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VALORISATION AND APPRAISAL OF DIGITAL CORPORATE RECORDS IN INSOLVENT COMPANIES DURING THE FINANCIAL CRISIS (2008-2018)

Abstract

This study analyses the currently existing system of evaluation and storage of digital archival records created by Slovenian companies over which the insolvency proceedings were initiated in the period of financial crisis (from 2008 onwards). The author analyses 175 insolvency proceedings which he had direct access to. The analysed bankruptcy procedures were applied by various private companies, like limited trade companies, joint stock companies etc.

The fundamental hypothesis emphasized by the author is that the valorisation and selection of electronic archival material is properly regulated both at the level of legal and by-law regulation, as well as at the level of implementation of legal solutions. In the case of confirmation of the basic hypothesis, a secondary hypothesis is set, according to which it is established that the permanent preservation and conservation of corporate digital archival records, such as cultural monuments, is adequately taken care of.

The analysis notes a discrepancy between the legal regulation of the area and the existing situation. The period under consideration represents the peak of the economic crisis, which is also seen as the second transition period starting in 2008. This period empowers the new legislation in both fields; the archives area and insolvency proceedings.

Research is based on the quantitative research method, more specifically, on the descriptive method. The researcher described and observed phenomena, categorized and synthesized them.

Research confirmed that there is a tangible discrepancy between the positive regulation dealing with the evaluation, appraisal and preservation of archival material and the practical application of material norms in the case of economic entities on which bankruptcy proceedings have been initiated.

The analysis considers a representative sample; it concludes that the digital archival material found in companies fell victim to the lack of implementation of legal solutions.

Key words: *digitised corporate records, conflict between public and private interest, valorisation and appraisal of digitised corporate records, bankruptcy, insolvency.*

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1. INTRODUCTION

The subject research deals with two areas: insolvency and the area of corporate electronic archival material.

When dealing with the area of insolvency, it is first necessary to highlight the importance of the economic crisis, which violently affected the Slovenian economy in the period 2008-2018.

The bankruptcy of the American bank Lehman Brothers, which occurred on 14 September 2008, is considered as the trigger for the collapse of the global financial system. The collapse of one of the largest US investment banks was a sign of the tightening of lending conditions on the financial market. Banks were no longer willing to lend money to other banks (Štiblar, 2008). The event is seen as the beginning of the global economic crisis, which lasted almost a decade. A crisis indicates uncertain yet significant positions over a long period of time. It refers to many areas of natural, social, economic and other processes, which have different dimensions (Dubrovski, 2004).

A few months after the outbreak of the financial instability in the USA, due to strong global interdependence, the first negative economic impacts could also be felt in Europe. Due to the pronounced export orientation of production processes, the Slovenian economy relatively quickly felt the strong negative effect of the economic crisis. It hit the automotive and metal industries and the construction industry the most, especially small and medium-sized enterprises (Zorc, 2013).

Liquidity problems, reduced income, late payment of wages, declaration of insolvency and then the introduction of forced settlement and bankruptcies... this was the fate of several Slovenian companies from 2008 to 2018, when there was a noticeable trend of decreasing bankruptcy proceedings. In 2008, twice as many bankruptcy proceedings were recorded as in 2007. In 2009, there were 54 percent more bankruptcy proceedings than in 2008. (Dobovišek, 2012) The table below shows that the effects of the economic crisis were evident from 2012 onwards, when the number of initiated bankruptcy proceedings increased significantly (AJ PES, 2022).

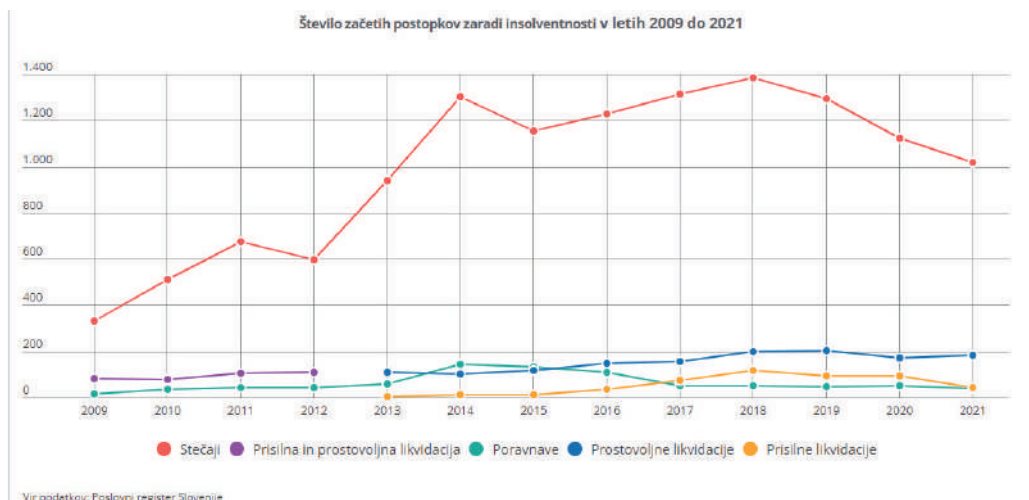


FIGURE 1: Number of insolvency proceedings opened in 2009 to 2021

The revision of the insolvency legislation was one of the consolidation measures of the Slovenian economy. Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (ZFPPIPP, 2021) was adopted at the end of the year 2007 and largely used from 1.10.2008 onwards. Since then, the law has been amended several times. Two authentic interpretations of the law were also accepted (Cepec, 2016). The law was adopted in light of the coming economic crisis and the modernization of the regulation of insolvency proceedings, taking into account the needs of a developed economy. The previously valid insolvency legislation was adopted in 1993, when the Slovenian economy was just preparing for new market conditions. The expert public was of the opinion that the previously applicable law was too kind to the debtor and that it did not fully consider the interests of creditors (Cepec, 2016).

In Slovenia it is possible to identify the following Insolvency procedures such as compulsory settlement procedure, simplified compulsory settlement procedure and bankruptcy procedure (Plavšak, 2013). For the purposes of the subject research, the author, in the analysis of insolvency legislation, will limit himself to two institutes, which are crucial for the subject research, namely the institute of the court, which conducts bankruptcy proceedings, and the institute of the (bankruptcy) administrator as a procedural body of the court leading the bankruptcy procedure.

In accordance with the provisions of Article 51 of the ZFPPIPP (2021), the district court has real jurisdiction to make decisions in insolvency proceedings. The court is the fundamental body, as it conducts bankruptcy proceedings by issuing decisions, orders and instructions. The latter are intended for the bankruptcy administrator and are mandatory for him (ZFPPIPP, 2021, Article 101). Pursuant to the provisions of Article 97 of the ZFPPIPP (2021), the administrator is the authority of the insolvency procedure, which in this procedure carries out its powers and tasks specified in the law in order to protect and realize the interests of creditors. The second paragraph of Article 97 of the ZFPPIPP (2021) stipulates that the administrator in bankruptcy proceedings manages the affairs of the insolvent debtor and represents him:

- in procedural and other legal actions related to the examination of claims;
- in procedural and other actions related to contesting the legal actions of the insolvent debtor taken prior,
- in legal transactions and other actions necessary for the liquidation of the bankruptcy propriety,
- in exercising resignation and other rights acquired by the insolvent debtor as a legal consequence of the initiation of bankruptcy proceedings, and
- in other legal transactions that the insolvent debtor may perform in accordance with this law.

The first paragraph of Article 98 of the ZFPPIPP (2021) stipulates that the manager must perform his duties and responsibilities in accordance:

- with this law and the regulations issued on its basis,
- with other laws applicable to the insolvent debtor and regulations issued on their basis,
- with the rules of the profession of persons who, as agents, perform business for other persons.

The aforementioned authorities of the bankruptcy proceedings are "supposedly" also the creators of archival records according to the regulations governed by archival legislation. In the given case, when applying the linguistic interpretation of the mentioned provisions of the ZFPPIPP, it is not clear whether the administrator, as a

procedural body of the court, is competent to carry out the activities required by the archival legislation.

Almost at the same time, the archival legislation also underwent a thorough overhaul, namely with the adoption of the umbrella Act:² "Protection of Documents and Archives and Archival Institutions Act" (ZVDAGA, 2006, 2014), which entered into force in 2006 and was revised in 2014 (Melik & Jeraj, 2015). In 2016, the³ "Act Regulating Archives Containing Personal Data from Medical Records" was also adopted (ZAGOPP, 2016). On the basis of ZVDAGA, the following by-laws have been adopted:

- Regulation on the protection of documentary and archival material⁴ (UVDAG, 2017);
- Rules on the work of inter-archival working groups⁵ (2016)
- Rulebook on determining the retention periods of documentary material in the public administration⁶ (2019);
- Rulebook on determining compensation for the costs of using, preserving and restoring archival material and the storage of private archival material in archives performing archival public service⁷ (2017);
- Rulebook on uniform technological requirements for capturing and storing material in digital format⁸ (2020);
- Rules on professional qualifications for working with documentary material⁹ (2016);
- Rules on professional exams and the acquisition of academic titles in the field of the protection of archives¹⁰ (2017);
- Rules for the valorization of persons under private law who have acquired the status of operating in the public interest on the basis of the law¹¹ (2016)

The subject research will be limited to four areas in the analysis of legal and by-laws regulations.

The first area represents private archival records, part of which are the corporate digitised archival records. Another area is the regulation of valorisation and appraisal of digitised archival records. The third area is the treatment of private (digitised) archival records in the event of the termination of a legal entity under private law. The last key area is the handling of conflict between public and private interest.

In the Republic of Slovenia, there are not many archival experts who deal with the storage and use of private archival records. The findings of Klasinc, who was one of the few who dealt with this area in detail, only confirm this. Klasinc notes that the area under consideration was neglected mainly in the countries of real socialism, namely because of the specific relationship of this social arrangement to private property, where the prevailing view was that the only suitable form of property is public property (Klasinc, 2007).

2 Slo. Zakon o varstvu dokumentarnega in arhivskega gradiva ter arhivih (2006, 2014)

3 Slo. Zakon o arhivskem gradivu, ki vsebuje osebne podatke o zdravljenju pacienta (2016)

4 Slo. Uredba o varstvu dokumentarnega in arhivskega gradiva (2017)

5 Slo. Pravilnik o delu medarhivskih delovnih skupin (2016)

6 Slo. Pravilnik o določanju rokov hrambe dokumentarnega gradiva v javni upravi (2016)

7 Slo. Pravilnik o določitvi nadomestila stroškov uporabe, konserviranja in restavriranja arhivskega gradiva in hrambe zasebnega arhivskega gradiva v arhivih, ki opravljajo arhivsko javno službo (2017)

8 Slo. Pravilnik o enotnih tehnoloških zahtevah za zajem in hrambo gradiva v digitalni obliki (2020)

9 Slo. Pravilnik o strokovni usposobljenosti za delo z dokumentarnim gradivom (2016)

10 Slo. Pravilnik o strokovnih izpitih in pridobivanju strokovnih nazivov na področju varstva arhivskega gradiva (2017)

11 Slo. Pravilnik za valorizacijo oseb zasebnega prava, ki so na podlagi zakona pridobile status delovanja v javnem interesu (2016)

The research area deals with conservation of private archival records that is created during business operations of commercial companies and, as a subsystem, corporate digitised archival records.

In the second article, ZVDAGA (2006, 2014) states that archival corporate records are corporate records of legal entities under private law, which has the characteristics of archival records and is defined as archival records on the basis of ZVDAGA or a decision of the state archive. At the request of the competent archive, the person who stores private archival corporate records (in digital form) must report on the conservation method (ZVDAGA, 2006, 2014, Article 37). Private archival records are owned by persons or legal entities. The acknowledgment of corporate records in private ownership, which is assumed to have the characteristics of archival records, is carried out by the competent archives. On the basis of the performed recording, the archive declares private records, which has the characteristics of archival records, to be archival records by decision. The State Archives keeps a record of issued decisions and determines the detailed method of recording and competent archives for individual areas of private archival records (ZVDAGA, 2006, 2014, Article 44). If it is determined that private archival records are in danger of being destroyed or damaged, the competent archive is notified (ZVDAGA, 2006, 2014, Article 49). The state provides in the state budget the funds necessary to promote the protection of private archival records (ZVDAGA, 2006, 2014, Article 50). Archives acquire archival records either with remunerative or non-remunerative legal transactions (e.g. purchase, gift, will) in the case of private archival records, or if the competent archive determines that private records has the characteristics of private archival records, either with by taking private archival records for safekeeping (ZVDAGA, 2006, 2014, Article 61). In case it is found out that the private archival records are in danger of being destroyed or damaged, the inspector may by decision determine the conditions for the storage, preservation or restoration of the private archival records, but also the obligation to hand over the private archival records to the competent archive for a certain period of time until the danger ceases (ZVDAGA, 2006, 2014, Article 78).

The records created in the company's operations can be in its original form as digital, or the records were created in a physical (classical) form and is then digitized. Such records are e-stored or stored in digital form (Hajtnik, 2011). They are corporate records that may already contain archival records at its creation. Such records are handled professionally, as each document is a credible source of information that supports the responsible, transparent success of the creator's current business. Archival records that are part of these records can play a major role in the development of society. Society must ensure the protection and preservation of its usefulness for individual and collective memory, as a cultural monument (Klasinc, 2013). Here, it is necessary to distinguish between e-preservation and e-archive. E-preservation refers to the storage of digital records by the company that created the documentation and keeps it itself. However, when digital archival records are selected from this documentation, and then handed over to the competent archive, the concern for ensuring further credibility is transferred to the competent archive. The company, if it is the creator of archival records, is only obliged to keep it in its original form (digital or classic form), which, based on the professional instructions of the competent archive, is only handed over to it, namely in the original (Hajtnik, 2011).

For the evaluation and selection of corporate digitised archival records, as private archival records, the provisions governing the evaluation criteria of public archival records (UVDAG, 2017, Article 54) are applied *mutatis mutandis*. The criteria for evaluating archi-

val records from documentary records are defined in Article 40 of ZVDAGA (2006, 2014) and are as follows:

- the needs of historiography, other sciences and culture;
- the need for permanent legal validity to achieve the rights of persons;
- the importance of the content of the material;
- specificity of events and phenomena at a certain time;
- specificity of place or area;
- the meaning of a public legal entity;
- the importance of the author;
- the importance of the material in terms of cultural diversity;
- originality of documents;
- originality of data and information;
- representative selection;
- internal and external characteristics of the material;
- and other criteria determined by the competent archive.

In accordance with Article 19 of the ZVDAGA (2006, 2014), the appraisal of archival records is determined by a written instruction issued by the competent archive.

Article 41, paragraph 4 of the ZVDAGA (2006, 2014) stipulates that, in the event of the termination of a legal entity under private law, the competent court conducting the termination proceedings shall decide on the retention of corporate records that has not yet expired the prescribed retention periods and archival records in accordance with the ZVDAGA (2006, 2014).

Toward the end of the introductory chapter, the author defines a broader background of the conflict between public and private interest, which is the centre of the actual state of the research field. Corporate (digitised) archival records are part of the national documentary and cultural heritage in many countries. National legislation mandates national archives to preserve and develop material heritage for the benefit of the community. At the same time, the legislation defines administrative frameworks that ensure both the integrity and appraisal of the records. The general social use of corporate archival records often conflicts with the interests of the record owners. National legislation must foresee and prevent such conflicts. Lawmakers are expected to clarify at some point whether the interest of the creator or the community that requests access to the material prevails. If the interest of the creator prevails, then the integrity and permanent preservation is questionable. If the interest of the community prevails, then countries will have to invest a lot of effort and resources in order to crush the resistance of private creators to handing over the material (Nalen, 2002).

1. RESEARCH DESIGN

The results of this research, which will be presented below, considering what was stated in the introduction, show that the research focuses on the forced termination of an economic entity and on the fate of corporate digital (digitised) archival records, which, according to the entity in question, were created over a certain period of time, in some cases even over the scope of several decades, that is, from the very creation of the digital document. The research deals with the practical application of mandatory provisions to the factual situation under consideration. Special consideration is given to the issue of whether the public interest manifested in accepted legal norms and by-laws, encourages

private interest manifested in the conduct of the creator, against whom bankruptcy proceedings have been initiated, of corporate digital archival records, to the valorisation, appraisal of corporate digital archival records and handing it over to the competent archive. The purpose of this paper is to analyse the factual situation on a representative sample and to determine the practical application of legal solutions.

The goal is to contribute to the evaluation and appraisal of digital archival records in accordance with positive regulation.

The fundamental hypothesis emphasized by the author is that the valorisation and appraisal of digital archival records are properly regulated both at the level of legal and by-law regulation, as well as at the level of implementation of legal solutions. In case of confirmation of the basic hypothesis, a secondary hypothesis is set, according to which it is established that the permanent preservation and security of corporate digital archival records as cultural monuments is adequately taken care of.

1.1. METHODOLOGY

When testing the hypotheses, the research will be based on the quantitative research method, more specifically, on the descriptive method. The researcher will describe and observe phenomena, categorize and synthesize them (Plazar, 2022). The descriptive method will be based on the analysis of 175 bankruptcy proceedings in the considered period. The discussed data is available on the AJPES portal in the section on the publication of decisions and letters issued in insolvency proceedings.

1.2. LIMITATIONS OF THE RESEARCH

The method used does not cover the analysis of all bankruptcy proceedings in the considered period. The analysis covers two percent of bankruptcy proceedings initiated in the period under review. The research allows for the possibility that, in the initiated bankruptcy proceedings against the company, not included in this research, different solutions were adopted than in the cases under consideration. The author believes that any shortcoming cannot significantly affect the findings of the research.

2. RESULTS

Summarizing legal regulations, which this research states in the introductory part, the system of identification, valorisation and appraisal of corporate digital archival records can be divided into the following process stages:

- Recording of privately owned digital corporate records that is believed to have the characteristics of digital archival records, which is carried out by competent archives. On the basis of the performed recording, the archive declares private digital corporate records, which has the characteristics of digital archival records, to be digital archival records by decision. (ZVDAGA, 2006, 2014, Article 44);
- Evaluation and appraisal of corporate digital archival records, as private archival records, for which the provisions governing the evaluation criteria of public archival records (UVDAG, 2017, Article 54) apply *mutatis mutandis*.
- In accordance with the provisions of Article 19 of ZVDAGA (2006, 2014), the selection of digital archival records is determined by a written instruction issued by the competent archive.
- Acceptance of the court decision conducting bankruptcy proceedings, which decides on the conservation of digital documentary records that has not yet surpassed the prescribed retention periods and archival records in accordance with ZVDAGA (2006, 2014), in the event of the termination of a legal entity (ZVDAGA, 2006, 2014, Article 41).

This research analysed 175 companies for which bankruptcy proceedings have been initiated. It concludes that the commercial companies had their headquarters registered in the areas of jurisdiction of all regional archives.

It is noted that all companies had at least one computer unit on which digital documentary records were stored. In total, there were 892 computer units. 47 economic entities had more than two computer units on which digital documentary records were stored. The research further notes that in 13 economic entities that were considered medium or large companies, a central database was established to store digital documentary records.

In none of the analysed cases did the competent archive record digital documentary material. Not even a decision has been issued declaring private digital records material that has the characteristics of digital archival records.

In none of the analysed cases the competent archive valorised and described digital archival records as private archival records.

In none of the analysed cases professional instruction were written, issued by the competent archive.

In none of the analysed cases did the court conducting the bankruptcy proceedings issue a decision on the preservation of archival records and digital documentary records that have not yet expired.

The research further concludes that, to a large extent, all the considered computer units were cashed in, namely within the framework of the provisions of ZFPPIPP (2021), which regulates the cashing of the property of the bankrupt debtor. Only two economic entities have still intact digital documentary records.

The research further establishes a high probability of the existence of digital archival records in the digital documentary material fund for 27 economic entities, given the importance of economic entities for the regional environment and, in certain cases, for the wider Slovenian and international business environment. The analysed 27 entities represent companies with many years of tradition with renowned brands, innovative business solutions and creations that left an indelible mark on the environments in which they operated. The vast majority of digital records has been destroyed and it is no longer possible to determine what proportion of this documentation fell under digital archival records.

The research found that not all of the archives, created by the subjects in question, share the fate of digital archival records. Considering the fact that the valorisation and appraisal of "classic" archival records are not subject of this research, the author will give some brief conclusions. In 19 cases, the competent archives issued an instruction specified in the law and defined which documentary records they consider to be archival records. However, the research found that the procedure does not fully comply with the legal provisions. The recording of records is done by the bankruptcy debtor himself, through the bankruptcy administrator or professional associates of the administrator. The record is sent to the competent archive, which then issues an instruction. At the same time, the research found that due to financial and spatial limitations, the competent archives did not take all the documentation that was valued as archival records. When comparing two instructions issued to two business entities with the same business activity, under the jurisdiction of different competent archives, the research found completely different evaluation criteria. In the case of the company, which was incomparably smaller in scope of business and socially less important than the other company, the competent archive evaluated the archival records to a significantly greater extent than in the case of

the other company. In one case, research found that the competent archive did not take over the archival records at all, as it did not have the spatial capacity to store it. Thus, the bankrupt debtor entered a rental agreement for the temporary storage of records with an external provider for two years. During this time, capacities should be freed up at the competent archive. Even when dealing with "classic" archival records, the competent court conducting the individual bankruptcy proceedings did not issue a decision on the preservation of archival records and digital records that had not yet expired as stipulated by ZVDAGA (2006, 2014, Article 41).

3. DISCUSSION

Research confirmed that there is a tangible discrepancy between the positive regulation of the evaluation, appraisal and preservation of archival records and the practical application of material norms in case of business entities for which bankruptcy proceedings have been initiated. In this research, the author analysed companies of various legal forms, namely limited liability companies, joint stock companies and agricultural cooperatives. In the case of bankrupt debtors, business entities, against whom bankruptcy proceedings have been initiated, the research concludes that the valorisation, selection and conservation of digital archival records is non-existent. Not one of the participants in the process of valorisation and appraisal of digital archival records highlighted the existence of digital archival records in all the years under consideration.

Research disapproved the primary hypothesis in the part that refers to the practical implementation of legal and by-law solutions. The primary hypothesis is confirmed in the part that refers to the legal and by-law regulation itself, which as shown, consistently provides for all phases of the procedure to ensure the preservation of digital archival records. The secondary hypothesis cannot be confirmed, because without the implementation of legal solutions, we cannot confirm the hypothesis that the digital archival records are adequately taken care of.

Public interest in the subject of the research is manifested only declaratively. Regardless of all provisions in the law and by-laws, there is no practical application. From the point of view of the conflict between public and private interest, the bankruptcy procedure is a hybrid, i.e. the state forcibly intervenes in a private interest, with the aim of treating all interested interests equally. We can talk about the interweaving of public (forced) and private interest, with the aim of treating all creditors equally (private interest). The research can confirm that, despite the fact that the state intervenes forcibly in the business relations that take place in the bankruptcy process, digital archival records are not protected as a cultural monument. The state does not even try to detect whether digital archival records exist in the mass of digital records created by the subjects in question, so we cannot even discuss the valorisation and appraisal of digital archival records.

The author estimates that there are several reasons for this situation. Undoubtedly, the first reason is financial. Competent archives are faced with limited space and financial resources in order to be able to self-initiatively detect digital archival records from various economic entities. The second challenge, according to the author, is a lack of knowledge of the statutory and by-law provisions of archival legislation. It is clear from the studied subject that even the courts are not familiar with the provisions imposed on them by ZVDAGA (2006, 2014). Therefore, it is optimistic to expect legal behaviour from the other participants in, first, detection of digital archival records, then evaluation and appraisal of only this, and finally long-term and effective conservation.

4. CONCLUSION

The subject research represents the basis for the introduction of improvements or a different model that will consistently ensure, identify, valorise and permanently store corporate digital archival records.

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TYOLOGY: 1.01 Original scientific research