- Kraciuk J., *Przestępstwa gospodarcze w przedsiębiorstwach i sposoby ich przeciwdziałania*, „Zeszyty Naukowe Uniwersytetu Szczecińskiego” 2012, No. 690.

- Pływaczewski E.W. (ed.), *Current problems of the penal law and criminology: Aktuelle Probleme des Strafrechts und der Kriminology*, Warszawa 2012.
- Poliakov B., Правонарушения в сфере банкротства в Украине [Pravonarusheniya v sfere bankrotstva v Ukraine], "Sanacija ta bankrutstvo" 2016, No. 1–2.