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Life after Death? Legal Relations of Companies after Cessation of their Legal Existence

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The cessation of the legal existence of a company affects many entities that have entered into legal relations with it. Above all, its unsatisfied creditors are affected, but the legal situation of the company's shareholders is also altered. Legislators approach the issue of the cessation of the company's legal existence in different ways and address the problems related to the status of the legal relations of the defunct company differently. The paper presents the two main approaches legislators adopt in this regard in several European jurisdictions (Italy, Poland, the United Kingdom, Germany, France, Spain and Switzerland) and discusses models that exemplify each approach. The study points out the strengths and weaknesses of these approaches and various models, paying particular attention to the way in which the interests of stakeholders and shareholders are balanced and how legal certainty is addressed in each of them. The paper seeks to answer the question of whether it is legitimate to build parallels between the cessation of the legal existence of an individual and a company and to draw on institutions known from succession law when regulating the legal relations of defunct companies.

Keywords: *Defunct company; Striking off; Legal succession; Liquidation; Creditor's protection*

Introduction

Regardless of the jurisdiction, it does not pose serious difficulties for lawyers to determine what happens to the legal relations concerning an individual after his or her death. Over the centuries, the rules of succession in the various jurisdictions have already been shaped. Matters become more complicated regarding legal entities other than natural persons. While companies[1] cannot die, they can cease to operate and lose their subjectivity under the norms of the legal system, which has equipped them with legal subjectivity. Just as legal norms regulate the formation of a company, they should also regulate the termination of a company's legal existence. This is because the termination of its existence affects all those who enter into legal relations with the company (stakeholders). Sometimes, the solutions adopted by legislators to address this problem are based on drawing an analogy between the "life" of the company and the life of a human being, as it seems tempting to reach

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[1]The terminology used in different jurisdictions to describe a capital company varies. In this paper, the term "company" will be used to refer only to a capital company and does not include a partnership.

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for the known and stabilised rules of inheritance law. However, is drawing such a parallel the right way? This study aims to find an answer to this question.

The stimulus to take up the topic of the legal relations of defunct companies was a critical assessment of the solution adopted in 2015 by the Polish legislator, prompting consideration of whether there are better models for shaping legal relations after the company's deregistration. In order to find an answer to this question, the solutions adopted in 7 European legal orders were studied (besides Poland, these were: Italy, the United Kingdom, Germany, France, Spain and Switzerland). The solutions functioning in practice in these jurisdictions were analysed. This means that apart from the analysis of statutory provisions and doctrinal positions, great attention was paid to the case law, especially of the highest judicial authorities.

The assessment of which model is "better" requiring prior identification of evaluation criteria. This study analyses the rules governing the cessation of the company's legal existence from the point of view of whether they appropriately balance the interests of the company's environment: on the one hand, the creditors, including employees, agents, *etc.*, and on the other hand, the shareholders. Thus, attention was also paid to whether the basic principles determining the functioning of a given type of company were taken into account, *e.g.*, the principles of unlimited liability of the company with all its assets towards its own creditors and limited liability of the shareholders towards the company's creditors. However, balancing the interests of stakeholders and shareholders is not enough. Another important factor that should be taken into account by the legislator is the certainty of legal relations, *i.e.*, the clarity and stability of the legal situation of all parties involved.

The study has shown that there are two main approaches taken by legislators with regard to the cessation of the legal existence of companies. The following sections will first outline the key difference between these approaches. Each approach will then be characterised, with the identification of models that are examples of the application of each approach. Each model will be analysed from the point of view of the criteria listed above. This will allow final conclusions to be drawn as to which approach better meets these criteria.

Approaches for Determining the Cessation of the Company's Legal Existence

The analysis of solutions adopted in various jurisdictions allows us to draw a distinction between two basic approaches to addressing the cessation of the legal existence of a company. The first approach anthropomorphises the company. It includes models which attempt to solve the problems of termination of the company's legal existence by drawing analogies (sometimes very far-reaching) with the cessation of the legal existence of individuals. These models transfer certain legal concepts known from the law of succession to the field of corporate affairs. The second approach avoids such anthropomorphising, perceiving that a company is an entity with significantly different purposes and of a different nature than an individual. Therefore, its legal subjectivity also requires a different approach. Models adopting the latter view are driven by an understanding of the company as

an asset serving a specific purpose, or as a legal construct necessary to link rights and obligations to it ('point of attachment', "subject of attribution").

In essence, therefore, the divergent approaches to the question of the cessation of the legal existence of companies are to some extent a reflection of various theories of legal persons developed by legal doctrine: on the one hand, naturalistic theories, seeing legal persons as real entities behind which individuals are concealed, and on the other hand, theories of fiction and theories of special-purpose assets[2].

Anthropomorphising Models

Characteristics

The anthropomorphising view of the company essentially leads to the conclusion that, just as an individual at some point terminates their legal existence, and this effect is both inevitable and irreversible, the same fate awaits the company: a definitive end to its "life". Therefore, just as an individual has an heir, a universal legal successor, so too should a company have a universal successor to take its place in legal relations and to fill the "vacuum" left by the "deceased" company. Fully anthropomorphising models can thus also be called models based on universal succession.

Legal solutions following this view have certain advantages, the most significant of which is the certainty of legal relations. This concerns certainty in three aspects. Firstly, at a precisely defined point in time, the company loses its legal existence and ceases to be a party to legal relations. It is known precisely when the legal situation of the entire company environment changes. Secondly, the loss of the company's legal existence is definitive and irreversible. As with individuals, it is certain that there is irrevocably no return to a situation in which the "deceased" company can regain its existence as a legal subject. Thirdly and finally, this model offers a relatively simple answer to what happens to the legal relations in which the company has hitherto participated. This is because, in principle, all of these legal relationships are entered into by a universal successor; therefore, these relationships do not extinguish.

The implications of this approach are indeed appealing. In the light of the assumptions of the fully anthropomorphising models, it should be immediately clear who should take legal action in cases where debts uncollected by the defunct company remain; it should also be clear to whom assets would accrue if after the company's legal existence has ceased, it was to turn out that certain assets remained undisposed of by the company before its "death". Anthropomorphising models also presuppose certainty as to whom creditors and anyone else with an unfinished legal relationship with the company should turn to.

The two main decisions facing legislators opting for this model are to prejudge who is to be the universal successor to the company and how the principles of liability of this successor for the obligations it has "inherited" from the defunct

[2]These theories are familiar to every lawyer; they are presented by, among others, Simonart (1995) at 23-37.

company should be shaped. In making these decisions, the interests of stakeholders and shareholders need to be appropriately balanced, as the factor of legal certainty has already been duly taken into consideration by the very fact that the universal succession model has been chosen.

Only two of the seven European jurisdictions investigated for this study (Italy and Poland) fully adopted this model. The third jurisdiction (the United Kingdom) also prominently uses the anthropomorphising approach, although due to the different succession law principles, anthropomorphising leads to slightly different results in the United Kingdom than in Italy or Poland.

Thus, as can be seen, it is not an uncommon approach, which is probably determined by its main advantage highlighted above: the certainty of legal relations after the end of the company's operation. However, the question to be answered is whether models adopting this view do not lean too much towards respecting legal certainty at the expense of a proper balance of stakeholders' and shareholders' interests.

It turns out that in each of the fully anthropomorphising models (Italian and Polish), the two mentioned issues requiring fundamental decisions by the legislator (who is to be the universal successor of the company and how the principles of liability of this successor for obligations "inherited" from the defunct company should be shaped), are resolved in a fundamentally different way. What these systems have in common is, firstly, the assumption of irreversible and definitive cessation of the legal subjectivity of the company at the moment of the company's deletion from the public register, and secondly, the entry of the universal successor into the legal relations of the company at that very moment.

Italian Model

In Italian law, it is assumed that it is the shareholders of a "deceased" company who become its universal successors (co-successors)[3]. The statute does not expressly proclaim this principle, but this conclusion is derived from art. 2495(3) *in principio* of the Italian Civil Code (*Codice Civile*, CC), from which it follows that, although the company is extinguished as a result of its striking off from the register, the company's unsatisfied creditors may still enforce their claims against the shareholders. As, in the light of the provisions on the liquidation of companies, the shareholders are also entitled to the assets remaining after the liquidation[4], it is to

[3]Of key importance are three rulings of the combined chambers of the Italian Supreme Court (*Corte Suprema di Cassazione*, CSC) of 12 March 2013 nos. 6070, 6071 and 6072, and the earlier three rulings of the combined chambers of CSC of 22 February 2010, nos. 4060, 4061 and 4062; see also, *inter alia*, rulings of CSC Civil Chamber I: of 6 December 2019, no 31933, of 22 May 2020, no 9464 and of 13 October 2021, no 27894. In the doctrine, the proponent of this position is in particular Speranzin (2004) at 514 *et seq*.; Speranzin (2014) at 254. However, there are also strong objections (Sanna (2015) at 80/II *et seq.* and the criticism cited therein). The current position of jurisprudence has been taken since the reform of Italian company law introduced on 1 January 2004 by the Legislative Decree no. 6 of 17 January 2003. Previously, it was accepted in case law that a company "is always alive" as long as there remain unfinished legal relations involving it (cf. the reasoning of CSC ruling of 22 May 2020, no 9464, cit.).

[4]Art. 2492(1) first sentence CC.

them that any assets that emerge after striking off the company from the register accrue. It is, therefore, the shareholders who are entitled both to assets that have been omitted and not liquidated (*sopravvivenze*; "survivals") and to those that only came into existence after the company has been struck off the register (*sopravvenienze*; "contingencies")[5]. The same applies to overlooked liabilities of the company and liabilities that have arisen after the company's striking off: these pass to the shareholders as well[6]. Thus, legal relations not terminated before the company was struck off the register continue in a specific way[7].

This solution seems to consider the interests of creditors, as their claims are not extinguished due to the debtor's absence when the company ceases to exist. The former shareholders become their debtors. At the same time, the shareholders' interests are considered, as their rights to the liquidation surplus, if any, are respected. This solution also takes into account the basic principle that the company is liable for its obligations with its assets and the shareholders only with their contributions. These principles are still respected after the company ceases to exist. Shareholders are only liable to the company's unsatisfied creditors up to the amount of the sums received on the basis of the final liquidation balance sheet[8]. Those sums are the remainder of the company's former assets with which the company would have been liable to creditors if its legal existence had not been terminated. For the same reason, it is assumed that the shareholders are also liable towards the company's creditors with assets omitted during liquidation, which only came to light later (*sopravvivenze*), as well as those which only arose after the company was struck off the register (*sopravvenienze*)[9]. Regarding pending litigation, the cessation of the company's legal existence and the entry of successors in its stead takes place according to the same rules as in the case of inheritance[10].

For unsatisfied creditors, this may still not be sufficient. In principle, however, only the company's assets provide a guarantee for the satisfaction of its creditors. In principle, as another advantage of the universal succession for the company's creditors is that, since their claims do not expire, neither do the securities of their claims that were of an accessory nature. The creditors can still exercise these securities.

However, the final outcome of the Italian model seems to fall to the disadvantage of the company's creditors, especially in companies with multiple shareholders. For creditors, this generally means they have to enforce their claims against all of the shareholders, as the amounts to which individual shareholders are liable may not be sufficient to satisfy the creditor[11]. The exercise of creditors' claims is also hindered

[5]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; CSC ruling of 22 May 2020, no 9464, cit.; see also Speranzin (2014) at 254, 256.
[6]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 255.
[7]For the sake of accuracy it should be noted, however, that in several situations arising from case law it is permissible to reinstate an erroneously struck-off company in the register by applying art. 2191 CC. These cases are discussed by Sanna (2015) at 85/II-86/II.
[8]Art. 2495(3) first sentence CC.
[9]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 254, 255.
[10]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 254, 257.
[11]Sanna (2015) at 84/II. Some facilitation for creditors was to be provided by the regulation stipulated in the second sentence of art. 2495(3) CC. If creditors submit their claims within one

by the lack of one representative of their new debtors. For all unfinished company matters, interested persons must address all shareholders. Another impediment for creditors is that the statute does not provide for any separation of the assets "inherited" by the shareholders from the extinguished company from their own assets, with the result that former creditors of the company wishing to obtain satisfaction from the shareholders, have to compete with the shareholder's creditors[12]. Shareholder succession results in a kind of "dilution" of liability towards unsatisfied creditors.

Polish Model

A different solution has been adopted in Polish law. It is a relatively new regulation, as it entered into force in 2015[13]. Previously, the issue of the consequences of the cessation of the companies' legal existence was not regulated in any way, and the practice went in all conceivable directions[14], making the intervention of the legislator inevitable[15]. Since 2015, Polish law has been characterised by the assumption of the irreversible and definitive cessation of a company's legal existence at the moment of its striking off from the register and the entry of a universal successor into the company's legal relations .

The universal successor of "deceased" companies is the State Treasury. It enters into all the rights and obligations of the defunct company[16]. Thus, as in Italy, the company's property does not become ownerless, and its debts are not extinguished when the company is struck off the register. It is argued that the choice of the State Treasury as successor, rather than the shareholders, is due to the fact that the shareholders could deliberately conceal the company's assets during liquidation in order to acquire them when the company is struck off the register[17]. The State Treasury's succession is, therefore, intended to protect the creditors. The successor, however, is not liable for the company's obligations with its own assets, but only

year of the company being struck off the register, it is sufficient to notify the claims to the address of the defunct company. However, this does not mean that creditors are relieved of the obligation to establish the circle of shareholders, which can be difficult in case of joint-stock companies (cf. Sanna (2015) at 84/II).

[12]Sanna (2015) at 84/II.

[13]Art. 25e of the *ustawa o Krajowym Rejestrze Sądowym* (National Court Register Act; NCRA) of 20.08.1997.

[14]Each of the solutions proposed in legal doctrine and jurisprudence had the fundamental deficiency that they were unfounded in the light of the provisions of the then applicable law. The proposed solutions are summarised, among others, by Klepacz (2012) at 39-43; A. Witosz (2014) at 187-188; Węgrzynowski (2014a) at 25–31; Węgrzynowski (2014b) at 8-13.

[15]The solution chosen by the Polish legislator was not the one recommended; cf. Wild (2013) at 40-43.

[16]The acquisition by the State Treasury of all the assets of an entity removed from the register is expressly provided for in art. 25e(1) NCRA. The conclusion that the State Treasury enters into all the liabilities of entities deleted from the register is derived by way of interpretation in particular from art. 25e(4) NCRA (see most recently the resolution of the Polish Supreme Court (*Sąd Najwyższy*) of 20 April 2023, III CZP 122/22, *Biuletyn Sądu Najwyższego – Izba Cywilna* 2023, issue 5-6, with comment of Zawadzka (2023) at 87 *et seq.*).

[17]Cf. resolution of *Sąd Najwyższy* of 24 January 2007, III CZP 143/06, OSNC 2007, no 11, item 166.

with those items of property that it "inherited" from the company (liability limited *cum viribus patrimonii*)[18]. As for pending litigation, the cessation of the company's legal existence and the entry of the successor in its place follows the same rules as in the case of inheritance.

After striking off the company from the register, Polish law does not provide for shareholders' liability towards the company's unsatisfied creditors with the liquidation quota received by the shareholders[19]. During the liquidation procedure, distribution of the company's remaining assets is permissible after a certain period calculated from the date of an announcement on the opening of liquidation, summoning creditors to submit their claims[20]. The claims known to the company, including those that were notified within this period, are to be satisfied or secured by the liquidators. However, creditors whose claims were neither reported in due time nor known to the company may only claim satisfaction from the company's assets not yet distributed among the shareholders[21]. If the shareholders received liquidation quota in violation of art. 286(1) CCC (art. 474(1) CCC for SA) or they received overstated liquidation quota while being in bad faith, they are obliged to return the amounts received to the company[22]. It is the obligation of the liquidators to recover these amounts from the shareholders on behalf of the company. The liquidators shall be liable to the company for damages for failure to comply with this obligation[23]. The company's claims against the shareholders, as well as against the liquidators, are the company's assets, which are passed to the State Treasury when the company is struck off the register. The State Treasury may exercise these claims, while creditors should pursue their claims against the State Treasury[24].

However, with respect to the so-called late creditors, *i.e.*, those who did not submit their claims before the date on which the distribution of the company's remaining assets was permitted and were not known to the company, including those whose claims arose after the expiry of the aforementioned deadline, no liability of the shareholders with the liquidation quota received is provided for. The fact that the claims were legitimate is irrelevant. No consideration is given to the possibility

[18]Art. 25e(2) NCRA.

[19]Nowacki (2021) art. 287, marginal no 22.

[20]The time limit is 6 months for a limited liability company (sp. z o.o.; art. 286(1) of Polish Code of Commercial Companies of 15 September 2000, *Kodeks spółek handlowych*, hereinafter: CCC) and one year for a joint-stock company (SA; art. 474(1) CCC). Cf. art. 300^{121}(3) CCC for a simple joint-stock company (*prosta spółka akcyjna*; PSA).

[21]Art. 287(1) CCC in respect of sp. z o.o. and art. 475(1) CCC in respect of SA and PSA.

[22]With regard to sp. z o.o., see art. 287(2) CCC. For the SA, analogously, art. 475(2) CCC; cf. art. 300^{121}(3) CCC for the PSA.

[23]Cf. art. 293(1) CCC. A creditor may not, in his own name, enforce the liquidator's liability against the company or reimburse the company for the shareholder's inflated liquidation quota, but may, in enforcing his claim against the company, seize those claims of the company (cf. Witosz (2018) art. 287, marginal no 6; Nowacki (2021), art. 287, marginal no 23). Ultimately, therefore, the shareholders will be liable to the creditor up to the amount of the liquidation quota obtained in breach of art. 286(1) and art. 287(1)-(2) CCC). It is assumed that the creditors of a sp. z o.o. may also claim liability for damages against the liquidators (cf. art. 300 CCC) if they are the ones who have neglected to make a demand for restitution to the shareholder (Witosz (2018) art. 287, marginal no 6). For SA see art. 483(1), art. 490 CCC.

[24]Cf. Nowacki (2021) art. 287, marginal no 24.

that certain categories of claims (especially those in tort) may not come to light until later, after the distribution of the remaining company's assets, or even after the company has been struck off the register. Although, thanks to universal succession, these claims do not expire when the company is struck off the register, the substrate of assets from which they may later be satisfied is smaller due to the shareholder's lack of liability with the liquidation quota.

Such a solution violates (to the benefit of the shareholders and to the detriment of the company's creditors) the principle that a company is liable for its obligations with all its assets and that after the cessation of the company's activity, its assets constitute a kind of guarantee of satisfaction for its creditors. This principle should be respected also after the company's legal existence has been terminated, as Italian law (in this respect correctly) provides. Polish regulation insufficiently protects the company's creditors in this aspect, giving primacy to the shareholders' interests and clarifying their legal situation as soon as possible. On the other hand, an advantage of the Polish model, in comparison to the Italian solution, is undoubtedly the fact that firstly, the company's creditors have only one new debtor and do not have to pursue their claims against many successors of the company and, secondly, they do not have to compete with the State Treasury's creditors, as the property remaining after the company is allocated only to satisfy the company's creditors (at least it is temporarily, which will be discussed later).

On the other hand (this time, to the disadvantage of the shareholders and to the advantage of the State Treasury), the possibility for shareholders to assert their rights to supplementary liquidation quota in the event that, after the company is struck off the register, it comes to light that certain assets were not liquidated, is very limited. In Polish practice, such situations do occur, and the omitted holdings of the company are even immovable property. Formally, shareholders may direct their claims against the State Treasury, but this requires bringing an action within the preclusion period of one year from striking off the company from the register[25]. After that time, all shareholder claims expire irretrievably. The running of the time limit does not depend on any further circumstances, particularly when the unliquidated company's assets are revealed. If the property was only revealed after one year, the shareholders no longer have any rights to it. In addition, the shareholders may only claim their rights to their share of the unliquidated assets if they collectively represent at least two-thirds of the votes and prove that all the company's creditors have been satisfied or secured (art. 25e(3) NRCA).

Shareholders' rights are, therefore, not sufficiently respected either. Notably, the limitation of shareholders' rights to further liquidation quota after the expiry of the company does not necessarily benefit the company's creditors. It may well be that the only entity gaining will be the State Treasury. This is because also the claims of the company's unsatisfied creditors expire irretrievably with the lapse of the one-year period counted from the striking off of the company from the register if those claims are not pursued against the State Treasury within that time[26]. Again, it is irrelevant when these claims come to light or when the property left by the defunct company, from which the State Treasury could be liable to creditors, was revealed.

[25]Art. 25e(4) NCRA.
[26]Art. 25e(4) NCRA. See also art. 25e(6) NCRA.

The deadline is very short and is the most criticised point of the Polish regulation. The excessive rigour of this time limit can be very well seen when one compares it with the general limitation periods for claims, which are three years in professional relations and six years in others (Article 118 of the Polish Civil Code).

On the one hand, the assumption of all debts of a defunct company by the State Treasury is supposed to protect these creditors – it is supposed to compensate for the fact that there is no possibility whatsoever of restoring the company once it has been struck off the register. However, on the other hand, this protection of creditors' rights is too tenuous as all their claims are extinguished after a year. Notably, these creditors are not always businesses, but those are just as frequently consumers. Still, the unified one-year deadline applies to all creditors. A further consequence is that as the creditor's claims are extinguished, the securities for their claims, which were of an accessory nature, are also extinguished. This excludes the exercise of, for example, a suretyship of an accessory nature.

The time limit for the expiry of creditors' claims essentially deprives the Polish model of one of the most significant advantages offered by the system of universal succession, which is the continuation of the company's obligations, albeit with a new debtor. One year after the expiry of the company, these liabilities are discontinued.

It is clear that in the model adopted in Poland, the scales have been tilted far too much in the direction of guaranteeing legal certainty, stabilisation and clarity of the legal situation of the interested parties (shareholders, creditors, but above all, the successor). Indeed, it cannot be denied that this aim is achieved by the Polish solution almost perfectly. It raises serious doubts, however, whether the interests of stakeholders and shareholders should be sacrificed to such an extent in the name of certainty of legal relations.

British Model

As mentioned, the anthropomorphising approach is also very evident in the model adopted in the United Kingdom. Indeed, it also draws from the solutions known from the law of succession. The company loses its legal existence at a specific point in time (the company „dies")[27]. Unlike individuals, the company never has an heir. Thus, all of its assets become ownerless property (*bona vacantia*). This property passes to the Crown[28] unless the Crown's representative decides

[27]This effect does not take place on the striking off of the company from the register of companies, but on the publication in the Gazette of the notice that the company's name has been struck off the register, if the company is struck off the register without liquidation proceedings or after an improperly conducted liquidation (sec. 1000(4)-(6), sec. 1001(2)-(4), sec. 1002A(4)-(5) of the Companies Act 2006, CA). If striking off follows a winding up procedure, the company is dissolved at the end of the period of 3 months beginning with the day of the registration of the final account and statement sent under section 146(4) of the Insolvency Act 1986 (final account) or a notice, from the official receiver that the winding up of a company by the court is complete; however, the Secretary of State may defer the date at which the dissolution of the company is to take effect (sec. 205(1)-(3) of the Insolvency Act 1986; cf. also sec. 202(5) and sec. 204(4) of the Insolvency Act 1986).

[28]Or the Duchy of Lancaster or the Duke of Cornwall (sec. 1012(1) CA).

within 3 years that the Crown disclaims the title to it[29]. This solution is modelled on the English law of succession, where an individual's estate also passes to the Crown[30] if there are no heirs[31].

A public body can, therefore, acquire the assets of the defunct company. The liabilities, on the other hand, are essentially extinguished. The British model does not, therefore, assume universal succession of the successor in all the rights and obligations of the extinguished legal entity, as Italian or Polish law does. This is because, strictly speaking, universal succession understood in this way is unknown to the English law of succession.

Unlike in the case of succession to individuals[32], the Crown does not receive the assets only after the liabilities have been paid off (residuary estate). The liabilities are generally extinguished along with the company. The rights of creditors and all other persons having an interest are to be guaranteed by the institution of restoration of the deleted entry of the company to the register and, thus, the restoration of the company's legal existence[33]. The company's creditors are listed among entities entitled to apply to the court to restore the company to the register[34]. The general effect of the restoration is that the company is deemed to have continued its existence as if it had not been dissolved or struck off the register[35]. It must then be assumed that the company has never lost its property, its creditors' claims have never been extinguished, *etc*. There is, however, a time limit. As a general rule, restoration of the company cannot be requested more than 6 years from the date of the dissolution of the company[36].

The restoration undoubtedly constitutes an element alien to typical anthropomorphising approaches. Although the purpose of this institution is applaudable, as it allows the protection of the rights of those who had entered into legal relationships with the defunct company, in practice, the need to initiate a restoration procedure in each individual case where there is a need to protect the rights of third parties is burdensome and seriously hinders the assertion of those rights.

Non-Anthropomorphising Models

Characteristics

The second approach deals with issues concerning the company's loss of legal existence from an entirely different perspective than for individuals. For this

[29]Sec. 1013 CA. The provisions of the CA relating to the acquisition by the Crown of the property of a company struck off the register also apply to companies dissolved following insolvency proceedings (Goode (2011) at 216).
[30]Or to the Duchy of Lancaster or to the Duke of Cornwall.
[31]Sec. 46(1)(vi) of the Administration of Estates Act 1925.
[32]Kerridge (2013) at 423.
[33]Sec. 1024-1034 CA.
[34]Sec. 1029(2) CA.
[35]Sec. 1032(1) CA.
[36]Sec. 1030(4) CA, cf. the exceptions in sec. 1030(5) CA.

approach, it is characteristic to reject any analogy between the succession to an individual and the cessation of the company's existence and to seek a solution to the problem of terminating the company's activity, taking into consideration the specificities of companies as legal entities. These models are derived from the theory of the company as a special-purpose asset or as a "subject of attribution".

German Model

The predominant view in German doctrine and case law explicitly links the company's existence to the existence of its assets, and therefore, some features of the theory of the legal person as a special-purpose asset can be discerned[37]. The prevailing view on the question of the cessation of the company's legal existence differs in detail depending on whether the company in question is a limited liability company (*Gesellschaft mit beschränkter Haftung*; GmbH) or a joint-stock company (*Aktiengesellschaft*; AG). In essence, however, the results of the views taken are similar. They boil down to the fact that striking off a company from the register does not always result in the company definitively ceasing to be a subject of rights and obligations. For this to happen, it is necessary, in addition to striking off the register itself, that the company no longer has any assets[38]. As a result, striking off the company from the register in some cases is not even of a declaratory nature (if there are assets), but in others, it is of a constitutive nature[39]. Thus, the mere absence of the company's assets does not deprive the company of its legal subjectivity. Because of two requirements which must be met jointly for a company to lose its legal subjectivity (lack of assets and striking off the register), this theory is called the double fact (*Doppeltatbestand*) theory[40]. The existence of the company's assets after striking it off the register justifies the continued existence of the company as a

[37]Cf. Schmidt (1989) at 106, 122.

[38]The basis for this conclusion is § 66(5) of the Limited Liability Companies Act of 20 April 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*; GmbHG), as well as § 273(4) of the Stock Corporation Act of 6 September 1965 (*Aktiengesetz*; AktG). The latter section provides for the so-called *Nachtragsliquidation* (supplementary liquidation) in cases when further liquidation measures are necessary after the company has been struck off the register. The court shall reappoint the previous liquidators or appoint other liquidators for that purpose. This also applies *mutatis mutandis* to GmbH.

[39]In the case of a GmbH, the dominant view is that the company is still a legal person after striking off the register and is still a GmbH, only dissolved and in the liquidation phase (Berner (2022) § 60, marginal nos. 40-41), while with regard to AG, the view prevails that, once struck off, the company loses its legal personality and is no longer an AG but it becomes a „post-company" (*Nachgesellschaft*), a sub-type of AG, retaining its legal subjectivity, analogous to the „pre-company" (*Vorgesellschaft*) prior to its registration. See, *inter alia*, Bachmann (2024) § 262, marginal nos. 92-94; cf. H. Schmidt (1989) at 138-139, 170-171; about the concept of the *Nachgesellschaft* Lindacher (1995) at 553-556.

[40]Today it is supported by the majority of doctrine (see, among others, Bork (1991) at 844; Berner (2022) § 60, marginal nos. 40-41 and further literature referenced there), as well as case law (see, *e.g.*, decision of the German Federal Tribunal (*Bundesgerichtshof*; BGH) of 20 May 2015, VII ZB 53/13, *Neue Juristische Wochenschrft* 2015, at 2424; decision of the *Oberlandesgericht* in Celle of 3 January 2008, 9 W124/07, *Neue Zeitschrift für Gesellschaftsrecht* 2008, at 271; judgment of the *Oberlandesgericht* in Düsseldorf of 14 November 2003, 16 U 95/98, *Neue Zeitschrift für Gesellschaftsrecht* 2004, at 916).

legal entity, although at this stage, the purpose of the company's existence is only to terminate its legal relations and liquidate the remaining assets.

In its original form, the *Doppeltatbestand* theory did not consider relevant for the company's continued existence as a legal entity, either the ongoing existence of the company's unsatisfied liabilities or other third-party interests not necessarily related to its assets. However, practice soon showed that the need for the company to continue to exist because of its assets was only a part of a more complex problem. Disposing of the remaining assets is not the only thing that may need to be done by the company after striking off the register[41]. After all, liquidation proceedings also are not just about cashing out assets. There may also be a need to conclude other matters involving the company (*e.g.*, issuing an employment certificate to a former employee). This has given rise to the concept of the extended (*erweitertes*) *Doppeltatbestand*, which today is predominant and which assumes the continued existence of the company also in other situations where, after striking off the register, the need arises for further liquidation measures, not necessarily directly related to the company's assets[42].

The development of the concept thus goes in the direction of viewing the company not exclusively through the prism of its assets serving a specific purpose, but to a certain extent also as a "point of attachment", allocation subject (*Zuordnungssubjekt*) of legal relations not directly related to the assets[43]. Still, it is submitted, however, that the continued existence of the company's unsatisfied claims does not in itself justify the continuation of the legal subjectivity of a company that no longer has any assets and has been struck off the register[44].

The model adopted in Germany could be criticised for paying too little attention to the issue of legal certainty, which is better provided by anthropomorphising approach. Indeed, it is very difficult here to indicate whether a company struck off the register is still a legal entity and, if not, when it ceased to exist. On the other hand, however, it is questionable whether the need to precisely determine the point in time when the company "dies" is necessary in this model. It can be argued that this model (especially the *erweiterter Doppeltatbestand*) provides relative certainty that whenever the company's continued existence as a legal entity is needed, its existence will be assumed even after striking off the register. From the creditors' point of view, it does not seem to change much whether (and possibly when) the legal existence of the company has ceased. If they only point to the assets left behind by the company, this will mean that it has not ceased. German model offers, therefore, a pragmatic solution and maintains the legal existence of the company where necessary – wherever this serves a specific purpose.

The solution adopted in Germany considers the shareholders' interests and respects the limitation of their liability for the company's obligations. Against this model, it can be argued that, like the Polish one, it insufficiently takes into account the principle that after the company's dissolution, its assets serve first to satisfy the

[41]Schmidt (1989) at 110-111, 122-129, 137, 184.
[42]Bork (1991) at 845; Berner (2022) § 60, marginal nos. 45-59 along with dissenting opinions reported there.
[43]Schmidt (1989) at 138.
[44]Berner (2022) § 60, marginal no 59.

company's creditors. The distribution to the shareholders of the assets remaining after liquidation is not permitted before the company's known debts have been paid or secured and before one year has elapsed from the date on which the summons addressed to the creditors was published[45]. The debts known to the company and reported within this period must be paid or secured. The liquidators are liable to the company for damages for breaches of these regulations[46]. However, if no violations have occurred, the shareholders are not liable to the creditors with the liquidation quota received. The so-called late creditors, including those whose claims only came to light later (*e.g.,* from tortious acts) or even arose later, can count on satisfaction only to the extent that some of the company's assets still remain undistributed to the shareholders[47].

Nevertheless, striking off a company from the register does not prevent creditors from pursuing their claims against the company since, as long as its assets remain, the company still retains its existence as a legal entity. Striking off the register during the course of the court proceedings does not lead to the discontinuance of the proceedings or to the substitution of a legal successor. Only the rules on the representation of the company change[48]. The same objective that the fully anthropomorphising models achieve through universal succession, the German model achieves through the assumption of the continued legal subjectivity of the company.

Adopting this model, on the other hand, may raise serious doubts as to whether the creditors of a company that has been struck off the register and its remaining assets are unknown can exercise accessory security rights established to secure their claims against the company. Again, in German law, it is pragmatically assumed that they can[49]. Dogmatic justification for this position is more complex though. Concerning suretyship, it is assumed that the guarantor's debt remains despite the principal debt's expiry and becomes an independent obligation. In order to justify the breach of the accessory nature of suretyship, an argument is built up that in this

[45]§ 65(2) and § 73(1) GmbHG; § 267 and § 272(1) AktG.

[46]§ 73(3) GmbHG. The prevailing view grants the creditors of the GmbH the right to directly claim compensation from the liquidators in their own name and on their own behalf if the creditors cannot obtain compensation from the company and the company does not pursue claims against the liquidators (§ 93(5) AktG and § 268(2) AktG applied accordingly). See, *inter alia*, Altmeppen (2023) § 73, marginal no 21; Büteröwe (2024) § 73, marginal no 14. On the other hand, the creditors are denied the right to directly pursue claims against shareholders who, due to a violation of § 73(1)-(2) GmbHG, have obtained excessive liquidation quota at the expense of unsatisfied creditors (H.-F. Müller (2022) § 73, marginal no 55; Müller (2023) § 73, marginal nos. 59-60). The liquidators who satisfied these creditors are, however, granted a recourse claim against the shareholders - Müller (2022) § 73, marginal nos. 57-60). It is therefore the GmbH shareholders who ultimately bear the burden of satisfying the creditors with the liquidation quota they have received due to the violation of § 73(1)-(2) GmbHG, although the road to this result is long.

[47]Altmeppen (2023) § 73, marginal no 34; Müller (2023) § 73, marginal no 32; Büteröwe (2024) § 73, marginal no 11.

[48]Bork (1991) at 846-850; Schmidt (1995) at 759.

[49]Altmeppen (2023) § 73, marginal no 34; Berner (2022) § 60, marginal no 192; Haas (2022) § 74, marginal no 16 and § 77, marginal no 16; in the case law see BGH's judgments: of 25 November 1981, VIII ZR 299/80, *Neue Juristische Wochenschrft* 1982, 875 and of 28 January 2003, XI ZR 243/02, *Deutsches Steuerrecht* 2003, 845 (both relating to suretyship).

case, the principle of accessory liability is limited by the purpose of the security expressed in the contract of suretyship itself[50], so this limitation of accessory liability is supposed to result from the agreement of the parties to the suretyship contract. With respect to accessory security rights, linking the continued existence of the company's legal subjectivity to the existence of its assets is therefore problematic. It forces to adopt new concepts of security rights, which, in such a case, change their nature – they transform from accessory to non-accessory rights.

French Model

A model that rejects the anthropomorphising approach and focuses on the specificity of the company as a legal subject has also been adopted in France[51]. It differs from the German model in certain respects and appears much simpler. With regard to the cessation of the company's legal existence, the provisions of the French *Code du Commerce* only provide that the legal personality of the company continues until the "closure of the liquidation"[52]. This provision allows considerable room for interpretation, because the "closure of liquidation" can be understood in a broad sense: if there is still a need to take action to terminate the company's activity, the liquidation is not yet completed, and, since this is the case, it is still necessary to maintain the company's legal personality for the purposes of the liquidation, so the company is still the subject of rights and obligations[53]. This is the direction taken by the French *Cour de Cassation* (CdC), which accepts that even the formal termination of the liquidation with the subsequent striking off of the company from the register does not necessarily result in the cessation of the legal personality of the company at the moment it is removed from the register. CdC considers that this legal personality continues as long as the company has rights or debts (liabilities) that have not yet been liquidated. This case law has been well-established for almost 50 years[54].

According to CdC, what may exclude the assumption that a company has lost its legal existence with striking off the register is also the very existence of its unsettled obligations (debts). The most recent ruling in which the CdC reiterated this position dates from 20 September 2023 and concerns a tenant company that was struck off the register, after which its creditor (the landlord) sued it for payment of outstanding rent. CdC accepted that the company could still be sued because, since there is an unfinished business, it means that the liquidation has not been completed and thus

[50]Stadler (2023) § 767, marginal no 9.
[51]Cf. the remarks of Arrighi (2016) at 29.
[52]*Code de Commerce*, art. L237-2 sec. 2.
[53]Cf. Arrighi (2016) at 26.
[54]See judgments of CdC, Commercial Chamber: of 30 May 1978, no 76-14.690, *Bulletin des arrêts Cour de Cassation Chambre commerciale* no 156, p. 133; of 2.05.1985, no 83-17409, *Bulletin* 1985 IV no 139 p. 120; of 26.11.2003, no 99-21076, Legifrance; of 7 April 2010, no 09-14671, Legifrance; of 2 November 2011, no 10-25130, *Bulletin* 2011, IV, no 175; of 18 December 2012, no 12-10136, Legifrance; as well as the most recent judgment of 20 September 2023, no 21-14.252 22-21.718, ECLI:FR:CCASS:2023:CO00577 (with approving comment of Barbièri (2023). See also Germain (2002) at 96; Merle (2007) at 152.

the company has not lost its legal subjectivity[55]. In such cases, the court must appoint an *ad hoc* representative to represent the company because once the company was struck off the register, the liquidator lost the power to represent the company[56].

There is a perceptible difference here from the German approach. According to the German *Lehre vom Doppeltatbestand*, a company generally exists despite being struck off as long as it has assets. Debts alone do not prevent the loss of the company's legal existence. If a company struck off from the register has no assets, it loses its legal existence and can no longer be a debtor, even if there are remaining unsatisfied creditors. It can thus be seen that the solution adopted in France perceives the company to a far greater extent through the prism of the legal person as the "centre of attribution" of legal relations of various kinds, attaching little importance to the asset substrate as prejudging the legal existence of the company. Apart from this difference, the company's legal existence is also maintained in France as long as it is needed. This need is even seen in a wider range of cases than in Germany. Once the company has finally lost its legal existence (although it is sometimes difficult to determine when this has occurred), there is no need to identify an entity to "inherit" rights and obligations from the company, as these no longer exist.

Under French law, the creditors' interest is further protected by the possibility to address claims directly to the shareholders of the defunct company. After striking off the company from the register, the shareholders are liable to the company's creditors up to the amount of their contributions and liquidation quota received[57]. Moreover, in the light of the position of CdC accepting the continued existence of the company where this is needed to satisfy its debts, it is also possible to justify dogmatically the view allowing the creditors to exercise accessory securities (*e.g.*, suretyship) established to secure creditor's claim against the defunct company.

Spanish Model

Despite the difference of opinions in the doctrine[58] and the initially divergent approach of the jurisprudence, Spanish law now seems to be moving in the same

[55]Judgment of CdC of 20 September 2023, no 21-14.252 22-21.718, cit.

[56]Germain (2002) at 96; Merle (2007) at 152. Such a conclusion also follows from the cited judgment of CdC of 20 September 2023 no 21-14.252 22-21.718.

[57]Germain (2002) at 99; Merle (2007) at 154.

[58]The amendments introduced by the consolidated text of the *Ley de Sociedades de Capital* (LSC), *Real Decreto Legislativo* 1/2010 of 2 July 2010, have not removed the doubts that existed before. Some doctrine takes the view that the company terminates definitively without a successor; another view is that the Spanish legislator's aim was to adopt the Italian model of the shareholder succession (the views presented in the literature are summarised by Recalde Castells & Martínez Flórez (2018) at 536-538). Indeed, like the Italian CC, the LSC provides that former shareholders are liable to the company's unsatisfied creditors after striking off the company from the register up to the amount of the liquidation quota received (Art. 399(1) LSC). Although unlike Italian CC, the LSC does not explicitly state that the company ceases to exist when struck off the register, the shareholders are referred to in Art. 399(1) LSC as "former" (*antigos*) shareholders. At the same time, however, art. 398(1) LSC stipulates that if, after striking off the company from the register, undistributed assets of the company appear, the liquidator shall carry out a supplementary liquidation and pay the former shareholders additional liquidation quota.

direction as French jurisprudence, thanks to the plenary decision of the *Tribunal Supremo* (TS) of 24 May 2017 (324/2017)[59], unifying the doctrine of the Civil Chamber regarding the legal capacity of companies that have been dissolved, liquidated and struck off the register. TS accepted that "although the registration of the deed of extinction and the cancellation of all the registry entries of the extinguished company entails, in principle, the loss of its legal personality, since it cannot operate in the market as such, it retains this personality with respect to claims pending based on supervening liabilities, which should have formed part of the liquidation operations. For these purposes, related to the company's liquidation, it continues to have personality and, therefore, the capacity to be a defendant"[60]. Once struck off the register, however, the company's purpose is merely to deal with unfinished legal relationships. As the liquidation is incomplete, the existing liquidators retain their position as the company's representatives[61].

Swiss Model

Finally, the interesting situation of Swiss law is worth mentioning, which does not yet lend itself to a clear classification into models adopting or rejecting anthropomorphising approaches. Swiss law seems to be now at a turning point when it comes to resolving the question of the loss of legal existence of companies, and it is not easy to point to the currently dominant view[62]. Historically, the predominant view was that a company's legal personality ceases definitively upon striking off the register, subject to the court's power to reinstate the company's entry in the register (with *ex nunc* effect only) in the event of the existence of an interest worthy of protection (*schutzwürdiges Interesse*; *un intérêt digne de protection*)[63], but this view gave rise to insoluble problems in determining the status of the company's rights and obligations in the period between striking off and reinstatement in the register[64]. Subsequently, the view began to prevail that the striking off of a company from the register has purely declaratory effects, meaning that the decisive factor is whether

[59]ECLI: ES: TS:2017:1991.

[60]In earlier case law, there was both a position coinciding with this (see TS rulings: no 979/2011 of 27 December 2011 and no 220/2013 of 20 March 2013; see also resolution of the *Dirección General de los Registros y del Notariado* (Directorate General of Registers and Notaries): of 13 May 1992, *Boletín Oficial del Estado* (BOE) no 153 of 26 June 1992, of 13.04.2000, BOE no 139 of 10 June 2000, and of 29 May 2001, BOE no 167 of 13 July 2001), as well as a contrary view, according to which the striking off of a company from the register signifies the moment when it ceases to exist as a legal subject and therefore it is not possible to sue the company unless the company's entry in the register is reinstated (TS ruling no 503/2012 of 25 July 2012, ECLI:ES:TS: 2012:5693).

[61]In this way, with reference to art. 400 LSC, TS ruling no 1991/2017 (324/2017) of 24 May 2017, cit.; see also earlier TS ruling no 9304/2011 of 27 December 2011 (ECLI: ES:TS:2011:9304).

[62]The views presented in Swiss doctrine and case law are carefully collated by Jung (2013) at 85-90; see also Vischer (2015) at 259 and Gilles (2024) art. 746, marginal no 5.

[63]Currently, the procedure for the reinstatement of the registration of a struck-off company is regulated in art. 935 of the Swiss law on obligations (*Obligationenrecht*; OR). Initially, such a procedure was not provided for at all in Swiss law, and the current regulation is a codification of the *acquis* of case law (see the reasons for the judgment of the Swiss Federal Court, *Bundesgericht* (BGE) of 6 April 2010, 4A_16/2010, sec. 5.1.1, Swisslex).

[64]This is best illustrated by the considerations of Vischer (2015) at 260-261; see also Jung (2013) at 85-90.

the company's liquidation has been entirely and effectively completed[65]. This view makes it much easier to resolve problems arising in the event of the subsequent reinstatement of the company in the register. However, there is also a viewpoint that coincides with the German *Lehre vom Doppeltatbestand*[66]. In the BGE jurisprudence, there are signs of a move in the latter direction[67]. It still seems too early to assess whether this will be a sustainable trend, though[68].

Conclusions

It is true that the history of the existence of legal persons is considerably shorter than the history of succession law. Nevertheless, it is already several centuries old and still, the cessation of the legal existence of legal persons, including companies, and the fate of their legal relations after the termination of their activities are far from developing general principles that would provide a certain direction for the resolution of specific problems that often emerge in practice.

The field of a company's legal relations after the termination of its activities is still evolving in many jurisdictions. Legislators are clearly searching for a solution that will be the right one. Sometimes, they change their minds in the course. Undeniably, practice plays a large role in this process of evolution. It is in practice that it turns out which needs the theoretical constructs should meet. This is well illustrated in Spanish law, where the legislator may have intended to adopt the Italian model in 2010[69], but the practice seems to indicate that the French model is more suited to the market's needs. The practice also shows that the company's property liability to creditors is not the only reason why it is necessary to maintain the company's legal relations after its deletion from the register. Even if the company no longer has any assets, other unfinished business of the company may still have to be dealt with, such as striking off from the land register some long-expired right that has been entered in favour of the defunct company, or issuing an employment certificate to a former employee.

The anthropomorphising approach does not seem to be a direction that adequately meets the market's needs. In the case of individuals, it is nature that confronts lawyers with a *fait accompli* and necessitates the creation of legal regulations in connection with the definitive and irreversible cessation of legal subjectivity. Nothing of the sort occurs in the case of companies. There is no *fait accompli*. Quite the contrary: the power of decision rests in the hands of the legislator.

One common feature can be seen in all the approaches mentioned above: the recognition of the practical need to maintain a certain "point of attribution" for the

[65]This view is joined by Calderan & Geiser (2016) art. 746, marginal no 3; Haberbeck (2017) and Kuster (2023) art. 746, marginal no 2.
[66]Jung (2013) at 90.
[67]See BGE's judgment: of 2 September 1991, 117 III 39, sec. 3b; 4A.12/2006 of 19 September 2006, BGE 132 III 731, sec. 3.1, and of 25 September 2012, 2C_408/2012, sec. 3.1-3.3.
[68]In its judgment of 19 August 2020, 4A_19/2020, Swisslex, BGE had an excellent opportunity to unequivocally prejudge this issue, but did not actually resolve it conclusively.
[69]Cf. fn. 58.

company's legal relations, even if it has ceased to exist, for as long as the environment with which the company has entered into legal relations requires it. Addressing this need by ascribing to another entity the role of universal successor to the company seems superfluous and only results from a strong attachment to institutions known from the law of succession. Instead of choosing another entity to take over the function of this "point of attribution" for the company's legal relations, a better solution is to assume that this "point" invariably remains the company itself, even though after the cessation of its activities it functions in a different way – as a special residual legal entity. This solution is simpler. There is still the same subject of the rights and the same debtor to obligations. It also has advantages from the point of view of the accessory liability of third parties for the debts of the extinguished company. These persons can still be liable for the company's debts as those continue to exist.

What legislators should focus on, therefore, is regulating the operation of the company in the residual stage. The issue to be decided is to determine the manner of representation of this entity. The most practical solution would be to appoint a representative (*e.g.*, a liquidator) on an *ad hoc* basis when the need arises rather than assuming that the last representative of the company before the transition to the residual stage retains its position (cf. Spanish law), as it were, a perpetual right of representation. Firstly, this representative may no longer exist when the need arises to act for the company. Secondly, he or she cannot be required to be ready to represent the company indefinitely.

As far as creditors' rights are concerned, the general rules on the prescription of claims or the extinction of specific rights should determine the time horizon over which the creditors can exercise their rights, not the fact that the company has ceased to operate. The rules for asserting rights should be standardised irrespective of whether the other party to the legal relationship operates as a sole trader or in the legal form of a company. Regulations disciplining creditors in the course of liquidation of a company should not change these rules.

At the same time, as long as the legal norms concerning a specific right of the company's creditor allow it to be exercised, there should also be a liability of the shareholders limited in amount to what the shareholder in question received as the liquidation quota. Relieving the shareholders of this liability, as provided, for example, in Polish and German law, is not justified. These sums constitute the residue of the company's assets, which guaranteed the satisfaction of creditors entering into legal relations with the company.

In order to address the question contained in the title of the study, it must be stated that drawing a parallel between the life of a human being and the "life" of a company does not lead to accurate results. In the case of companies, legislators have the power to prejudge that there is no category of "legal relations of companies after the cessation of their legal existence" and to state that it is the existence of these relations that determines the continued legal existence of the company, albeit in an altered legal form.

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