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Comparative Overview of Registration, Founding Acts and Dissolution of Limited Liability Companies throughout the legal systems of Austria and Serbia

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1. Gmbh – Gesellschaft mit beschränkter Haftung
2. d.o.o – Drustvo s ogranicenom odgovornosću
3. GmbHG – Gesetz betreffend die Gesellschaften mit beschränkter Haftung
4. FBG – Firmenbuchgesetz
5. UGB – Unternehmensgesetzbuch
6. ARPIACR – Act on registration procedure in Agency for commercial companies. Translated from ZPRuAPR – Zakon o postupku registracije u Agenciji za privredne registre
7. ACC – Act on Commercial Companies. Translated from ZPD – Zakon o privrednim društvima
8. AußStrg – Außerstreitgesetz
9. AGAP – Act on general administrative procedure. Translated from ZOUP – Zakon o opštem upravnom postupku
10. ASHTC – Act on signatures, handwritings and transcripts certification. Translated from ZORP – Zakon o overavanju potpisa, rukopisa i prepisa
11. NO – Notariatsordnung
12. AktG – AktienGesetz
13. IO – Insolvenzordnung
14. UmwG – Umwandlungsgesetz
15. SpaltG – Spaltungsgesetz
16. ZPO – Zivilprozessordnung
17. IPA – Insolvency proceedings Act. Translated from ZOS – Zakon o stečaju

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23. Bundesgesetz über die Umwandlung von Handelsgesellschaften (UmwG) StF: BGBl. Nr. 304/1996 idF BGBl. Nr. 680/1996 (DFB) (NR: GP XX RV 32 AB 133 S. 25. BR: AB 5177 S. 614.) [CELEX-Nr.: 368L0151, 377L0091, 392L0101, 378L0855, 378L0660, 390L0605, 390L0604, 394L0008, 382L0891, 383L0349, 384L0253, 389L0666, 389L0667]
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Abstract – Operating a business in the modern age is unthinkable without the involvement of commercial companies as actors on the commercial market. Depending on the needs of the founders and their abilities and inabilities, multiple forms of commercial companies, such as joint-stock companies and limited liability companies, to name the most popular ones, have been introduced over time in order to accommodate these factors. What are the differences and similarities between the legislative solutions regarding the founding, founding acts and dissolution of limited liability companies of Republic of Serbia and Republic of Austria? This work analyzes the systematic legal solutions of limited liability companies between the Republic of Austria and Republic of Serbia by examining all of the relevant pieces of legislation such are the Serbian Act on Commercial Companies, Act on Public Notaries, Act on Insolvency and Austrian UGB, GmbHG and FBG, only to name a few, along with the educational university-approved literature and case-law definitions of vague and unspecified terms in order to answer these questions. By analyzing the legislations in this regard using the comparative method and writing style, this work aims to provide a clear and precise overview of legal mechanics connected to the foundation of the limited liability companies, the founding acts of limited liability companies and dissolution of limited liability companies as these are one of the most important in company law, effectively influencing the entirety of the company's lifespan, to the point where too strict jurisdiction in these matters can become a barrier to entry for many and thus negatively effect the country's economy and the well-being of the citizens. Additionally, the compliance of Serbian legislation is important in regard to it's ascension and entry into the European Union. The principles behind foundings of the limited liability companies are the same in both countries, as both legislation utilize the foundation based on compliance of the prescribed formal prerequisites, while they differ in regards to authorities that manage the foundation of the companies, with courts being of jurisdiction in Republic of Austria and independent administrative authority, called Commercial Registers Agency in Republic of Serbia. The founding acts were examined in the contexts of their issuance, their doctrinal nature and legal effects, process and effects of founding act's amendment. Following this, in the 3rd chapter of this work, the „legal death" of the limited liability companies, the dissolution of the company, is analyzed with all of the possible ways for which the dissolution of the company is the end-result.

Abstrakt - Das Betreiben eines Unternehmens in der heutigen Zeit ist ohne die Beteiligung von Handelsgesellschaften als Akteure auf dem Handelsmarkt nicht denkbar. Je nach den Bedürfnissen der Gründer und ihren Fähigkeiten und Unfähigkeiten wurden im Laufe der Zeit verschiedene Formen von Handelsgesellschaften eingeführt, wie z. B. Aktiengesellschaften und Gesellschaften mit beschränkter Haftung, um nur die bekanntesten zu nennen, um diesen Faktoren Rechnung zu tragen. Welche Unterschiede und Gemeinsamkeiten gibt es zwischen den gesetzlichen Lösungen für die Gründung, den Gründungsakt und die Auflösung von Gesellschaften mit beschränkter Haftung in der Republik Serbien und der Republik Österreich? Diese Arbeit analysiert die systematischen rechtlichen Lösungen von Gesellschaften mit beschränkter Haftung zwischen der Republik Österreich und der Republik Serbien, indem sie alle relevanten Gesetzestexte wie das serbische Handelsgesellschaftsgesetz, das Notariatsgesetz, das Insolvenzgesetz und das österreichische UGB, GmbHG und FBG, um nur einige zu nennen, zusammen mit der pädagogischen Universitätsliteratur und den Definitionen der Rechtsprechung zu vagen und unbestimmten Begriffen untersucht, um diese Fragen zu beantworten. Durch die Analyse der diesbezüglichen Gesetzgebung unter Verwendung der vergleichenden Methode und des Schreibstils soll diese Arbeit einen klaren und präzisen Überblick über die rechtlichen Mechanismen im Zusammenhang mit der Gründung von Gesellschaften mit beschränkter Haftung, den Gründungsakten von Gesellschaften mit beschränkter Haftung und der Auflösung von Gesellschaften mit beschränkter Haftung geben, da diese zu den wichtigsten im Gesellschaftsrecht gehören und die gesamte Lebensdauer des Unternehmens effektiv beeinflussen, bis zu dem Punkt, an dem eine zu strenge Rechtsprechung in diesen Angelegenheiten zu einem Hindernis für den Eintritt in das Unternehmen für viele werden kann und sich somit negativ auf die Wirtschaft des Landes und das Wohlergehen der Bürger auswirkt. Darüber hinaus ist die Einhaltung der serbischen Gesetzgebung im Hinblick auf den Aufstieg des Landes und den Beitritt zur Europäischen Union wichtig. Die Prinzipien, die der Gründung von Gesellschaften mit beschränkter Haftung zugrunde liegen, sind in beiden Ländern gleich, da beide Gesetzgebungen die Gründung auf die Erfüllung der vorgeschriebenen formalen Voraussetzungen stützen, während sie sich in Bezug auf die Behörden, die die Gründung der Gesellschaften verwalten, unterscheiden, wobei in der Republik Österreich die Gerichte zuständig sind und in der Republik Serbien eine unabhängige Verwaltungsbehörde, die Handelsregisteragentur, zuständig ist. Die Gründungsakte wurden im Zusammenhang mit ihrem Erlass, ihrer dogmatischen Natur und ihren rechtlichen Auswirkungen, dem Prozess und den Auswirkungen der Änderung der Gründungsakte untersucht. Danach, im 3. Kapitel dieser Arbeit, wird der „rechtliche Tod" der Gesellschaften mit beschränkter Haftung, die Auflösung der Gesellschaft, mit allen möglichen Wegen analysiert, bei denen die Auflösung der Gesellschaft das Endergebnis ist.

INTRODUCTION – GmbH and d.o.o

Each country regulates the legal forms for conducting business activities through its national legislation.
The choice of a legal form for a business entity depends on the founders' preferences. They must evaluate the advantages and disadvantages of each type of company and select the one that aligns best with their business interests. This choice may be limited by legal regulations.

Business entities are commonly divided into partnerships and corporations. The most prevalent types of corporations in European countries are joint-stock companies and limited liability companies.

The limited liability company (German: *Gesellschaft mit beschränkter Haftung* – GmbH, English: Private Limited, French: *Société à responsabilité limitée*, Italian: *Società a responsabilità limitata*) as a legal form of business entity originated within the German legal system. Unlike other company types that evolved over time to meet business and economic needs, the limited liability company resulted from direct legislative intervention in Germany. Until then, the only company form where members' liability for the company's obligations was separate from the legal entity was the joint-stock company. However, in contrast to the Anglo-Saxon legal system, the German joint-stock company was not designed for small entrepreneurs. It was considered too rigid and complex, making it unsuitable for business ventures involving smaller capital and fewer members. The ultimate solution was found in the limited liability company, regulated by the Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung - GmbHG* §5), which came into effect in May 1892.

Formed as an exceptional type of corporation with less capital concentration than joint-stock companies, the limited liability company quickly became a popular legal form among entrepreneurs.

In legal literature, various definitions of the limited liability company can be found.

According to one definition, a limited liability company is a form of association for natural and legal persons, domestic and foreign, operating under a common business name and engaging in business activities with limited liability in order to undertake joint economic endeavors or achieve larger business ventures.

Another definition states that a limited liability company is an entity where one or more members hold shares in the company's capital, and the members are not personally liable for the company's obligations, except in cases where a member abuses the principle of limited liability.[1]

[1] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, "Kompanijsko pravo – pravo privrednih društava", 1st ed., 2023, 875, 878-879

According to a third view, a limited liability company is a corporation in which members invest contributions to form an agreed-upon founding capital, based on which they acquire membership rights represented by business shares.

Some authors argue that a limited liability company combines features of both corporations and partnerships. They note that, similar to joint-stock companies, members of a limited liability company bear only the risk of the company's operations without being liable for its obligations. However, the characteristics of partnerships are evident in the mutual trust required among members, resembling partnerships or limited partnerships.

The term "limited liability" in the company's name is a *terminus technicus* that should not be associated with the company's liability for its obligations to creditors.[2] This liability is not "limited"; rather, the company is fully liable for its obligations with all its assets. The limitation applies only to members' liability for the company's obligations, restricted to their capital contributions.

Since a limited liability company is an independent legal entity, it possesses its own assets, separate from those of its members.

The company's assets originate from the contributions made by its members, ceasing to be their property and becoming the company's assets. Through economic activities and legal transactions, this initial asset base may increase or decrease, with everything the company acquires becoming part of its assets. The company and its members have separate ownership.

Both in the Republic of Serbia and Austria, business entities are subject to the principle of *numerus clausus*, meaning that no other organizational form of business activity can be established beyond those provided by law.[3]

The Serbian legal system allows for the establishment of the following types of business entities:

- General partnership (*ortačko društvo*);
- Limited partnership (*komanditno društvo*);
- Limited liability company (*društvo s ograničenom odgovornošću*);
- Joint-stock company (*akcionarsko društvo*).

Austrian law permits the formation of these business entities:

- Limited Liability Company (*GmbH*);

[2] Zlatko Stefanović, *"Kompanijsko pravo"*, 1st ed., 2020,314, 315-316
[3] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *"Kompanijsko pravo-pravo privrednih subjekata"*, 3rd ed., 2023, 284, 285-286

- Joint-Stock Company (*AG*);
- European Company (*Societas Europea – SE*);
- Flexible Company (*FlexCo*).

A limited liability company acquires legal personality in Serbia upon registration with the Business Registers Agency, and its name must include a designation indicating it is a limited liability company (e.g., "d.o.o.").

In Austria, a limited liability company gains legal personality upon registration with the commercial courts. Its name may (but does not necessarily) include the designation "GmbH" or "Gesellschaft mit beschränkter Haftung."

CHAPTER I - R E G I S T R A T I O N

Registration of Limited Liability Companies (Gesellschaft mit beschränkter Haftung – GmbH) is governed by Act of Limited Liability Companies from March 6, 1906 (Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung) with all of the changes since that time, Commercial Register Act (Firmenbuchgesetz – FBG) and the Commercial Code (Unternehmensgesetzbuch – UGB) in Austria, while in Republic of Serbia the governing laws for LLC registration (Drustvo ogranicene odgovornosti – d.o.o.) are Zakon o postupku registracije u Agenciji za privredne registre ("Sl. glasnik RS", br. 99/2011, 83/2014, 31/2019 i 105/2021) (translated - Act on registration procedure in Agency for commercial registers - ARPIACR) and Zakon o privrednim drustvima ("Sl. glasnik RS", br. 36/2011, 99/2011, 83/2014 - dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019 i 109/2021) (translated – Act on commercial companies) which contains only two Articles, Aticle 5 and Article 6, that are related to LLC registration. The first difference between two legislations is that there is no Code of laws in the Serbian legislation, like Commercial Code in the Austrian counterpart. While having a Code is more efficiant from the practiality standpoint of learning, understanding and practising law in the sense of having all, or most of, relevant information at one place, in this particular topic that does not seem to pose a problem, since only a few laws govern the forementioned registration systems. The Act of Limited Liability Companies stipulates the regulation of LTD registration in it's first chapter, starting from Article 1 and concluding with Article 12. The competent authority for the LLC registration is Regional Court (das Landesgericht in German) which has juridisction on the territory of the future adress of the company's seat or registered office. The Regional Court on the territory of Vienna is called Regional Curt of Vienna (das Handelsgericht Wien) and the Regional Court on the territory of Graz is called Regional Civil Court, Graz (das Landesgericht für Zivilrechtssachen Graz). While the Austrian LLC registration system involves a judicial body, that is a court, the Serbian legislation takes a different approach to the solution of this problem by removing the authority of courts over the registration and transferring it to an independent, government-established and owned body - the Agency of Commercial Registers. This system of an independent body that is in charge of the commercial registers took effect in Republic of Serbia in 2004, with the adoption of the Agency of Commercial Registers Act which defines the Agency as a public agency with a legal personality, seated in Belgrade, the capital of Republic of Serbia, with the goal of keeping and managing different registry databases, such as the register of commercial entities, register of different chambers, register of endowments and foundations and others. Main organs of the body are the director and the board of directors. The biggest advantages of the Austrian system– the judicial system of commercial registry – are twofold :

1. legal certainty - the registries are managed by the courts which are independent from legislative and executive state powers and;
2. the efficiency in different procedures governed, managed and ran by the court such as litigation, since the insight into these is done in an instant, removing the providing third party body from the process, making it much faster and more straightforward. Republic of Serbia had the same system until 2005, which marks the year of adoption of the Agency of Commercial Registers Act. This Act has been adopted and the system has been changed because the Serbian court system at that time was overburdened with number of different by law delegated powers and responsibilities - which aside from the primary jurisdiction were both the certification of documents and keeping and managing the commercial and other registers. With the lack of personnel and lack of expertise for those delegations it was clear that there was a need for independent bodies in order for these two burning questions to be resolved in a sufficient manner - the commercial and other registers were taken over by the Agency for commercial registers and the certification of documents and other related questions and issues were transferred to the public notaries in 2011 with the adoption of the Public Notaries Act.

While these systems are more complicated on paper, for the Serbian market of services they seem to be more beneficial for the regular person who requires these services. Procedures at the Agency are much faster than the same procedures that used to take place in the court framework prior to 2004, especially in the last couple of years since the introduction of public, online database of the Agency where all relevant information and data can be found.

Limited liability Companies can be founded in both Austria and Serbia by an individual or by multiple people for any lawful purpose with exclusions of conducting insurance and operating as political associations in Austria. It is clear that a purposeless LLC cannot exist. Prior to the registration itslef, company is considered non-existent, meaning that the sheer fact that one or multiple people has or have established some sort of business for a commercial remuneration does not mean that the LLC in actuality exists. It´s existence is conditioned i both legal systems by successful registration into the commercial register. That is the constitutive characteristic of registration. Austrian legislation does provide one exclusion to the rule that the company must be registerd in order to exist in the eyes of the law. As the company is nothing more than the individual or the group of people with an intent of performing certain activity and pursuing economical value for that activity, there can be some cases in which some actions have been taken in the company's name before it has been registered at the Austrian Commercial Register. In those cases Article 2, paragraph 1 of the Act applies which stipulates that for those actions are jointly personally liable those acting. This is a prime example of what is called a legal fiction – some actions are taken in the name of the company which does not exist, because it has not been registered as of that time, but they are taken as if the company actually exists. The concept of joint personal liability means that all those who acted in the execution of the action in company's name are liable personally not just for their own doings, but even for doings and liabilities of everyone else who acted in to-be company's name. This is unlike the concept of several, separated liabilities where each person is responsible only for their own actions and not for the actions of others involved. Now, the registration procedures of LLCs in both legislations will be covered and compared, along with all the necessary documentation for the registration itself and the Austria-exclusive simplified registration process .

In order to fully cover the registration procedure of LLCs we need to ask the questions such as the initiation of registration procedure of GmbH and d.o.o, authorized people for the initiation, the required documentation, the legal structure behind the procedures and their overview, the state bodies with authority to decide whether to register the company or not and compare the answers to these from both legislation's perspectives.

1.1.1 – Registration procedure initiation

The registration procedure in Austria starts exclusively by the submission of application to the court, as provided in the §8 (1) AußStrG (AußStrG - Federal law on judicial proceedings in legal matters other than disputes). As this procedure does not involve any disputes as such, this legal act is applicable. On the contrary, the registration procedure in Republic of Serbia can be done in two different ways – either by registration request submission or ex officio initiation by the Agency itself (§5 ARPIACR) . This is the primary difference between the Austrian and Serbian legislation in the context of the registration procedure initiation.

1.1.2 – Authorized persons

Austrian legislation does not expressly stipulate persons authorized for the initiation of the GmbH registration procedure, but the AußStrG does contain the provision which regulates who can be a party in the non-dispute procedure, which the GmbH registration procedure surely is. According to the §2 AußStrG, the parties can be either the applicant, who is, most often, the founder or the founders of the company or the person designated by the applicant as the defendant or otherwise as a party or any person insofar as their legally protected position would be directly affected by the decision sought or envisaged by the court or by any other judicial activity and any person or body that must be involved in the proceedings on the basis of statutory provisions.

As the procedure for d.o.o registration takes place in front of the Agency as the non-judicial state body, ARPIACR specifies that only the founder is authorized to initiate the registration process.

1.1.3 – Required documentation

In order to successfully register a d.o.o in, the Art. 10 of Rulebook on the contents of the Register of Business Entities and the documentation required for registration imposes an exhaustive list of the required documents which includes the founding act of the company with the certified signatures of the members of the company, a document on the identity of the members of the company in accordance with Article 6 of this Rulebook, a decision on the appointment of a representative if it is not determined by the founding act, a decision on the appointment of the chairman and members of the supervisory board, if the management of the company is two-tier, if the chairman and members of the supervisory board are not appointed by the founding act, a bank certificate on the payment of a monetary contribution, or an agreement of the members on the assessment of the value of a non-monetary contribution or an assessment of the value of a non-monetary contribution, as well as a statement of the members of the company that the non-monetary contribution has been entered into the company, if the contribution is paid or entered into the company.

The Art. 10 does not specifically stipulate the mandatory contents of the founding act other than the certified members' signatures, the Agency does also check for other mandatory content, on the basis of which it can dismiss the registration of the company if the aforementioned is missing based on the Art. 14, ARPIACR in connection with the Art. 17, paragraph 2 ARPIACR and Art. 141 Act on Business Companies. Art. 14 ARPIACR stipulates that upon the reception of the submission of the Unique registration application of legal and other entities establishment and registration in the unified tax register obligee, the personnel of the Agency is to check the submitted documentation and especially the additional, already mentioned, documentation on the basis of the 6th paragraph of the same Article and the contents and legal form of it regulated by another act. In the case of d.o.o registration, that act is Act of Business Companies which in it's 141st Article lists the mandatory provisions that the founding act of the d.o.o must incorporate. If any of these provisions are missing or the legal form isn't in line with what the Act provides the Agency will dismiss the registration based on Art. 17, paragraph 2 ARPIACR. In order to avoid the dismissal, the founding act, which must be in either form of an agreement, if there are multiple members of the company, or in form of a one-sided decision, in case of a singular founder and member of the d.o.o, must contain the information on the members of the company

from Art 9a of the same Act, as well as information on the residence of the member or members of the company, business name and headquarters of the company, the predominant activity of the company, the predominant activity of the company, the total amount of the basic capital of the company, the amount of the monetary contribution, that is, the monetary value and description of the non-monetary contribution of each member of the company, the time of payment, i.e., the entry of contributions into the share capital of the company, the share of each member of the company in the total share capital expressed as a percentage, determination of the company's organs and their competences as mandatory provisions, according to Art. 141 ACC and a decision on the appointment of a representative and a decision on the appointment of the chairman and members of the supervisory board, if the management of the company is two-tier as optional provisions.
Nevertheless, these provisions are optional when it comes to the contents of the founding act, as they can be submitted independently of the founding act to the Agency in the form of decision.

Point one of the Art. 10 of Rulebook on the contents of the Register of Business Entities and the documentation required for registration stipulates that the signatures of the members of the company must be certified. Certification of the signature alone is possible and is performed by a public notary or public notary intern in accordance with the Act on Public Notaries. This process will be covered in a following chapter dedicated to certification.
With the point two of the article in mind, Art. 6 of the same Rulebook stipulates that the identification data for the members of the d.o.o includes their full name, their Unique Citizen Identification Number (JMBG in Serbian). The accuracy of this data is checked by submitting the copy of the national ID or by submitting the qualified electronic certificate for electrical signing issued in accordance with the laws of the state.
Point 5 is specifically complicated as it lists multiple different documents which can be in the form of certificates, agreements, assessments and statements, depending on the nature of the contribution to the company and the amount of members. If the contribution is monetary, the bank certifies that the monetary contribution has been paid. If the contribution is non-monetary, for example the contribution is in form of office space, devices, vehicles or machinery, and the company has multiple members, their agreement on the assessment of value of the non-monetary contribution is required as well as the statement that the contribution has been entered into the company. On the other hand, if the company has only one member, the founder, and the contribution is non-monetary, agreement on the assessment of value of the non-monetary contribution ,due to the lack of the parties required for the agreement, is impossible and is replaced by the statement of the founder assessing the value of the entered non-monetary contribution. The assessment is done in relation to the market price, having in mind all the relevant characteristics, of the object of contribution in mind. For example, if the object of the contribution is a vehicle or some sort of machinery, some of the relevant criteria for the value assessment would be market price of the vehicle at the time of entry into the company, the state of the object, is it bought new from the manufacturer or from a third-party as the previous owner,

date of production of the vehicle, etc.
Along with these documents the registration application, called the Unique registration application of legal and other entities establishment and registration in the unified tax register obligee by the Art.7 of the Rulebook, must be submitted, in case of the non ex-officio registration. The registration application is to be submitted in electronic form exclusively in case of commercial companies registration, which includes d.o.o. For other entities, such as partnerships or entrepreneurs, that are eligible for registration in the Agency's commercial register, registration application can be submitted in a written, physical form either in person or by mail, or in electronical form. Registration application must include the name of the commercial register that the request is being submitted to, the object and the type of the registration, identification data of the submitter, in which way will the decision of the Agency on registration of the company be delivered to the submitter as the mandatory content which is regulated by the Art. 6 ARPIACR.

On the other hand, registering a GmbH in Austria can only be done by the authorized applicant, who must submit, according to the §16 Firmenbuchgesetz (FBG), the registration application, which must contain company name, legal form, registered office (political district), business address, short name of the business sector, date of conclusion of the memorandum of association, forename, surname, date of birth and address of the partners, their companies register number, if applicable, their address (for natural persons), the amounts of the contributions accepted and made by them and, if applicable, their capital contribution subject to founding privilege, level of initial capital stock, forename, surname, date of birth and address of the managing directors, as well as the type and start date of their power of agency, where applicable – if appointed – forename, surname and date of birth of the supervisory board members and their function, declaration from the managing directors that the initial capital stock has been raised appropriately and if applicable, the claim of founding privilege.
Comparing the two applications, it is evident that the Serbian application is much more simplistic and informal than it's Austrian counterpart. This does have it's own advantages and disadvantages. Having a simple application means that errors are less likely to take place during it's creation by the applicant, who usually is not a person with legal training or expertise and less work for the authority with jurisdiction for the registration of the company. On the other hand, having a more comprehensive approach to the contents of the application does often mean that the applicant would require assistance from the lawyer or an attorney in order to create a suitable application but it also creates better legal certainty in the registration itself as it involves making sure that all the required documentation, along with the application itself, is in line with the minimal conditions stipulated by the national law.
When it comes to additional documentation, GmbHG lists, in it's 3rd paragraph, that the application must be accompanied by the article of association and the appointment of the managing director. When the founder of the future GmbH is one individual natural person, the article of association is to be replaced by the declaration of establishment.
Partnership agreement is one of the main mandatory pieces of documentation required for LLC

registration. Since the name of this document includes the word „agreement"-which implies the meeting of wills- it is clear that this can not be created by a single individual person, but rather by at least two people. The partnership agreement has other uses other than being the mandatory requirement for the company's registration and can have many elements and stipulations, but for the purpose of registration it must include the company name, the geographical location of the company's registered office, the objective of the company, the amount of share capital and the share capital contribution.

This list is not limiting, meaning that the partnership agreement can also include other lawful stipulations but it must include the aforementioned points. Otherwise, the registration can be denied due to insufficient mandatory elements of the partnership agreement. Also, any elements of the agreement which have a contrary or derogatory effect to the regulations of the Act can not be included in the agreement and even if they are, they have no legal effect.

The company's name is the first required element of the partnership agreement. „ Gesellschaft mit beschränkter Haftung" must be included in the name of the company, even in the case of continuation from the §22 UGB.Company's registered office is a term which must be specified in every single instance of company registration. The applicant(s) can choose one between three different factual locations for the registered office:

a) the location where company has business;
b) the location of company's management;
c) the location of company's administration.

This regulation can be deviated from for important reasons.
Share capital and share deposit must be denominated in nominal amount in euros.Minimal amount of the share capital must be 10.000,00 euros. If it's lower than that the reward of founding of the company will be denied. The share capital is made up of share contributions of individuals in the minimal amount of 70 euros. At least half of the share capital must be raised through cash contributions (at least 5.000,00 euros), with the exclusions stipulated by paragraphs 2 to 4 of the same Article, in which cases the cash contributions in total can be lesser than half of the share capital. Each individual can have only one share contribution. In the case of remuneration or special benefits to or for the specific partner, the partnership agreement must include the details of that occurrence. §6(4) GmbHG specifies these details as the identification of the partner who is being credited, the object of the takeover, the monetary value for which the assets are taken over and specification of the benefits granted.
For example, if person X is to be remunerated 5.000,00 euros for the overseeing the company dissolution process, the partnership agreement must include that a person X is being credited, shall oversee the company's dissolution process and shall cover the necessary expenses and fees of the dissolution process, the remuneration for this activity shall be 5.000,00 euros.
The prohibition of rewarding the partner from the share capital for their efforts in registering the company or it's preparation is stipulated in §7 GmbHG. It is forbidden to reward or remunerate

the partner from the share capital for their efforts in going through the registration process of the company or the preparation efforts, as the share capital must stay complete and intact after the company has been registered in the commercial register. This does not mean that the partner who suffered the cost of fees of the registration will go unreimbursed. The partner will be reimbursed in the maximum amount set up for the start-up costs in the partnership agreement. It is up to the partners to properly assume and calculate the total amount of costs of the company's start-up so the partner can be properly reimbursed.
In the case of partner providing recurring services as a part of their contribution to the share capital of the company, in addition to their financial contribution, Article 8 stipulates that it is required to outline the scope of the service, the conditions of the payment, any contractual penalties for the default and the basis for payment remuneration in the partnership agreement. For example, if one of the partners is providing recurring service of bookkeeping or marketing and those services are considered as assets, partnership agreement must include the aforementioned details – what exactly is that individual doing for the company and how is it contributing to the share capital, what does the payment plan look like, how is the amount of payment calculated and any potential contractual penalties for not providing services in due time, for example.
In the case of potential share transferability, the consent of the company for share transfer must be regulated in the partnership agreement.

In Austria it is possible for one individual person to establish the GmbH. In that event, the partnership agreement is to be replaced by the declaration of establishment with all the rules applicable to the partnership agreement applicable mutatis mutandis to the declaration of establishment.

As previously stated, the company can only be entered into the database of Commercial Registry on the basis of submitted application signed by all partners with the notarized copy of the partnership agreement or notarized copy of declaration of establishment and the notarized copy of documents appointing the managing directors. At the same time, the partners or the sole establisher must sign their signature at the registry court or provide their signature in certified form.

1.1.4 – Registration procedure overview

Registration procedure in Austria is governed by Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG) (translated into Federal Law on Judicial Procedure in Non-Contentious Legal Matters (Non-Contentious Law – AußStrG)) and Firmenbuchgesetz (FBG) (translated into Companies Register Act (FBG)), while Zakon o opstem upravnom postupku *("Sl. glasnik RS", br. 18/2016, 95/2018 - autentično tumačenje i 2/2023 - odluka US)* (translated **-** Act on General Administrative Procedure – AGAP) and Zakon o postupku registarcije u Agenciji za privredne registre ("Sl. glasnik RS", br. 99/2011, 83/2014, 31/2019 i 105/2021) (translated – Act on registration procedure in Agency for commercial registers – ARPIACR) govern the Serbian counterpart.

Both of these procedures are procedures that do not include any disputes, so they are regarded as a judicial procedure in non-contentious legal matters in Austria and as a legal matter of administrative procedure in Republic of Serbia. The difference in defining these two procedures exist because the registration procedure is performed in front of the judicial court in Austria and that fact makes the procedure a judicial matter, while in Serbia the same procedure is not carried out in front of the court, but rather a state body, which in turn does not make the procedure a judicial matter, but an administrative one.

Both systems follow a set of principles that are universal, such as:

-publicity and availability principle –according to which registered data and documents are public and accessible to all persons, through the respective bodies' databases and by direct inspection of the register, unless the public and accessibility is limited or excluded by law;

- accuracy and presumption of conscientiousness, according to which third parties who rely on data from the registers in legal transactions do not bear harmful legal consequences due to inaccurate data in the registers;

- formality- according to which the registrar makes decisions based on the facts from the application, attached documents and registered data, without examining the accuracy of the facts from the application, the credibility of the attached documents and the regularity and legality of the procedures in which the documents were made;

- the time of creation - according to which data and documents are kept in the register according to the time of creation of the data, that is, the document, unless otherwise specified by law;

- chronological order - according to which the earlier submitted application has priority in decision-making.

As previously stated, the only way to initiate the GbmH registration is to submit a registration application to the competent regional court, which is the court of first instance based in the location of the future company's address of the seat. On the contrary, the commencement of the registration procedure in Serbia can be done either by submitting a registration request to the Agency of Commercial Registers, or ex officio by the Agency itself, which is rare in the current state of affairs in Serbia. The application for the regional court of the first instance in Austria has to be made up in the written form (§8 AußStrG) or submitted via the Electronic Legal Transactions system. The application must be prepared by the founders and certified by court or the notary. The Serbian counterpart is submitted in an orderly form, either physically in person by the applicant to the Agency or via the post office or electronically. In the case of post office submission,the date and time of the Agency's reception of the application form is considered the date and time of the application submission (Art. 9 ARPIACR). Upon application submission, the applicant receives a reception of submission confirmation from the Agency, confirming the fact that it has received the application. However, Agency is required to issue the aforementioned confirmation only upon the applicant's request. Information about the application, such as the identity of the applicant, the status of the application, the type of application, the date and time of application submission is published on the Agency's web-page (Art. 12 ARPIACR). The applicant is entitled by Art. 13 ARPIACR to change the application or to quit the registration procedure until the decision on the registration by the registrator has been issued (Art. 13 ARPIACR). The registrator, upon the reception of the application, examines the following, which is stipulated in the Art. 14 ARPIACR: whether they are competent to act upon the application; whether the application was submitted by a person authorized to submit the application and whether it was signed in accordance with the law; whether the data or document is subject to registration; whether the information or document whose registration is requested has already been registered; whether the application contains data and facts necessary for registration; whether prescribed documents, the content and form of which are determined by law, are attached to the application; whether the facts from the application agree with the facts from the documents attached to the application and the data registered in the register that acts on the application, that is, with the data registered in the competent register, which are publicly available; whether another legal entity or entrepreneur has already been registered in the registry that acts upon the application under the same name, or whether an application for registration under the same name has already been submitted, or whether the name has already been reserved in accordance with this law, i.e. whether the name has been determined in accordance with the law; whether proof of payment of the fee for conducting the registration procedure was attached to the application, on the basis of which it can be determined that the fee was paid to the current account of the Agency; whether the application was submitted within the deadline prescribed by law, if the deadline is a condition for registration; whether the application referred to in Article 17, paragraph 3 of this Act was submitted within the prescribed period and whether the identified deficiencies were remedied; whether the registration of the data or document is contrary to a special law; whether the registration of the data or document is contrary to the act of the competent authority adopted in accordance with the law.

Upon receiving the application, the registrator must issue their decision regarding the d.o.o registration in the form of the solution in the time frame of five working days, pursuant to Art. 15 ARPIACR. The solution can be threefold – solution approving the registration application, solution that is partially approving the registration application and the solution that dismisses the registration application. The most important one, which generates an unwanted outcome is the dismissing solution which is regulated by the Art. 17 ARPIACR. The registrator will dismiss the registration application if the following the violations of any of the following points from the Art. 14 ARPIACR occur:

-whether they are competent to act upon the application,

-whether the data or document is subject to registration,

-whether the information or document whose registration is requested has already been registered

-whether the application was submitted within the deadline prescribed by law, if the deadline is a condition for registration;

-whether the application referred to in Article 17, paragraph 3 of this law was submitted within

the prescribed period and whether the identified deficiencies were remedied;
-whether the registration of the data or document is contrary to a special law;
-whether the registration of the data or document is contrary to the act of the competent authority adopted in accordance with the law.
However, for violation of any other point of the Art. 17 ARPIACR, the registrator needs to provide an explanation regarding to which exact prerequisite for the registration. For example, if there has been a violation regarding the necessary documentation which is required to be attached to the registration application, the registrator shall dismiss the application via the dismissing solution and as a part of that solution will explain the circumstances of the dismissal. The applicant has an option to submit an additional registration application with all of the corrections listed in the published solution and indicating the number of dismissal solution within the time frame of 30 days from the date of solution publication. Upon submission of the additional application, the applicant is obliged to attach only the previously missing documentation or the documentation in proper form and content which previously lacked those characteristics, meaning that the applicant does not have to attach all of the documentation again, which does contribute to the speed of the registration procedure. If these prerequisites are met, the applicant has a one-time right to pay half of the procedural expenses, according to Art. 17 para. 2 and para. 3 ARPIACR.

For the documents and data that do fulfill the formal requirements for the registration, the registrator will issue a solution of partial approval in regards to those aforementioned as stipulated by Art. 18 ARPIACR, and proceed to issue a dismissing solution for the rest of the registration application in accordance with the Art. 17 ARPIACR.

If the registration application completely fulfills the formal requirements, the registrator will issue a solution of application approval (Art. 16 ARPIACR). The formal requirements are considered as fulfilled if the registrator has not found any violations in place in regards to Art. 14 para. 1, points 1 through 14 ARPIACR. In short, if there are no grounds for dismissal, the registrator must issue an approving solution. The registartor has no legal power to decide whether or not will the registration occur if the formal requirements are met.

In the event of registaror missing the deadline for the issuing a decision of 5 working days as stipulated in Art. 15 ARPIACR, the application is automatically deemed to be approved and registrator must issue a solution which declares that fact, and the registration must take place immediately upon the solution publication, except when there are violations of the following formal prerequisites: incompetency of the Agency; the data is not a subject of registration; the data is already registered in the register of the Agency;the application is not submitted in the legally binding deadline, if such timely submission is a prerequisite for the registration; whether the application referred to in Article 17, paragraph 3 of this Act was submitted within the prescribed period and whether the identified deficiencies were remedied; whether the registration of the data or document is contrary to a special law; whether the registration of the data or document is

contrary to the act of the competent authority adopted in accordance with the law (Art. 19 ARPIACR). In those cases, the registrator will issue a dismissing application solution. The applicant has the right to have the issued decision delivered to them either by post to the registered address for post shipments of the newly established business' registered, the address of the newly established business' seat, the address of the applicant themselves, physically in the Agency's premises or electronically via e-mail (Art. 24 para. 1 ARPIACR). If a person with the power of representation, which can but does not have to be an attorney, has applied for registration in the name of the founders, the issued decision is to be delivered to them and not the applicant with the request, analogue to the first paragraph of the same Article of ARPIACR (Art. 24 para. 5 ARPIACR).
The immediate entry in the commercial register held and managed by the Agency is the effect of the publication of the approving solution of the registration application and the erga omnes effect takes place the following day after the day of publication (Art. 22 para. 3 ARPIACR). Erga omnes effect represents a legal concept by which certain rights, such as an entry of a company into a commercial register which is a core, most basic identity right for legal persons, which are a product of a legal procedure between one or two parties and a state body, either an administrative body or a judicial body and seemingly have legal importance only for those acting in said procedure in reality affect all subjects of law and the holders of such right are protected by law and all subjects of law are obliged to respect the said right.
The company's establishment by entry into the commercial register has no retroactive effect, as it's legal power comes into existence at the day of entry and continues to apply only for the future and not the past (Art. 22 para. 4 ARPIACR).
The Austrian procedure is handled differently, as it's fundamentally different in nature compared to a Serbian administrative procedure of d.o.o registration. Upon receiving the application with the enclosed documentation required, the court examines both the application and the documentation provided. The court then decides wheather the formal requirements are met.On the contrary to the Serbian regulation which stipulates the exact amount of days the registrator has to reach a decision and issue it, it is unspecified in the Acts such as Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), Firmenbuchgesetz (FBG) and ZPO (Zivilprozessordnung) as to what deadline does the court have to decide on the registration of GmbH. However, this process should be concluded rather expeditiously as it doesn't require mandatory oral hearings and the needs of the founders would've been ignored by the legal system if these proceedings would've dragged on for an extended periods of time, as it is in the founders' or founder's interest to commence their business activities through their newly founded GmbH as fast as possible. Not setting forth the exact deadline for the court's decision does not necessarily mean it is opposite of beneficial. It gives court the room it needs for situations when it would be hard to stick to the exact deadline or even impossible due to the workload of the court. Upon reviewing all of the formal requirements, the court can either issue a positive decision, a negative resolution or issue an order for improvement.
In the event that the registry entry application is incomplete or has deficiencies which are obstacles

to entry remediable by the applicant, the court will issue an improvement order and set the appropriate instructions and potentially a deadline if such is necessary (§17 (1) FBG). The logic behind this provision is to avoid needless rejection because of the deficiency that could have been easily remedied and having to re-initiate the procedure for insignificant reasons in the first place. It gives enough room for applicants to be assured that they won't be punished for unimportant errors that they could've made, but as long as they are actually insignificant. The improvement order cannot be issued due to the partnership agreement not being in notarial form or the share capital is lower then the amount stipulated by the GmbHG. These flaws result in rejection of the entry application because they are severely out of line with the Acts that govern the corporate law in Austria.

If the applicant acts upon the improvement order in the deadline, if such is imposed and remedies the deficiency, the effect of such action is that the application is deemed to have been submitted on the first day of it's initial submission (§17 FBG). This is important for preservation of the principle of chronological order in law – the applicant of the first submitted application is to be protected against all other applicants that submitted the same application. The applicant cannot have their right infringed because another applicant submitted a subsequent application for the formation of the same GmbH in the time frame of the proceedings regarding the first application in which the improvement order has been issued. If there wasn't such rule in place, by the time of submission of the remedied application, another one by a different applicant could've already been approved, stripping the initial applicant of the right to establish the desired GmbH. Section 3 of Außerstreitgesetz (AußStrG) provides the necessary rules regarding the decisions, their forms and the contents of the copies and deliverables in the proceedings in non-contentious matters, such as the GmbH registration. §31(1) AußStrG stipulates that the form of the court decisions is a resolution, unlike it's Serbian counterpart where the decisions of the registrator are in the form of a solution. The resolution can be issued in two ways: in writing and orally. The resolution issued in writing is the general rule, but it can be orally expressed if the party is present in front of the court, though this kind of issue in the GmbH registration proceedings is rare. §31 (3) AußStrG prescribes that the decision must be taken within the scope of the subject matter meaning the decision must clearly resolve the matter of the registration application. This is also supported by the following paragraph by which the decisions that came out of the proceedings that are initiated by the application must be made within the framework of the application itself and the §20 (1) FBG that provides that the court's decision must contain the wording of the entry, which is the primary request of the registration application. The written resolution must follow the required structure of content which is described in the § 39 AußStrG. The structure contains the identification of the court handling the case and the identification of the case itself, the identification of the parties which is reflected in their first and last names, their representatives, if such exist in the particular case, their addresses, their place of birth and their nationality. The subject matter as well as the ruling of the decision and the justification for said ruling are the core part of the resolution (§ 39 (1) AußStrG). It is mandatory that the ruling and the justification be clearly stated (§ 39 (2) AußStrG). The decision can either be implemented immediately or after it

has become final or binding. For the latter to take effect, the decision must contain such wording, so it cannot take place ex lege. Upon it's implementation, the GmbH is listed in the commercial register and is considered formed.
There is an additional, particular way of GmbH incorporation, called simplified incorporation.This type of registration of LLCs in Austria is regulated by GmbHG,§ 9a through §12. A future company can be an object of these rules if there are no multiple shareholding partners but there is only one sole shareholder who is a natural person and a sole managing director at the same time, the share capital is 10.000,00 euros with half of that (5.000,00 euros) paid in cash, the content of the declaration of incorporation is limited to a minimum of company's name and adress of the registered office of the company, the object of the company, the amount of share capital and the share contribution of the sole proprietor, and the appointment of the managing director, the regulations on incorporation fee reimbursement stipulate that the reimbursement is possible for up to 500 euros and on the distribution of the balance sheet profit, if it is reserved for a special resolution from year to year.

These conditions indicate that only a limited type of companies are eligible for simplified incorporation, based on the required quantity of the partners – or rather a lack of quantity - and the required amount of share capital. The benefits of this system reflect in the facts that the declaration of the incorporation does not need to be in the notarial deed in order to be eligible for incorporation submission and is submitted electronically in a way which is regulated by the Federal Minister of Justice. This way, the procedure is much more straightforward, efficient, cheap and less formalized since the public notary is taken out of the process and there is no need for the notarial certificate of the highest order and that the registration application form does not need to be certified by the notary and is submitted electronically in a way which is regulated by the Federal Minister of Justice.

The credit institution shall verify the identity of the sole proprietor, based on their official photo-ID, upon payment of the cash capital contribution into the newly opened account and it shall transmit the bank confirmation, a copy of the photo ID of the future shareholder and managing director and a specimen of the signature to the commercial register. In the case of the single-proprietor company, the sole proprietor can have multiple contributions to a share capital, unlike the founders of the companies that are not under the simplified registration regulation. These contributions can be payable and not payable in cash. For each payable in cash contribution, at least the quarter of it must be paid prior to the registration, if the amount of the contribution payable in cash exceeds the value of 70 euros. If it does not exceed the mentioned amount, the cash contribution must be paid in full. If compensation of assets that are being taken over is to be credited to the share capital, the payment must be fully completed immediately. The minimal amount, that being 5.000,00 euros, which must be paid prior to the incorporation must be made as the credit to an account of the company or the payment to the managing director for their free disposal or payment to the notary as a trustee for their disposal.

In the third case, the notary as a trustee will transfer the amount to the company's account after it has been successfully registered.

The registration application form must contain the declaration which contains the information that clarifies that the cash share capital contributions have been paid in the required amount, that these amounts are free disposal of the managing directors or the notary trustee, provisions regarding the proof that the managing directors are not restricted, especially by counterclaims, in the disposal of the paid amount proof that the managing directors are not restricted, especially by counterclaims, in the disposal of the paid amount and proof of payment of the cash share contribution, which is either a written confirmation from the credit institution or the written confirmation of the notary as a trustee.

The managing directors are burdened by the liability of any damages that incur due to false statements when it comes to company's registration information, although the credit institutions and notaries as the trustee are liable for the accuracy of their written confirmations.
The compensation right for the legal fees of the registration procedure expires in 5 years, starting from the date of company's registration. This right or the deadline for the execution of said right cannot be canceled, changed or modified in any way by agreements or waivers.

It is clear that the simplified incorporation is more efficient that the traditional, regular incorporation – a lot of the crucial steps from the regular registration are being left out, such as notarial deeds as a certification form of the partnership agreement which can only be obtained through the separate, notarial procedure or some parts of the procedure have been transferred to another entity such as a credit institution. These benefits do come with a couple of conditions that limit the amount of the eligible future companies. Regardless of the pathway towards the incorporation of the company, either it being a regular registration procedure or the simplified one, the company is officially registered when the articles of association, which are company's name, the address of the registered office, the address of the business itself, the date of conclusion or creation of articles of association – either a partnership agreement or the declaration of incorporation, the amount of the share capital, the amount of capital contributions, the identities of the shareholders – their names and their birth dates, the company register number if such does exist, the amount of the payments made on the capital contributions, the identity of the chairman and their deputies, the identity of the supervisory board members, the identity of the managing directors and the power of their representation of the company, the duration of the company if applicable, the use of the founding privilege, the amounts of privileged capital contributions are entered in the commercial register.

1.2 – Forms of certification

As it is impossible to incorporate a GmbH and a d.o.o. without some kind of notary certification of required documents, it is appropriate to explain different forms of certification which are done

by Austrian and Serbian notaries. These forms are established to create legal certainty in all relevant facts. Two main forms of certification done by the Austrian notaries are certification and notarized form. Certification can be applied in many different instances, such as:
-the conformity of paper document copies with their original counterparts, conformity of electronic document copies with their original counterparts (also called „vidimization"), conformity of paper printouts with the electronic original counterparts;
-accuracy of translations;
-authenticity of a signature (also called „legalization") and the authenticity of the writing;
-about the time of presentation of documents;
-about entries in the public books or registers;
-about deliberations and decisions and others listed in Article 76, paragraph 1, points A) through L) Notariatsordnung (NO) (Notarial regulation). There are different rules when it comes to executing the certification due to the difference in nature of the certifiable items, which rules are stipulated in §77 and §79 NO, so this work will focus on the certification of relevant items when it comes to GmbH registration, which is provision of signature to the registry court in certified form. In order for the notary to commence signature certification, the applicant must identify themselves and if applicable, identify their date of birth in accordance with §55 NO and declare to the notary that they know the contents of the signed document and the document was signed without coercion.In case of electronic signature, applicant must prove that the electronic signature is assigned to that exact signed document. Additionally, the applicant must present the signature clearly and expressly to the notary and clearly and expressively acknowledge that the signature comes from them. There are additional rules regarding those that are disabled – mute, blind, etc. or illiterate.
Notarized form is considered to be a „stronger" form of certification, as it involves very strict and formalized rules and regulations in order to be lawfully executed. In this case, copy of the partnership agreement and documents regarding the association of the managing directors must be in notarized form. The notarization of these documents is regulated in §83 through §86a NO. These rules are applicable to to aforementioned documents because those documents constitute declarations made by one party to the other with the intention of creating legal effect. In this case one party are the founding partners of the company (or one individual founder) and the other party is the state body with legal power to decide on the registration of the company. In order for these documents to become notarized the party must go to the notary and formally request the notarization of the documents. The notary shall create a protocol with minutes that record all that has been said by the party with the time indication, which then the party will sign. The notary shall then go to the opposing party with the protocol at the by the initial party specified location and present the declaration to them. The notary shall record minutes of the interaction regarding the facts of announcement and the opposing party's reply only if it consents to it and signs it willingly. Other rules are further stipulated and concern different situations and variations when it comes to the content of declarations, such as a case when the party, through the declaration, requests from the opposing party to make use of the right granted to it within the certain period

of time or when different factual hurdles are in place, like when the opposing party cannot be found at the specified location. The notarization itself must contain the names of both parties, the literal content and the day, month, year and if necessary, the hour of announcement :
Also, the notarization can include the answer of the opposing party only if the answer is included in the minutes recorded by the notary.

The notarial certification is generally described and regulated by the Act on Public Notaries. This text regulates most questions when it comes to the status of notaries and their work, but does not cover the relevant questions regarding the d.o.o. registration. Namely, the Act on Public Notaries does not stipulate the certification of signatures. This is important because one of the required documents according to the Rulebook on the contents of the Register of Business Entities and the documentation required for registration is the founding act of the d.o.o. which has the signatures of the founders certified. This signature certification is regulated by a separate act, called Act on signature, handwriting and transcription certification. The notarial certification on signature is described in the 2nd section of the Act, Articles 5 through 19. The entirety of the content of the Section will not be covered as this work is focused on the most important points. By the certification of the signature, the notary certifies that the applicant of the registration application, whose identity has been previously determined, has personally signed the registration application in the presence of the notary or has confirmed that the already existing signature on the registration application is theirs (Art. 5 para. 1 ASHTC).
Further, the same article explains the steps necessary in order for signature certification to be lawful.
The first step in every signature certification process is for the public notary to determine the identity of the party that wishes to have their signature certified. This is primarily done by presenting an ID card, a passport, their driver's license or any other official document that contains a photo of the party to a public notary (Art. 8 para. 1 ASHTC). If the party does not present the the eligible documents for identity determination, it is possible for them to be identified by two witnesses, called "identity witnesses" by this Act (Art. 8 para. 1 ASHTC). An identity witness can be any person that is of legal age and is capable to determine the party's identity to the public notary. Prior to them witnessing, they must identify themselves following the same rule stipulated in Art. 8 para. 1 ASHTC. However, it is not possible for the identity witness to be identified by another identity witness.
In the event of the public notary not being able to determine the identity of the party in the different ways prescribed by this Act, either through documentation or via the identity witnesses (for example – there is no documentation and there are no witnesses), the public notary is to decline the certification as per Art. 10 para. 1 ASHTC. The same result must take place also when the public notary does not believe that the party has been successfully identified (Art. 10 para. 2 ASHTC). In these two paragraphs there is a good example of balance between the principles of formality of law and discretion granted to a state body when resolving a legal matter. The law does not allow for any identity determination way other than the ways that are

stipulated in the Act. Therefore, if the party was to use a document that is not listed in the Act in order to prove their identity, the public notary must decline the certification of a signature. However, just because the party used a document that is listed in the Act or used identity witnesses in the way the Act prescribes, the public notary has the legal authority or power to decline the certification if they themselves do not believe the identity has been rightfully proven. This is to prevent the abuse of the principle of formality of law, by which one can achieve the desired result by simply sticking with the legal text. For example, one can hire two people to act as identity witnesses even though they do not have the required knowledge of their identity in reality.

The public notary must be introduced to the minimal amount of content of the submission for which the signature needs to be certified required for the submission to be entered later in the registry of certifications and confirmations (Art. 11 par. 1 ASHTC). However, the notary does not have to inspect the entirety of the submission paper, as the signature certification process is primarily a formal one which does not go into the merits of the submission, nor does the notary have to go into the question of the legal basis of the submission (Art. 11 para. 2 ASHTC). There are a couple of exclusions to this rule stipulated in the third paragraphs of the same Article, like the fact that there is a reason for notary's exemption, the submission contains a legal relationship tat is prohibited, the submission contains a legal relationship that is permitted but lacks the required forms in order to be considered as lawful or the acceptance of the submission would lead to fulfillment is prohibited. In the context of d.o.o registration and the certification of signature(s) required for such, the exception would hardly and rarely be applicable, but one could potentially argue that the last exception would be applicable if the future d.o.o would support armament production for the support of terrorism.

Upon determining the identity of the party and the minimal content of the submission, the public notary will proceed with the signature certification by placing a signature certification clause with a with a stamp or an electromechanical device for typing text to the right or below the signature (Art. 6 para. 1 ASHTC). In the event that a submission has multiple pages, the public notary will attach the pages and place the signature certification on the last page, all whilst indicating the number of pages the submission has in the clause itself (Art. 7 para. 1 and para. 2 ASHTC). Article 5 ASHTC stipulates that the identification of the acting public notary, more precisely first and last name of the notary and the address of the seat of the public notary, notice that the public notary is acting in the scope of the legal power of the notary in certification in question, identification of the party submitting the document in which the signature is a subject of certification, more precisely first and last name and the address of the party, the method of party's identity determination, the notary's statement that the party has signed the document in their presence or that the party has confirmed that the signature already placed in the document is party's, date and time of the certification, the place of the certification if the certification process is carried out outside of the public notary's premises, the number under which the signed document has been entered in the register of notarizations and confirmations and the signature and the stamp of the public notary are the required content.

Upon the placement of the signature certification clause in the founding act of the future d.o.o, the act is deemed eligible for successful d.o.o registration.

CHAPTER II – FOUNDING ACT

The founding act is defined as an act of the legal person via which the founder expresses their will to establish a legal person. Since it is known that there can be, and usually is, more than one founder in a company, who express their will for incorporation in a form of a one-sided statement or a decision, the form of the expression of founders' wills is considered to be an incorporation contract. Also, the company's incorporation can be a product of the state's legislative power, so the founding act can take form of an ordinance, more specifically as an Act, if created by the parliament, or a sub-legal Act, if issued by the state's government.[4]

Before the analysis of the Serbian and Austrian legislation on the founding act as such, a few theoretical regards will be pointed out, for the sake of better understanding of the founding act's legal concept.

The legal effect of the founding act has been one of the argued points among the lawyers in the legal doctrine. If the founding act as an ordinance and one-sided statement or decision is ignored, the legal nature and effect of the founding act as a contract is brought into question, due to it's characteristics and implications. One group argues that the founding act when issued by multiple founders is a contract and the other group believes that such an act is not purely a contract, but rather of a hybrid nature, combining the characteristics of a contract and those of a general act with legal effects. They even go further to elaborate that between the moment of the founding act's conclusion and the point of the company's termination and liquidation, the founding act's nature shifts and changes due to the change in facts and legal reality which it refers to. More specifically, they describe the founding act as initially of contractual nature, prior to the company's registration, only for it to later display the characteristics of a general act with legal effects after the company's incorporation into the legal system of the state, more predominantly showing it's other nature, other than the one of a contract. One of the characteristics that is purely contractual is the sheer fact that it is a meeting of at least two wills with the intent and a goal to cause a consequence recognized and accepted by the law. All founders express their wills to establish a company. What can be a specific subject of further analysis is the nature of wills of the founders. Namely, their wills are more or less directed towards the same goal and that is making a profit through company's operations in business, which they alone as individuals lack the skills, assets or permissions to execute. This is different than contractual obligations which a buyer and a seller take up on themselves in an acquisition of a car, for example – the interests and goals of both the buyer and the seller sit at the opposite ends, where the buyer's goal is to acquire the seller's car and the seller's goal is to acquire the buyer's funds by selling him the car. Founders of the company, unlike the parties in the acquisition contract, have a affectio societatis – the common will to create a company for pursuit of the common goals. After the founding contract has been concluded but prior to the establishment of the company, the founding act is a legal relationship between the

[4] Zlatko Stefanovic, '*Kompanijsko pravo*' (2020), 8th ed., 97, 97-98

founders and founders only, as the company does not yet exist. It has relative applicability between the founders. However, when the company has been established and is regarded by law as an independent legal person with it's own legal personality, the founding act now establishes a relationship between the founders of the company and the company itself. Founders are not obliged by the founding act towards each other, but towards the company. Also, in the event of amending or changing the founding act, the decision of the majority of the company's assembly is the legal basis for such an action, which is against the principles of contract law, by which the contract can only be amended by another contract of the same parties as in the initial contract. In order to amend a founding act, the initial founders do not agree on the contract that serves as an amendment to the founding act, but the company must issue a decision[5]. Another unique situation that leads one to believe that the founding act as a contract is not purely of contractual nature is when founders of the company leave the company, with only one founder of the company remaining. The contractual principles stipulate that there is no contract without at least two parties.[6] Will the founding act cause any legal effect due to the lack of parties of the contract? Due to the unique set of characteristic of the founding act, it can be concluded that the founding act as a contract has dual nature – contractual and the nature of a general act with legal effects.[7] Based on the moment of the founding act's effects' analysis, one nature will be more present that the other. Prior to the company's establishment into existence, it is believed that the founding act leans more into it's contractual side because up until that point the founders can only have the obligations towards each other and vice versa after the company has been entered into a commercial register since the obligations between the founders end and the obligations between the founders and the company take place.

Two theories of the founding act's nature were the result of the analysis of it's intricacies and characteristics – institutional theory and the contractual theory.[8]

According to the institutional theory, which is predominant in Germany and other legal systems that have been created and regulated by drawing inspiration from the German legal system, the founding act is marginally a contract, as the contractual nature only displays prior to the establishment of the company. Namely, the German doctrine argues that the company, though coming into existence on the basis of the meeting of wills of it's founders, once founded, stops being a product of the founder's contract and becomes it's own entity, an institution. The founding act is of legislative nature towards the founded company, as it prescribes the functioning of the company and the relations between all those involved in it. German doctrine provides a good example of this system in the legislation of joint-stock companies – the founding act serves a contract between the founders for the sole purpose of founding a joint-stock company. After it has been founded, the functioning of the company is regulated by a statute, which is completely rid of contractual nature. It is believed in German doctrine that upon the (joint-stock) company's incorporation, the founding act stops producing legal effects, as it's purpose was only for founders to establish a company and the statute is the only act left in the legal power. As for other types of companies that do not feature a double-act system like a joint-stock company does, it is believed that a statute is incorporated and consumed into the founding act itself, and the part of the founding act that is a contract stops applying after the company's registration and the institutional part, that

[5] Zlatko Stefanovic, '*Kompanijsko pravo*' (2020), 8th ed., 100, 100-102
[6] Ibid.
[7] Ibid.
[8] Ibid.

functions as a statute essentially, remains in place.[9]
On the contrary, the contractual theory, which was rooted primarily in France, argues that, although with separate identity from it's founders, essentially is forever a product of the founder's contract and the provisions that have effect on the functioning of the company are the products of the founder's wills, making them contractual.[10]
The founding act is regulated in the Serbian legislation by The Act on Commercial Companies ("Zakon o privrednim drustvima - "Sl. glasnik RS", br. 36/2011, 99/2011, 83/2014 - dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019 i 109/2021) in Articles 11 through 16. In these Articles the reader finds the norms regarding the definition of a founding act, the possible forms of the founding, the process of amending and changing the founding act, the applicability of the founding act on the new coming members to the company and the nullity of the founding act and the process of the determination of the founding act's nullity. In Austria the founding acts for the GmbH are regulated by the GmbhG in the Articles 3 and 4.
According to the Article 11 ACC, the founding act of the company is a constitutional act of the company in the form of a decision, if the founder is a singular person, or in the form of a contract, if there are multiple founders. With the increased development of technology in the past 20 years, it is now possible to have a founding act in the various different formats. The ACC recognizes three main formats of the founding act – the physical, written form, the electronic form and the digitized form. This differentiation is important because the rules on the signature certification, required for the lawful incorporation of the company and it's registration in the commercial register, are different depending on the format the founding act is in.
Normally, when the founding act is in the physical, paper format, the signatures of the founders are certified according to the rules already analyzed in the chapter that covers the certification processes in general. However, when the founding act takes form of an electronic document, the conventional signature certification is replaced by the qualified electronic signature of the founders. In case of the digitized document as the form of the founding act, the aforementioned qualified electronical signatures or the qualified electronical stamp are used (Art. 11 para. 2 and 3 ACC). In the Serbian legislation, the d.o.o has only one constitutional act and it is both the founding act and the act that determines the functioning of the company, unlike stock corporations which have a founding act which governs only the founding of the company and the statute prescribing the functioning of the corporation.
It is possible for a person, who was not initially a founder of the company, to access the d.o.o as a member after the company has been established. In this case, according to the paragraph 7 of Article 11 ACC, the founding act is legally binding to that person from the moment of their acquisition of the membership status.
Article 12 ACC prescribes the amendment procedure of the founding act for various types of companies, including the d.o.o. Usually, the law permits the possibility of founding act's amendments. However, the joint-stock companies are an exception to this rule, as they have a double-document structure, comprising of the founding act and the statute. The ACC explicitly prohibits the possibility of joint-stock company's founding act amendation (Art 12 para. 3 ACC), and only permits the possible amendments to the statute (Art 12 para. 4 ACC). The procedures vary between the types of companies, but the most common denominator is that the founding act can be amended on the basis of the decision. The authority that issues this amendment decision is

[9] Ibid.
[10] Ibid.

different as the structures of the companies differ greatly. For example, the amendment decision in partnerships are issued by the partners themselves and for d.o.o it is the assembly, as a structural body of the d.o.o. The Article 142 of ACC aims to prescribe the amendment procedure of the d.o.o's founding act with more precision. The founding act of the d.o.o can be amended by the regular majority of the votes of all members of the company, unless the founding act itself doesn't stipulate any other majority rule. However, if such an amendment decision by the company has an influence on one of the members' rights regarding their position in the company so their position is better prior to the enforcement of the amendment decision, their vote is required in order for the decision to be accepted. The Article further specifies some instances in which this rule must take effect, such as amendments that aim to incur additional contributions to the company or strip away or limit the right of first refusal or the right for first purchase of shares or to change the rules regarding the majority of votes required to enforce decision making in the assembly of the company, the withdrawal or cancellation of the shares, the member's exclusion from the company, the appointment of the chief executive officer and the supervisory board, provided that the structure of the company's management is dual-tiered. This list is non-exhaustive as the Article solely presents some examples of different situations in which the member's rights can be limited by the amendation of the company's founding act. The members that voted for the amendment decision sign it. The certification of the signature is possible but only under the condition that the founding act stipulates the obligation of amendment decision certification and if such obligation is registered in accordance with the appropriate Act (Art. 12 para. 2 ACC). After the d.o.o's founding act amendment decision has been dealt with internally (the signatures are in place and the certification is carried out if necessary), the legal representative of the company is under the legal obligation to prepare and sign the consolidated version of the text of the now amended founding act and sign it (Art. 12 para. 5 ACC). The consolidated text and the amendments made to the founding act must be registered in the commercial register at the Agency for commercial registers (Art. 12 para. 5 ACC).

The founding act is null and void of legal power if it is not in a prescribed form or if an activity of the company, listed in the founding act, is prohibited by law or the information on the business name of the company, the contributions of the members of the company, the amount of the share capital or the company's predominant activity is missing or at the time of the founding act's conclusion, the signatories have been devoid of legal or business capacity (Art. 13 ACC). This list is exhaustive, as the Act prohibits the founding act from being declared as null and void for any reason other than those listed in the Art 13 ACC.

The procedure of the determination and declaration of the nullity of the founding act is described in the following, 14th Article of the ACC. The procedure is carried out by the competent court. If the nullity reason because of which the action for the founding act's declaration of nullity has not been removed from the founding act prior to the conclusion of the main discussion phase, as the main integral part of the judicial procedure in civil matters, the court will issue a decision on the nullity of the founding act. After the ruling has become final and binding and in the case the company has been entered in the commercial register, the court will forward to the Agency for commercial registers the ruling which represent a legal basis for the registration and commencement of the procedure of forced liquidation upon the company in question. The nullity of the founding act has no effect on the commercial relationships between the company and the diligent third parties. Diligent third parties in this context represent persons that had no knowledge of the founding act's nullity at the time of the contract's formation. If the members of the company have not paid in or contributed the required amounts for the initial capital and such obligation is assumed towards the company, they are to fulfill such obligation to the extent necessary for the fulfillment of the company's obligations towards the diligent third parties. Unlike commandites and partners, who are unlimitedly and jointly, the members of the d.o.o are liable limitedly and jointly towards the diligent third parties for the obligations of the company. These rules are in place in order to protect the diligent third parties on an economical level, as they put trust in the commercial business and the other party of the contract, they cannot suffer because of the internal shortcomings of their business partner due to the null founding act and the lack of funds for the fulfillment of the company's obligations.

The expenses for the founding of the company are refundable to the member of the company who was effective in such tasks, but only under the condition that such obligation towards the member is stipulated by the founding act (Art. 16 ACC).

The founding act of the GmbH in Austria is primarily regulated by the GmbHG. The founding act is one of the elements mandatory for the successful establishment of the company. Founding act can take two different forms – a partnership agreement and a declaration of establishment. The partnership agreement is of contractual nature and is present whenever a company is being formed by at least two people. In the case of sole founder, the founding act is in the form of declaration of establishment, as a one-sided declaration of intent with the aim of achieving legal consequence. Even though the GmbHG stipulates the necessary content of the company's founding act in order to perform a successful establishment and registration in the commercial register, the provisions also allude to the nature of the founding act itself and what it represents for the company. The founding act is of vital importance to the company and the public as well as it is a constitutional centerpiece of the company, describing and stipulating the most imporant and basic aspects such as the registered name of the company, the legally admissible purpose of the company, the amount of the share capital in the company and also providing such information to the state's, it's bodies', it's legal system's and eventually all interested parties' knowledge, as the publicity of both the commercial register and the founding act must achieve the desirable degree in order to be transparent.

§49, §50 and §51 GmbHG regulate the procedure of the GmbH's founding act amendation. §49 GmbHG stipulate that the resolution of the members of the company is the legal basis for amending the founding act, similarly to the regulations in Serbia. Additionally to the existence of the resolution as a legal basis, the notarial deed as a form of the resolution and entry of such resolution in the commercial register, similarly to the provision of Art. 12 para. 6 ACC, are mandatory for the amendments to take legal effect. The mandatory requirement for the amendment resolution to take form of a notarial deed is a requirement set out by the law and cannot be changed or limited by the founding act, which contrasts the Serbian legislation in which the signatures of the amendment decision must be certified only if the founding act stipulates that requirement and if such requirement is registered in the commercial register. The founding act's amendment resolution is issued by the two-thirds votes cast of the General Assembly of the company, which is comprised of all members of the GmbH, if there is a quorum met in the Assembly for the meeting . The quorum required for the meetings of the Austrian GmbH's General Assembly to lawfully take place and the decisions resulting from those meetings to be legal and lawfully issued is, according to the §38(6) GmbHG, unless otherwise provided by the founding act of the GmbH, one tenth of the share capital represented while according to the Serbian legislation, quorum is met when 51% of the voting body is present at the General Assembly meeting (Art. 208 ACC). Serbian and Austrian legislation differ in this regard as well. When comparing these two legislative solutions when it comes to both the quorums required in order for the meetings of the General Assemblies and the voting majorities required for the decisions of the General Assemblies to be issued there seems not to be the distinctive „winner" in terms of what is „better legislature", as it is purely situational as to what solutions benefit the company. On one side, Austrian legislation allows for much easier General Assembly meetings, as the quorum is much lower than the one the Serbian legislature provides. On the contrary, the Serbian d.o.o's General Assembly can pass and issue the decisions more easily as the ACC prescribes lower voting majority required.

The nullity of the GmbH's founding act is not expressly stipulated in the GmbHG, as it lacks the appropriate legislative solution such as the one in the ACC in the Article 13 and 14 that have already been covered. However, analogous application of the appropriate provisions of the AktienGesetz (AktG)(translated into Stock Corporation Act), which covers the reasons of nullity and the action for annulment of the stock corporation's founding act, to the nullity of the GmbH's founding act and the action for its annulment is appropriate and necessary.

Any shareholder, any member of any of the organs of the company is authorized to file an action for annulment of the company (§ 216 (1) AktG). Having in mind the nature of the company in Austrian law, as the legal personality, distinct from its founders, it is deductible that wording of the § 216 (1) AktG is inappropriate, as it describes the possibility of the annulment of the company itself, as if it was a legal transaction. Legal transaction is an expression of will(s) aimed at producing a legal effect, such as a contract or a testament of the deceased. In the light of this, this provision of the AktG assumes the nature of the company to be a contractual one. It would be more in line with the Austrian jurisprudence and it's understanding of the company's nature to understand this provision as action for annulment of the company's founding act instead of the annulment of the company itself. This way the legal transaction would be the object of the annulment and the amendment or possible dissolution, liquidation and the deletion of the company would be the end-results of such annulment. § 217 (1) AktG defines that the Court of the First instance for any and all annulment actions, which is the court in whose territorial jurisdiction is the company's registered office. Action is aimed against the company itself (§ 197 (2) AktG), as it has it's own legal personality and therefore can be a party in a judicial proceedings and is a separate legal entity from it's founders. The same paragraph provides the right and duty of representation, carried out by the either Supervisory Board or the Management Board and the Supervisory Board in tandem, of the joint-stock companies. In the case of the GmbH companies, which usually do not contain the Management Board as such and contains a Supervisory Board in some exceptional cases under the requirements provided by the GmbHG, the right and duty of the representation is reserved for the managing director(s) on the basis of § 18 (1) GmbHG. The action for annulment must be filed within one year of the company's entry into the commercial register (§ 216 (3) AktG). However, the same provision allows for the ex officio commencement of the deletion procedure of the company from the commercial register without the possibility of preclusion for the same reasons that could be the grounds for annulment action and the additional reason of the company lacking in assets. The AktG's provision continues to list the reasons for annulment, which are related to the founding act and the object of the company. If the founding act does not contain the provisions regarding the company name, the amount of the share capital or the object of the company is missing or it is prohibited by law or immoral, the reasons for annulment action are present (§ 216 (1), items 1 and 2 AktG). This list is an exhaustive list as the provision § 216 (1) AktG expressly stipulates that no other facts can be the reason for annulment. Some of these reasons do not automatically lead to the founding act being declared void and null as the § 217 AktG allows for the defects regarding the company name and the object of the company to be remedied by founding act amendment. In this case, the action can only be filed three months after

such a remedy has been requested by the applicant to the company and the company has failed to comply with that request (§ 216 (2) AktG). If there have been multiple annulment procedures against the same company, these will be combined into one for joint hearing, challenge and decision (§ 201 para. 2 AktG). In case that the court finds the founding act to be null, the court's judgement is binding towards all of the members of the company and all of the social organs of the company, even though they are not the party in the judicial annulment proceeding (§ 198 (1) AktG). This is the effect of the principles of corporate governance integrity and collective responsibility of the members and the social organs of the company as decisions of the company's management are viewed as collective decisions and for such the collective responsibility of said decisions must be taken up by the entirety of the company. The ruling of the court regarding the annulment of the founding act must be immediately reported to the commercial register in which the company has been entered by the managing director(s) and the ruling along with the action itself must be entered into the commercial register itself since the founding act is entered in the commercial register, according to the provision § 198 (1)AktG which the stipulates the obligation of reporting of the annulment ruling and it's entry to the commercial register and § 216 (4) AktG. Since the nullity of the company's founding act is an object of registration in a Commercial Register, the winding-up of the company follows and is regulated by the appropriate provisions that cover the winding-up of the company upon dissolution (§218 (1) AktG). The following paragraph protects third parties that have been in the business cooperation with the company in question by prescribing that the transactions that occurred prior to the declaration of nullity and it's registration are not affected by the nullity, meaning the transactions are not the subject of the nullity and therefore ex tunc effect of it, which would result in the restitution, which could endanger the economic interest of the possible many business partners that the company might have had. The members are obliged to make the necessary payments for the agreed contributions to meet the liabilities incurred (§218 (3) AktG).
It is possible for the for the company to come into valid and lawful existence by being entered into the commercial register along with the void founding act, in case of the legal error that led to the nullity of the founding act being unnoticed by the commercial court which governs the commercial register[11]. This effect is achieved through the theory of defective companies whose scope, applicability and effects are still debated in the jurisprudence. The theory speaks of „defective companies" and the legal acts speak of „nullity of the company", but both seem to implicate the defectiveness of the founding act and a winding up of the company as a result of such a founding act.[12] Ex tunc effect of the company's termination is the most important result of the founding act's nullity.[13] Such effect leads to undesired results such as all of the business transactions since the initiation of the company's business operations being void and the restitution being needed, which is never a desired outcome in the business world. The theory is considered to be a teleological reduction of the ex tunc effect of the defective company and the nullity of the founding act. The first requirement for the theory to take effect and the defective company to be assumed as lawful and the null founding act to be assumed as valid is the legal act of incorporation.[14] Albeit a defective one, as the founding act lack the necessary law-provided elements, the incorporation must be fully completed, as if the requirements for the incorporation are fully satisfied. If there is no legal act of incorporation, then there is no place for the defective company theory, but rather a

[11] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 216 (Rz 2/364)
[12] Ibid.
[13] Ibid.
[14] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 217 (Rz 2/365)

sham company.[15] Also, the founding act must be void in it's entirety. If only specific provisions of the founding act are void and null, there is no defective company.[16] The second requirement is for the company to actually be put into operation. This means that it has to be actively engaged in the commercial activities.[17] The capability of the company to be engaged in the commercial activities has mostly been assumed in the legal doctrine. Historically, the capability has been assumed as existing based on the actual operationality, meaning the presence of staff, funding and equipment among other factors, and the fact that the company has been entered into the commercial register. In the contemporary legislature, due to the many forms of companies and the sheer number of companies, the first factor is ignored. This does not mean that every company that has been entered in the commercial register is capable of commercial operation, but that fact is only assumed. If the company that has been incorporated but lacks the actual ability to operate a commercial business, it cannot be a subject of the defective company theory.
The main legal consequence of the doctrine of defective company is the fact that the company is regarded as a legal entity despite it's defect.[18] The effect is twofold and it involves external and internal legality of the company.[19] The external legality of the company encompasses the legality of the company towards the law, the state and the other companies and persons. After the effect of the defective company has taken place no other person can claim the nullity of the company's founding act, the ex tunc effect of such nullity and the winding up of the company as the result. They are to accept legality of the company, regardless of their knowledge of the defect. The internal legality is reflected in the relationships that take place in the company itself, between the social organs of the company, the members of the company and the legal acts that the company's social organs are authorized to issue. The resolutions of the company that has been affected by the doctrine are lawful and valid.
The doctrine of defective companies has it's limits which refer to the individual protection and the overriding public interest.[20] The individual protection is highlighted in cases of the incapacity to conduct business, malice of the founder(s) or the threats towards the founder(s) aimed at incorporating a company when concluding the founding act. The doctrine can be limited when the public interest is endangered. For example, when the conclusion of the founding act and the incorporation of the company would breach the anti-trust law. In these cases, the company is not regarded as legally incorporated and ex tunc effect of the founding act's nullity and in turn, the winding up of the company.

C H A P T E R III – DISSOLUTION OF DOO AND GMBH

3.1 – *General modes of dissolution*

Business entities may cease to exist due to various circumstances. Sometimes these reasons are economic in nature (poor business performance, lack of financial resources, influence of economic

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[15] Ibid.
[16] Ibid.
[17] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 217 (Rz 2/366)
[18] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 217 (Rz 2/367)
[19] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 218 (Rz 2/367)
[20] Kalss/Nowotny/Schauer, 'Österreiches Gesellschaftsrecht' (2017), 2nd ed., 218 (Rz 2/369)

crises), while at other times, these reasons may be the result of the founders' will (decision).[21] The modes of dissolution of business entities under Serbian law are thoroughly regulated by the norms of positive legislation. Three universally accepted modes of dissolution of business entities are: liquidation, insolvency proceedings and corporate restructuring.[22] For each of these modes of dissolution, it is characteristic that the dissolution occurs by deletion from the register of business entities. Thus, regardless of the reason or basis for dissolution, the company ceases to exist at the moment of deletion from the register of business entities.

Corporate restructuring is a distinctive mode of dissolution, characterized by first undergoing a process of corporate reorganization (merger, acquisition, or division), and as a consequence of that process, one or more participants in the restructuring are deleted from the register. Corporate restructuring is the only mode of dissolution of business entities without the execution of a liquidation process, which implies that the process is conducted without the filing and examination of claims, without the liquidation of assets, without the settlement of claims, etc., as creditor and minority member rights are protected in a different manner compared to liquidation and bankruptcy procedures.[23] The dissolution of a company through corporate restructuring under Serbian law is regulated by the Act of Commercial Companies (ACC) in the Articles 483 through 514.

By liquidation, a business entity ceases to exist with the full settlement of all debts, and this process is carried out when the business entity has sufficient funds to pay all of its debts. The dissolution of a company by liquidation under Serbian law is regulated by the Act of Commercial Companies (ACC) in the Articles 524 through 548.

Insolvency proceedings are most often an undesired basis for the dissolution of a business entity and is characterized by the collective settlement of creditors, its exceptional nature, greater involvement of state and other bodies, and the conduct of a special procedure to protect the interests of all concerned parties, primarily the creditors. For this reason, it is regulated by specific rules. In Serbian law, bankruptcy is regulated by the Act on Insolvency Proceedings.

Liquidation and insolvency proceedings share many similarities, which is why they are often grouped under the common concept of liquidation in a broader sense.[24] They share the characteristic of collective settlement of creditors from the total assets of the liquidating or bankrupt debtor. According to some authors, liquidation represents a method of dissolving financially healthy (solvent) companies, while insolvency proceedings are a method of dissolving insolvent companies (companies in financial distress).[25]

3.1.1 - Methods of Dissolution of a DOO

A limited liability company (DOO), as one of the legally designated forms of business organization, may dissolve through one of the general, legally prescribed methods:

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[21] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *'Kompanijsko pravo – pravo privrednih društava, Beograd, Univerzitet u Beogradu*' ,Pravni fakultet, Centar za izdavaštvo, 2023, 871

[22] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata*', Beograd, Univerzitet u Beogradu – Pravni fakultet, Centar za izdavaštvo, 2023, str. 282

[23]Ibid.

[24] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023), 3rd ed, 282, 282-283

[25] Mirko S. Vasiljević, *'Izabarane besede'*, (2013) , 2nd ed, str. 391-392

1) liquidation;
2) insolvency proceedings;
3) as a result of a corporate restructuring.

Article 238 ACC prescribes that the legal consequence of dissolution, regardless of the method, occurs upon deletion from the register.

3.1.2 - Liquidation as a Method of DOO Dissolution

Liquidation as a method of LLC dissolution is conducted when a legally prescribed liquidation cause is met and if the company has sufficient assets to settle all its liabilities. Both conditions must be cumulatively fulfilled.[26] Depending on various criteria, liquidation procedures can be categorized differently

According to the criterion of necessity for initiating and conducting the procedure, liquidation may be voluntary (optional) or compulsory (mandatory). Serbian law recognizes both forms: voluntary and compulsory liquidation.

According to the entity responsible for conducting the liquidation procedure, liquidation may be judicial (conducted by a court), administrative (conducted by an administrative body), creditor-led (through an agent chosen by the creditors), or conducted by the business entity itself (through an agent selected by the company's governing bodies). Under Serbian law, the liquidation procedure is generally conducted by the business entity itself, although, in certain situations, administrative liquidation is exceptionally applied.

Depending on whether the liquidation is conducted over the entire business entity or only part of it, a distinction is made between complete and partial liquidation. Serbian law recognizes only complete liquidation.

Depending on the phases of the procedure being conducted, a distinction is made between regular and expedited liquidation procedures. Under the currently adopted principle, the regular procedure is conducted in cases of voluntary liquidation, while compulsory liquidation is generally considered to be conducted in a form of expedited procedure.[27]

3.1.3. - *Voluntary Liquidation of a DOO*

- characteristics

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[26] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *'Kompanijsko pravo – pravo privrednih društava'*, (2023),1st ed, 871, 874-875
[27] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023), 3rd ed, 282, 285-286

Voluntary Liquidation of an DOO is carried out based on the will of the founders, who make the decision to liquidate. The other condition, which must be cumulatively met, is that the company has sufficient assets to settle its obligations.

- liquidation decision

Accordingly, the reason for liquidation in this case is the will of the company's members, expressed in a decision by the competent body. The decision to liquidate constitutes the legal basis for initiating the liquidation process.[28] Under Serbian law, more specifically under the Art. 211, para. 2, point 3 in connection with Art. 525 ACC, the adoption of this decision falls within the competence of the company's assembly, and the decision is made by the required majority—two-thirds of the total votes of all company members. The decision of the members of an DOO to liquidate the company can be made for any reason (economic, personal, etc.) and depends solely on the will of the company's members. This method of dissolving a business entity represents a consistent application of the constitutional principle of entrepreneurial freedom, as it leaves the members of the company with a completely open legal option to, at their discretion and desires, after conducting the legally prescribed procedure and settling all obligations, "shut down" the company.[29]

Art. 526 ACC provides that the liquidation procedure begins with the adoption of the decision to liquidate and the publication of a notice regarding the initiation of the liquidation. The decision to initiate the liquidation procedure is registered in the competent commercial register. Upon the registration of the decision to initiate the liquidation procedure, the legal consequences of initiating the liquidation process take effect. From that moment, the primary goal of the company's existence is the settlement of creditors and the conclusion of the company's business operations, with the ultimate aim of dissolving the company. The decision is registered in the prescribed manner with the competent commercial register—the Agency for Business Registers—and is publicly announced on the agency's website, thereby becoming publicly accessible. Upon registration of the decision, the designation "in liquidation" is added to the business name of the company. In this way, the company's name communicates to all third parties that the company is undergoing liquidation.

Another significant legal consequence is that upon the registration of the decision to initiate liquidation, the company's representatives are changed so that the liquidator becomes the authorized representative, while all other registered representatives are deleted. The liquidation procedure produces significant legal effects in the internal relations of the company's members—because after the registration of the decision to initiate liquidation, it is no longer possible to make payments to the company's members based on profit participation or dividend payments. The law establishes the obligation to publish a notice regarding the initiation of the liquidation procedure, aimed at informing all creditors of the company to file their claims. This is a method of collective protection of creditors, as it invites all creditors (known and unknown) to file their

[28] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *'Kompanijsko pravo – pravo privrednih društava'* , (2023), 1st ed, 871, 874 - 875

[29] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata, Beograd'*, (2023), 3rd ed, 284, 285-286

claims within 120 days from the date of publication of the notice.In addition to this method of notification, the law imposes an obligation on the liquidator to personally inform all known creditors of the company about the initiation of the liquidation procedure and the obligation to submit their claims. The notification of known creditors is carried out by the liquidator in the form of a written notice, which he is required to prepare and send to each known creditor within 15 days from the commencement of the liquidation. This constitutes what is referred to as individual creditor protection.[30] Art. 534, para. 4 ACC requires that all creditors of the company are to file their claims, except for those creditors whose claims have been established by an enforceable document and creditors who initiated judicial proceedings for the collection of their claims prior to the commencement of the liquidation; as their claims are considered filed by law. Upon the expiration of the deadline for filing claims, a statute of limitations occurs—the creditor loses the right to enforce their claim as per Art. 533 ACC.

The company, through the liquidator, has two options regarding the filed claims: to acknowledge the claim or to dispute it (if it believes that there is no obligation of the company to the given creditor), about which it must specifically inform the creditors of the disputed claims, stating the reasons for the dispute.Based on the submitted claims, the liquidator prepares a list of filed claims, a list of acknowledged claims, and a list of disputed claims.The liquidator has the option to dispute a filed claim and include it in the list of disputed claims. The creditor of the disputed claim is obligated to initiate proceedings before the court within 15 days from the date of receipt of the notice of the dispute.According to the Art. 535 para. 4 ACC, failure to act upon this obligation renders the claim barred.

The central authority of the liquidation procedure is the liquidator or the liquidating manager.The liquidator is appointed by the decision to initiate liquidation. Upon his appointment, he becomes the legal representative of the company, and all prior representatives lose their rights to represent the company, according to the Art. 529 para 2 ACC. This is the most significant legal consequence of appointing a liquidator. The following paragraph stipulates that if a liquidator is not appointed by the decision to liquidate, in that case, the existing legal representative becomes the liquidator. The primary powers of the liquidator are to represent the company and to undertake actions aimed at conducting the liquidation procedure. In addition to the liquidator, the governing body of the liquidation procedure is the assembly of the DOO, which makes decisions necessary for conducting and concluding the liquidation process, such as appointing the liquidator, adopting the initial liquidation balance sheet and the initial liquidation report, and the decision to conclude the liquidation.

After the payment of all creditors, the liquidator prepares the final liquidation balance sheet. The assets of the liquidated company remaining after settling all creditors constitute the liquidation remainder, which is distributed among the members of the company in proportion to their share in the capital, unless a different method of distribution of the liquidation remainder is stipulated

[30] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *'Kompanijsko pravo – pravo privrednih društava'*, (2023), 1st ed, 874, 877-878

in the founding act. The liquidation of the DOO is concluded by adopting a decision to terminate the liquidation. The decision is made by the assembly of the DOO with a two-thirds majority of all members of the company. Upon the conclusion of the liquidation, the company is removed from the register of business entities in accordance with the law on registration, as the Art. 543 para. 2 ACC stipulates. With the removal of the company from the register of business entities, the company ceases to exist as a legal entity.

3.1.4 - *Compulsory Liquidation of a d.o.o*

Compulsory liquidation is a method of terminating a business entity by removing it from the register of legal entities, carried out by the competent authority ex officio in cases prescribed by law.[31]

The reasons that constitute the basis for compulsory liquidation are exhaustively prescribed by the Act on Commercial Companies.

Although varied, they essentially indicate that the company no longer meets the conditions to continue its operations. Unlike the voluntary liquidation procedure, which is always based on the will of the company members, the reasons here are of an objective nature and are most often independent of the members' will. [32]

In terms of the nature of the reasons, the most common ones relate to situations where the company lacks an essential element without which it cannot operate:

a) reasons related to the company's activities (if the company has been prohibited from conducting its activities or if its permit or license has been revoked);
b) reasons concerning the expiration of the period for which the company was established (if a company established for a specific period fails to register an extension of its duration within 30 days after the expiration of that period or does not initiate a voluntary liquidation procedure within that period);
c) reasons related to deficiencies in registration or the founding act (if the validity of the company's registration or the validity of the founding act has been established as null and void by a final court judgment);
d) reasons concerning deficiencies in the representation of the company (if the company remains without a legal representative and does not register a new one within three months from the date of removal of the previous representative).
In addition to the aforementioned, other reasons may include:

a) failure to submit annual financial statements (if the company does not submit its annual financial statements to the competent registry for two consecutive financial years);

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[31] Zlatko Stefanović, *'Kompanijsko pravo'*, 2020.,8th ed, 310, 314-315
[32] Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *'Kompanijsko pravo – pravo privrednih društava'*, (2023), 1st ed, 874, 878-879

b) termination of the company by court decision (if a final court judgment orders the termination of the company and the company does not initiate liquidation within 30 days from the date the judgment becomes final);
c) reasons that may arise during voluntary liquidation (e.g., if the company remains without a liquidator and does not register a new one within three months from the date of the removal of the previous liquidator from the registry, or if the company fails to submit the initial liquidating balance to the competent registry);
d) non-contribution of the minimum capital (this reason applies only in cases where, in bankruptcy proceedings, the bankrupt debtor is sold as a legal entity and the price paid is lower than the value of the minimum capital).

Upon the occurrence of any of the legally enumerated reasons, the registrar in the relevant registry (the Agency for Business Registers) has the obligation to notify the company as soon as it learns of the fulfillment of the grounds for initiating the forced liquidation procedure. This notification is not sent directly to the company but is published on the APR's website in the section containing announcements for that particular company. [33]

In this way, the company is given the opportunity to remedy any deficiencies within the legally prescribed period if the reasons for forced liquidation are rectifiable (e.g., if the company is without a legal representative, it can appoint a new legal representative).
If the reason is irremediable or was remediable but has not been addressed, in the next phase, after the legally prescribed period has elapsed, the registrar of the competent registry, ex officio, in accordance with the Art. 547 para. 4 ACC issues an act to initiate the forced liquidation process and simultaneously publishes a notice of forced liquidation on the website of the business register, continuously for a duration of 60 days.
In connection with the previously mentioned points, it is important to highlight the difference between the voluntary liquidation process, which is carried out by the liquidator as an organ of the company based on the will of the company, and the forced liquidation process, which is conducted by a public official—the registrar of the business registry—ex officio.
Legal consequences of initiating the forced liquidation process are similar to those that occur in the voluntary liquidation process, but there are also some differences.Art 547a ACC provides that here, the designation "in forced liquidation" is added to the name of the company. The company cannot undertake new business but may only complete ongoing tasks, including settling due obligations. Dividend payments to members of the company are not permitted. The differences are as follows: the company's bodies continue to operate until the conclusion of the process, a liquidator is not appointed, and all court and administrative proceedings against the company are automatically suspended by operation of law.

[33] Zlatko Stefanović, *'Kompanijsko pravo'*, Beograd, (2020),8th ed, 310, 315-316.

The following Article of the ACC requires that upon the expiration of a 60-day period from the date of publication of the announcement regarding the initiation of the compulsory liquidation procedure, the registrar maintaining the register of business entities, ex officio, shall issue an act for the deletion of the company from the register within an additional period of 30 days, in accordance with the law on registration.

With the date of deletion, the existence of the business entity ceases. In this way, the termination of the business entity occurs, and its legal personality ceases to exist.
The assets of the deleted company that remain after its deletion become the property of its members in proportion to their shares in the capital.

Creditor protection is achieved through the Art. 548 para. 2 ACC which prescribes that the members of the deleted company are liable for the company's obligations up to the value of the assets they received.

The position of creditors of a forcibly liquidated DOO is further strengthened by the following paragraph of the same Article by which the controlling member of the limited liability company is jointly and severally liable for the company's obligations after the company is deleted from the register.

A controlling member of an DOO is considered to be a member who has more than 50% of the participation in the company's capital, as well as a person who has the right (ability) to independently or together with other persons acting in concert with them, possess more than 50% of the votes in the company's assembly.[34]

Claims of creditors against the controlling member of the company become time-barred after a period of 3 years from the date of the company's deletion from the register, as defined in the Art. 548 para. 2 ACC.

In the process of forced liquidation, unlike in the process of voluntary liquidation, the monetization of the assets of the entity in liquidation and the settlement of creditors does not take place. Instead, the protection of creditors' rights in the process of forced liquidation is achieved in a specific manner—through the establishment of limited liability of the members of the company, i.e., the unlimited joint liability of the controlling member of the company. Such legislative solutions may jeopardize the settlement of creditors of the dissolved company in cases of over-indebtedness (insolvency) of the members of the company. This is due to the possibility that creditors who already have an enforceable title against a member of the company may capitalize on the transfer of the company's assets to that member and obtain priority settlement rights from those assets over the creditors of the dissolved company. The latter, if they do not have an enforceable title, will still require a certain amount of time to obtain such a title through the appropriate court proceedings.

[34] Zlatko Stefanović, *'Komentar Zakona o privrednim društvima'*, (2022),4th ed, 1116

3.1.5 - *Insolvency proceedings of DOO*

Insolvency proceedings are a judicial process of collective creditor settlement from the entirety of the insolvent debtor's assets when the debtor is experiencing financial difficulties.[35] This method of terminating a company applies to entities experiencing financial difficulties, rendering them unable to fulfill obligations to their creditors. In such situations, the state intervenes by prescribing and implementing a procedure aimed at, on one hand, enabling all creditors to be compensated from the company's assets and, on the other hand, "restricting" the company's future business operations to prevent further risk of noncollectable claims.[36] Insolvency proceedings are conducted by the court, distinguishing this form of company termination from voluntary liquidation, which is carried out solely by the company, and from compulsory liquidation, which is conducted by the Serbian Business Registers Agency (APR) as an administrative authority. Article 2 of the Insolvency Proceedings Act sets the primary goal of insolvency proceedings as the collective settlement of the company's creditors from the assets of a company in financial distress. The concept of collective settlement in insolvency proceedings aims to satisfy all creditors of the company regardless of the type, amount, or timing of their claims. This prevents a situation where only certain creditors, by leveraging the principle of chronological priority, could fully settle their claims, thereby placing other creditors at risk of only partial or no repayment due to the company's insufficient assets. Thus, insolvency proceedings ensure the proportional satisfaction of all creditors of a financially troubled company from its assets. The conduct of insolvency proceedings for a financially troubled company may, but does not necessarily, result in the termination of the company. There are two possible approaches to conducting insolvency proceedings:

1. bankruptcy ;
2. reorganization.

In the case of conducting insolvency proceedings through bankruptcy, the assets of the insolvent debtor are sold, and creditors are proportionately satisfied from the company's assets, resulting in the company ceasing to exist upon completion of the insolvency process.

In the case of conducting insolvency proceedings through reorganization, the company does not cease to exist but continues its existence and economic activity under the terms established by the reorganization plan (ensuring the legal survival of the company). Creditor satisfaction is achieved according to the adopted reorganization plan, often by redefining debtor-creditor relationships.

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[35] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023), 3rd ed, 292, 295-296
[36] Zlatko Stefanović, *'Kompanijsko pravo'*, (2020),8th ed,292, 293-294

According to the Art. 11 of Insolvency Proceedings Act, insolvency proceedings are initiated when at least one ground for insolvency is established. The grounds for insolvency proceedings initiation are:

1) permanent inability to pay;
2) imminent inability to pay;
3) overindebtedness;
4) non-compliance with the adopted reorganization plan, and if the reorganization plan was obtained through fraudulent or illegal means.

The first three reasons relate to different forms of the financial incapacity of the company to fulfill its obligations, whereby the Law on Insolvency Proceedings defines each of these forms separately, as follows:

Permanent inability to pay exists if the insolvent debtor: 1) cannot meet its monetary obligations within 45 days from the due date of the obligation; or 2) completely ceases all payments for a continuous period of 30 days.

Impending inability to pay exists if the insolvent debtor makes it probable that it will not be able to fulfill its existing monetary obligations upon their due date.

Over-indebtedness exists if the assets of the insolvent debtor are less than its obligations.

The fourth insolvency reason relates to the situation when a company in financial difficulties is already undergoing reorganization proceedings and fails to comply with the approved reorganization plan or acts contrary to the reorganization plan in a manner that significantly jeopardizes its implementation.

Insolvency proceedings are never initiated ex officio, but only at the request of an authorized person.

Insolvency proceedings are initiated by the request of a creditor, the debtor, or the liquidator.

A creditor of the company may submit a request for the initiation of insolvency proceedings in the case of the existence of a persistent inability to pay, failure to comply with the adopted reorganization plan, and if the reorganization plan was obtained through fraudulent or unlawful means. In this case, it is referred to as involuntary or forced insolvency, as it does not depend on the will of the company against which the insolvency is initiated.

Insolvency proceedings are initiated by the debtor and the liquidator (if the company is in the process of liquidation) for all legally prescribed insolvency reasons. In this case, it is referred to as a voluntary insolvency – as the submission of the proposal to initiate insolvency proceedings is based on the will and decision of the company's governing body. [37]

In insolvency proceedings, there are four bodies that have a legally prescribed role in conducting the insolvency. These are: the insolvency judge, the insolvency administrator, the creditors' assembly, and the creditors' committee, each with its own scope of authority and responsibilities as stipulated by the Insolvency Act.

In insolvency proceedings, it is a judicial process as it is conducted by the court. Serbian law does not recognize specialized insolvency courts; rather, insolvency matters fall under the jurisdiction of commercial courts. The insolvency proceedings are carried out by a judge whose powers pertain to: deciding on the opening of the insolvency proceedings, appointing the insolvency administrator, making decisions related to the management of the proceedings, overseeing the work of the insolvency administrator, and finally concluding the insolvency proceedings.

The insolvency administrator is the central operational body in the insolvency proceedings. He is appointed by the insolvency judge through a decision on the opening of the insolvency proceedings. Thus, Serbian law applies the principle of judicial appointment of the insolvency administrator.

An individual appointed as the insolvency administrator must be listed in the registry of licensed insolvency administrators maintained by the Agency for Licensing Insolvency Administrators. To be registered in the registry of insolvency administrators, an individual must meet the conditions prescribed by law: a) possess a higher education degree; b) have passed the professional examination for obtaining a license; c) have three years of work experience with a higher education qualification; d) be a citizen of the Republic of Serbia.

From the moment of appointment (by the court's resolution to open insolvency proceedings), the insolvency administrator becomes the legal representative of the company. In this capacity, they represent and act on behalf of the company, manage its affairs, and undertake actions aimed at satisfying the creditors (e.g., conducting an inventory and appraisal of the company's assets, examining the filed claims, compiling lists of creditors and debtors, and taking steps to liquidate the company's assets).

The creditors' assembly, composed of all insolvency creditors of the company, supervises the activities of the insolvency administrator as well as the creditors' committee.

The creditors' committee is composed of elected representatives of the creditors. They are elected by the creditors' assembly from among the insolvency creditors, with the right for secured creditors to select one member from among themselves. The creditors' assembly determines the

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[37] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'* , (2023),1st ed, 300, 302-303

number of members on the creditors' committee. The most significant powers of the creditors' committee include granting consent for certain actions of the insolvency administrator (such as the sale of assets through direct agreement and the sale of the insolvency debtor as a legal entity).

From the aforementioned, it can be concluded that the jurisdiction of the bodies in the insolvency proceedings is legally distributed among the insolvency judge, who is the judicial authority in the insolvency proceedings; the insolvency administrator, who is the body representing the insolvency debtor; and the creditors' assembly and creditors' committee, which are the fiduciary bodies in the insolvency process. [38]

After the submission of a proposal to initiate insolvency proceedings by an authorized person to the competent commercial court, it is the insolvency judge who decides on the fulfillment of the grounds for opening insolvency proceedings.

When the bankruptcy judge determines that the legal conditions for opening bankruptcy proceedings have been met, they issue a decision to open the bankruptcy proceedings, in accordance with Art. 70 Insolvency Proceedings Act. This decision establishes the existence of a bankruptcy reason, appoints a bankruptcy trustee, invites creditors to submit their claims within a legally specified period (not shorter than 30 days and not longer than 120 days from the publication of the announcement regarding the opening of bankruptcy proceedings), and sets the date, time, and place for the hearing to examine the claims, as well as the date of publication of the announcement about the opening of bankruptcy proceedings on the court's notice board.

In the further course of the proceedings, the bankruptcy trustee carries out several different actions, the most important of which are:

1. examination of claims;
2. inventory and valuation of the assets of the bankruptcy debtor; and
3. monetization of the bankruptcy estate.

After the deadline for the submission of claims has expired, the bankruptcy administrator conducts an examination of the submitted claims. In order to ascertain the claims, an examination hearing is held, to which all creditors who have submitted claims are invited, during which the final list of claims is adopted, containing information about all submitted claims, including which claims have been verified (recognized) and in what amounts, as well as which claims have been disputed.

Based on the final list, the bankruptcy judge issues a ruling on the list of recognized and disputed claims. Creditors whose claims have been disputed are instructed to establish their claims through litigation.

In the further course of the proceedings, the bankruptcy judge issues a ruling on the insolvency proceedings.

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[38] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, 2023,1st ed, 310, 310-311

Upon the issuance of this ruling, the insolvency practitioner initiates and conducts the process of selling the assets of the insolvent debtor. In this process, the entire assets, a portion of the assets, or the insolvency debtor as a legal entity may be sold.
The sale of assets or legal entities is conducted through public auction, public collection of bids, or direct agreement, in accordance with the law, specifically Art. 132 Insolvency Proceedings Act and subordinate legislation (national standards for managing the insolvency estate).
The monetary funds obtained from the sale of the assets of the insolvency debtor enter the distribution estate from which creditors are satisfied. In addition to these funds, the distribution estate also includes the monetary funds of the insolvency debtor existing in the debtor's accounts at the time of the opening of the insolvency proceedings, as well as the funds obtained from continuing ongoing operations, and those funds collected during the insolvency proceedings from the debtor's debtors, as provided by Art. 138 Insolvency Proceedings Act. From the obtained distribution estate, creditors are satisfied.

The main idea behind the introduction of insolvency proceedings is a fair method of collective satisfaction of insolvency creditors to prevent their race in individual enforcement proceedings and the fragmentation of the assets of a company already facing financial difficulties. [39]

In order to achieve this idea, Serbian law has adopted the principle of satisfying creditors according to payment priorities. According to Serbian law, all insolvency creditors are classified into four payment categories.

In relation to the satisfaction of insolvency creditors according to payment categories, two fundamental principles have been adopted:

1) The principle of exclusivity between insolvency categories - creditors of a later payment category are satisfied only after the complete satisfaction of creditors of an earlier payment category;
2) The principle of proportionality - if there are insufficient funds to fully satisfy the claims of a certain payment category, then the creditors of that payment category will have the right to proportional satisfaction of their claims according to their amounts.

The first two payment categories are privileged insolvency creditors:
The first payment category includes: claims of employees based on unpaid net salaries amounting to the minimum wages for the last year prior to the opening of insolvency proceedings, and claims based on unpaid contributions for pension and disability insurance of employees for the last two years before the opening of insolvency proceedings.

The second payment category includes: claims based on all public revenues due in the last three months prior to the opening of insolvency proceedings. The third payment category is referred to as the general payment category. Once all priority insolvency claims from the first two payment categories are fully satisfied, the remaining unsecured claims are addressed. In practice, the

[39] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023), 1st ed, 300, 304-305

majority of insolvency claims fall into this third payment category, which serves as a residual category, comprising all insolvency claims that do not fall into other payment categories. [40]
The fourth payment category consists of so-called subordinated insolvency creditors. This category includes claims from related parties based on loans extended to the company. These claims are settled after the claims from the general payment category (the third payment category) have been satisfied.
In addition to the rules previously discussed regarding the settlement of insolvency creditors (those creditors who have unsecured claims against the insolvent debtor), Serbian law also provides rules for certain special types of creditors who fall outside the category of insolvency creditors.

Insolvency estate creditors are creditors whose claims arose after the initiation of bankruptcy proceedings through actions taken by the bankruptcy administrator. Insolvency estate creditors have priority in settlement because they are settled from the insolvency estate before insolvency creditors, and this is done in full.
Creditors from financial security agreements are creditors who hold a lien based on a financial security agreement. These creditors receive the most privileged treatment, as the rights and obligations arising from this agreement are executed according to non-bankruptcy rules, meaning regardless of the ongoing bankruptcy proceedings.
Art. 49 IPA defines secured creditors as those creditors who, on the day of the bankruptcy filing, have secured claims against the debtor in the form of a lien, statutory right of retention, or rights to payment on property and rights that are recorded in public registries. These creditors are paid with priority, primarily from the proceeds of the sale of the pledged property or rights, up to the full amount of their claim, independently of the payments to bankruptcy and other creditors. If there are surplus funds remaining after the secured creditor has been paid from the sale of the pledged property, that surplus enters the bankruptcy estate and is used to satisfy bankruptcy creditors. If the sale of the pledged property does not yield sufficient funds to satisfy the secured creditor, then they have the right to be compensated for the difference up to the full amount of their claim as a bankruptcy creditor.

The same Article provides that the pledge creditors are all those individuals who have a real security interest in a certain asset or right that is part of the bankruptcy estate, while the main claim is not against the bankrupt debtor, but against a third party. The bankrupt debtor only serves as the pledger, having pledged their asset or right as security for a debt owed by the third party to the creditor. The pledge creditor has the right to priority payment from the value obtained from the sale of the pledged asset, a right guaranteed by non-bankruptcy law.[41]

Creditors from financial security agreements are creditors who hold a pledge or another security right based on a financial security agreement, according to Art. 50a IPA. These creditors enjoy the most privileged treatment, as the rights and obligations from this agreement are executed under

[40] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023),1st ed,300, 305-306
[41] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023),1st ed, 300, 308-309

non-bankruptcy rules, meaning they are not affected by the bankruptcy proceedings. Due to this status, holders of these claims have what is known as "bankruptcy immunity." This category of creditors was included in the Bankruptcy Law by amendments to the law in 2018, as part of aligning Serbian law with EU law.
Art. 50 IPA stipulates that an excise creditor is a person who, based on a real or personal right, has the right to request that a specific item (asset or right) be excluded (excised) from the bankruptcy estate and handed over to them as the holder of the right to that item. They exercise their right to exclusion by submitting a request for exclusion, asking the bankruptcy administrator to return the asset that does not belong to the bankruptcy estate. If their request for exclusion is denied, they pursue their right through legal proceedings by filing an exclusion lawsuit, thus following the rules of non-bankruptcy law. [42]

After liquidating the assets of the debtor, the creditors are paid according to the legally established payment hierarchy based on the decision on the main distribution. Practice has shown that if the value of the distribution estate is sufficient, after settling the first two payment tiers, creditors from the third payment tier are partially compensated in proportion to the amount of their claims. If, after settling all creditors, there remains a surplus in the distribution estate, the bankruptcy judge distributes this surplus to the members of the company according to the rules of the liquidation process, as required by the Art. 147 IPA.

The bankruptcy procedure concludes at the final hearing held by the bankruptcy judge. At this hearing, the court issues a decision to conclude the bankruptcy procedure. This decision is delivered to the registration authority and serves as the basis for the deletion of the business entity from the register. Upon deletion from the register, the bankruptcy debtor ceases to exist as a legal entity.

3.1.6 – Reorganization of DOO

In the previous section, the focus was on the method of conducting bankruptcy proceedings through liquidation. However, Serbian law also recognizes an optional method of conducting bankruptcy proceedings through reorganization. Thus, reorganization is an alternative to bankruptcy. [43] The primary goal of this procedure is the rehabilitation, or "healing," of a company facing financial difficulties, which has put its ability to satisfy creditors in question. Almost all participants in the proceedings can benefit from reorganization: the bankruptcy debtor retains legal personality and continues to operate; creditors may find themselves in a more favorable position compared to bankruptcy proceedings; employees will not lose their jobs; and members of the company will not see their investments go to waste, as they gain hope that the company's good performance in the future will allow them to earn income from their membership rights again. In Serbian law, reorganization is not an independent procedure but rather an option within an already

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[42] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023),1st ed, 300, 309-310
[43] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023), 1st ed, 328, 331-332

initiated bankruptcy proceeding. Therefore, it is stated that Serbian law applies the concept of bankruptcy reorganization.[44]

According to the Insolvency Proceedings Act, there are two methods for conducting the reorganization process: 1. ordinary (bankruptcy) reorganization and 2. prepackaged reorganization plan.

Ordinary reorganization is a process that takes place after the opening of the bankruptcy procedure. For this process to be conducted, certain legal conditions must be met. First, a proposal for the implementation of the bankruptcy process through the adoption of a reorganization plan must be submitted by an authorized person. According to the Bankruptcy Law, the proposal can be submitted by specific parties, namely: the bankruptcy administrator, secured creditors, bankruptcy creditors, and owners of at least 30% of the debtor's capital (members of the company). The deadline for submitting the reorganization plan is 90 days from the date of the opening of the bankruptcy procedure. An additional condition is that a decision on bankruptcy has not been made at the first creditors' meeting, because, as previously mentioned, reorganization is an alternative to bankruptcy. Therefore, the creditors' declaration at the first creditors' meeting to proceed with bankruptcy excludes the possibility of submitting a reorganization plan.

Unlike the so-called ordinary (bankruptcy) reorganization, Serbian law recognizes the possibility of reorganization even before the bankruptcy procedure is opened. Serbian law allows for a prepared reorganization plan to be submitted simultaneously with the proposal to open the bankruptcy procedure. This option is reserved exclusively for the debtor in bankruptcy. Thus, only the debtor in bankruptcy has the authority to submit a prepared reorganization plan.

The reorganization plan (or pre-prepared reorganization plan) includes measures aimed at the "rehabilitation" of a business entity that is experiencing financial difficulties, rendering it unable to fulfill its obligations to its creditors. The measures outlined in the reorganization plan can vary: repayment of obligations in installments, modification of due dates, debt forgiveness (either in full or partially), liquidation of assets, conversion of claims into equity, changes in status, alteration of legal form, closure of facilities, layoffs, and so on.Article 155 paragraph 1 IPA goes to say that the essence of these measures is to ensure a more favorable settlement for creditors compared to bankruptcy. The reorganization plan (or prepared reorganization plan) is submitted in written form as per the stipulation of the following paragraph. The adoption of the reorganization plan (or the prepared reorganization plan) is decided by the creditors of the bankrupt debtor, specifically by the bankruptcy creditors and secured creditors. They vote by classes. The plan is considered adopted in a class if it receives a simple (ordinary) majority of claims from the total claims of creditors in that class. Finally, the plan is considered adopted if it is approved in the prescribed manner by all classes of creditors, after which the bankruptcy judge issues a decision confirming the adoption of the reorganization plan.

The adoption of the reorganization plan triggers certain legal consequences for the bankrupt debtor. The initiated bankruptcy procedure is suspended, and the designation "in bankruptcy" is removed from the name of the bankrupt debtor.

The reorganization plan serves as an executive document and a new contract for the settlement of claims, based on which creditors can initiate enforcement proceedings in the event that the bankrupt debtor fails to fulfill their obligations under the reorganization plan.

[44] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *'Kompanijsko pravo-pravo privrednih subjekata'*, (2023),1st ed,331, 332-333

Art. 167 IPA requires that all operations and actions undertaken by the bankrupt debtor in the future must be in accordance with the reorganization plan. The execution of the reorganization plan settles the creditors' claims as per the prescription of Art. 172 IPA.

The reorganization process is concluded upon the complete execution of the reorganization plan. In the event of non-compliance with the reorganization plan, creditors, on the basis of Art. 173 IPA, have the option to file a proposal to initiate insolvency proceedings against the company for which the reorganization plan was adopted. This means that non-compliance with the reorganization plan is legally defined as a ground for insolvency proceedings, resulting in the re-initiation of bankruptcy proceedings with all its consequences.

3.2 - Methods of Dissolution of a GmbH

Under Austrian law, the grounds for the dissolution of a GmbH (limited liability company) are stipulated in the Limited Liability Company Act (GmbHG) in §84, §95, and §96. Additionally, some grounds are set out in other laws, such as the Federal Act on the Transformation of Commercial Companies (UmvG 1996), the Demerger Act (SpaltG 1996), the Commercial Register Act (FBG), and the Insolvency Act (IO).

According to §84,(1) of the GmbHG, a company shall be dissolved in the following specifically enumerated situations:

1. Upon expiration of the term specified in the articles of association;
2. By resolution of the company's members;
3. By a decision to merge with a joint-stock company or another limited liability company;
4. Upon the opening of insolvency proceedings or a final court decision not to open or to terminate insolvency proceedings due to insufficient assets to cover costs;
5. By order of an administrative authority;
6. By decision of the commercial court.

According to the §84, (2) GmbHG, it is possible for the members of the GmbH to stipulate additional grounds for dissolution in the partnership agreement. This reflects the will of the members. Just like the creation of the company is the fruit of their will, so the grounds for dissolution of the same company can be a result of their will. However, the partnership agreement cannot overrule the stipulations in the GmbHG and other acts, which is logical due to the hierarchy of legal acts.

Dissolution of the company due to: expiration of the term specified in the articles of association, resolution of the company's members, order of an administrative authority and decision of the commercial court – is strictly followed by the liquidation of a company, as per §89 and §94 GmbHG.

Liquidation is not performed if the decision to merge with a joint-stock company or another limited liability company and the opening of insolvency proceedings or a final court decision not to open or to terminate insolvency proceedings due to insufficient assets to cover costs are the grounds for dissolution.

3.2.1 - EXPIRATION OF TERM as a Reason for GmbH Dissolution

The general legal rule is that a GmbH is established for an indefinite period, but the articles of association may provide otherwise. Thus, it can be stipulated in the articles that the company will be considered dissolved upon expiration of the term specified, on reaching a particular date, or upon the occurrence of a specified event.

A clause setting the company's duration is, therefore, an optional provision in the articles; however, if included, it becomes a fundamental term that must be registered in the commercial register (§ 3,(1), item 11 of the FBG and §11 of the GmbHG). Only actual time limits can lead to the dissolution of a GmbH under § 84, item 1. These time limits are based on the calendar, i.e., specified by a precise date or fixed period, or may be defined in relation to a specific event (e.g., patent or trademark expiration, death of a partner, etc.).[45]

Upon the expiration of the term specified in the articles of association or the occurrence of a predetermined event, the company is considered dissolved without requiring a special decision by the members. Dissolution due to the expiration of the term must be immediately registered in the commercial register (§88, (1) of the GmbHG).

Once this condition occurs, liquidation proceedings are mandatory (§89 of the GmbHG). Only upon the completion of these proceedings is the company deleted from the register, resulting in the loss of its legal personality and its definitive cessation.

3.2.2 - DECISION TO DISSOLVE THE COMPANY as a Reason for GmbH Dissolution

The decision is made by a majority vote of the members, unless the articles of association stipulate a different majority for passing such a resolution. It may also require unanimity of all members. The decision is made at a company meeting, must be in written form, and must be notarized (§87 of the Notary Code).

The dissolution decision includes a statement that the company is dissolved and is entering the liquidation phase as of a specified date. For legal certainty, the founders' intent to dissolve the company must be clearly expressed. This decision also confirms the release of management and appoints a liquidator.

According to §88,(1) of the GmbHG, the dissolution decision must be promptly submitted by the directors for entry into the commercial register.

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[45] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010),27, 27-28

Upon the occurrence of this condition, liquidation proceedings are mandatory as per §89 of the GmbHG. Only after the completion of these proceedings is the company deleted from the register, resulting in the loss of its legal personality and its ultimate cessation.

3.2.3 - DECISION TO MERGE WITH ANOTHER COMPANY as a Reason for GmbH Dissolution

According to § 96 GmbHG, there are two forms of merger for limited liability companies:

1. Merger by absorption – where one or more companies transfer their assets through a comprehensive legal succession and become part of an existing company (the absorbing company); and
2. Merger by the creation of a new company – where two or more companies merge by establishing a new company into which the transferring companies convey their assets via comprehensive legal succession and become part of this newly established company.

The merger is executed based on a resolution by the members of the merging companies. The merger decision requires a three-fourths majority of the total votes of the company's members (§98 of the GmbHG). The decision must be notarized (§87 NO). The change is registered in the relevant commercial register (by analogous application of §225 of AktG per §96, (2) of the GmbHG).

The adoption of the merger resolution results in the dissolution of the company that merges into the other company – the absorbing or newly established company (§84,(1), item 3 of the GmbHG). Thus, the critical point is the decision date, not the registration date in the commercial register.

3.2.4 - INITIATION OF INSOLVENCY PROCEEDINGS as a reason for GmbH dissolution

With the insolvency court's decision to initiate bankruptcy proceedings, the GmbH is considered dissolved (§ 84, (4) GmbHG). The dissolution takes legal effect immediately upon the court's decision to initiate insolvency proceedings, without waiting for the finality of that decision.Insolvency process for a GmbH is regulated in a separate section of the Insolvency Code (IO), from §63 to §180. Insolvency proceedings are initiated only if both formal and substantive conditions are met:

<u>Petition for insolvency proceedings initiation</u>

The insolvency court initiates proceedings based on a petition from the debtor (§69, (1) IO), from a creditor (§70, (1) IO), or ex officio.

<u>Insolvency/Overindebtedness</u>

Insolvency of the GmbH is the general condition for initiating bankruptcy (§66 KO). Insolvency is deemed present if the GmbH, as the debtor, has ceased to make payments or cannot meet all due obligations due to a lack of liquid funds.

Funds to Cover Costs

Per §71 IO, an essential requirement for opening bankruptcy proceedings is the availability of funds to cover the bankruptcy process costs. The bankruptcy court, acting ex officio, verifies the fulfillment of this requirement. In practice, the minimum amount considered necessary for covering bankruptcy costs is typically 4,000 euros . [46]

If it shows that there are insufficient funds to cover the costs of the bankruptcy process, the court may order the petitioner to deposit an advance to cover these costs. If the advance is not paid within the stipulated time, the bankruptcy petition is dismissed, triggering procedures under §39 of the Business Registry Act (FBG).

Issuance of the Bankruptcy Opening Order

If statutory conditions are met, the court must open insolvency proceedings through an order, which is served on the debtor and appoints a liquidator ex officio. The opening of insolvency proceedings legally dissolves the company. Management and disposal rights are transferred to the liquidator, though the organizational structure of the dissolved GmbH remains operative even during bankruptcy . [47] The court notifies the commercial register of its decision to record the insolvency initiation.

The dissolution of the GmbH due to the commencement of insolvency proceedings, rather than liquidation, follows the process set out in Insolvenzordnung (IO).

3.2.5 - ORDER OF AN ADMINISTRATIVE AUTHORITY as a reason for GmbH dissolution

Under §86, para. 2 of the GmbHG, an administrative authority may order the dissolution of a GmbH in the following cases:

1. when the company exceeds the scope of its activities as defined by the §1, (2) GmbHG;
2. when the directors of the GmbH commit a criminal offense (money laundering or embezzlement) in the course of the company's operations, and the severity of the offense suggests a risk of recurrence that can compromise the company's continued operations.

[46] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010), 34, 44-45

[47] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010), 34, 45-46

According to §86, (2) of the GmbHG, the decision to dissolve the company is made by:

- the federal minister of finance, in cases involving insurance companies;
- the competent provincial governor, based on the company's registered office location, for all other companies;
- a specific case applies under §6, (4) of the Banking Act, where the Financial Market Authority (FMA) may revoke the banking license granted to a credit institution operating as a GmbH if the conditions specified in the Banking Act are met. The revocation of this license results in the legal effect of the GmbH's dissolution.

The administrative authority responsible for ordering the GmbH's dissolution must notify the competent commercial registry court to record this decision. It is important to emphasize that the legal effect of dissolution takes place upon the administrative authority's decision, while the entry in the commercial registry serves only a declarative purpose, confirming and publishing the dissolution.

Following the administrative authority's decision to dissolve the company based on §84, (1), item 5 of the GmbHG, a liquidation process is conducted for the dissolved company §94, (1) of the GmbHG). The administrative authority may order the company's governing bodies to cease their activities immediately (§94, (2) of the GmbHG). In such cases, the commercial court exclusively appoints the company's liquidators.

3.2.6 - DECISION OF THE COMMERCIAL COURT as a Reason for GmbH Dissolution

According to §84, (1), item 6 of the GmbHG, a company may be dissolved by a decision of the commercial court. This law does not prescribe specific material conditions for such a decision. The material conditions for the commercial court's decision are instead set forth in other laws, such as §40 of the Commercial Register Act (FBG) and §10,(2) and §10(3) of the FBG. After the issuance of the decision and it's entry into the commercial register, the liquidation process follows as per §94, (1) GmbHG.

3.2.7 - NATIONALIZATION under §95 of the GmbHG as a Reason for GmbH Dissolution

The Republic of Austria, an Austrian province, or a municipality may, by law, acquire all shares of a GmbH for the purpose of dissolution and thus become the sole shareholder of that GmbH. Additionally, in a separate scenario, a local authority may acquire the entire assets (including liabilities) of an already dissolved GmbH based on an agreement. In these cases, liquidation proceedings are not conducted, as the GmbH is considered replaced by an entity with sufficient creditworthiness. [48]

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[48] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010),53, 53-54

According to §95 of the GmbHG, in both scenarios, an application for dissolution without liquidation is submitted along with a request to remove the company from the register. Upon registration of this removal, the GmbH is considered fully dissolved, and the transfer of the company's assets and liabilities to the local authority is deemed completed at the time of registration of deletion, under §95, (3) of the GmbHG.

This legal solution is critized and brought into question in the legal doctrine as it favors the state or other forms of state teritories and thus incurs into the legal principle of equality between the legal persons, as it is proclaimed in the constitution and the legal acts of the European Union.

3.2.8 - GROUNDS FOR DISSOLUTION OF A GmbH SPECIFIED IN THE ARTICLES OF ASSOCIATION (§84, (2) of the GmbHG)

In addition to the statutory grounds for the dissolution (termination) of a GmbH, the legislator, in §84, (2) of the GmbHG, allows shareholders to specify additional grounds for dissolution in the articles of association beyond those mandated by law.

The primary requirement for such dissolution is that these (non-statutory) grounds must be established in the articles of association. These grounds can vary: the death/incapacity or bankruptcy of a partner; withdrawal of a particular shareholder; cessation of operations; achievement of the company's purpose; lack of financial resources to continue business activities; loss of a license, expiration of patent protection or another intellectual property right; failure to meet revenue goals; or failure to obtain a contract.[49] Other grounds are also possible.

In all of these situations, a mandatory liquidation procedure is performed, and only after the completion of this process is the company deleted from the commercial register. This results in the legal consequence of the loss of legal personality and the termination of the legal existence of the deleted company.

3.2.9 - GROUNDS FOR DISSOLUTION OF A GmbH UNDER OTHER ACTS

A) If a bankruptcy court, pursuant to §71b of the Insolvency Code (IO), rejects a petition for bankruptcy due to insufficient assets to cover expenses, dissolution of the company follows ex lege (§39 of the Commercial Code (FBG)). The commercial court's decision to delete the company from the register is declarative, as the bankruptcy court assesses the substantive and formal conditions of the dissolution decision.

B) Under §40 FBG, the commercial register court may delete a company from the register ex officio, upon request from the competent tax authority or the Chamber of Commerce, if a material condition is met: that the company has no assets. This provision serves legal certainty by removing asset-less companies from the register, thus preventing potential business partners

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[49] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010)53, 61-62

from relying on the status shown in the commercial register. Here, the liquidation process is not performed due to the lack of assets.

According to some authors, §40 FBG is not an independent ground for dissolution but merely a legal basis for the commercial register court's actions under §84, (1), point 6 of the GmbHG.

C) The commercial register court, under §10, (2) of the FBG, is authorized to delete companies that either should never have been registered or whose registration later became inadmissible because a "substantive prerequisite" is lacking, making deletion in the public interest. Additionally, a GmbH may be nullified by the register court's decision in accordance with §10, (3) of the FBG by applying §216, (1) of the Stock Corporation Act (AktG).

The commercial court's decision represents the legal basis for the dissolution of GmbH, without actually affecting it's existence, because it is only affected by the conclusion of the liquidation process which follows the entry of the decision of the nullity into the commercial register, as per mutatis mutandis application of §218 AktG. [50]

According to some opinions, actions taken by the commercial register court under §40 FBG and §10, (2) and §10 (3) of the FBG can be subsumed under grounds for dissolution within the meaning of §84 (1), item 6 of the GmbHG, as these FBG provisions constitute the material conditions for corresponding decisions by the commercial court. Thus, they are not independent grounds for dissolution.[51]

D) According to §2, (5) of the Transformation Act (UmwG), it is possible to transfer a corporation without liquidation by transferring all assets to the main shareholder or to a partnership (OG or KG) that acts as the corporation's universal successor. Upon registration of the transfer, the GmbH ceases to exist, so this may be considered an independent basis for dissolution.[52]

E) Under §14 of the Split-Off Act (SpaltG), a corporation may divide or separate its assets. Division or separation of assets can be transferred to one or more newly established corporations (split-off for the purpose of re-establishment) or to one or more existing corporations (split-off for absorption). In both cases, liquidation is avoided, and the transferring company is considered to have ceased to exist once the division is registered.

Based on the above, Austrian law recognizes two types of grounds for GmbH dissolution, depending on how they are prescribed: legally mandated grounds and grounds stipulated in the articles of association.

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[50] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010), 53, 46-53

[51] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010), 23, 23-24

[52] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010), 24, 24-25

Additionally, a distinction can be made between voluntary dissolution, based on the shareholders' will (e.g., through a shareholder resolution under §84, (1), or a merger decision), and mandatory dissolution, arising as a necessary consequence of specific legal circumstances (occurring independently of shareholders' will and prescribed by law, such as bankruptcy proceedings, administrative order, commercial register court order, or bankruptcy court decision not to open or dismiss bankruptcy due to insufficient assets to cover expenses).

3.2.10 - LEGAL CONSEQUENCES OF DISSOLUTION – LIQUIDATION

The direct and generally mandatory legal consequence of a GmbH's dissolution is liquidation (§89, (1) of the GmbHG), unless otherwise specified by law, such as in cases of nationalization, merger, dissolution due to restructuring, or deletion due to lack of assets. Liquidation also does not occur if insolvency proceedings are opened over the GmbH's assets. In such situations, insolvency proceedings are conducted per the KO provisions.

The primary goal of liquidation is to protect creditors, i.e., to settle the obligations of the dissolved company. This includes completing ongoing business, realizing transactions in progress, collecting receivables, settling creditors' claims, and ultimately transferring remaining assets to the founders. Immediate cessation of the GmbH as a legal entity upon dissolution would conflict with creditors' interests, as there is no personal liability of founders for GmbH's obligations.

Dissolution does not affect the company's legal personality. The dissolved company can still sue and be sued. The company's name remains, with an addition indicating liquidation, which must be registered in the commercial register. The GmbH's business license does not expire. Dissolution does not impact the maturity of claims and obligations; the company remains a creditor and debtor to third parties.

Liquidators carry out the liquidation process.

The directors serve as liquidators unless one or more other individuals are designated by the articles of association or a member decision (§89, (2) of the GmbHG).

Exceptionally, the commercial register court appoints the liquidator in cases where:

- it acts ex officio due to non-compliance with the court's requirement to register the dissolution (§88, (3) of the GmbHG) or if an administrative authority ordered the dissolution and stipulated that corporate bodies must cease operations (§94, (2) of the GmbHG);
- upon the proposal of the supervisory board or members whose shares constitute at least 10% of the share capital or a nominal value of 700,000 euros, if there are valid reasons for doing so.

The liquidator's main role is defined in §149 of the Austrian Commercial Code, applied per §90, (1) of the GmbHG, which includes duties to terminate current business, occasionally engage in new transactions to conclude ongoing business, take steps to collect the company's receivables, liquidate remaining assets, and finally, settle creditors.

At the beginning of liquidation, the liquidator must announce the dissolution in an "official gazette" and invite creditors to submit their claims. Known creditors must be directly notified (§91, (1) of the GmbHG).

The liquidator must prepare an opening balance sheet, reflecting the company's assets and liabilities at liquidation start. If this balance reveals insolvency, the liquidator must file for insolvency. Additionally, the liquidator must compile an annual balance sheet at each fiscal year-end during liquidation.

The law does not mandate that liquidation conclude within a specific period.

On the date of dissolution and the invitation to creditors, a three-month "block period" commences, during which assets cannot be distributed to liquidation beneficiaries until this period expires. This deadline is not preclusive; creditors who file claims afterward still have the right to settlement. Late creditors must also be satisfied or secured, but only if or to the extent that funds are still available. Thus, there is a risk that a late creditor may receive nothing. Due to the principle of separation, creditors of unknown claims who file late cannot take action against members who received surplus liquidation proceeds in good faith. This does not constitute a violation of the GmbHG distribution prohibition.[53]

For debt settlement, a distinction is made between due and undisputed debts existing at liquidation start or arising during liquidation, paid from the available dissolution assets and incoming funds (§91, (2) of the GmbHG); and non-due or disputed debts, i.e., "unresolved amounts," for which necessary funds can be deposited with the court (§91, (4) of the GmbHG).

Any surplus assets remaining after creditor settlement are distributed among the founders (partners) in proportion to their shares. The articles of association may stipulate a different distribution ratio regarding liquidation surplus assets. At liquidation's end, the liquidator prepares a final liquidation balance.

Liquidation is considered complete when there are no more distributable assets. The founders then resolve to discharge the liquidator (release of the liquidator).

Following this resolution, the liquidator submits a deletion request to the commercial register court. This request must include: a) the liquidator's statement that liquidation is complete; b) proof of liquidator discharge approval; c) identification of the custodian of the dissolved company's books and documents; d) tax clearance from the competent tax authority. Notably, the

[53] Enrico Reitenbach, *' Die Beendigung der GmbH – systematische Darstellung und Möglichkeiten'*, (2010),14, 16-17

deletion request does not need to include proof that all debts were paid, as liquidation is deemed complete when nothing remains to liquidate.

Deletion from the commercial register is declarative.

SUPPLEMENTARY LIQUIDATION – If additional assets subject to distribution are discovered post-liquidation and deletion from the register, the commercial court may initiate supplementary liquidation. The court issues a supplementary liquidation order upon request from an interested party (e.g., an unpaid creditor or a former company founder). The applicant bears the burden of proving the existence of additional assets. During supplementary liquidation, the commercial court appoints a liquidator, either a previous one or a new individual. The purpose of supplementary liquidation is to distribute the newly discovered assets among unpaid creditors, if any, or former founders if no creditors remain, as the newly found assets do not belong to the deleted legal entity. In this case, the previously deleted company temporarily regains legal personality and procedural capacity, but is not re-registered. This legal consequence confirms that deletion from the commercial register after liquidation had only a declarative effect, as the complete cessation of the company is always tied to the absence of assets in the deleted entity.

3.2.11 - INSOLVENCY PROCEEDINGS of GmbH

After the Austrian Bankruptcy Reform Act (the "IRÄG 2010"), which was aimed at unifying the Austrian legal system or rather the insolvency component of said system, came into force, the dual act system that comprised of the Bankruptcy Act (Konkursordnung), which dealt with bankruptcy, and Settlement and Reconciliation Act (Ausgleichsordnung), which dealt with reorganisation, was replaced by the unitary insolvency system with the preceding act being the Insolvency Act (Insolvenzordnung) that dealt with the insolvency proceedings which encompassed both bankruptcy and reorganization.[54] This way, the IO created a significant change, introducing the more convenient and unified environment for insolvency proceedings conduction. In the following paragraphs insolvency proceedings, both the reorganization and bankruptcy proceedings will be analyzed.

The first stage in every, not only the insolvency proceedings, is the opening of the proceedings. In order for the insolvency proceedings to be opened, some prerequisites, stipulated in §66 and §67 IO, need to take place – ,,iliquidity" and ,,over-indebtedness". While over-indebtedness is applicable only to the legal entity as the debtor, the iliquidity applies to all debtors, including the physical persons as well. In addition, §167, (2) IO provides that the impending iliquidity is also sufficient for insolvency proceedings initiation. Even though the Act stipulates the prerequisites, it does not define the meaning of them. Case law has provided widely-accepted definitions of these terms. Iliquidity is seen as the accumulation of two different circumstantial occasions - the inability of the person, either physical or legal, to pay it's due and payable debts and the lack of possibility of the debtor being in position to acquire sufficient assets in the near future.[55] What is the meaning of the term "near future" is to be determined by the court in the specific cases. Over-

[54] https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-2016-New-Logo-Austria.pdf
[55] Ibid.

indebtedness is present if, again, two cumulative requirements are present - the total amount of liabilities of a company, both payable and non-payable, exceed the total amount of assets of the company and the company is unlikely to continue operating in the foreseeable future.

If any of these two prerequisites are met,both the debtor or the debtor's creditor are entitled to submit the request for the insolvency proceedings initiation.

In the event of debtor applying for the insolvency proceedings initiation, which is governed by §69 IO, the insolvency proceedings have to be opened immediately in front of the insolvency court. Upon the realization of either iliquidity or over-indebtedness, the company is obliged to submit the insolvency proceedings initiation request without culpable delay, but no later than 60 days after the occurrence of the one of the prerequisites. In the event of the company not abiding by these rules, the debtor or the management of the debtor will be personally liable for the damages that have arisen out of their negligence towards the filing of the insolvency proceedings initiation request.

The following article stipulates the initiation of the insolvency proceedings by the creditor. The proceeding will be opened immediately if the creditor provides prima facie evidence that they have and insolvency claim, whether payable or not, and that the debtor is facing iliquidity or over-indebtedness.

One additional requirement for the insolvency proceedings to take place is the fact that debtor needs to have the minimal assets required to cover the costs of the proceedings. If the entity does not have the assets required, the insolvency court may reject the initiation of the proceedings. However, the §71a IO provides that in the event of insufficient funds to cover the costs of the proceedings, the court may still open the proceedings if the applicant pays the advance payment on the order of the court. That means that both the debtor, or rather debtors management or the shareholders, or the creditor(s), can pay the advance payment in order to cover the costs and thus directly affect the court to open the insolvency proceedings. The failure to initiate the insolvency proceedings will result in the revocation of the company's business license.[56]

After the request has been submitted to the insolvency court, the court will determine if the debtor is in fact iliquid or in the state of over-indebtedness. The debtor has the authority to comment on the request submitted by the creditor. Upon it's decision to initiate the insolvency proceedings or to reject the opening of the proceedings due to the lack of assets which would cover the costs of the proceedings, the court must publish the said decision in the insolvency register, called Insolvenzdatei, which is available for public access. The court is also responsible for notifying the court which holds the commercial register in which the company is entered. Following the notification, the court that holds the commercial register will make an entry in the register, declaring that the insolvency proceedings are ongoing.

It is possible for the creditor as the applicant of the request to withdraw their request for insolvency proceedings initiation. In this case, the court is not bound by the withdrawal of the request. The court has the authority to continue the inspection of the necessary requirements for

[56] Ibid.

insolvency proceedings. This rule is in place to ensure that the reason for conducting the insolvency proceedings is not of procedural nature, but rather a material one. Insolvent companies should go through the insolvency proceedings because they are insolvent, not because the request for insolvency proceedings initiation is submitted. This is further reflected in the fact that court has the authority to reject the request if it concludes that the debtor is not in the states of iliquidity or over-indebtedness.

The insolvency proceedings can be conducted in two different forms, as per §167, restructuring proceedings and §180 IO, the bankruptcy proceedings.

Restructuring is a mechanism with a purpose to redefine the debtor-creditor relationship by introducing the quota of debt that must be paid by the debtor to the creditors in a certain period of time. The IO prescribes that, in the event of self-administration variant of restructuring, the quota of at least 30% of the total amount of debt must be paid back to the creditors over the course of two years time, while in the case of no self-administration, the quota is reduced to 20% over the unchanged time period. Restructuring proceedings take the advantage over the bankruptcy proceedings as restructuring is a more favorable result that can come out of the insolvency of the debtor and the creditors can expect the restructuring to be more in line with their interests over bankruptcy. Restructuring proceedings apply only to legal entities as physical persons can only be included in the bankruptcy proceedings.

In order for the restructuring proceedings to be a success, the debtor must first present a restructuring plan. Such plan usually includes the debtor's propositions regarding the redefinition of it's relationship with the creditors and the potential business operations planned to take place with the goal of settling the debt in which the debtor is in at the time. Sole proposition of restructuring plan is not enough for the restructuring proceedings to result in success, as the creditors need to agree with the plan. The restructuring plan is deemed as accepted if the majority of the creditors have voted for the plan, and those who have voted at the court hearing represent the majority in the total amount of notified claims. If the creditors reject the proposed restructuring plan in the time frame of 90 days starting from the opening of insolvency proceedings, the insolvency court must revoke the self-administration and appoint the insolvency administrator who gains the only authority of managing the assets of the debtor, effectively making the proceedings take the form of bankruptcy proceedings.

The same end-result is achieved in the event of debtor failing to propose the restructuring plan.

The main consequence of the opening of the bankruptcy proceedings is the appointment of the insolvency administrator who, as previously stated, gains all authority over every legal action concerning the insolvency estate of the debtor as the debtor is prohibited from disposing of it's assets while the insolvency administrator is in place. The duties and responsibilities of the insolvency administrator are:
-clarification of the debtor financial situation and any third-party guarantees that are in the debtor's interest;
-immediate assessment of the possibility of reopening or continuation of the debtor's business operations if those have been closed;
-assessment of the restructuring plan's potential and effectiveness;

-evaluation of the insolvency estate’s value and management of any ongoing or pending legal proceedings.

As one of the administrator's authorities is assessment of the restructuring plan’s potential and effectiveness, it is appropriate to analyze the relationship between bankruptcy and restructuring. It is possible to conclude the restructuring proceedings even though the bankruptcy proceeding has been opened. If the insolvency administrator assesses that it would be viable to propose the restructuring plan, they have the authority to do so and if the creditors accept the restructuring plan, the proceedings will be conducted materially as restructuring proceedings, all while under the unchanged name. This means that even though the proceeding will in fact be of restructuring nature, it will still be called bankruptcy proceedings.

If no restructuring plan has been proposed after one year of the opening of the insolvency proceedings, the insolvency court must issue an order of debtor’s business closure in order to ensure the credtors’ interests.

Some legal mechanisms are unique and exist only during the time of bankruptcy proceedings. Those are: authority of the insolvency administrator in connection to the contractual relationships of the debtor, prohibitions of certain contractual norms when the company is in the status of the debtor in insolvency proceedings, clawback and recovery mechanism such as intentional discrimination of creditors and discrimination of a single creditor, transactions for no consideration and transactions despite the knowledge of the insolvency.

Contractual relationships of the debtor do not influence the bankruptcy proceedings and vice versa except for the fact that insolvency administrator is authorized by law to withdraw the debtor from the contract in the time period specified by the court. This leads the conclusion that in order to be able to withdraw from the contract, the administrator has to notify the insolvency court first and request the time frame in which they can withdraw the debtor from the contract. While the contract itself remains unchanged during the bankruptcy proceedings, the stipulations of a contract or separate contracts which enable the other party to withdraw from the contract in case of insolvency or dissolve the contract in case of insolvency are prohibited under §25b IO. Previous article of IO stipulates that within six months of the opening of the insolvency proceedings, the creditor is authorized to terminate, due to material cause, the contract that has a substantial impact on the debtor’s business.

Clawback and recovery mechanisms is an umbrella term for multiple different rule sets that govern different situations and behaviour of the debtor. The situations that the debtor might be in and the behaviors and acts the debtor may commit are generally aimed at creditor discrimination, either pointed at all creditors in general or towards the single creditor. The rule sets, while being different and governing different instances, aimed at the same goal – protecting the interests of creditors. The most important mechanisms of clawback and recovery will be briefly touched upon.

If the debtor aim was to discriminate the creditors by entering an agreement and the other party to the agreement was aware or at least negligible to that fact, the insolvency administrator is authorized to appeal such transactions under the §28, (1) and §28(2) IO, and the insolvency court is authorized to annul such contract.

If the debtor has made a transaction of no consideration, which is a transaction in which the debtor does not gain anything in return, in the time frame of 2 years prior to the opening of the insolvency proceedings, the insolvency administrator is authorized to appeal such transaction on the basis of §29 (1) IO.

§31, (2) of IO stipulates that if a debtor created a transaction towards it's creditor and by such put the creditor into unlawfully more favorable position, the insolvency administrator is authorized to appeal that transaction.

In the §31A (2) the situation in which the debtor has entered the transaction with one of it's creditors or a third-party after the debtor has become insolvent or after the request for insolvency proceedings has been submitted to the court is stipulated. If the creditor that is the party to the transaction is in the more favorable position because of it or the transaction with the third party is to the detriment of the creditors, the insolvency administrator is authorized to appeal such transactions, as they either favor the creditor directly and discriminate every other creditor in the insolvency proceedings or discriminate all creditors.

§31A (3) is similar to the previous rule in a way that it does regulate the situation in which the debtor has entered into the transaction which is to the negative detriment to the creditors, but the difference is that this rule applies when the other party is not a creditor. If this is the case, this rule is the basis on which the insolvency administrator is authorized to appeal the transaction under the cumulative conditions with the first being the objective fact that the transaction is to the detriment of the creditors, the second one being the subjective fact that the other party was aware or was able to be aware of the fact that the debtor was already in the process of insolvency or the insolvency proceedings initiation was highly probable. Finally, the third cumulative condition relates to the nature of the transaction, more specifically the overall value of the transaction as the condition prescribes that the detriment of the transaction towards the insolvency estate was objectively foreseeable.

The distribution of the insolvency estate in the insolvency proceedings is regulated by IO. The IO stipulates four different tiers of creditors and a certain settlement order that must be applied and respected during the proceedings.

First and the most privileged tier of creditors are the creditors with in rem rights such as liens, mortgages, reservations of titles or other secured claims. These creditors have the authority to request and to be granted, the exclusion of these in rem rights from the insolvency estate. Only after they have been dealt with completely, or if there are no such creditors in the given case, the rest of the creditors can have their claims settled.

The second tier behind the creditors with in rem rights is reserved to creditors with preferential claims, exhaustively listed in §46 IO. Those are creditors whose claims are unsecured, but have preferential treatment due to the nature of their claims. Some examples of creditors with preferential claims are employees of the debtor for the salaries, the state for administrative costs of the insolvency proceedings, social insurance of the debtor and all creditors whose claims are induced by acts of insolvency administrator. In order for these claims to be of preferential treatment, they must arise during the proceedings are aimed at the continuation of the business. Settlement of these claims is performed first, prior to any other settlement with the exclusion of the first tier of claims and creditors, and in full from the entirety of the insolvency estate if the value of it is sufficient enough. If not, then these claims are settled in specific order regulated by §47 IO.

Any other claims that are provable and have arisen before the initiation of the proceedings represent the third tier of claims. They can be settled only after the first two tiers have been settled. If the insolvency estate does not contain enough assets for the complete settlement, the claims are treated equally and the settlement is performed pro rata in proportion to the entirety of the claims notified to the insolvency court and accepted by the insolvency administrator.

The final and the least privileged tier of claims and creditors is the one called low-ranking claims and creditors. They represent the claims of the shareholders that are treated as equity to the debtor. If a shareholder has provided a loan to the debtor and the debtor is facing a financial crisis, this loan is classified as equity in the company. A financial crisis is defined as a situation where the company is over-indebted, unable to fulfill its debt obligations, or has a debt-to-equity ratio below 8% with a notional debt repayment period exceeding 15 years. Such claims will only be addressed after all higher-priority claims have been settled.

Finally, there are claims that are fully ignored in the insolvency proceedings and will not be settled during the proceedings. Those are called excluded claims.

After the insolvency estate has been fully exhausted by claim settlements, the bankruptcy proceedings are concluded and the insolvency court issues a decision for the insolvency conclusion. Further, the insolvency court notifies the commercial court that holds the commercial register of the mentioned decision so the commercial court can make the proper entry in the register.

§84 of the GmbHG prescribes that the GmbH shall be dissolved after the opening of the bankruptcy proceedings. This means that the initiation of bankruptcy proceedings itself is the trigger for the dissolvement of GmbH. Additionally, the GmbH will be dissolved once the decision of bankruptcy proceedings rejection or dismissal due to the lack of sufficient funds for procedural cost coverage. The dissolution must be notified, on the basis of §88 GmbHG, to the commercial court that holds the commercial register in which the GmbH has been entered. The dissolution will then be entered in the register.

3.3 - DISSOLUTION OF A COMPANY - SIMILARITIES AND DIFFERENCES IN THE SOLUTIONS OF SERBIAN AND AUSTRIAN LAW

When it comes to the reasons for the termination of an LLC (DOO or GmbH), a comparative analysis shows that both legal systems prescribe essentially identical grounds for the termination of a company, with some specific distinctions.

Comparing the statutory regulations of Serbian and Austrian law, it can be concluded that the concept of company termination is regulated in both legal systems by legislative acts, and in a very similar manner: primarily, the reasons for terminating an LLC (DOO or GmbH) are regulated by substantive laws governing corporate entities — the Serbian *Act on Commercial Companies* and the Austrian *GmbHG*. However, in both jurisdictions, termination due to insolvency is governed by special bankruptcy laws: in Serbian law by the *Bankruptcy Law* and in Austrian law by the *Insolvency Code (IO)*. A specificity of Austrian law is that some grounds for terminating a GmbH (unrelated to the founders' will but constituting obstacles to continued operation) are prescribed by other laws outside the *GmbHG*, such as §10 (2) and §10(3) and §40 of the FBG. In Serbian law, such reasons are prescribed by the *Act on Commercial Companies* (Art. 546).

It can also be concluded that both legal systems recognize two general modes of company termination:

1. Termination based on the will of the members, and
2. Termination due to certain adverse legal circumstances.

Voluntary Termination

For voluntary termination, both Serbian and Austrian law recognize the following reasons:

- A decision by members to liquidate (dissolve) the company,
- Expiration of the company's term, and
- Corporate restructuring.

Just as a company is established by the will of its members, it can also cease to exist based on their decision, provided this decision is made in the appropriate form. This principle is common to both Serbian law (Art. 525 para. 2 in conjunction with Art. 211 para. 2 item 4 of the *Act on Commercial Companies*) and Austrian law (§84 (1) item 2 of the *GmbHG*).

Key Differences

1. **Voting Majority:**

    -In Austrian law, a simple majority is required unless a higher threshold is specified in the articles of association.
    -In Serbian law, a two-thirds majority of the total number of votes is required, unless the founding act stipulates a different majority, which cannot be lower than a simple majority.

2. **Form of the Decision:**

    -Austrian law requires the decision to be in writing and notarized.
    -Serbian law only requires a written form.

In both systems, the decision to dissolve a company triggers a liquidation process aimed at settling the obligations of the dissolving company. After liquidation, the company's termination occurs with its deletion from the business register.

Expiration of the Company's Term

Both legal systems share the principle that companies are generally established for an indefinite period. However, deviations from this principle are permitted: the founding act (in Serbian law) or the articles of association (in Austrian law) may specify a limited duration.

1. **Serbian Law:**

   -If a company is founded for a fixed term, it is legally obliged to initiate liquidation proceedings unless it registers an extension of its duration (*Art. 10 of the Act on Commercial Companies*).

   -If the members fail to adopt a resolution for voluntary liquidation within 30 days after the expiration of the company's term, the Business Registers Agency (acting as an administrative authority) initiates a mandatory liquidation procedure (*Art. 546 para. 2 of the Act on Commercial Companies*), which is a specific feature of Serbian law.

2. **Austrian Law:**

-Similarly, in Austrian law (*§84 (1) item 1 and §88 of the GmbHG*), the expiration of the company's term leads to termination through liquidation proceedings.

In both legal systems, the expiration of the company's term results in mandatory liquidation, primarily aimed at settling creditors. Following the completion of liquidation proceedings, the company ceases to exist upon its deletion from the register.

The Serbian and Austrian legal systems exhibit a high degree of similarity regarding the cessation of companies due to corporate transformations. According to Austrian law (§84 (1), item 3 GmbHG), a GmbH is dissolved by resolution to merge with another GmbH or joint-stock company. Mergers can occur in two forms: merger by absorption (transfer of the assets of one or more GmbHs to an existing GmbH) or merger by formation of a new company (two or more GmbHs transfer their assets into a newly formed entity). In both cases, the merging companies cease to exist upon being removed from the register. Liquidation is not required under §96 GmbHG, as the successor company assumes the obligations of the original company under the principle of universal succession. Similarly, under §14 SpaltG, a corporation can split or transfer its assets, either forming new corporations or transferring assets to existing ones, with no liquidation process required.

Serbian law mirrors these provisions through three forms of corporate transformations leading to the dissolution of an LLC (DOO):

1. Merger by absorption (Article 486 of the ACC) – where one or more companies are absorbed by another, transferring all assets and liabilities, thereby ceasing to exist without liquidation.
2. Merger by formation (Article 487 of the ACC) – where two or more companies merge to create a new entity, transferring all their assets and liabilities, ceasing to exist without liquidation.
3. Division (Article 488 of the ACC) – where a company splits into two or more entities, transferring its assets and liabilities, ceasing to exist upon the completion of the transformation without liquidation.

In both jurisdictions, the cessation occurs with the company's deletion from the business register, and universal succession ensures that creditors' claims are safeguarded. However, the Serbian system incorporates a unique mechanism known as "compulsory liquidation," designed to address specific statutory dissolution scenarios.

The grounds for initiating insolvency are largely comparable between Serbian and Austrian law. The Serbian Insolvency Act (Article 11) outlines permanent inability to pay, imminent inability to pay, over-indebtedness, and irregularities in restructuring plans as triggers for insolvency proceedings. Austrian law, through the Insolvency Act (IO), specifies iliquidity and over-indebtedness as grounds. Despite some differences in terminology, these criteria align closely in substance, aiming to ensure timely responses to financial distress.

Both legal systems prioritize creditor satisfaction, striving to settle claims to the greatest extent possible. Initially, restructuring is preferred due to its potential for higher recovery, while bankruptcy serves as the definitive mechanism to address insolvency where restructuring fails.

In both countries, insolvency courts, which are specialized commercial courts, oversee the proceedings. Insolvency administrators, endowed with similar powers, manage the debtor's assets, represent the debtor, and act to protect creditors' interests, such as by contesting detrimental transactions.

The dissolution of a company is the ultimate consequence of insolvency proceedings, though the timing differs. Austrian law considers dissolution to occur upon the opening of insolvency proceedings, whereas Serbian law formalizes dissolution upon completion and registration of insolvency closure. Additional consequences include the suspension of managerial powers and possible termination of employment contracts.

Beyond insolvency, both jurisdictions provide for company dissolution due to statutory reasons independent of members' will. Austrian law (§84 (1), item 6 GmbHG) allows for dissolution by economic court decision when a company lacks assets (§40 FBG) or fails to file financial reports for two consecutive years. Serbian law has analogous provisions under Article 546 para.10 of the ACC but differs in assigning this authority to the Business Registers Agency instead of a court.

A key divergence lies in nationalization under Austrian law (§95 GmbHG), which enables dissolution by transferring ownership to the state, a concept absent in Serbian legislation.

Serbian law uniquely prescribes forced liquidation for specific statutory cessation scenarios, distinguishing it from regular liquidation. The process excludes creditor settlement, focusing solely on determining cessation conditions. Creditors' interests are safeguarded post-dissolution through provisions holding members accountable up to the value of the distributed assets.

While there are nuanced differences between Serbian and Austrian company laws regarding dissolution, the similarities reflect a high degree of alignment, particularly with EU standards. Serbia’s recent amendments to its Act on Commercial Companies demonstrate its integration into the EU legal framework, underscoring its readiness for eventual membership.