

Assets Without a Legal Holder

JERNEJA PROSTOR

Abstract In recent years, the presence of certain assets, e.g. shares, immovable property or business shares, the owner or the holder of which no longer exists, can be identified in business practice. When the holder ceases to exist, he loses his legal personality and thus the ability to be the holder of rights and obligations in legal relationships. This article analyses legal regulation on the winding up of companies, in which the author sets out to answer the question of what leads to such unusual situations in practice. The winding up procedure should in fact resolve all legal relationships of those participating in a company. However, problems arise when cancelling a company from the court register without liquidation. Additionally, Slovenian Constitutional Court just recently found parts of the regulation of this procedure unconstitutional. The author offers a possible solution to the dilemma of how to transfer assets without a legal holder to a new holder or how to otherwise resolve the still existing legal relationships within the wound up company.

KEYWORDS: • assets • commercial company • winding up of a company • losing legal personality • cancellation from the court register without liquidation

CORRESPONDENCE ADDRESS: Jerneja Prostor, M.Sc., Assistant, University of Maribor, Faculty of Law, Mladinska ulica 9, SI-2000 Maribor, Slovenia, email: jerneja.prostor@um.si.

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1 Introduction

Natural persons cannot simply waive certain property without transferring it to someone else, *i.e.* giving it as a gift, selling it etc. If we own a car, for example, we cannot simply go to the register, cancel it from the register and then just park it somewhere thinking that our connection to the car is now broken. Sooner or later someone is going to demand that we move the car, remove it from the streets, change the ownership of the car or at least take the car to a dumpsite. If we die, our property becomes a part of our inheritance and subject to universal succession. Under current Slovenian legislation, companies generally do not have universal legal successors (except in some cases of substantive corporate transformations). For that reason, all legal relationships to which they are a part of need to be resolved before a company is wound up in the strict sense. Their assets must be transferred to other persons, liquidated and used to repay the company's debts or be allocated among the shareholders. In short, the company's assets should not be left without a legal holder after the winding up of the company. However, such cases have not been as rare in recent years as they should have been, which is why two questions need to be answered, (1) how do these situations occur and (2) how to transfer these assets to a new legal holder, liquidate it or at least somehow "destroy" it.

2 Winding up of a company

When a reason for winding up of a company occurs, *e.g.* upon expiration of the period for which it was established, with the decision of the shareholders to wind up the company, with declaration of the invalidity of the company (declaring a corporation null and void)¹ etc.² the company is wound up in the wider sense. But it is not yet dissolved. To get from the point of winding up in the wider sense to the point of winding up in the strict sense, one of the winding up procedures needs to be performed (Plavšak, Prelič, 2000: 604) in which all legal relationships of the company in relation to its creditors and shareholders can be resolved. Such procedures are:

- Liquidation proceedings (voluntary winding up) (Art. 404 of the Companies Act (Zakon o gospodarskih družbah, ZGD-1)³ and the following);
- Winding up of a company under simplified procedure (Art. 425 ZGD-1 and the following);
- Compulsory liquidation procedure (Art. 419 of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju, ZFPPIPP)⁴ and the following);
- Substantive corporate transformation (Prelič, 2003: 8–9);
- Bankruptcy proceedings (Art. 222 ZFPPIPP and the following) and
- Cancellation from the court register without liquidation (Art. 424 ZFPPIPP and the following).⁵

In all these procedures, except in the case of substantive corporate transformation and the cancellation of a company from the court register without liquidation, all the relationships of the wound up company should be resolved within the time frame that starts with the reason for winding up of a company and ends with the conclusion of these proceeding, i.e. with cancellation from the court register. If the winding up procedure is not conducted or if some relationships in the company remain unresolved, two issues arise: (1) the interests of persons involved in the relationships with the company might be at risk and (2) the property of a company might be left without a legal holder.⁶

All company's assets should be realized in the liquidation procedure (conducted as a voluntary or compulsory liquidation) and used to first fulfil all due obligations (as they are stated) according to the principle of priority (Prelič, 1999: 19), while any remaining assets should be divided among the shareholders. Relationships should be regulated in the same manner when a company is wound up under simplified procedure. In bankruptcy proceeding, the funds are usually not sufficient to repay all creditors, so their claims need to be repaid proportionally (according to the principle of equal treatment of creditors) (Prelič, 1999: 19), while shareholders do not even get their turn. If the distribution estate is (exceptionally) sufficient to repay all unsecured claims against the company, its remainder shall be distributed among the shareholders of the debtor in bankruptcy in proportion to their shares (Art. 383(2) ZFPPIPP). The procedure of cancelling a company from the court register without liquidation is intended to cancel inactive companies, i.e. companies that do not conduct any business and do not have any assets or outstanding obligations, from legal transactions. In this procedure, it is therefore not necessary to pay special attention to the interests of shareholders, since we are basically dealing with "dead companies".⁷ In case of substantive corporate transformation, the company is wound up (in cases of mergers, divisions, and transfers of property), but has a universal legal successor. Since the cases of winding up that are important for the topic of this paper, are those where companies are left without a universal legal successor, the paper will pay no further attention to substantive corporate transformation.

When one of the winding up procedures is completed, the company is wound up in the strict sense⁸ and is thus cancelled from the court register. In theory, that should also represent the loss of its legal subjectivity (Juhart, 2011: 105).⁹ From that moment, a company is deemed to no longer be the holder of rights and obligations in legal relationships.¹⁰ The regulation that allows the creditors to be repaid under certain conditions even after the company is wound up in the strict sense, somewhat differs from the general understanding of a legal person as the holder of rights and obligations in legal relationships. This possibility is given to the creditors in bankruptcy proceeding with assets discovered at a later time or with assets of the company already cancelled from the register (Arts. 380 and 443 ZFPPIPP). In this case, the legislator actually recognizes the existence of the creditor's claim against a non-existent legal person, as well as the existence of

assets of a non-existent company, which would strictly legally speaking mean that these rights and obligations exist without its legal holder.

Bankruptcy proceeding over assets discovered at a later time can be proposed by creditors (that were entitled to perform procedural actions in the proceeding) and shareholders of the company that was already wound up in the bankruptcy proceeding. After the completed removal of the company from the court register without liquidation, bankruptcy proceeding over assets of the cancelled company can be initiated by: (1) the creditor who demonstrates as probable his claim towards the cancelled company, (2) the member of the management or supervisory board and (3) the shareholder. If one of the stated persons proposes bankruptcy proceeding over assets of the cancelled company, this proceeding does not involve determining whether the company truly was insolvent at the time it was cancelled. Bankruptcy proceeding is conducted in any case. The law also determines consequences of judicial or other procedures conducted by the company at the time of its removal, in which the company asserted its claim or other property right, as well as for assets of a cancelled company, found in enforcement proceedings (Arts. 444 and 444(a) ZFPPIPP). In these cases, creditors also have an option to propose the commencement of a bankruptcy proceeding over the later discovered assets of a cancelled company.

If the company's assets are discovered after the completed liquidation procedure¹¹ or after the completed simplified winding up procedure, they should be distributed to the shareholders of the wound up company. This solution applies because the liquidation proceedings are conducted on the assumption that the company has more assets than are needed to fulfil all its obligations. The creditors in these procedures were therefore already repaid or were given a proper security for their claims towards the company or have had an option of being repaid directly from the shareholders' assets in the preclusion period of two years after the announcement of the cancelling of the company from the court register (Art. 425(2) ZGD-1). The only thing that has not been resolved is a procedural dilemma of how to achieve the transfer of assets without a legal holder to the shareholders.

We can conclude that in, and during, all the mentioned procedures for winding up of a company, a certain level of cooperation is expected from all that are involved in the company – either its creditors, its shareholders or members of the company's bodies, as well as the court that is conducting a particular winding up procedure. If the company has enough assets to fulfil all its obligations, and some assets remain after the repayment of creditors that are to be distributed among the shareholders, the latter will be interested in conducting a liquidation proceeding or a simplified procedure for winding up of a company. Bankruptcy proceedings are more problematic, since creditors would sometimes rather come to terms with the unpaid claim towards a cancelled company than propose the commencement of a costly bankruptcy proceeding or try in some other way to get repaid. On the other hand, in circumstances where bankruptcy proceedings should be conducted, the

shareholders generally no longer care about the matters of that company, as the bankruptcy is conducted under the assumption that not even the creditors will get repaid in full, so there is most definitely nothing left for the shareholders. The shareholders and members of different bodies of the company often make sure to find different ways to hide their assets even before the bankruptcy proceedings and only the “emptied” company is left to the creditors.¹² The legislator provided various security mechanisms to prevent these situations,¹³ but these mechanisms are rarely (successfully) enforced in practice – especially due to the difficulty of proving these actions (the creditors do not have access to the company’s records and are usually not adequately acquainted with all the matters of the company) and because of the fact that court proceedings for enforcement of such claims are not only risky, but also accompanied by great costs and may last a long time. Finally, creditors in bankruptcy proceedings are repaid proportionately and starting the procedure might therefore not be worth their while.

Nevertheless, bankruptcy proceedings are in practice frequently conducted against insolvent companies, since in certain circumstances the company’s management is required by law to propose the commencement of this proceeding (Art. 38 ZFPPIPP). Legal relationships within the company are therefore often resolved in bankruptcy proceeding, even if part of the company’s assets is in a form that cannot be liquidated. In such cases, the courts do not leave the assets “without a holder”. Instead, the law provides how to proceed in these cases: if the assets are not transferred to the shareholders, they should be transferred to the creditors. If that is not possible, the assets are to be transferred to the state, charity organisation or local community, or, if even that is not an option, the claims that were not transferred and other property rights are declared to cease to exist, while movable property is discharged as waste material (Art. 347 ZFPPIPP).

Analysis of the discussed winding up procedures shows that both in the liquidation procedures (among which voluntary and compulsory liquidation and simplified winding up procedure can generally be qualified) as well as in bankruptcy proceedings, all legal relationships within a company are generally resolved before the company is wound up in the strict sense or, at the latest, in bankruptcy proceedings over the later discovered assets of the debtor in bankruptcy. Nevertheless, significant problems have been in recent years detected in practice because of the existence of assets of a company that was already wound up – the fact that may even be evident from certain registers. The reason for these “unusual” situations is the regulation of the procedure of cancellation of a company from the court register without liquidation. This regulation was considered problematic ever since the Act on Procedures for the Enforcement or Remission of the Shareholders’ Liability for the Obligations of Cancelled Companies (Zakon o postopkih za uveljavitev ali odpustitev odgovornosti družbenikov za obveznosti izbrisanih gospodarskih družb, ZPUOOD)¹⁴ came into force in 2011, and until the recent decision of the Constitutional Court of 14 April 2016.¹⁵ ZPUOOD partly changed the regulation under the ZFPPIPP – it eliminated

the liability of “active shareholders” of a cancelled company for the company’s obligations, but it failed to properly correct the regulation of creditors’ status following the abolishment of this security measure. The Constitutional Court recently decided the case, discussed below, found that ZFPPIPP is unconstitutional in the part regulating cancellation of a company from the court register without liquidation.

The court decided to start the procedure for cancellation of a company from the court register without liquidation for a reason of company’s business inactivity at the address listed in the register (Art. 417(1)(2) ZFPPIPP). A creditor of this company objected against the decision, but his objection was rejected because he could only justifiably contest the cancellation by claiming that the company actually operates at the listed address and that it is entitled to operate at this address (which is virtually impossible)¹⁶, or that a proposal was filed to start the procedure for insolvency or compulsory liquidation. The creditor in this case based his objection on a reason that this company still had assets – immovable property that is (even still is) being rented out and that the company obviously keeps changing its address in order to avoid paying its obligations. The cancellation of a company that is still operating has assets and outstanding obligations, would not fulfil the main goal behind the notion of cancellation of a company from the court register without liquidation, i.e. the removal of inactive legal subjects from legal transactions.¹⁷ The company that is not operating at the business address listed in the court register is not necessarily an inactive subject under valid regulation (as well as in the discussed case).¹⁸ After all, the inadequate regulation already applied for four years,¹⁹ before the Constitutional Court declared it unconstitutional because it violates the general principle of equality (of creditors).²⁰

The companies that do not engage in business and have no assets or outstanding obligations (i.e. the inactive companies, the shareholders of which did not take care of their winding up in the strict sense) should only rarely be detected in legal transactions. Accordingly, the cancellation of such companies from the court register without liquidation should also occur only exceptionally. No stakeholders are supposed to exist in these companies, which is why there are no mechanisms foreseen to resolve legal relationships within the company and to protect the interests of the parties involved in the procedure. However, the regulation under ZFPPIPP (from the time ZPUOOD entered into force and until the recent judgment of the Constitutional Court) also allowed the cancellations in cases where a liquidation proceeding should normally be conducted. Many controversial decisions were rendered on the basis of this unconstitutional regulation and many companies were consequentially cancelled that “left behind” assets and obligations without a legal holder, while some of them might even still be illegally doing business. Of course, it was not hard to figure out in business practice that companies could transfer most of their assets to other holders on various legal grounds, opportunistically change their business address so they would be

considered inactive on the former address, which would sooner or later lead to their cancellation from the court register without liquidation, whereby they would avoid the payment of their obligations. The legislator even tried to address these problematic practices and their unsustainable consequences by amending the ZGD-1,²¹ despite the fact that it would be more efficient to properly amend the regulation under the ZFPPIPP (which was in the meantime amended three times), which is exactly what the discussed decision instructed. With the unanimously adopted decision, the Constitutional Court therefore largely contained the emergence of newly cancelled companies that would still have assets or obligations or would even conduct business before the cancellation. Based on § 3 of the decision of the Constitutional Court, the objection stating that the company did not stop operating, that it still has assets or outstanding obligations (§ 21 of the decision) is allowed in the procedure of the cancellation of a company from the court register without liquidation for the reason of inactivity at the address listed in the register, until the unconstitutional regulation is rectified.

In all winding up procedures (except in the procedure for cancellation of a company from the court register without liquidation), all legal relationships within the company are generally resolved before the company is wound up in the strict sense. Due to the recent decision of the Constitutional Court, we can reasonably expect that the cancellation of a company from the court register without liquidation will now be performed less frequently. Consequently, far less cases of assets without a legal holder should be encountered in practice. However, a number of “unusual” cases that occurred as a consequence of this unconstitutional regulation will still have to be resolved.

3 Difficulties in practice arising from assets without a legal holder

It is completely understandable that considerable discontent is present in business practice when a certain company is cancelled from the court register (irrespective of the type of the winding up procedure), while its outstanding debts remain. This practically means that a company that no longer exists or does not have legal personality still has unpaid obligations. The question of what happens with these obligations afterwards was quite controversial in practice, until the Supreme Court issued the following general legal opinion at the plenary session in June 2013: *“Obligations of a company, over which bankruptcy proceeding has already been conducted, do not cease to exist when a company is cancelled from the court register with a legally binding decision on the completion of bankruptcy proceeding (translation).”*²² The issue does not hold any special importance for partnerships, since the ZGD-1 expressly states that all claims towards the members arising from the company’s liability shall fall under the statute of limitation within five years after the winding up of the company, unless a shorter statute of limitations is determined for the claim against the company (Art. 133 ZGD-1).

Even if a company is wound up in the strict sense and “leaves behind” outstanding debts, creditors can therefore in accordance with the general opinion still hope for the repayment of their debts. Whilst they cannot demand to be repaid by the shareholders of the company, since they are generally²³ not liable for the obligations of the company, they can, for example, claim the repayment from guarantors, who guaranteed the payment of the company’s obligations, or they can realize the security that was provided for repayment of the company’s obligations by a third party.²⁴ These cases are not problematic, as the guarantor and the pledger, as well as the creditor, are holders of rights and obligations in legal relationships.

In case law, difficult cases are being encountered even in the least problematic procedures, such as the cancellation of a company from the court register without liquidation. Recently, the Supreme Court ruled on a case in which the appellant who filed a revision was wound up under a simplified procedure and was no longer listed in the court register), which was why the opposing party claimed that the appellant can no longer be considered a party in the procedure.²⁵ The court held that *“The judgment against the party that did not exist at the time the action was filed is absolutely invalid. However, this does not apply for judgments rendered in proceedings where the party was wound up after the proceedings were initiated. /.../ The Supreme Court already decided that after all procedural acts in the revision procedure were conducted or after time limits for these acts have expired, the suspension of proceedings does not affect the rendering of the decision by the Supreme Court (translation).”*²⁶ The revision was granted and the judgment of the administrative court was amended in a way to satisfy the claimant, the decision of the defendant on the assessment of payment was reversed and the case was returned to the defendant for a new procedure. *Galič* states in the commentary to the Civil Procedure Act (Zakon o pravdnem postopku, ZPP)²⁷ that *“a situation, in which a certain decision would be rendered in the name of a person that died during the proceeding, should never happen (translation).”* (*Galič*, 2005: 324). The judgment should in such cases be issued in the name of the (perhaps not yet specifically determined) inheritors.²⁸ In the discussed case, there were no universal legal successors of the company. If the revision had been rejected, there would be no problems with the case.²⁹ However, we can only guess how the procedure will now be repeated before the defendant – considering the content of the judgment, the case will probably be decided by the Agency for Communication Networks and Services of Republic of Slovenia (previously known as the Agency for Post and Electronic Communications of the Republic of Slovenia). The Agency should, in accordance with the judgment, reduce the amount of payment that was charged to the now non-existent company. It remains debatable whether the Agency will even be able to issue a decision for a lower amount to be paid by the non-existent company and, since the higher amount was already paid, who is entitled to the reimbursement. In addition to substantive guidelines, the Supreme Court could also provide some general instructions on how to conduct the reopened proceedings. A situation is not the same if the action

is filed against a non-existent person (in this case, the action is dismissed due to a lack of capacity to be a party in the proceeding – Art. 81 ZPP) or against a legal person that was wound up during the proceedings and that no longer exists in the repeated proceedings.

The Supreme Court dealt with a similar case several years ago, when the litigation was assumed by legal successors of the company that was wound up in a simplified procedure, i.e. its shareholders. The Supreme Court rendered the following decision: *“Companies that are wound up in any way other than the merger or acquisition /.../, no longer have a universal legal successor. However, this does not mean that following the winding up, they have no assets. The company’s assets also include their claims. The law states that in liquidation proceeding conducted by a company in accordance with the ZGD /.../, the company’s assets that remain after repayment of all of its obligations are to be distributed among its shareholders and members of the company. /.../. This rule also applies in bankruptcy proceedings if any assets remain after repayment of all of the debtor’s obligations/.../, as well as to the liquidation proceedings conducted e by the court /.../. In all the cases listed above, the shareholders are the company’s legal successors in relation to all assets that were transferred to them when the liquidation or bankruptcy proceeding were concluded (translation).”*³⁰ Shareholders are therefore company’s legal successors in relation to assets that remained after the company was wound up in the simplified procedure.³¹ This judgment could be used as a helpful guideline in solving the above mentioned case.

Furthermore, many difficulties in business practice are caused by assets that belonged to a company before it was cancelled from the court register, but was left without a legal holder after the cancellation. Based on the regulation of winding up procedures, we can conclude that these situations mostly occur as a consequence of the procedure of cancellation of a company from the court register without liquidation. In all other winding up procedures, legal relationships of participants in the company are more consistently being resolved before the company is wound up in the strict sense. The cases with assets without a legal holder were mainly a result of the inadequate regulation following the enactment of ZPUOOD and until the recent judgment of the Constitutional Court.³² Besides the fact that the creditors are now given wider options to prevent the cancellation of a company from the court register without liquidation, it would also be sensible to follow the example of Austrian legislation³³ and properly provide an additional condition for cancellation of a company from the court register without liquidation, which could thus not be performed if it is obvious that some of the company’s assets still exist. The institution of cancellation of a company without liquidation is intended to remove inactive companies from legal transactions, meaning that only companies that conduct no business, have no assets and no outstanding obligations (reason for cancellation under Art. 427(1)(1) ZFPPIPP)

should be removed from the court register. In such cases, there is also no need to protect the interests of anyone else than legal transactions in general.

At first glance it might seem that even in cases of cancellation of a company that does not operate, has no outstanding obligations, but has some assets, the interests of stakeholders in the company would not be jeopardised. It is correct to conclude that in this case, the interests of creditors would indeed not be harmed (as there are none) and that the shareholders obviously do not care for the company's assets, since they would otherwise have already objected to cancellation of the company from the court register without liquidation and conduct a voluntary liquidation. However, the consequence of these situations, *i.e.* presence of assets without a legal holder on the market, *e.g.* an immovable property listed in the land register, while the owner (or his legal successors) no longer exist, is problematic in itself. Situations with shares or business shares without a legal holder also represent a problem, since no one is exercising their voting rights in the company, that company does not know how to invite the non-existent shareholders to the annual assembly, *etc.* ... The business share without a legal holder could possibly be terminated in accordance with Arts. 501 and 502 ZGD-1, but this solution would not be appropriate for the shares without a legal holder. Perhaps the shares could be forcibly removed in accordance with Art. 381 ZGD-1, but this option would have to be allowed by the company's statute even before the (now non-existent) company took over the shares that are now without a legal holder. Moreover, the question remains what to do with movable or immovable property that no longer has a legal holder.

4 Conclusion

Analysis of the regulation of winding up procedures shows that the existence of assets without a legal holder is generally a result of the conducted procedure for the cancellation of a company from the court register without liquidation. The number of these cases increased between the enactment of ZPUOOD and the decision of the Constitutional Court³⁴ of 14 April 2016 and caused significant difficulties in practice. Since the creditors were given more options to prevent the cancellation of a company from the court register without liquidation following this decision, it is to be expected that these cases will be less frequent. However, it may still happen that neither the company nor its shareholders or creditors are interested in preventing the cancellation of a company from the court register without liquidation, despite the fact that the company still owns or has certain assets. Therefore, there are generally also no creditors, shareholders or members of management and supervisory bodies of the company that would be interested in proposing the bankruptcy proceeding over assets of the cancelled company. In these cases, the consequence of the removal of a company from the court register without liquidation are assets without a legal holder, which causes problems for third parties that do not have any legal options to solve these problems. It would therefore be reasonable to amend ZFPPIPP in a way that would only allow the

cancellation of a company without liquidation under an additional assumption of no obvious existence of company's assets. If the circumstances of the case would normally lead to the cancellation without liquidation, a compulsory liquidation would be conducted in such case. The cancellation of a company from the court register without liquidation would therefore be reserved only for companies that are truly inactive, are not conducting business and generally also do not have any assets or outstanding obligations. Only exceptionally, when after the completion of various winding up procedures, i.e. after winding up of a company in the strict sense, unresolved legal relationships would nevertheless be discovered would it be reasonable in certain cases to grant these "formations" the ability to be a party³⁵ in accordance with Art. 76(3) ZPP, or conduct appropriate procedures with the newly found assets in order to definitely resolve all legal relationships. This solution could also be applied to the already existing cases of assets without a legal holder.

Notes

¹ See more from Cahn, Donald, 2010: 143–144.

² *E.g.*: for partnerships Art. 105, for public limited companies Art. 402 and for limited liability companies Art. 521 ZGD-1.

³ Official Gazette of RS, no. 65/09 – UPB, 33/11, 91/11, 32/12, 57/12, 44/13 – odl. US, 82/13 and 55/15.

⁴ Official Gazette of RS, no. 13/14 – UPB, 10/15 – amend. and 27/16.

⁵ Cf. Ivanjko in (Ivanjko, Kocbek & Prelič, 2009: 1133).

⁶ Cf. (Prelič, 2003: 6).

⁷ See § 20 of the Constitutional Court's decision, no. U-1-135/2000, 9. 10. 2002.

⁸ For voluntary winding up see also (Hudson, 2012: 251): "Ultimately, the company is dissolved and ceases to exist. For this to happen, a final meeting of the company must take place and a notice of that meeting must be given by the liquidator to the register of companies."

⁹ Cf. (Štruc, 2003: 477), referencing (Prelič, 2003: 5; Galič & Ude, 2005: 317; Trstenjak, 2003: 285), referencing: H. M. Riemer, J. Aicher in W. Flume; works are cited in the reference no. 902.

¹⁰ "In legal theory it is commonly accepted for the legal subject to be the holder of rights and obligations in legal relationships (Pavčnik, 2011: 137).

¹¹ This would generally apply to both voluntary and compulsory liquidation, unless some other outcome is determined for the company's assets in the latter case.

¹² Especially the imminent threat of the company's insolvency increases the need for increased legal protection of the creditors, since "that is when the risk of opportunistic behavior by the shareholders is the greatest." (Podgorelec, 2006: 1670).

¹³ *E.g.*: The liability for damages by members of company bodies, disregard of legal personality, company's corporate-law restitution claim.

¹⁴ Official Gazette of RS, no. 87/2011.

¹⁵ U-I-57/15-13 of 14. 4. 2016.

¹⁶ "Absence of a reason for cancelling a company under Art. 427(1)(2) ZFPPIPP is connected to the burden of proof that cannot be satisfied by the creditors or can be satisfied only with great difficulty (§ 14 of the decision). The Constitutional Court decided that the creditors of a company which is being cancelled for reason of inactivity at its business

address are unjustifiably in a significantly worse (and therefore unequal) position compared to a situation when a company is being cancelled for being inactive, having no assets and has fulfilled all its obligations. In these cases, it suffices for the creditor to submit a substantiated objection that he still has a claim towards the company or that the company still has assets, which can be evident from the court or land register (§§ 11 in 19 of the decision).

¹⁷ § 13 of the decision.

¹⁸ *Ibid.*

¹⁹ See more in (Prostor, 2012: 5–18).

²⁰ § 16 of the decision.

²¹ See *e.g.*: the new reason for winding up a public limited company under Art. 402(1)(9) ZGD-1: “if it has no shareholders or only has its own shares. This reason was added with the amendment ZGD-II, Official Gazette of RS, no. 55/2015.

²² Legal opinion 1/2013, p. 7.

²³ Shareholders can be liable for the obligations of a company if reasons occur for the disregard of legal personality. An interesting stance was taken by the High Court in Ljubljana, stating that “the pursuit (notification) of a claim in the bankruptcy proceeding is not a condition to file an action under the rules for the disregard of legal personality (VSL I Cp 720/2011, 14. 9. 2011, more specifically in § 6).

²⁴ For details see (Vrenčur, 2012: 49–59; Plavšak, 2012: II–VIII).

²⁵ VSRS X Ips 97/2013 of 25. 11. 2015.

²⁶ The court referred to decisions III Ips 11/2013 of 2. 9. 2014 and III Ips 41/97 of 4. 12. 1998.

²⁷ Civil Procedure Act (Official Gazette of RS, no. 73/07 – UPB, 45/08 – ZArbit, 111/08 – odl. US, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 40/13 – odl. US, 92/13 – odl. US, 10/14 – odl. US and 48/15 – odl. US).

²⁸ Cf. (Galič & Ude, 2005: 324–325).

²⁹ Cf. *ibid.*

³⁰ VSRS III Ips 25/2001 of 12. 4. 2001.

³¹ *Ibid.*

³² U-I-57/15-13 of 14. 4. 2016.

³³ § 40 of the Court Register Act (Vermögenslosigkeit) (Firmenbuchgesetz (FBG), BGBl. No. 10/1991, Zuletzt geändert durch: BGBl. I No. 156/2015)) (Štruc, 2003: 482): the cancellation procedure in Austria is regulated somewhat differently from the procedure in Slovenia, as it also applies to cases that are covered under our Art. 378 ZFPPIPP).

³⁴ U-I-57/15-13.

³⁵ See more from (Galič & Ude, 2005: 319–320).

References

- Cahn A. & Donald D. C. (2010) *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge, New York: Cambridge University Press).
- Hudson, A. (2012) *Understanding Company Law* (Abingdon, Oxon, New York: Routledge).
- Ivanjko, Š., Kocbek, M. & Prelič, S. (2009) *Korporacijsko pravo: pravni položaj gospodarskih subjektov* (Ljubljana: GV Založba; Maribor: Pravna fakulteta).
- Juhart, M. (ed.) (2011) *Uvod v civilno pravo* (Ljubljana: Uradni list Republike Slovenije).

- Pavčnik, M. (2011) *Teorija prava, Prispevek k razumevanju prava* (Ljubljana: GV Založba).
- Plavšak, N. (2012) Učinek prenehanja glavnega dolžnika na hipoteko za tujo obveznost, *Pravna praksa*, 31(22), pp. II-VIII.
- Plavšak, N. (ed.) (2000) *Zakon o prisilni poravnavi, stečaju in likvidaciji (ZPPSL) s komentarjem; Zakon o finančnem poslovanju podjetij (ZFPF) s komentarjem* (Ljubljana: Gospodarski vestnik).
- Podgorelec, P. (2006) Ohranjanje osnovnega kapitala pri d.o.o., *Podjetje in delo*, 32(8), pp. 1669-1698.
- Prelič, S. (1999) *Stečajno pravo* (Maribor: Pravna fakulteta).
- Prelič, S. (2003) Pravne posledice prenehanja gospodarskih družb in drugih pravnih oseb, *Pravna praksa*, 22(4), pp. 5-9.
- Prostor, J. (2012) Varstvo upnikov družb, izbrisanih iz sodnega registra brez likvidacije, *Podjetje in delo*, 38(1), pp. 5-18.
- Štruc L. T. (2003) Avstrija: izbris gospodarskih družb iz sodnega registra po uradni dolžnosti, *Podjetje in delo*, 29(3), pp. 477-493.
- Trstenjak, V. (2003) *Pravne osebe* (Ljubljana: GV Založba).
- Ude, L. et al. (2005) *Pravdni postopek: zakon s komentarjem, 1st book* (Arts. 1-150) (Ljubljana: GV Založba, Uradni list Republike Slovenije).
- Vrenčur, R. (2012) Usoda akcesornih zavarovanj v primeru prenehanja insolventnega dolžnika, In: *Gospodarski subjekti na trgu - aktualna vprašanja gospodarskega prava / Dvajseto posvetovanje o aktualni problematiki s področja gospodarskega prava*, Portorož, 17.-19. maj 2012, pp. 49-59. (Maribor: Pravna fakulteta, Inštitut za gospodarsko pravo).