

## Retaining Public Enterprise Status Through Own Shares

MARIJAN KOCBEK

**ABSTRACT.** The paper deals with the transitory provisions of the Public-Private Partnership Act that strongly interferes with the legal status of the public enterprises in Slovenia. According to this Act, there are merely two options for public enterprises in which there are private equity stakes. A public enterprise can be transformed into a company in accordance with the Companies Act, or the public enterprise status can be retained, provided that the private equity stakes are in a way nullified in the public enterprise, and that only the equity stakes owned by the Republic of Slovenia or local communities remain. The Act expressly refers to an option of terminating the private equity stakes through an own shares fund. By analysing the Companies Act, the author states that in practice, the procedure for acquiring own shares is most relevant due to their withdrawal. Thus, the share capital is reduced. In this case, the companies have two options. In the first option, the companies may withdraw their shares by following a simplified procedure. When doing so, they must have reserved profits at their disposal to use them for this purpose instead of dividing them among shareholders. In the second option, the companies may also withdraw their shares chargeable to quality funds, i.e., fixed-term categories of capital. However, in so doing, they must carry out all the necessary procedures for protecting creditors, which delays the whole transaction.

**KEYWORDS:** • public-private partnership • public enterprise • own shares • Slovenia

---

CORRESPONDENCE ADDRESS: Marijan Kocbek, Ph. D., Professor, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: [marijan.kocbek@uni-mb.si](mailto:marijan.kocbek@uni-mb.si).

DOI 10.4335/9.1.85-101(2011)  
ISSN 1581-5374 Print/1855-363X Online © 2011 Lex localis (Maribor, Graz, Trieste, Split)  
Available online at <http://pub.lex-localis.info>.

## 1 Introduction

In 2006, the National Assembly of the Republic of Slovenia passed the Public-Private Partnership Act that strongly interfered with the legal status of public enterprises, which is exceptionally important for further organisation and operation of the public enterprises that provide public utility services. We agree with the assessment that the public enterprise situation is rather odd in the Slovenian legal order (see Repas, 2010: pp. 227-243; Kranjc, 2009a; Kranjc, Kerševan, Plauštajner & Prelič, 2009b). Unfortunately, this conclusion holds good also after adopting the new Public-Private Partnership Act. There are different opinions about the legal status of public enterprises in the legal literature. No wonder we have no uniform definition of the public enterprise in Slovenia (Ferk & Ferk, 2007). It is also for this reason that the new legislation, which is supposed to regulate the public enterprise status, has been in preparation for several years. Thus, its enforcement could not occur. Therefore, the Public-Private Partnership Act provides the definition of the legal status of public enterprises. This Act includes transitory and final provisions which cancel some provisions of the Public Utilities Act that used to be the “central” Public Enterprises Act. The main objective of the new regulation is to distinguish between genuine public enterprises (that shall remain exclusively publicly owned to perform public service activities) and other public enterprises that shall be transformed into traditional companies.

According to the Public-Private Partnership Act, there are merely two options for the public enterprises in which there are private equity stakes:

- a public enterprise can be transformed into a company in accordance with the Companies Act /ZGD-1/,
- or the public enterprise status can be retained, provided that the private equity stakes are in a way nullified in the public enterprise, and that only the equity stakes owned by the Republic of Slovenia or local communities remain.

By way of example, the Public-Private Partnership Act provides some ways of withdrawing the private equity stakes (see Bohinc, 2007; 1209). One of the possible ways the PPP Act expressly mentions is the termination of the private equity stakes through the fund of own shares.<sup>1</sup> In this context, it needs to be pointed out to the inconsistency of terminology in the Public-Private Partnership Act because the term “fund of own shares” was already omitted in its Amendment F in 2001, and it was replaced by the corporate law institution of own shares, and in connection with their acquisition, also the institution of reserves for own shares.<sup>2</sup> After that, the Public-Private Partnership Act no longer regulates in detail this issue. Therefore, of course, the corporate law regulation of the institution of own shares shall be completely observed in the implementation of the Companies Act. In this context, it is essential that the Public-Private Partnership Act provides no exceptions which could or should be used as a *lex specialis* in such

transforming or retaining the public enterprise status. It is necessary to observe all the provisions of the Companies Act that apply to the admissibility of acquisition of own shares, own share trading method, disposal of own shares, their withdrawal, and the balance legal aspects. It needs to be particularly stressed that the purpose of harmonisation with the Public-Private Partnership Act does not inherently represent the legitimate legal basis for the admissible acquisition of own shares. Therefore, in the following sections, we are going to discuss in more detail the corporate law issues associated with the acquisition of own shares, disposal of own shares, and their further withdrawal by reducing the share capital. Thus, the purpose of harmonisation with the Public-Private Partnership Act can be realised in one of the possible ways which the Act expressly lays down.

## **2 The Fundamental Ban on Acquisition of Own Shares**

In principle, the Companies Act prohibits both the original acquisition of shares (in the primary market, either upon the establishment of a joint-stock company or upon an increase in the share capital so that a company may subscribe for its own shares), and the derivative acquisition of own shares (from the other shareholder in the secondary market), but with the exception that the ban on the original acquisition of shares is absolute, whereas the ban on the derivative acquisition of shares is relative, because the Act enumerates eight exceptions (the first paragraph of Article 247) (Prelič et al, 2009a; Prelič, 2009b).

## **3 Exceptions to Ban on Acquisitions of Own**

### **3.1 The Necessary Acquisition of Own Shares**

A company may acquire its own shares provided that the acquisition is necessary to prevent severe direct damage (pursuant to the first indent of the first paragraph of Article 247 of the Companies Act). The damage must be direct, and it must endanger the company assets and not the assets of individual shareholders. Therefore, acquisition of own shares does not fit into this framework if their price falls. The damage must be large, not just small or even negligible. Such acquisition of shares is necessary, for example, when a company acquires shares from the shareholder, i.e., the company's debtor. Only in this way can the company get its claims paid.

### **3.2 An Offer to Employees – Workers' Shares**

The second exception is related to the purpose of offering shares for sale to the company and associated companies' employees (pursuant to the second indent of the first paragraph of Article 247 of the Companies Act). It is about the technical acquisition of the company shares that the employees are going to get. So, the procedure is not such as to allow the employees themselves to subscribe to the new issue of shares, which would also be possible, but the company buys its own

shares and, later on, offers them for sale to employees. The Act obliges the company to offer the acquired shares for sale to employees not later than one year after the acquisition (the third paragraph of Article 247 of the Companies Act).

### **3.3 Severance Pay**

The company may acquire its own shares to provide adequate severance pay for its shareholders in accordance with the Companies Act (and pursuant to the third indent of the first paragraph of Article 247). Articles 553 and 556 lay down severance pay in more detail.

The German regulations are broader. They determine severance pay in a wide range of status transformations, i.e., in divisions, mergers, and reconstructions according to Mon UmwG (nAktG expressly provides a link to severance pay according to UmwG). The Companies Act also provides for severance pay upon status transformations. However, in order to provide severance pay, the company's own shares may be acquired only in some cases of transformations.

### **3.4 Gratuitous Acquisition**

The exception to the ban on acquisition of own shares is also gratuitous acquisition of own shares (pursuant to the fourth indent of the first paragraph of Article 247 of the Companies Act). This includes gifts or a simple release of shares to the company. It is important that the company pays no compensation for the acquired shares. Even in this case, the Companies Act lays down the condition that such shares must be fully paid up (either the lowest amount of issue or the eventual higher amount of issue).

### **3.5 Purchase Committee**

A company may also acquire its own shares through the purchase committee (pursuant to the fifth indent of the first paragraph of Article 247 of the Companies Act). Since the 2004 Amendment to the Act, this option has been exercised only for banks, insurance companies, and other financial organisations that are joint-stock companies buying their own shares for themselves and for the account of their clients. Therefore, the Companies Act expressly provides that the acquisition of own shares is admissible if the total amount of issue has been paid up for them.

### **3.6 Universal Succession**

A joint-stock company may acquire its own shares on the basis of universal legal succession (pursuant to the sixth indent of the first paragraph of Article 247 of the Companies Act). Such examples are the mergers, divisions, and transformations on which the Companies Act has special provisions, and succession based on a will.

### **3.7 Withdrawal of Shares**

By way of exception, a company may acquire its own shares on the basis of the decision of the shareholders' meeting on withdrawal of shares under the procedure for reducing share capital by withdrawing shares (pursuant to the seventh indent of the first paragraph of Article 247 of the Companies Act). The reduction of a joint-stock company's capital by withdrawing shares is (in addition to the exceptional case, e.g., compulsory withdrawal of shares) also possible if the shares are acquired by the company. The procedure to be carried out in this case is discussed below in the chapter on the reduction of the joint-stock company's share capital by withdrawing shares. Even in this case, the lowest or highest amount of issue must be fully paid up for the shares acquired by the company.

### **3.8 Powers of the Shareholders' Meeting**

The exception is governed by the Companies Act in the eighth indent of the first paragraph of Article 247. For this exception, there is a requirement for the company to have adequate resources. It is essential that there is no statutory intent for this exception, but it is left to the autonomous decision of the company. The company may acquire its own shares on the basis of the special powers of the shareholders' meeting. They shall be exercised for 36 months.

By adopting the decision on authorisation for the purchase of shares, the shareholders' meeting determines the purpose of acquisition. The company is autonomous. It is only restricted by the statutory ban on the acquisition of own shares for the sole purpose of trading.

## **4 Additional Conditions for Permissible Acquisition – Resources: Reserves for Own Shares**

The Act provides ability to develop available resources to purchase own shares. This is an additional condition for the legal derivative acquisition of own shares.

The Companies Act provides that the company is obliged to create reserves for own shares pursuant to the fifth paragraph of Article 64 of the Companies Act. The reserves for own shares shall be created from the available resources without reducing share capital or the reserves prescribed by law or statute. These reserves shall not be used to make payments to shareholders. The company is obliged to create its reserves for own shares in the balance sheet for the financial year during which it acquired its own shares. However, it does not have to create reserves in advance, or at the date of acquisition.

In the event of urgent acquisition of shares under the first indent of Article 247 of

the Companies Act, the management shall report on the reasons for the acquisition and on its purpose, on the total number of shares, the least amount of issue, the portion of the shares acquired, and on the value of the shares. The Companies Act specifies the data to be provided in the annex to the financial statements which refer to the acquisition and disposal of own shares (under item 5 of the first paragraph of Article 69).

The joint-stock company must not continuously possess more than 10 percent of its own shares. This holds good even in the cases where the acquisition of over 10 percent of own shares is admissible. The shares the company received in an inadmissible way, i.e., outside the exceptions provided by law, must be disposed of within one year after acquisition. This applies to the cases of statutory exceptions and to the fulfilment of conditions for implementing these exceptions. The acquisition of own shares that is otherwise admissible in the first three and eighth exceptions is also inadmissible because it exceeds 10 percent of the share capital. In this case, ten percent of excess must be disposed of within one year after the acquisition (pursuant to the first paragraph of Article 250 of the Companies Act).

## **5 Acquisition of Own Shares due to Share Capital Reduction by Withdrawing Shares**

### **5.1 Legal Definition of Share Capital Reduction by Withdrawing Shares**

The share capital reduction by withdrawing shares is the third independent way of reducing the share capital of a joint-stock company, which represents neither a subtype nor regular reduction of share capital, nor a simplified reduction of share capital (Hüffer, 1999: 1051). This is true

- either during the procedure as creditors are particularly protected prior to making payments to shareholders, although in principle, they are protected in the same way as in regular reduction of share capital;
- or in the procedure where there is no such protection prior to making payments to shareholders because there is withdrawal of shares acquired gratuitously (or chargeable to fixed-term categories of own capital).<sup>3</sup>

The essence of the procedure for share capital reduction is the withdrawal of shares as a special institution of corporate law. Withdrawal of shares (*Einziehung*) is a corporate law action of a joint-stock company through which the corporate law (membership) rights are repealed. They refer to the shares withdrawn. Thus, all the property and management rights from shares cease and so do obligations.<sup>4</sup> Since share withdrawal refers to the membership rights and not to the share certificate, it is not identical to the physical destruction of share certificates. It is

about the joint-stock company's legal business for which an expression of will by the company is necessary through its management. The destruction of share certificates is merely a declaration of this act.<sup>5</sup>

Share withdrawal needs to be distinguished from similar corporate actions such as caducity procedure, invalidation of shares, acquisition of own shares, and depreciation on shares known from the German AktG of 1937 (for more information, please see Samec, 2000: 166-167; Hüffer, 1999: 1052; Geßler, 1991: 3).

On the one hand, this procedure for share capital reduction always represents also share withdrawal, but on the other hand, the withdrawal of shares is not possible either,<sup>6</sup> except in the event of a simultaneous procedure for share capital reduction.

The very derivative acquisition of own shares with a view to their withdrawal to reduce share capital is one of the statutory exceptions which, unlike the others, has no restrictions, particularly quantitative ones, regarding the number or percentage of potentially acquired and withdrawn shares (pursuant to the seventh indent of the first paragraph of Article 247 of the Companies Act). For this purpose, a joint-stock company may acquire more than 10% of its shares to reduce the share capital even below the statutory minimum (provided that there is a simultaneous combined increase to achieve the statutory minimum) with the only restriction that the company does not withdraw all its shares, thereby reducing the share capital to zero because this would lead to a legally inadmissible situation, i.e., to a joint-stock company with no shareholder (*Keinmann - AG*) (Hüffer, 1999: 1057; Schilling, 1973: 299).

Since according to the definition of a joint-stock company, a share is one of its main defining elements that represent an aliquot part of the share capital, and the share capital reduction<sup>7</sup> is the necessary consequence of the withdrawal (invalidation) of shares.

Consequently, the share withdrawal has a dual nature. On the one hand, it is the means for restructuring the categories of the own capital, but on the other hand, it is an instrument for the exclusion of shareholders from the company (Oechsler, 2001: 111). Such exclusion of certain shareholders from the company leads to a change in the proportional ownership interest between the shareholders who remain in the joint-stock company. This may also cause a change in control in the management structure. Thus, a shareholder or a group of shareholders can acquire control which they did not have prior to the withdrawal of shares. Such acquisition of control was not funded by this shareholder or group of shareholders, but all the other shareholders funded it indirectly through the company assets.

The reason that the law allows such 'unlimited' acquisition of own shares through share withdrawal lies in allowing the company to achieve different objectives,

e.g., capital restructuring, managerial objectives, making payments to shareholders, etc. The decision on reducing the share capital must always specify the purpose of such reduction (pursuant to the fourth paragraph of Article 381 of the Companies Act) (Hüffer, 1999: 1052).

Despite the principle of preserving the share capital and the prohibition of contribution repayment, payments to shareholders can be made as in the case of share capital reduction on a regular basis. This refers to a legally permitted exception where, economically viewed, the so-called "partial liquidation of a company" may occur by making payments to shareholders. However, the partial liquidation must be carried out under the procedure that ensures creditor protection as in the case of share capital reduction on a regular basis. The difference lies in the fact that in this procedure, payments are made only to those shareholders whose shares have been acquired, whereas in the case of share capital reduction on a regular basis, payments must be made proportionally to all shareholders. This is the way how creditor protection is provided. A much greater problem than that in the case of share capital reduction on a regular basis is the protection and equal treatment of all shareholders. In this procedure, already by its definition, there are shareholders whose statuses are not equal because only some shareholders receive payments (their contributions are repaid indirectly), other shareholders remain in the company. Their proportional ownership and management interest changes in the joint-stock company. Therefore, the Act specifically provides the institutions that are supposed to ensure their protection.

Payments to shareholders are certainly not an essential element of the share capital reduction by withdrawing shares. In certain cases, it is not necessary that, for instance, payments are made to shareholders in the case of the gratuitous acquisition of shares, or by compulsory withdrawal of shares through compensation in the form of replacement of the shares issued.

A distinction should be made between the acquisition of shares by a company, including the acquisition of shares by way of withdrawal, and the procedures for reducing the share capital and for withdrawing the shares. In all the cases of this procedure, it is not necessary that the procedure for the prior acquisition of shares is included by way of withdrawal pursuant to the seventh indent of the first paragraph of Article 247 of the Companies Act. There may also be the withdrawal of shares that the company previously acquired for any other purpose, or there may be even a withdrawal of shares without acquisition. All these different cases, of course, condition the use of institutions that are intended to protect creditors and shareholders, which also has specific implications for the balanced legal treatment.



## 5.2 Withdrawal Types

In corporate literature, share withdrawal is divided into two basic forms: compulsory withdrawal and withdrawal of the acquired own shares. Both of them have their own subtypes in the procedure for *withdrawal on a regular basis* and in the procedure for the *simplified withdrawal of shares* (Lutter, 1995: 786). When taking into account different criteria, we must distinguish:

- *compulsory withdrawal of shares*
  - statutory withdrawal of shares,
  - approved (admissible) withdrawal of shares;
- *withdrawal of own shares or withdrawal of shares by acquisition*
  - simplified withdrawal of own shares,
  - withdrawal of own shares on a regular basis,
  - simplified or regular withdrawal of own shares already acquired,
  - simplified or regular withdrawal of own shares acquired on the basis of the decision on reducing the share capital,
  - withdrawal of own shares, acquired in the previous year, for which there are reserves created for own shares;
- *withdrawal of unlawfully acquired own shares;*
- *withdrawal of shares acquired on the basis of the decision of the shareholders' meeting on reducing the share capital;*
- *withdrawal of own shares by the management board on the basis of the approval (authorisation) by the shareholder's meeting.*

The above arrangement takes into account different criteria that are very important for the competent authorities to make decisions (when different majorities are needed for the decision-making processes) either in terms of developing and using resources, and in the light of the balance legal aspects, or in terms of the aspects of time dimensions of individual procedures, etc.

Indeed, there is a basic distinction between the compulsory withdrawal of shares and the withdrawal of own shares acquired by a company.<sup>8</sup> The essential difference lies in the fact that in the case of the compulsory withdrawal, the company withdraws (cancels) the shares held by shareholders, whereas in the case of the withdrawal of own shares, there is a withdrawal of the shares acquired by the company from its shareholders in the secondary market. In the case of the compulsory withdrawal, the most important issue is the adequate protection of the shareholder whose shares are withdrawn. Therefore, the Act allows this option only on the condition that the compulsory withdrawal was determined or allowed in the primary statute or amendment to the statute prior to the acceptance or subscription of shares.<sup>9</sup> In our shareholder practices, the compulsory withdrawal, unlike the withdrawal of own shares, has not yet been established (Kocbek, 1995: 272).

The withdrawal of shares by acquisition means a reduction of the company's share capital on the basis of the withdrawal of the shares acquired by the company. On the one hand, this procedure allows for the lawful acquisition of own shares as one of the possible exceptions of acquiring own shares. The requirement for the acquired shares to have the status of lawfully acquired own shares is the existence of a decision of the shareholders' meeting. By all means, the company may withdraw also its own shares acquired either lawfully on the basis of any allowed exceptions from the first to the eighth indents of the first paragraph of Article 247 of the Companies Act (Hüffer, 1999: 1058) or unlawfully. The violation of the provisions on possible acquisition of own shares under Article 247 of the Companies Act does not affect the issue of the legal admissibility of the withdrawal of shares.<sup>10</sup>

The specific legal task of the withdrawal (revocation of membership rights) of shares is carried out by the management board. It may perform this legal task in a legally valid manner as late as after adopting the relevant decision of the shareholders' meeting on the share capital reduction by withdrawal of shares. The management board cannot withdraw otherwise lawfully acquired own shares in other allowed cases pursuant to the first paragraph of Article 247 of the Companies Act before a decision of the shareholders' meeting is adopted. Such a legal task of the management board would be null and void. After possible later adoption of the decision of the shareholders' meeting, the management board should re-perform the task of withdrawal.

### **5.3 Protection of Shareholders and Creditors**

Share withdrawal can essentially affect both the interests of creditors and the interests of shareholders. In the cases where payments to shareholders are simultaneously made, the creditors' security is reduced due to the reduction of assets and share capital. In these procedures, different shareholders can be affected, either the shareholders whose shares are being withdrawn or the rest of the shareholders whose shares can essentially lose their value due to an inadequate reduction of the joint-stock company's assets, or due to unequal treatment of opportunities for sale, or due to the changes in control in the management structure of the company.

In the light of creditor protection, there is an essential difference between regular and simplified withdrawal of shares. In the withdrawal of shares on a regular basis, as a rule, payments are made to the shareholders whose shares the company acquires. For this reason, the company ensures the same level of protection for creditors as for the basic reduction of the share capital on a regular basis. The Act prohibits payments to shareholders until the six-month period expires from the date of publishing the entry of the amount of the reduced share capital. In addition, no repayment or appropriate insurance are provided to the creditors who signed in on time. It is a *mutatis mutandis* application of the provision of the second

paragraph of Article 375 of the Companies Act.<sup>11</sup> This applies in the case of the compulsory withdrawal and in the case of the withdrawal of the acquired own shares. However, this prohibition applies only to the payments for the shares acquired by way of withdrawal pursuant to the seventh indent of the first paragraph of Article 247 of the Companies Act. The payments for the shares that have been acquired on other bases in a legally admissible manner are being withdrawn; they are allowed, but they were mostly carried out in the past (Hüffer, 1999: 1058, Krieger, 1999: 846). The violation of this prohibition may be the basis for tort liability of the management board. For the shareholder, there is a claim for refund of prohibited payments. It is about a special corporate law claim that may be enforced by minority shareholders and, subsidiarily, also by company creditors (Kocbek, 2002: 670). As a result, voidness of decisions on using the accumulated profit is indicated in foreign literature (Hüffer, 1999: 1058, Krieger, 1999: 670-671; Lutter, 1995: 804).

In the simplified withdrawal, there is no such need for creditor protection as in the withdrawal of shares on a regular basis because there are no payments to shareholders (in the case of the gratuitous acquisition of shares), or the withdrawal of shares is chargeable to the accumulated profit, or to the statutory reserves and other reserves from profit. They are payments from the non-fixed-term categories of own capital that give no security to creditors. The company could pay these profits as non-fixed-term categories of own capital to shareholders any time by using the accumulated profits. It is therefore irrelevant to creditors if upon such payments from the company assets, the company does not declare them as dividends, but as a withdrawal of shares, while the shareholders receiving a payment give the company a share. The situation is completely different when it comes to payments from the fixed-term categories of the capital that represent the creditors' security.

But even in the event of a simplified withdrawal of shares, the Act provides special protection of creditors by way of the provision that the company must transfer an amount to the capital redemption reserve. This amount is equal to the total nominal amount of the withdrawn shares (pursuant to the fifth paragraph of Article 381 of the Companies Act). The purpose of the legislative provision is to protect creditors so that the company cannot show the effects of such reduction of the share capital (caused by withdrawing shares) in the categories of non-fixed-term items of own capital. This would allow for the future additional payments to shareholders by deducting and using the accumulated profit.

The issue of shareholder protection is multi-layered. The first level of protection is provided by legal requirements for the decision-making mode. For adoption of the decision of the shareholders' meeting, the majority of at least three-quarters is required when making decisions on the represented share capital, whereas the Articles of Association may set a higher capital majority and other requirements. Thus, only a qualified majority of shareholders may decide on a withdrawal of

shares. The compulsory withdrawal of shares is inherently a statutory matter. An exception is determined when it comes to the simplified reduction of the share capital where, by law, a bare majority of votes is sufficient. This is the only instance where the law, in statutory changes in addition to the bare majority of votes, does not require the qualified capital majority either. The same is true for German law.<sup>12</sup> In this case, also the consent of an individual class of shares is not necessary either. The withdrawal of preference shares requires an individual shareholder's consent because withdrawal of shares is of individual concern to them (Hüffer, 1999: 1064, Krieger, 1999: 847). The shareholders whose shares are supposed to be withdrawn are eligible to vote as long as they possess their shares.<sup>13</sup>

At the same time, as a result of the share capital reduction, the Articles of Association (AoA) must be appropriately amended and adjusted, and then they must modify the provisions on the amount of share capital, and on the number of shares in the company. The Companies Act, like nAktG, has no specific provision on that. However, the *mutatis mutandis* interpretation suggests that for such formal adjustment of the Articles of Association, no qualified majority of the capital is required because Article 329 of the Companies Act provides that the same majority is sufficient as in the case of adopting the decision of the shareholders' meeting, i.e., a bare majority of votes (this is identical to the German theory; Krieger, 1999; 847, Hüffer, 1999: 1064; Schilling, 1973: 313). To adopt a decision of the shareholders' meeting on reducing the share capital by withdrawal of shares, no statutory provision is required, except in the case of the compulsory withdrawal of shares. The AoA may define certain issues. It may also limit the possibilities of the withdrawal of own shares. However, it cannot fully exclude this possibility (Lutter, 1995: 801; Hüffer, 1999: 1056; Schilling, 1973: 306; Krieger, 1999: 844).

The second set of issues, associated with the shareholder protection, refer to their equal treatment in this procedure. The primary issue we pay attention to is the shareholders' entitlement to the sale of shares, and to their control over the purchase of shares by the company. It is admissible that the decision of the shareholders' meeting defines issues in detail regarding the withdrawal of shares, including setting a maximum purchase price, the time and mode of acquisition. The guiding principle is one of the fundamental principles of a joint-stock company, i.e., equal treatment of shareholders (Article 221 of the Companies Act). When implementing the decision of the shareholders' meeting on the withdrawal of shares, the management board must comply with the required professional diligence (Article 230 of the Companies Act), and in the first place, it must treat the shareholders equally under equal conditions. In practice, there is an essential difference when it comes to the public and non-public joint-stock companies. In the joint-stock companies whose shares are listed on an organised market, this issue is relatively simple because the purchase of shares on the stock exchange represents equal treatment of shareholders.<sup>14</sup> In non-public companies, their

management board must either carry out the procedure for the public takeover bid or treat equally all shareholders with an option of selling a proportional portion of shares. A different mode and deviation from this rule may be determined (for well-founded reasons) only by the decision of the shareholders' meeting which must also observe minimum principles of shareholder protection. Therefore, prior to adopting the decision on an increase in the share capital, the shareholders' meeting should provide challenging reasons. In addition to the unjust legal *squeeze-out* process that is challenged under Article 400 of the Companies Act, the decision on the share capital reduction is also challenged. It demonstrates the reverse situation, i.e., the unjust (overbought) purchase of shares by only a certain shareholder.<sup>15</sup> The responsibility for carrying out the withdrawal of shares lies in the competence of the management board that must act with due care. The limits and possible deviations can be determined in the decision of the shareholders' meeting that must have its justification in the equal treatment of shareholders.

#### **5.4 The Balance Legal Aspects of a Withdrawal of Shares**

When dealing with the balance legal aspects, we should pay attention both to the changes (appearing in the transactions related to the withdrawal of shares) on the asset side of the balance sheet and to the liability side of the balance sheet at individual time points.

In principle, the withdrawal of shares is not related to the issue of creating reserves for own shares. If a company acquires (purchases) its own shares, and then on the basis of the decision of the shareholders' meeting, it withdraws them immediately, the company assets decrease in the amount of the payment for the acquired shares, and the liabilities also decrease for the same amount. On the liability side, the share capital reduces to the amount of the total nominal amount of all the shares withdrawn. At the same time, the own capital items are changed or restructured. These changes depend on the relationship between the purchase price of the withdrawn shares and their nominal value. If the purchase value exceeds the nominal amount of shares, other own capital items should be reduced for the difference in value. This should be done in accordance with the Slovenian Accounting Standards.<sup>16</sup> If the acquired shares are purchased at a lower price, we believe that the capital reserves should be appropriately increased.<sup>17</sup>

Special arrangements for liability structuring – own capital items; they apply in the case of a simplified withdrawal where there are two situations:

- gratuitous acquisition,
- withdrawal chargeable to the accumulated profit and reserves from the profit that may be used for these purposes (non-fixed-term categories)

In the case of a gratuitous acquisition, there are no special problems because the company assets are not reduced, but only the share capital is reduced for the total

nominal amount of the withdrawn shares. At the same time, the capital reserves should be created or increased in the same amount for the creditor protection purposes (under item 5 of the first paragraph of Article 64 of the Companies Act, ZGD-1). In the case of the onerous acquisition of shares and their withdrawal chargeable to profits (non-fixed-term categories), and at the same time, with the reduction of the share capital and transfer of the same amount to the capital reserves, the resource should also be reduced; withdrawal is chargeable to this resource, i.e., either accumulated profit or other reserves from the profit or statutory reserves. This resource should be reduced in the amount of the purchase value of the shares acquired. If the acquired shares are below the nominal amount, capital reserves should be additionally created (for the difference of the reduced share capital).

The withdrawal of shares is related (through the balance sheet) to the reserves for own shares only then when the company withdraws its own shares acquired in the past. It acquired these shares only for the purpose of withdrawal pursuant to the seventh indent of the first paragraph of Article 247, or by way of withdrawal of the shares the company acquired for other purposes, but then it decided to withdraw them due to the withdrawal of illegally acquired shares. In the balance sheet for the business year in which the company acquired its own shares, and if the company still has them on the cut-off date, the company should create reserves for its own portions from statutory non-fixed-term categories of the capital in the amounts paid for these shares. This obligation also applies if the company acquired its own shares for the purpose of their withdrawal that was not carried out in the same business year. The company must release these reserves for its own shares if it disposes of them, or the amount was written off, and in the case of a withdrawal (pursuant to the sixth paragraph of Article 64 of the Companies Act). Under provision 24 and item 22 of the sixth paragraph of Article 66 of the Companies Act, the effect of released reserves for own shares must be indicated in the calculation of the accumulated profits. The accumulated profit is going to increase in both cases. Its destiny depends on the method of reducing the share capital. Thus, there is either regular or simplified reduction of share capital. If the company reduces the share capital in a simplified manner, the accumulated profit is going to be reduced for the same amount due to the use of the accumulated profit (owing to the released reserves for own shares from this simplified reduction of the share capital). Although the Act does not provide reserves for own shares as a resource for the simplified withdrawal of shares, own shares represent a category of reserves from profit, and they indirectly represent a resource because the accumulated profit (arising after releasing such reserves for own shares due to withdrawal<sup>18</sup>) is used. In the case of the regular reduction of the share capital, the company has the accumulated profit because the share capital and other components of own capital are reduced, and creditor protection is precedingly observed.

In practice, withdrawals of own shares are frequently combined with others, e.g., shares acquired in the past either exclusively due to withdrawal or for other purposes, or they will be acquired for this purpose. At the same time, there are combined balance sheets, so, creating and releasing reserves for own portions, and reducing other items of own capital, separately for an individual category of own shares that are being withdrawn.

The balance legal aspects are not the subject of the decision on the share capital reduction. This is the competence of the management board or of those who draw up annual reports. When drawing up annual reports, authors must take into account all the balance legal rules. It is not necessary to draw up balance sheets only due to the share capital reduction, neither prior to the start of the capital reduction nor upon the entry of the decision on the share capital reduction, nor upon its entry into the Register of Companies. The balance legal effects should be shown in the annual balance sheet that follows the withdrawal (or in the interim balance). If the balance sheet is not drawn up in accordance with the balance legal regulations, the annual report is void, but on the other hand, the conclusion on the use of the accumulated profit, based on such a balance sheet or annual report, is challenging (Hüffer, 1999: 1064).

## **6. Conclusion**

Out of eight statutory exceptions to the acquisition of own shares under the Companies Act, we may take into account three of them to regulate the public enterprise status in accordance with the Public-Private Partnership Act, e.g., acquisition of own shares for possibly offering them for sale to company employees, acquisition of shares due their withdrawal and reduction of share capital, and acquisition of shares on the basis of a special authorisation of the shareholders' meeting. The first and the last exceptions apply only to a limited extent because the Act sets the limit of maximum allowed acquisitions. This limit is up to 10% of all the shares. Therefore, in practice, the best procedure for acquisition of shares is the procedure for acquisition of own shares due to their withdrawal, and thereby reducing the share capital. The companies have two options. They may withdraw shares under the simplified procedure, for which they must have reserved profits at their disposal. They use them for this purpose rather than for dividing them among shareholders. They may also carry out the procedure for withdrawal of shares at the expense of quality assets – fixed-term categories of capital. However, they must complete all the necessary procedures for creditor protection, which delays the whole transaction.

### **Notes**

<sup>1</sup> The Act provides this option (mono technically) in a very interesting manner by giving definitions (at the end of the second paragraph of Article 141), e.g., fund of own shares.

<sup>2</sup> It is not about the categories of an active balance sheet, but it is about the categories that are exclusively shown on the liability side either as a positive item or as a negative item – Article 65 of ZGD-1.

<sup>3</sup> A terminological distinction must be made between regular and simplified share capital reduction. We must distinguish two subtypes of share capital reduction by acquisition of shares: the regular withdrawal procedure (*ordentliches Einziehungsverfahren*) and simplified withdrawal (*vereinfachtes Einziehungsverfahren*). In regular withdrawal, only few provisions on regular share capital reduction are used, especially Article 375 on creditor protection; in simplified withdrawal, there is not only nominal reduction of share capital, as is the case in the simplified reduction of share capital – see also Hüffer, *ibidem*, Rn. 30, page 1059.

<sup>4</sup> Hüffer, 1999: 1052: "For withdrawal of shares, the company action is required to abolish the right from shares" – Article 357 of the Companies Act.

<sup>5</sup> See Lutter, M. v Kölner Kommentar zum Aktiengesetz, Band 5/1, Zweite Auflage, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 1995, Rn. 7, stran 821: "Die konkrete Einziehung ist daher Rechtsgeschäft. Sie ist Willenserklärung der AG gegenüber dem Inhaber der betroffenen Aktie".

<sup>6</sup> Hüffer, 1999: 1051. This is not the case for the German limited liability companies - § 34 GmbHG says:

"Einziehung von Geschäftsanteilen

- (1) Die Einziehung (Amortisation) von Geschäftsanteilen darf nur erfolgen, soweit sie im Gesellschaftsvertrag zugelassen ist.
- (2) Ohne die Zustimmung des Anteilberechtigten findet die Einziehung nur statt, wenn die Voraussetzungen derselben vor dem Zeitpunkt, in welchem der Berechtigte den Geschäftsanteil erworben hat, im Gesellschaftsvertrag festgesetzt waren.
- (3) Die Bestimmung in § 30 Abs. 1 bleibt unberührt"

The Companies Act does not follow this German regulation regarding Ltd. Withdrawal of a business portion is possible only under the procedure for share capital reduction; for more information, see Samec, 2000: 166.

<sup>7</sup> "The share capital of joint-stock companies is divided into shares" – the first paragraph of Article 168 of the Companies Act; the formula is derived from this  $OK = \text{nominal amount of shares} \times \text{number of shares}$ ; it must always be equated both in reduction of share capital and in an increase in share capital. In regular reduction of share capital, this formula as a rule equates with reduction of the nominal amount of shares at unchanged number of shares (only by way of exception, by reducing the number of shares (by aggregating shares) when the lowest amount of shares is already at a minimum). In the withdrawal procedure, it is technically always about the reduction in the number of shares – for more information, see Kocbek, 1995: 272.

<sup>8</sup> In older comparative literature, withdrawal of own shares was called voluntary withdrawal (*freiwillige Eiziehung*). This term, which had its legal basis in history, is not appropriate because in certain cases, the company must withdraw its own shares, e.g., unlawfully acquired shares; for more information, see Schilling, 1973: 305.

<sup>9</sup> The first paragraph of Article 381 of the Companies Act, the first paragraph § 237 nAktG.

<sup>10</sup> "Verstoß gegen § 71 macht Einziehung nicht unzulässig" - see Hüffer, 1999: 1056; Lutter 1995: 801.

<sup>11</sup> The second paragraph of Article 381 of the Companies Act; the second paragraph § 237 nAktG.

<sup>12</sup> The fourth paragraph of Article 381 of ZGD-1; the fourth paragraph of Article § 237 of nAktG. See also Hüffer, 1999: 1064.

<sup>13</sup> Undoubtedly, this is a German theory; Hüffer, 1997: 1057; Lutter, 1995: 803; Krieger, 1999: 847; in the German theory, there is a disputed issue regarding the possibility of a compulsory withdrawal of shares in the case of a well-founded reason for the exclusion of a certain shareholder – Hüffer, *ibidem*.



<sup>14</sup> Mutatis mutandis application of the eighth indent of the first paragraph of Article 247 of ZGD-1.

<sup>15</sup> For instance, a control shareholder that has 75 % capital majority decides to sell 40 % of his shares to other company to withdraw his shares due to the share capital reduction where the purchase price of shares would be disproportionately high.

<sup>16</sup> Srs 8.20 provides: "The share capital shall be reduced for the nominal value of purchased and then withdrawn own shares; if they were purchased at a higher price, other components of the total capital should be reduced for the difference...".

<sup>17</sup> This arises from the mutatis mutandis interpretation of Srs 8.20 that provides that in the gratuitous acquisition of shares for the amount of the reduced share capital, the capital reserves shall be increased. This is in accordance with item 5 of the first paragraph of Article 64 of the Companies Act. In this case, profit is found only in books, and it must be added to the capital reserves where it is indicated as an amount of the reduction in share capital by withdrawing shares (item 5, paragraph 1, Article 64, the Companies Act); see more in German law Schilling, 1973: 309).

<sup>18</sup> The same in German law ; Krieger, 1999: 846.

## References

- Bohinc, R. (2007) Nekatera statusno pravna vprašanja javno – zasebnega partnerstva, *Podjetje in delo*, 33(6-7), pp. 1209-1222.
- Ferk, P. & Ferk, B. (2007) Javno podjetje med gospodarsko družbo in osebo javnega prava, *Pravna praksa*, 26(34), pp. 2-8.
- Hüffer, U. (1999) *Aktiengesetz*, 4. Auflage (München: Verlag C. H. Beck).
- Kranjc, V. (2009a) EU and International Organisations Rules on Public-Private Partnerships, *Lex localis - Journal of Local Self-Government*, 7(2), pp.197-207.
- Kranjc, V., Kerševan, E., Plauštajner, K. & Prelič, S. (2009b) *Zakon o javno-zasebnem partnerstvu* (Ljubljana: GV Založba).
- Lutter, M. (1995) *Kölner Kommentar zum Aktiengesetz*, Band 5/1, Zweite Auflage, (Köln, Berlin, Bonn, München: Carl Heymanns Verlag).
- Samec, N. (2000) Pravna narava, značilnosti in razmejitve postopkov razveljavitve, zamenjave, združitve, delitve in umika delnic, *Podjetje in delo*, 26(1), pp. 135-172.
- Gebler, J. H. (1991) *Aktiengesetz Kommentar* (Bonn: Luchterhand Verlag).
- Schilling, W. (1973) *Aktiengesetz Großkommentar*, Dritter Band, 3., neu bearbeitete Auflage (Berlin, New York: De Gruyter).
- Kocbek, M. (1995) *Delnice in delniška družba* (Ljubljana: GV Založba).
- Kocbek, M. (2002) *Zakon o gospodarskih družbah s komentarjem* (Ljubljana: GV Založba).
- Oechsler, J. (2001) *Münchener Kommentar zum Aktiengesetz*, Band 7, 2. Auflage (München: Verlag C. H. Beck/Verlag Franz Vahlen).
- Prelič, S. & Prostor, S. (2009a) *Evropska delniška družba* (Ljubljana: GV Založba).
- Prelič, S., Zabel, B., Ivanjko, Š., Podgorelec, P. & Kobal, A. (2009b) *Družba z omejeno odgovornostjo* (Ljubljana: GV Založba).
- Repas, M. (2010) Public entities as undertakings under competition rules, *Lex localis - Journal of Local Self-Government*, 8(3), pp. 227-234, doi: 10.4335/8.3.227-243(2010).
- Krieger, G. (1999) *Münchener Handbuch des Gesellschaftsrecht*, Band 4, Aktiengesellschaft (München: C. H. Beck'sche Verlagsbuchhandlung).