

Financial crime of legal persons in case law of the Court of Bosnia and Herzegovina

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Abstract

With entry into force of new criminal legislation in 2003 the legal concept of liability of legal persons for criminal offences was introduced into the criminal law of Bosnia and Herzegovina (B&H). However, the general scientific indifference to this issue reflected in limited literary fund and the scarcity, disorganization and inaccessibility of relevant case law in different circuits of B&H's criminal justice system well as absence or unavailability of relevant statistical data have created difficult environment for scientific observation of the results of implementation of new legal solutions regarding the liability of legal persons for criminal offenses. Following the premise that liability of legal persons for criminal offenses had the greatest practical significance in the sphere of financial crime, the authors analyzed the available case law of the Court of B&H in order to gain some insight into the specifics of legal persons' crime prosecution in B&H.

Keywords: *liability of legal persons for criminal offences, financial crime of legal persons*

I. Introduction

Liability of legal persons and especially their criminal liability no longer represents controversial point in majority of contemporary legal systems and present standpoint on subjection of the legal persons to the authority of criminal law has been shaped throughout alterations in legal systems during the last century. Long tradition of continental legal systems' opposition to the attribution of liability to legal persons emphasized with the principle *societas delinquere non potest* and characterized by focus on imposing liability on the natural person within the legal persons (such as employees at the managerial level), was scrutinized and consequently abandoned in the light of social, economic and political changes⁴. Modifications of criminal law concerning the

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⁴ See: Stanila, L. (2014), 'Criminal Liability of Legal Persons. History, Evolution and Trends in Romanian Criminal Law', *Journal of Eastern European Criminal Law*, No. 1/2014, pp. 109-121. Available at SSRN: <https://ssrn.com/abstract=2462414>.

introduction of liability of legal persons as additional layer of criminal liability, alongside the liability of individual perpetrator⁵, were especially stimulated by developments such as intensive privatization processes, immersion of legal persons in every aspect of economy and creation of mega-multinational corporations as the result of acquisitions, mergers and takeovers⁶. This intervention in the criminal law systems has been rationalized as an endorsement of fundamental societal values and effective deterrent of undesirable activity⁷ but also as a form of retribution toward the legal persons because of the possibility that they might profit from engaging in illegal activities⁸. Today, in literature and practice corporate⁹ wrongdoing is largely acknowledged as „delinquency worthy of criminal sanction”^{10 11}.

Establishment of liability of legal persons for criminal offences in continental legal systems was also encouraged by the regional and international organizations such as the Council of Europe, the European Economic Community/European Union, and the United Nations¹². It is interesting that this process of alteration also instigated

⁵ See: Pudovochkin Y. E. and Adrianov V.K. (2015), 'Principles of criminal law: Immersion in theory', *Journal of Eastern-European Criminal Law*, No. 1/2016, pp. 201-207.

⁶ Lederman, E. (2000), 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity', *Buffalo Criminal Law Review*, Vol. 4 No. 1, p. 644.

⁷ In a sense that it creates incentives for corporations to monitor the activities of its employees or to as well as for prevention of setting up corporations for illegal purposes, and to prevent existing corporations from doing harm in any way. According to: Godwin Muhwezi, M. (2016), The Case for Corporate Criminal Liability, pp. 4-5. Available at: https://www.researchgate.net/publication/309041784_THE_CASE_FOR_CORPORATE_CRIMINAL_LIABILITY. Various researches affirmed that sometimes corporate system itself generates criminal behavior. See: Foerschler, A. (1990) 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct', *California Law Review*, Vol. 78, Iss. 5, pp. 1289-1290; available at: <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4440&context=californialawreview>; Clubb, A. C. (2014), The corporation as a city, *Journal of Financial Crime*, Vol. 21 Iss. 2 pp. 191 – 203; Hansen, L. L. (2009) 'Corporate financial crime: social diagnosis and treatment', *Journal of Financial Crime*, Vol. 16 Iss. 1, pp. 28-40; available at: <https://doi.org/10.1108/13590790910924948>; etc.

⁸ Godwin Muhwezi (2016), pp. 4-5.

⁹ Terms corporation and legal person/legal entity are often interchangeably used in relevant literature. See: Coffee, J. C. (1999), Corporate Criminal Liability: An Introduction and Comparative Survey, pp. 9-39. In: A. Eser, G. Heine and B. Huber (eds), Criminal responsibility of legal and collective entities: international colloquium. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht; Heine, G. (1998), „Sanctions in the Field of Corporate Criminal Liability,” Paper presented at the International Colloquium on Criminal Responsibility of Legal and Collective Entities. 4-6 May 1998. Berlin, Germany; OECD (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, available at: <https://www.oecd.org/corruption/ACN-Liability-of-Legal-Persons-2015.pdf>; Vermeulen et al. (2012), *Liability of legal persons for offences in the EU*, Principal European Commission DG Justice (JLS/2010/JPEN/PR/1009/E4). Antwerpen, Apeldoorn, Portland: Maklu-Publishers; available at: <https://publications.europa.eu/en/publication-detail/-/publication/e6a11989-48d3-41a1-b4ee-8f7051d84253/language-en>.

¹⁰ Tiedemann, 1994, p. 14 according to Beale and Safwat, 2005:108) Beale, S.S. and Safwat, A (2004), 'What developments in Western Europe tell us about American critiques of corporate criminal liability', *Buffalo Criminal Law Review*, Vol. 8, No. 1, 2005, p. 108 (Duke Law School Legal Studies Paper No. 80.); available at SSRN: <https://ssrn.com/abstract=800533>.

¹¹ As Lederman states: „policy setters in various legislative and law enforcement bodies sensed that attaining effective, and mainly trouble-free, control of the economy through criminal law depends on a sweeping subordination of the legal bodies themselves, as far as possible, to criminal proceedings.” See: Lederman, E. (2000), 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity', *Buffalo Criminal Law Review*, Vol. 4 No. 1, p. 644.

¹² For more information on specific instruments of those organizations see: Derenčinović, D. (2002), Odgovornost pravnih osoba u hrvatskom kaznenom pravu, *Hrvatska pravna revija*, pp. 1-22,

modifications in the common law systems in form of further development of established legal and theoretical concepts of liability of legal person.

Despite the differences between the criminal law regimes, most of them usually require establishment of certain level of guilt (culpability, criminal intent, *mens rea*) before an imposition of criminal liability on person¹³. In the criminal law, guilt as an element of the notion of punishable act (criminal offence) represents the entirety of awareness about offence and awareness about unlawfulness¹⁴. In the narrow interpretation, the guilt is perceived as psychological relationship between the act and the offender¹⁵, which was key problem in creating concept of criminal liability of legal persons. Legal person as fiction cannot fulfill *mens rea* requirement. Since criminal law was constructed in the light of the specificity of human beings - their behavior and characteristics, thorough change was needed in criminal law theory in order to apply its key institutes on legal person.

Perception that culpability of legal person is the same as the culpability of the individuals associated with it (and thus liability of legal persons has derivative nature) is in the focus of the nominalist theory which resulted in two models: model of vicarious liability and identification doctrine (derivative model of corporate criminal liability). Both legal theories on the liability of legal persons for criminal offences were developed in common law as a modification of the law of torts' concept and focused on the adaptation and imitation of the imposition of criminal liability on human beings¹⁶. The theory of vicarious liability uses as a foundation concept of legal relationship between the employee and employer or agent and principal in manner that attributes the unlawful act of the employee or agent to the principal or the employer^{17 18}. The theory of vicarious liability¹⁹ was further developed by the courts who applied it to the situations when the principal or employer is a legal person (for example in case: *Tesco Stores Ltd. v. Brent London Borough Council*)²⁰; the *actus reus* and *mens rea* of the individuals who act on behalf of a corporation are automatically attributed to the

available at: https://www.pravo.unizg.hr/_download/repository/Derenčinović_D.%2C%20Odgovornost%20pravnih%20osoba%20u%20hrvatskom%20kaznenom%20pravu.pdf; Filipović and Ikanović (2010), *Krivični postupak protiv pravnih lica*, available at: https://vstv.pravosudje.ba/vstv/faces/docservlet?p_id_doc=4859; Clifford Chance (2012), *Corporate Liability in Europe*, available at: https://www.cliffordchance.com/briefings/2012/02/_corporate_liabilityineuropetechnicalbrochure.html; Vermeulen et al., 2012; etc.

¹³ Vermeulen et al., 2012, p. 49.

¹⁴ Derenčinović, 2002, p. 11.

¹⁵ Vermeulen et al., 2012, p. 57.

¹⁶ Lederman, 2000, p. 652.

¹⁷ *Ibidem*.

¹⁸ According to the Bassi, the most widely accepted rationale of vicarious liability is loss distribution – losses caused by organization's employees are to be positioned upon that organization itself because organization should bear the loss not the victim or innocent party and organization is better able to absorb the losses as a cost of doing business, see: Bassi, A. (2016), *Corporate criminal liability an analytical study with special reference to penal laws in India*, p. 86; available at: <http://shodhganga.inflibnet.ac.in/handle/10603/200004>. Moreover, vicarious liability motivates organization to be careful in selection and supervision of employees.

¹⁹ For example, in the United States (both on the federal level and in some states), any actor (whether a corporate employee, officer or agent) who acts within his normal scope of responsibility and violates the criminal law with an intent to benefit the organization thereby creates liability, both for himself and his corporate employ (Coffee, 1999:9).

²⁰ Gazette 07-Apr-1993, Times 16-Feb-1993, [1993] 1 WLR 1037.

corporation²¹. However, this doctrine failed to offer a comprehensive solution to the issue of imposing criminal liability to legal persons²² and as response federal courts in US improved vicarious criminal liability into doctrine of *respondeat superior*²³ which allowed imposition criminal liability on corporations for acts of its agents or employees under the following cumulative conditions: agent/employee acted within the capacity of employment/agency in furtherance of the corporation's business interests²⁴. Sporadically, courts insisted on additional condition that criminal acts of agent/employee were authorized, tolerated or ratified by corporate management²⁵.

The model of identification doctrine²⁶ was created mainly by English law²⁷ as a response to limitations of the theory of vicarious liability regarding the criminal liability of corporations. Under this theory of liability behavior and knowledge of certain individuals within the corporation (corporate organs/bodies) who act within the scope of their authority and on behalf of the corporate bodies is recognized as the behavior of the legal body itself (individuals as the embodiment of the legal body). Based on the perception that corporation must act through its representatives – individuals (natural persons) who operate within the certain corporative bodies (managerial or supervisory), it identifies those corporative bodies with legal person itself. This model occurs especially in relation to the offences requiring *mens rea*, highest ranking members of personnel act as company itself, rather than on behalf of it²⁸. While critics see vicarious liability simultaneously as too wide (in attributing the wrongdoings of any employee to the organization) as well as too narrow (there is no possibility to examine company policies), the identification theory was criticized as insensitive in relation to the organization, size²⁹ and functioning of large corporations³⁰.

Another model of liability – the aggregation model was created within the nominalist framework as an attempt to solve problems of attribution of fault³¹ at the end of twentieth century under the influence of theories developed in sociology and management³². This model was also consequence of the modification of the theory of vicarious liability in the context of decentralized and complex structures of large modern corporations. The aggregation model theory aimed at identifying a collective responsibility of individuals within the legal person, rather than identifying an

²¹ De Maglie, C. (2005), 'Models of Corporate Criminal Liability in Comparative Law', *Global Stud. L. Rev.* 547, p. 553; available at: http://openscholarship.wustl.edu/law_globalstudies/vol4/iss3/4.

²² It was criticized for distorting the concept of fault, particularly regarding *mens rea* offences, see: Bassi, 2016, p. 88.

²³ Supreme Court in *New York Central & Hudson River Railroad Co v United States* [53 L. Ed. 613 (1909)].

²⁴ Vermeulen *et al.*, 2012, p. 49.

²⁵ Lederman, 2000, p. 655.

²⁶ Theory of direct liability or alter ego theory of liability.

²⁷ In contrast, in the United Kingdom and much of the British Commonwealth, an alternative approach has long governed under which only the acts of certain very high-ranking corporate executives can be attributed to the corporate for purposes of creating corporate criminal liability („alter ego theory” or „identification theory”) has been the dominant approach for much of this century. See: Coffee, 1999, p. 9.

²⁸ Vermeulen *et al.*, 2012, p. 58.

²⁹ Wells C, (1999) 'The Millennium Bug and Corporate Criminal Liability', *The Journal of Information, Law and Technology (JILT)*, p. 121. Available at: <http://elj.warwick.ac.uk/jilt/99-2/wells.html>.

³⁰ See: Bassi, 2016, pp. 99-100.

³¹ Godwin Muhwezi, 2016.

³² Lederman, 2000, p. 661.

individual perpetrator, therefore aggregation could involve matching the conduct of one individual with the state of mind or culpability of another individual to achieve liability³³. This theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, met the requirements of *actus reus* and *mens rea* of the crime³⁴. However, in judicial practice implementation of this model has been modest because of the acknowledged difference between corporate collective knowledge and collective criminal intent and standpoint of courts that attributing *mens rea* of intent or recklessness to a legal body depends, according to these courts, on the full development of this culpable state of mind in one of the corporation's employees³⁵. Furthermore, it is often argued that the aggregation theory lacks consistency with the traditional principles of criminal law³⁶. In ongoing discussions regarding the idea of „optimal theory of corporate criminal liability“ focus is on three elements: the collective knowledge; alleged desirability of adequate care or non – negligence and alleged „perverse effects“ of existing rules on corporate liability³⁷.

In addition to the above-mentioned theories on liability of legal persons, in literature is often mentioned model of separate self – identity³⁸. Unlike aforementioned models, who were developed by the courts, this concept of criminal liability of legal persons has been created in American literature under the influence of specific social trends³⁹. It is based on the assumption that legal persons have a mechanism for expressing their substance and self-identity, which can be located and established and thus legal person can be held liable for criminal offences without necessity to be linked to the behavior of individuals⁴⁰. Identity of legal person is perceived as different and separate from the identity of the body or individual within the corporation, even if they all play a role and contribute significantly to the development and shaping of that identity⁴¹. The legal person is seen as whole, and its bodies shouldn't be observed as legal person nor manifestations of bodies should be seen as manifestations of the will of legal person⁴². Thus, views opposite to ones previously presented, created different concept of liability of legal persons – organizational model of criminal liability of legal persons⁴³. Organizations function as real entities in ways that are not reducible to propositions about individuals. So, the corporation is something more than what is attained from the sum of all individual parts.

³³ Vermeulen *et al.*, 2012.

³⁴ Pop, A. I. (2006), *Criminal Liability of Corporations—Comparative Jurisprudence*, p. 4. Available at: <https://digitalcommons.law.msu.edu/king/81>.

³⁵ See: Lederman, 2000, p. 666.

³⁶ Pop, 2006, p. 4.

³⁷ Coffee, 1999, p. 25

³⁸ See: Quaid, J. A. (1998), *The assessment of corporate criminal liability on the basis of corporate identity: An analysis*. McGill Law Journal Volume 43, pp. 67–114; Lederman, 2000; Wells, C. (1994), 'Corporate Liability and Consumer Protection: Tesco v Natrass Revisited Celia Wells', *The Modern Law Review*, Vol. 57, No. 5, pp. 817–823.

³⁹ Such as: complexity of the corporate phenomenon; rising dominance of collective theories; and growth of interdisciplinary research. See: Lederman, 2000, pp. 683–685.

⁴⁰ Vermeulen *et al.*, 2012, p. 59.

⁴¹ Lederman, 2000, p. 678.

⁴² See: Savić, V-I, (2011), *Koncept autonomne odgovornosti pravne osobe i njegova primjena u kaznenom pravu*, *Godišnjak Akademije pravnih znanosti Hrvatske*, Vol. II No. 1, str. 41–68.

⁴³ According to some authors (Godwin Muhwezi, 2016) this model is far superior to the derivative model of liability.

II. Financial crime of legal persons

Companies and corporations represent types of legal persons that are most often associated with contemporary criminal activities. Profit earning deeply rooted in the grounds of their establishment⁴⁴ makes them vulnerable to the criminal behaviors – often, they are used as cover up for various criminal activities, but also, they generate criminal activities because of their inclination to maximization of profits within short time and in the easiest manner, regardless to the consequences⁴⁵. In research it was pointed out that the national criminal justice system's capacity to investigate and prosecute corporate crime is in practice very limited as well as its capacity to enforce effective sanctions⁴⁶. If liability of legal persons for criminal offences is not adequately developed and identified in certain legal system, that creates a number of consequences: companies will continue to benefit from their criminal and dangerous practices by ensuring that individual employees plead guilty to the offence; crime remains very profitable for the corporation and carries few if any consequences for the company itself; and future offences are not effectively prevented⁴⁷. However, not only that corporate misbehavior is often handled in civil rather than criminal court, it is also rarely publicized for mass consumption as conventional crime⁴⁸.

Ability of corporate and collective entities to evade liability or responsibility for their harmful conduct is supported by the limitations of an antiquated social control system based solely on national institutions implying that contemporary corporate crime has increasingly transnational nature⁴⁹. Furthermore, absence of effective international regulations⁵⁰ has resulted that transnational corporations, with their complex and intricate structures of parent companies, holdings and subsidiaries, are easily able to exploit the weaknesses of the existing regulatory regime⁵¹. Even though criminal offences linked to the liability of legal persons are themes of various research

⁴⁴ As Dobbin states: „Without the state's strict enforcement of the obligations of citizenship, the corporation is exposed for what it is. It is not a citizen, or anything even vaguely resembling such a multifaceted and complex entity. The corporation is strictly one-dimensional, demonstrating only the narrowest of characteristics: greed.” See: Dobbin, M. (1998), *The Myth of the Good Corporate Citizen*, Stoddart Pub: Toronto, p. 24.

⁴⁵ Derenčinović, 2002, p. 20.

⁴⁶ See: Pontell, H. N., *et al.* (1994), Corporate crime and criminal justice system capacity: Government response to financial institution fraud, *Justice Quarterly*, Vol. 11, Iss. 3, pp. 383-410.

⁴⁷ Brenen, K.-D. (1999), Forms of Criminal Responsibility of Organisations and Reasons for their Development. A Description of the Legal Practice in Germany, p. 54. In: A. Eser, G. Heine and B. Huber (eds), *Criminal responsibility of legal and collective entities: international colloquium*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.

⁴⁸ See: Morris, B. (2008), „Corporate convicts: where are they now?”, *Fortune Magazine*, Vol. 157 No. 12.

⁴⁹ Préfontain, D. (1999), Effective Criminal Sanctions Against Corporate Entities: Canada, p. 277. In: A. Eser, G. Heine and B. Huber (eds), *Criminal responsibility of legal and collective entities: international colloquium*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.

⁵⁰ See: Gerber and Jensen, (2000), 'Controlling Transnational Corporations: The Role of Governmental Entities and Grassroots Organizations in Combating White-Collar Crime', *International Journal of Offender Therapy and Comparative Criminology* Vol. 44 Iss. 6, pp. 692-713, available at: <https://pdfs.semanticscholar.org/0551/bd8af2a8c0019980322720eb3018aa692e50.pdf>

⁵¹ Dandurand, Y. (1999), Entertaining Realistic Expectations About the Effect of Criminal Sanctions Imposed on Corporate Entities: Canada, pp. 269. In: A. Eser, G. Heine and B. Huber (eds), *Criminal responsibility of legal and collective entities: international colloquium*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.

for the last few decades they still represent, in criminological sense, an unknown phenomenon⁵². Generally, this is caused by absence of quantitative data on extent, development, structure and control of this type of crime and its varieties.

The essence of legal persons' crime (more often referred to as corporative crime) are criminal offences committed by employees on behalf or in favor of the legal person⁵³, which places this area of crime into white collar crime⁵⁴ or in much broader concepts such as financial crime. However, similarly to the corporate crime, most of the data on financial crime is produced without credible methodology⁵⁵. According to the Levi financial crime represents one of the biggest business and social issues of our time⁵⁶. In literature, financial crime is defined as crime that involves use of deception for illegal gain, normally involving breach of trust, and some concealment of the true nature of the activities⁵⁷ or as a financially driven non-violent crime committed by business and government professionals^{58 59}. Various categories of financial crime: fraud, theft, corruption and manipulation⁶⁰ include significant participation of legal persons, which is not surprise having in mind profound involvement of legal persons in every segment of the economy. Researches show that at least one domestic or foreign legal person is behind almost every serious financial criminal offence against budget of EU⁶¹. Even though no industry is immune to the various forms of financial crime such as tax evasion, antitrust crime, insider trading, accounting frauds, environmental, corruption crime, little is known about extent, structure and control of those criminal offences in context of liability of legal persons. One of the reasons is that in those types of crimes prosecution often focuses on the individual employee⁶² not legal person itself, even

⁵² Walburg, C. (2015), The measurement of corporate crime: an exercise in futility? p. 25. In: J.v. Erp, W. Huisman and G. V. Walle (Eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*. Oxon: Routledge.

⁵³ According to the Brenan there is no doubt that companies organize themselves in a way that minimizes the legal and financial consequences of the crimes that are committed on their behalf by their employees. See: Brenan, 1999, p. 55. And some authors point out that corporate organizational structure itself is criminogenic. See: Clubb, 2014.

⁵⁴ According to Friedrichs white collar criminality is financial delinquency of persons of reputable occupation and social status. See: Friedrichs, D. O. (2009), *Trusted criminals: white collar crime in contemporary society* Belmont, CA: Wadsworth Cengage Learning, p. 5. Clubb suggests there is a general consensus among modern definitions that white-collar crime involves delinquent and criminal acts committed in the course of one's occupational activities or otherwise facilitated by the trust and resources provided by one's occupational position; and even though white-collar crime occurs in a variety of occupational settings, one of the most complex environments in which white-collar crime flourishes is the corporate system. See: Clubb, 2014, p. 193.

⁵⁵ See: Economic & Social Research Council. (2012). Data on financial crime is not credible, UK research finds. ScienceDaily. Available at: www.sciencedaily.com/releases/2012/12/121213193137.htm.

⁵⁶ *Ibidem*.

⁵⁷ Picket, K. H. and Picket, J. (2002), *Financial Crime Investigation and Control*. New York: John Wiley and Sons, Inc., p. 3.

⁵⁸ Tupman, W. (2015), 'The characteristics of economic crime and criminals', p. 4. In: B. Rider (ed) *Research Handbook on International Financial Crime*. Cheltenham, Northampton: Edward Elgar Publishing Limited.

⁵⁹ The Financial Services and Markets Act (FSMA) 2000 s 6(3) determines financial crime as „any offence involving (a) fraud or dishonesty; (b) misconduct in, or misuse of information relating to, a financial market; or (c) handling the proceeds of crime”.

⁶⁰ Gottschalk, (2010), 'Categories of financial crime', *Journal of Financial Crime*, Vol. 17 Iss: 4, p. 443.

⁶¹ Derenčinović, 2002, p. 21.

⁶² For a long time, it was known that many managers - 43 % - are prepared to do things in their professional life that they would reject in their private life. See: Brenner, S.N. and Molander, E.A. (1977), *Is the ethics of business executives changing?*, Harvard Business Review, Vol. 55, January-February, pp. 57-71.

though profit derived from criminal activities goes to the employer⁶³. Hansen points out that corporate financial crime is additionally difficult to detect, due to elaborate conspiracies in the form of social networks, which are not restricted to members of the business community but extend themselves to include politicians and law enforcement officials⁶⁴. Due to the complexity of criminal offences connected with business activities of legal persons it can be assumed that „registered criminal offences represent only the tip of a large iceberg”⁶⁵.

In Bosnia and Herzegovina (abbreviated as: B&H) is even less known about financial crime (as well as any other type of crime) connected with legal persons. Uncertainties regarding the liability of legal persons for financial and other criminal offences are present in B&H due to general scientific indifference towards this issue reflected in scarce literary fund⁶⁶, and the insufficiency, disorganization and inaccessibility of relevant case law in different circuits of B&H’s criminal justice system. Furthermore, absence or unavailability of relevant statistical data on liability of legal persons for criminal offences was confirmed during our research when we contacted the competent authorities on every level of governmental organization of B&H, which, *inter alia*, collect, produce and disseminate statistics on crime within the segment of demography and social statistics: the Agency for statistics of Bosnia and Herzegovina at the level of the state, the Federal Office of Statistics for the Entity of Federation of B&H (abbreviated: FB&H) and the Institute of Statistics for the Entity of Republika Srpska (abbreviated: RS)⁶⁷. However, the official response of all contacted competent authorities was that they don’t have any statistics regarding the liability of legal persons for criminal offences.

Having in mind previously stated and testing the assumption that liability of legal persons for criminal offenses has the greatest practical significance in the sphere of financial crime, we conducted the analysis of only publicly available cases – cases that were heard before the Court of B&H. However, before examination of cases, the concept of liability of legal persons for criminal offences developed in legal system of B&H will be explained.

III. Liability of legal persons for criminal offences in legal system of B&H

As in other criminal law systems belonging to the continental legal tradition, strongly shaped by the Roman law, liability of legal persons for criminal offences in legal system of Bosnia and Herzegovina was introduced relatively late – in 2003 with the entry into force of the new criminal legislation. Primarily the result of influence of international documents (generated by the Council of Europe⁶⁸, the European Union⁶⁹,

⁶³ See: Eidam, G. (1999), *Forms of Criminal Responsibility of Organisations: Aspects of Legal Practice in Germany*, p. 65. In: A. Eser, G. Heine and B. Huber (eds), *Criminal responsibility of legal and collective entities: international colloquium*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.

⁶⁴ Hansen, 2009, p. 34,36.

⁶⁵ Gobert, J. and Punch, M. (2003), *Rethinking Corporate Crime*. Cambridge: Cambridge University Press; p. 12.

⁶⁶ During the writing of this paper we performed search of Cooperative online bibliographic system and services in B&H COBISS.BH (<http://www.cobiss.ba/>) that resulted with only four results.

⁶⁷ See: http://www.bhas.ba/?option=com_publicacija&id=1&lang=ba.

⁶⁸ The Recommendation No. R(88) 18 of the Committee of Ministers to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities.

In the context of liability this document stipulates: 1) that enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise; and 2) the enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not. Furthermore, Recommendation No. R(88) 18 indicates that the enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission. Also, it clarifies that the imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence; and persons performing managerial functions should be made liable for breaches of duties which conduce to the commission of an offence. Recommendation No. R (88) 18 favors a negligence-based approach to corporate criminal liability. The Recommendation No. R(96) 8 of the Committee of Ministers to Member States on crime policy in Europe in a time of change suggested that provision should be made for the liability of corporate bodies for criminal offences. In literature it is often referred to another international instrument as influential in context of introduction of liability of legal persons in legal system of B&H (see Babić *et al.* [2005]), Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini. Sarajevo: Evropska komisija, Vijeće Evrope): the Convention on the protection of the environment through criminal law (Strasbourg, 4.XI.1998). This Convention defines the concept of criminal liability of legal persons in Article 9, which prescribes adoption of appropriate measures that are necessary to enable imposition of criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 and 3 of Convention (intentional and negligent offences) has been committed by their organs or by members thereof or another representative. It is further stipulated that corporate liability in context of this Convention doesn't exclude criminal proceedings against natural person. Unfortunately, B&H still has not signed this Convention. Another influential instrument was the Criminal Law Convention on Corruption (Strasbourg, 27/01/1999), which incorporates provisions on liability of legal persons. The term „legal person” in Article 1(d) this document is defined as a „any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations”. In Article 18 of the Convention stipulates obligation to adopt legislative and other necessary measures in order to ensure that legal persons can be held liable for criminal offences of active bribery, trading in influence and money laundering established in accordance with Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: power of representation of the legal person; or an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences. Furthermore, States must take necessary measures to ensure that legal person can be held liable where the lack of supervision or control by a natural person who has leading position (referred to in Art.18 (1)) has made possible the commission of the criminal offences previously mentioned for benefit of that legal person by a natural person under its authority (Art. 18(2) of the Convention). Similarly, to the Convention on the protection of the environment through criminal law, this Convention also prescribes that corporate liability previously elaborated shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to the criminal offences referred to in the Art. 18(1). The Criminal Law Convention was signed by B&H on 1 March 2000, ratified it on 30 January 2002 and entry into force was 1 July 2002. Another relevant instrument for development of corporate liability the Convention on cybercrime (Budapest, 23.XI.2001) that requires establishment liability of legal persons for a criminal offence established in accordance with Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on: a power of representation of the legal person; an authority to take decisions on behalf of the legal person; an authority to exercise control within the legal person. Additionally, States must ensure that a legal person can be held liable where the lack of supervision or control by a natural person on leading position within the legal person, has made possible the commission of a criminal offence for the benefit of that legal person by a natural person acting under its authority (Art. 12(2) of the Convention). However, Convention doesn't explicitly prescribe criminal liability of legal persons but it leaves to the States that in accordance with its legal system and established legal principles to choose type of liability (criminal, civil or administrative) (Art. 12(3) of the Convention). Such liability will be without prejudice to the criminal liability of the natural persons who have committed the offence (Art. 12(4) of the

OECD⁷⁰ and the UN⁷¹), created concept of liability needed to provide more comprehensive approach in the fight against the financial crime and other related areas of crime given the implications of the criminal offences that are committed in relation with the activities of the legal persons or its structure (utilizing it as an instrument or

Convention). B&H signed the Convention on Cybercrime on February 9 2005, ratified it on 19 of May 2006 and entry into force was 1 September 2006.

⁶⁹ Second Protocol to the Convention on the protection of the European Communities' financial interest - Joint Declaration on Article 13 (2) - Commission Declaration on Article 7 (OJ C 221/12/97). This document in Article 3(1) prescribes that Member States must ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on a power of representation of the legal person, or an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud. Also Member State must ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in Art 3(1) has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority. Liability of a legal person doesn't exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

⁷⁰ The Convention on combating bribery of foreign public officials in international business transactions (adopted on 21 November 1997) created concept of „responsibility of legal persons” for the bribery of a foreign public official (Art. 2), like the concepts in other international documents. In the Annex I: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions it is prescribed that „Member States' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.”. Two approaches are suggested for Member States' systems for the liability of legal persons. First approach provides that the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons. Second approach stipulates that liability of legal persons is only triggered by acts of persons with the highest-level managerial authority. Furthermore, Annex I provide that Member countries should ensure that, in accordance with Article 1 of the OECD Anti-bribery Convention, and the principle of functional equivalence in Commentary 2 to the OECD Anti-bribery Convention, a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf. flexible and reflects the wide variety of decision-making systems in legal persons. B&H is not party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Significant influence for establishment of liability of legal persons also had FATF Recommendations that set out the essential measures that countries should have in place to enhance the transparency and availability of beneficial ownership information of legal persons and arrangements (See: FATF, 2012).

⁷¹ The United Nations Convention against transnational organized crime (General Assembly Resolution 55/25 of 15 November 2000) in Article 10 prescribes liability of legal persons for participation in serious crimes involving an organized criminal group and for offences established in Arts. 5, 6, 8 and 23 of this Convention. Liability of legal persons may be criminal, civil or administrative, and such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. B&H signed the Convention on 12 December 2000, and it was ratified on 24 April 2002. The United Nations have addressed the matter of liability of legal persons also in the International Convention for the suppression of the financing of terrorism in the Article 5 and in the Convention against corruption in the Article 26. In the former document it is stipulated that parties of this Convention shall take the necessary measures „to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence as set forth in Article 2.”. Liability of legal entities may be criminal, civil or administrative; and such liability is incurred without prejudice to the criminal liability of individuals who have committed the offences - Art. 5(2). This instrument doesn't define the position of perpetrator within the legal person nor its connection to the *actus reus* of offence.

cover for committing criminal offences) and especially their resulting consequences: instigated damage and generated benefits for legal persons. Notwithstanding the incentives for its establishment, final concept of liability of legal persons for criminal offences differs from the conceptions of that liability set forth in the international documents (conventions of the Council of Europe and by the Second Protocol to the Convention on Protection of Financial Interests of European Communities) in a sense that liability of legal persons is not linked to specific criminal offences⁷² nor its limited to offences committed on the behalf, for the account or in favor of the legal person by its high – ranking individuals^{73 74}.

Thus, the Criminal Code of B&H (Abbreviated: CC B&H)⁷⁵ adopts broader concept of liability given that it's not limited only to the offences committed on behalf, for account or in favor of legal person by the individual (natural person) in the leadership positions within its hierarchy. However, existence of one or more alternative forms of contribution of the managerial or supervisory bodies of the legal person to commission of a criminal offence is necessary for establishment of legal person's liability for such criminal offences. The specificities of the regulation of the liability of legal persons for criminal offences in legal system of B&H regarding: concept of a legal person, concept of liability of a legal person, and types of criminal offences for which liability can be imposed to a legal person, will be further discussed in the subsequent parts of this paper.

IV. Concept of a legal person

Unlike other countries in the region who adopted specific legislation on liability of legal persons for criminal offences⁷⁶, B&H opted to regulate liability of legal persons for

⁷² The Criminal Law Convention on Corruption ensures that legal persons can be held liable for criminal offences of active bribery, trading in influence and money laundering; the Convention on Cybercrime requires establishment of liability of legal persons for a criminal offence established in accordance with Convention (offences against the confidentiality, integrity and availability of computer data and systems; computer-related offences; content-related offences; and offences related to infringements of copyright and related rights); the Second Protocol to the Convention on the protection of the European Communities' financial interest prescribes that Member States must ensure that legal persons can be held liable for fraud, active corruption and money laundering.

⁷³ Which was indicated in: The Recommendation No. R(88) 18 of the Committee of Ministers to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities; the Recommendation No. R(96) 8 of the Committee of Ministers to Member States on crime policy in Europe; the Criminal Law Convention on Corruption; the Convention on cybercrime; the Second Protocol to the Convention on the protection of the European Communities' financial interest; the Convention against transnational organized crime; and the Convention for the suppression of the financing of terrorism Convention against corruption.

⁷⁴ See: Babić *et al.* (2005), Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini. Sarajevo: Evropska komisija, Vijeće Evrope.

⁷⁵ „Official Gazette of B&H”, no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18.

⁷⁶ Croatia – The law on liability of legal persons for criminal offences („Official Gazette of Republic of Croatia”, no. 151/03, 110/07, 45/11, 143/12); Serbia – The law on liability of legal persons for criminal offences („Official Gazette of Republic of Serbia”, no. 97/2008); Montenegro – The law on liability of legal persons for criminal offences („Official Gazette of Republic of Montenegro”, no. 2/2007, 13/2007, 30/2012).

criminal offences through provisions of the CC B&H⁷⁷. More specifically, criminal legislation of B&H is applicable to the legal persons in accordance with provisions of Chapter XIV of the CCB&H (Arts. 122-144)⁷⁸, which are explicitly designed for regulation of liability of legal persons for criminal offences, but also in accordance with other relevant laws of B&H⁷⁹. Provisions of Chapter XIV represent deviation from provisions of general part of the Law that regulates criminal liability of natural persons. The CCB&H doesn't use the term „criminal liability of legal persons” but the „liability of legal persons for criminal offences”. In literature is suggested that this is reflection of intention to emphasize the differences in fundamentals of liability of natural and legal persons for criminal offences i.e. to reserve the usage of the term „criminal liability” and all that it entails exclusively for natural persons as perpetrators of criminal offences⁸⁰. Having in mind previously stated, legal framework on criminal liability of legal persons in B&H consists of: provisions of Chapter IV of the CC B&H; provisions of the general section of the CC B&H; and criminal law provisions possibly contained in other B&H's laws.

Criminal law of B&H recognizes a legal person as its subject⁸¹. Following the premise that notion of legal person is based on a legal fiction about social construct bestowed with legal personality by legal order, the criminal legislation in B&H uses mixed approach to define the notion of a legal person. Listing of forms of legal persons (B&H, Federation of B&H, Republika Srpska, the Brčko District of B&H, canton, city, municipality, local community, every organizational form of economic enterprises and all forms of association of economic enterprises, public institutions, institutions performing credit and other banking activities, institutions for insurance of property and persons and other financial institutions, fund, political organizations, associations of citizens) is not closed given its ending indication of „other forms of associations” that meet two conditions: capacity for acquisition and usage of assets in a same way as any other institution or state authority that acquires and uses assets and recognition by the law as a legal person⁸². The „recognition by the law” refers to the concept of legal personality and whether such personality is granted to the certain associations or groupings⁸³. However, substance and meaning of the legal personality is not derived from the positive law but is defined by legal theory as the ability of being holder of rights and obligations in legal transactions⁸⁴. Furthermore, it is important to highlight that in B&H's legal system legal persons, unlike natural persons, have so called „special legal personality”, which means that legal person may be holder only of those rights and obligations that are within the scope of activity for which legal person was established⁸⁵. Limitations of special legal personality are defined through provisions of specific laws.

⁷⁷ And other relevant criminal laws in force: the Criminal Code of Federation of B&H (Abbreviated: CC FB&H) („Official Gazette of FB&H”, no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17), the Criminal Code of Republika of Srpska (Abbreviated: CCRS) („Official Gazette of RS”, no. 64/17) and Criminal Code of Brcko District B&H (Abbreviated: CC BD B&H) („Official Gazette of BD B&H”, no. 33/13).

⁷⁸ Arts. 126 – 148 of the CC FB&H; Arts. 103 – 122 of the CC RS and Arts. 126 – 148 of the CC BD B&H.

⁷⁹ Article 11 of the CC B&H.

⁸⁰ Babić *et al.*, 2005, p. 466.

⁸¹ See Arts. 11 and 122-144 of the CC B&H. See also: Arts. 126 – 148 of the CC FB&H; Arts. 103 – 122 of the CC RS and Arts. 126 – 148 of the CC BD B&H.

⁸² Article 1(15) of the CC B&H. Identical provision is contained in the Article 2 (11) of the CC FB&H and Article of the Article 2(13) CC BD B&H.

⁸³ See: Vermeulen *et al.*, 2014, p. 19.

⁸⁴ Čović, Š. (2003), *Poslovno pravo*. Sarajevo: Pravni Fakultet Univerziteta u Sarajevu, p. 41.

⁸⁵ Savremena administracija (1964), Pravni leksikon. Beograd: Savremena administracija, p. 691.

For example, the Law on companies of the Federation of B&H⁸⁶ stipulates in Article 2(2) that company is legal person that independently preforms activity of production and sale of goods and provision of services in the market for the purpose of gaining profit. The methods and moment of acquisition of legal personality are defined by the law regulating certain type of legal person, but in general, legal persons referred to in the Article 1(15) of the CCB&H obtain legal personality at the moment of their registration in appropriate record maintained by competent state authority⁸⁷. Thus, in B&H's law entry of legal person into the specific register has a constitutive effect in regard of their capacity to be liable for criminal offences.

Nevertheless, the CC B&H narrows the circle of legal persons to which provisions on liability for criminal offences can be applied. According to the Article 122(1) of the CCB&H provisions of Chapter XIV on liability of the legal persons for a criminal offence committed by the perpetrator in the name, for the account or in favor of the legal person don't apply to the B&H, the FB&H, the RS, the BD B&H, canton, city, municipality and local community⁸⁸. This exclusion of the legal persons of public law (i.e. prescribing their immunity) from the liability for criminal offences regardless of whether or not they acted *iure imperii* or *iure gestionis*⁸⁹ is based on the understanding that those legal persons are holders of *ius puniendi* as well as budget users, and therefore subjecting them to the liability for criminal offences would create situations of self-punishment and spilling of budget funds^{90 91}.

From the abovementioned provisions of Articles 1(15) and 122 of the CC B&H it is evident that in criminal law of the B&H, notwithstanding the exclusions, both public and private entities qualify as legal persons. Even though the CC B&H doesn't directly define the notion of a legal person⁹² it gives the catalogue of social structures, which are considered to be legal persons.

⁸⁶ „Official Gazette of Federation of B&H”, no. 81/15. Similar provisions are contained in the Law on the company in the RS („Official gazette of the RS” no. 127/08, 58/09, 100/11 and 67/13) which stipulate that companies are legal persons established for performing activities for the purpose of gaining profit (Art. 2(1)).

⁸⁷ The Law on banks in the Federation of B&H („Official gazette of Federation of B&H” no 27/17); and the Law on banks in the RS („Official gazette of RS”, no. 3/16).

⁸⁸ Identical solution is provided in: Art. 126 of the CC FB&H; Art. 126 of the CC BD B&H; and Art. 103 of the CC RS.

⁸⁹ This solution is encouraged by international instruments such as the Criminal Law Convention on Corruption (Strasbourg, 27/01/1999), in which term „legal person” in Article 1(d) this document is defined as a „any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations.”.

⁹⁰ Filipović and Ikanović, 2010, p. 18.

⁹¹ See also: Ilić, G. P. (2010) Marginalije uz Zakon o odgovornosti pravnih lica za krivična dela, *CRIMEN* (I) 2/2010 str. 246–256.

⁹² It is interesting that also other relevant laws even though they use notion of a legal person don't define it. For example, the Law on Companies of the Federation of B&H („Official Gazette of Federation of B&H”, no. 81/15) stipulates in Article 2(2) that company is legal person that independently preforms activity of production and sale of goods and provision of services in the market for the purpose of gaining profit. In the Article 4 the Law on Companies in FB&H titled legal capacity stipulates that company acquires capacity of legal person by the day of entry into the register kept by court indicated by the Law on registration of business subjects in Federation of B&H. Similar provisions are contained in the Law on the Company in the RS („Official gazette of the RS” no. 127/08, 58/09, 100/11 and 67/13) which stipulate that companies are legal persons established for performing activities for the purpose of gaining profit - Article 2(1). Also, company/business enterprise acquires status of legal person upon entering into register off business subject in a manner prescribed by law regulating the registration. Entities' laws on registration of business subjects refer to business subjects as a legal person: the Law on Registration of Business Subjects in FB&H („Official gazette of FB&H”, no. 27/05, 68/05, 43/09 and 63/14) and the Law on Registration of Business Subjects in RS („Official gazette of RS”, no. 67/13 and 15/16).

V. Concept of liability of a legal person

Attribution of liability for criminal offences to the legal person represents complex legal issue. In B&H, grounds of liability of legal person are stipulated in the Article 124 of the CC B&H: „Legal person will be liable for criminal offence that perpetrator committed on behalf, for account or benefit of that legal person: a) when purpose of the committed criminal offence stems from conclusion, order or permission of managerial or supervisory bodies of legal person; or b) when managerial or supervisory bodies of legal person have influenced perpetrator or enabled him/her to commit a criminal offence; or c) when legal person disposes with illegally acquired financial gain or uses objects obtained by the criminal offence; or d) when managerial or supervisory bodies of legal person failed to perform due supervision over the legality of employees' work”⁹³. Established concept provides liability of legal person for criminal offences under the following two conditions: 1. perpetrator committed criminal offence on behalf, for account or benefit of the legal person; and 2. presence of one or more legally prescribed forms of contribution of legal person (i.e. its managerial or supervisory bodies) to committing criminal offence by perpetrator. Having in mind previously stated, it is evident that the CC B&H adopts one form of derivative model of liability of legal person for criminal offence. In OECD study on liability of legal persons for corruption in Eastern Europe and Central Asia⁹⁴ it was stated that B&H adopted „expanded identification model” i.e. model of liability of legal person „where the liability of a legal person can be triggered by management's failure to supervise its employees ('lack of supervision rule')”, which is not entirely accurate. Namely, adopted model is more extensive than suggested because it encompasses liability of a legal person not only for the offence committed by person on leading position i.e. the person belonging to company's top management or having representative powers but also for offence committed by any employee acting within the scope of his employment and with the intent to benefit the legal person. Additionally, liability of legal person exists when it disposes with illegally acquired financial gain or uses objects obtained by the criminal offence. Established model of liability will be in more detail elaborated in the following sections of this paper.

The first condition for establishment of liability of legal person refers to actions of the perpetrator of the criminal offence and second to the actions of managerial or supervisory bodies of legal person. From the phrasing used in Article 124 of the CC B&H is evident that legal person is not perpetrator of criminal offence because the acts of criminal offence refer exclusively to the natural person, and perpetrator could only be natural person⁹⁵. Moreover, according to the relevant provision position of perpetrator within the legal person is irrelevant, i.e. it is irrelevant whether that person has leading position within the legal person or has status of employee or a member. Furthermore, the CC B&H doesn't even require existence of any formal legal relationship between perpetrator and legal person in order to impose liability for committed criminal offence.

First condition for liability of legal person is that perpetrator committed criminal offence on behalf, for account or benefit of that legal person⁹⁶. Consequently, there must

⁹³ Identical solution is provided in: Art. 128 of the CC FB&H; Art. 128 of the CC BD B&H; and Art. 105 of the CC RS.

⁹⁴ OECD, 2015, p. 21.

⁹⁵ See: Babić *et al.*, 2005, p. 466.

⁹⁶ Art. 124 of the CC B&H. Identical provision is contained in: Art. 128 of the CC FB&H; Art. 128 of the CC BD B&H; and Art. 105 of the CC RS.

be circumstance that links committed criminal offence of perpetrator with particular legal person in a manner which allows legal attribution of his/hers acts to the legal person. That circumstance is the authority of perpetrator to act on behalf, for account or benefit of the legal person. This authorization of perpetrator may result from law or another legal act such as individual act of legal person (i.e. is its managerial bodies) or contract⁹⁷. Having in mind this, legal person may be liable for criminal offence perpetrated not only by individual on leadership position within the legal person but also by non-member of legal person if he/she committed criminal offence acting on the some kind of legal basis on behalf, for account or benefit of legal person. This first condition will be fulfilled also when act of perpetrator which represents element of criminal offence represents abuse of given authority even in the form of their overstepping. However, according to the Babić *et al*⁹⁸. and Filipović and Ikanović⁹⁹ in that case action will be considered as action taken on behalf, for account or benefit of legal person only if overstepping relates to manner of taking of activity or on existence of requirements necessary for its performance but not when overstepping is done in a sense that act by which criminal offence was committed went outside the circle of activities to which his/hers activity relates.

Second stipulated condition further limits liability of legal person by requesting the presence of one or more alternatively prescribed forms of contribution of a legal person (i.e. its managerial or supervisory bodies) to committing criminal offence by perpetrator. The notion of „managerial or supervisory bodies” refers to the individual or collective bodies within a legal person that have authority to: represent legal person; make decisions for the legal person; and perform control within the legal person. Which bodies within the legal person have beforementioned powers is more precisely defined by provisions of specific laws regulating that form of legal person as well as by provisions of subordinate regulations created by the legal person itself (such as statute of the legal person). However, it should be noted that is argued by some authors that formal establishment of those bodies isn't required, which means inclusion of informal bodies that conduct business activities of legal person and direct its actions¹⁰⁰.

Actions of managerial or supervisory bodies must represent contribution to commission of criminal offence in a sense that criminal offence wouldn't be perpetrated or wouldn't be perpetrated in such manner or intent of perpetrator wouldn't be realized if there were no acts of managerial or supervisory bodies of the legal person¹⁰¹. Intensity of that contribution is relevant for decision of the prosecutor whether he/she will require initiation of criminal proceeding against legal person and if circumstances of the case indicate that contribution was of no consequence for perpetrating criminal offence prosecutor might decide not to instigate criminal proceeding¹⁰². It is important to note that in case when legal person operated primarily for a criminal purpose (e.g. a front for a scheme that was designed to commit fraud; or was established to participate in the illegal manufacture, importation, or distribution of a controlled substance) or operated primarily by criminal means (e.g. a hazardous waste disposal business that had no

⁹⁷ Babić *et al.*, 2005, p. 469; Filipović and Ikanović, 2010, p. 18.

⁹⁸ Babić *et al.*, 2005, p. 470.

⁹⁹ Filipović and Ikanović, 2010, p. 18.

¹⁰⁰ *Ibidem*, p. 33.

¹⁰¹ Babić *et al.*, 2005, p. 472.

¹⁰² See: Art. 367 of the CCB&H.

legitimate means of disposing of hazardous waste) in literature and judicial practice this legal person is recognized as „criminal purpose organization”¹⁰³.

First stipulated form of contribution of the managerial or supervisory bodies requires that purpose of the committed criminal offence stems from conclusion, order or permission of managerial or supervisory bodies of legal person¹⁰⁴. Conclusion, order or permission represent different types of decision making of vital bodies within the legal person who govern its operations. According to the Filipović and Ikanović, it is not necessary that they have certain official form¹⁰⁵.

Second form of legal person's contribution to commission of criminal offence is prescribed as influence or enabling of perpetrator to commit a criminal offence by managerial or supervisory bodies of legal person¹⁰⁶. Managerial or supervisory bodies of legal person could influence perpetrator with their actions to make decision or reinforce already made decision to commit criminal offence on behalf, for account or in favor of legal person. On the other hand, enabling perpetrator to commit criminal offence entails creation of conditions for him/her to commit criminal offence or facilitation of its commission¹⁰⁷.

Third form of contribution of legal person to commission of a criminal offence entails specific activities of its managerial or supervisory bodies: using the illegally acquired financial gain or objects obtained by the criminal offence¹⁰⁸. This behavior of managerial and supervisory bodies of legal person should be understood as confirmation of knowledge of managerial and supervisory bodies that financial gain was obtained through criminal offence as well as acceptance and approval of criminal offence and continuation of violation of protected goods and maintenance of illegal state created with that criminal offence¹⁰⁹.

Finally, legal person will be liable for criminal offence committed by perpetrator on behalf, for account or in favor of legal person when managerial or supervisory bodies of legal person failed to perform due supervision of legality of employees' work¹¹⁰. This contribution of legal person to commission of a criminal offence is consisted in violation of its legal duties to perform control over employees' work in terms of its compliance with relevant laws and to correct identified errors and omissions.

If requirements stipulated in Article 124 of the CC B&H are met, legal person will be liable for criminal offence even when perpetrator of the criminal offence is not guilty¹¹¹. This indicates that criminal law of B&H doesn't tie liability of legal person for criminal offence to establishment of guilt of the natural person as perpetrator. Consequently, even in situations when grounds for exclusion of perpetrator's guilt for criminal offence, which is committed on behalf, for account or in favor of legal person, are present,

¹⁰³ United States Sentencing Commission (2018), Guidelines Manual, §3E1.1 (Nov. 2018), p. 523. Available at: <https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>;

¹⁰⁴ Article 124(1) (a) of the CC B&H. Identical provision is contained in: Art. 128(1)(a) of the CC FB&H; Art. 128(1)(a) of the CC BD B&H; and Art. 105(1) of the CC RS.

¹⁰⁵ Filipović and Ikanović, 2010., p. 35.

¹⁰⁶ Article 124(1)(b) of the CC B&H. Identical provision is contained in: Art. 128(1)(b) of the CC FB&H; Art. 128(1)(b) of the CC BD B&H; and Art. 105(2) of the CC RS.

¹⁰⁷ See: Babić *et al.*, 2005.

¹⁰⁸ Article 124 (1) (c) of the CC B&H. Identical provision is contained in: Art. 128(1)(c) of the CC FB&H; Art. 128(1)(c) of the CC BD B&H; and Art. 105(3) of the CC RS.

¹⁰⁹ See: Filipović and Ikanović, 2010, p. 36; and Babić *et al.*, 2005.

¹¹⁰ Article 124 (1) (d) of the CC B&H. Identical provision is contained in: Art. 128(1)(d) of the CC FB&H; Art. 128(1)(d) of the CC BD B&H; and Art. 105(4) of the CC RS.

¹¹¹ Article 125(1) of the CC B&H. Identical provision is contained in the: Art. 129(1) f the CC FB&H; Art. 129(1) of the CC BD B&H; and 106(1) of the CC RS.

liability of legal person for criminal offence still can be established if one of the forms of contribution of managerial or supervisory bodies to committing criminal offence exists. Furthermore, CPC B&H in Article 375(2) stipulates that criminal proceedings against legal person can be conducted and its liability for criminal offence established even when it is not possible to initiate or conduct proceeding against the perpetrator because of the reasons provided by the law (such as: death of perpetrator, amnesty etc.). According to the Filipović and Ikanović even when actual impediment for instigating criminal proceeding exists, such as lack of evidence on reasonable doubt that identified person is perpetrator of a criminal offence, it is possible to indict legal person for that criminal offence of unidentified perpetrator and after conducting criminal proceeding to deliver a verdict that legal person is liable for criminal offence¹¹².

Liability of legal person for criminal offence doesn't preclude guilt of natural persons i.e. accountable persons for committed criminal offence¹¹³.

Conditions for imposing liability to a legal person stipulated in Article 124 of the CC B&H can hint towards the *mens rea* element, however they are only criteria for the attribution of liability to the legal person, not for the establishment of the criminal offence as such. First three forms of contribution of legal person to committing criminal offence assume premeditated actions given their content. Legal person can be liable for criminal offence committed by negligence only when last form of contribution of legal person exist¹¹⁴, and under these circumstances legal person can be punished less severely¹¹⁵.

In case when there is no other person or bodies within the legal person beside perpetrator, which could direct or supervise perpetrator¹¹⁶, the legal person will be liable for perpetrated criminal offence within the limits of the perpetrator's liability¹¹⁷. This means that when there is complete personal overlap between perpetrator and legal person i.e. between perpetrator and managerial or supervisory bodies of legal person, it is not possible to establish contribution of legal person to committing criminal offence separately from actions of perpetrator which represent criminal offence. Thus, for establishing of liability of legal person for criminal offence it is not necessary to determine some form of contribution of managerial or supervisory bodies of legal person prescribed in Article 124 of the CC B&H¹¹⁸ because liability of legal person is directly related to criminal liability of perpetrator. Consequently, if guilt of perpetrator is excluded for some reason, liability of legal person for that criminal offence will be excluded as well¹¹⁹.

When it comes to the impact of changes in status of a legal persons on its liability for criminal offences, the CCB&H regulates the liability of an insolvent legal person for

¹¹² Filipović and Ikanović, 2010, p. 43.

¹¹³ Article 125(2) of the CC B&H. Identical provision is contained in the: Art. 129(2) of the CC FB&H; Art. 129(2) of the CC BD B&H; and 106(2) of the CC RS.

¹¹⁴ Article 125(3) of the CC B&H. Identical provision is contained in the: Art. 129(3) of the CC FB&H; Art. 129(3) of the CC BD B&H; and 106(3) of the CC RS.

¹¹⁵ *Ibidem*.

¹¹⁶ This provision refers to two types of legal persons: legal persons who have no other person in their membership other than a perpetrator and a legal person who, besides the perpetrator, have no bodies to direct or control the perpetrator (a legal person in its structure has other members other than a perpetrator, but there is no body personally different from the perpetrator that could oversee or direct the perpetrator (Babić, *et al.* 2005:474).

¹¹⁷ Article 125(4) of the CC B&H. Identical provision is contained in the: Art. 129(4) of the CC FB&H; Art. 129(4) of the CC BD B&H; and 106(4) of the CC RS.

¹¹⁸ Also: Art. 128 of the CC FB&H; Art. 128 of the CC BD B&H; and Art. 105 of the CC RS.

¹¹⁹ (See: Filipović and Ikanović, 2010:44; Babić *et al.*, 2005).

criminal offences, i.e. influence of insolvency on the liability for criminal offences, and the effects of the termination of the legal person on its liability for criminal offences. In first case, position taken by law is that a legal person in insolvency can be liable for a criminal offence regardless of whether the criminal offence was perpetrated before the beginning of insolvency proceedings or in meantime¹²⁰. However, on a legal person in insolvency can't be imposed sanction, but only the security measure of confiscation of financial gain or objects acquired by criminal offence¹²¹. In case when legal entity had ceased to exist before the criminal proceeding has been completed, and a liability of the legal person is established in criminal proceedings, fines and other sanctions will be imposed on the legal entity which is legal successor of the liable legal person, if its managerial or supervisory bodies had knowledge of the perpetrated criminal offence, before the cessation of existence of the legal person¹²². The security measure of confiscation of the financial gain or objects acquired by criminal offence can be imposed on the legal person - legal successor only if its managerial or supervisory bodies had knowledge of the perpetrated criminal offence¹²³. If the legal person has ceased to exist after completion of the criminal proceedings, the criminal sanction will be executed over legal successor as above mentioned ceases¹²⁴.

VI. Criminal offences

Important aspect of the concept of liability of legal persons refers to the criminal offences which can give rise to liability of legal persons. Generally, most countries in EU have opted for enumeration strategy selecting either families of offences or single offences for which a legal person can be held liable¹²⁵. Quite opposite of that, B&H chose to establish liability of legal persons for all criminal offences entailed in the CC B&H as well as for other criminal offences prescribed by the other laws of B&H¹²⁶, meaning that all-inclusive criminal liability of legal persons was introduced in the legal system of B&H and no distinction is made between natural and legal persons in the sense that legal persons can be liable only for certain criminal offences. Hence, legal persons may be liable for any criminal offence prescribed by the criminal legislation of B&H. However, it should be noted that there are certain groups of criminal offences in regard to which liability of legal persons will have primacy in relation to others - such as criminal offences against economy, business and security of money transfers, corruption criminal offences, tax criminal offences against environment etc.¹²⁷

¹²⁰ Article 126(1) of the CC B&H. Identical provision is contained in the: Art. 130(1) of the CC FB&H; Art. 130(1) of the CC BD B&H; and 107(1) of the CC RS.

¹²¹ *Ibidem*.

¹²² Article 126(2) of the CC B&H. Identical provision is contained in the: Art. 130(2) of the CC FB&H; Art. 130(2) of the CC BD B&H; and 107(2) of the CC RS.

¹²³ Article 126(3) of the CC B&H. Identical provision is contained in the: Art. 130(3) of the CC FB&H; Art. 130(3) of the CC BD B&H; and 107(3) of the CC RS.

¹²⁴ Article 126(4) of the CC B&H. Identical provision is contained in the: Art. 130(4) of the CC FB&H; Art. 130(4) of the CC BD B&H; and 107(4) of the CC RS.

¹²⁵ Vermeulen *et al.*, 2012, p. 11.

¹²⁶ Article 143 of the CC B&H. Identical provision is contained in the Article 147 of the CC FB&H, Article 122 of the CC RS and Article 147 of the CC BD B&H.

¹²⁷ Filipović and Ikanović, 2010, p. 26.

VII. Methods

Beside the methods of content analysis, description and comparison, in this paper are also used methods of classification and specialization, as well as statistical method. Namely, in order to determine characteristic of liability of legal persons for criminal offences in legal system of B&H we analyzed all cases relating to legal persons (38), which are available on the official web site of the Court of B&H: <http://www.sudbih.gov.ba/>. Namely, research included total of 29 cases categorized as finalized. However, it is necessary to point out that very fact that our sample is consisted of published cases generates the first limitation of this research since there is a possibility that this is not definite number of cases on liability of legal persons for criminal offences heard before this judicial body. Second limitation of this research results from specific competence of the Court of B&H and exclusivity in selection of cases¹²⁸.

VIII. Findings and discussion

In our sample size out of 38 analyzed cases published on the official web site of the Court of B&H, 29 cases were categorized as finalized while 9 of cases are still in proceedings (appellate proceedings before second instance court). Thus, our critical analysis only focused on finalized cases. In our sample 93% of cases resulted with judgement that established liability of the accused legal person for certain criminal offence, and only 6,9 % of the cases resulted with acquittal.

A previously stated, criminal law of B&H recognizes a legal person as its subject. Even though the CC B&H doesn't directly define the notion of a legal person it gives the catalogue of social structures, which are considered to be legal persons. However, the CC B&H through exclusion of the legal persons of public law (the B&H, the FB&H, the RS, the BD B&H, canton, city, municipality and local community) from the liability for criminal offences narrows the circle of legal persons to which provisions on liability for criminal offences can be applied. According to the Article 122(1) of the CCB&H provisions of Chapter XIV on liability of the legal persons for a criminal offence committed by the perpetrator in the name, for the account or in favor of the legal person only applies to private legal persons: all organizational form of economic enterprises and all forms of association of economic enterprises /companies, public institutions, institutions performing credit and other banking activities, institutions for insurance of property and persons and other financial institutions, fund, political organizations, associations of citizens and other forms of associations that meet two conditions: capacity for acquisition and usage of assets in a same way as any other institution or

¹²⁸ In accordance with the provisions contained in Art. 7(1) of the Law on Court of B&H, the Court has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. The following provision in Art. 7(2) of the Law on Court of B&H stipulates that the Court has further jurisdiction over criminal offences prescribed in the laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences: a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina.

state authority that acquires and uses assets and recognition by the law as a legal person. All cases from our sample relate to private legal persons - economic enterprises in organizational form of limited liability company. This is not unexpected, given that this type of organizational form of economic enterprises is prevalent in B&H's business practice because it is suitable structure for family business ventures or for joint business of founders who are closely connected. Furthermore, in B&H limited liability company is not only appropriate form for small entrepreneurial capital owned by one or fewer number of founders (members) but it often appears as a form of aggregation of large entrepreneurial capital with a small number of founders - members, which is the result of the legal flexibility because in the management and regulation of internal relations dispositive norms are more applicable (unlike joint stock companies)¹²⁹.

Even though majority of countries in Europe opted for introduction of criminal liability of legal persons only for certain criminal offences or families of criminal offences¹³⁰ in legal system of B&H liability of legal persons is established as all-inclusive criminal liability of legal persons, meaning that legal persons can be liable for all criminal offences prescribed by criminal legislation and other laws. In literature it was suggested that liability of legal persons has special significance in relation to financial criminal offences¹³¹. Because of significant presence of legal persons in every segment of the economy, it is no surprise that at least one legal person is behind almost every serious financial criminal offence¹³². In literature, financial crime is defined as crime that involves use of deception for illegal gain, normally involving breach of trust, and some concealment of the true nature of the activities¹³³ or as a financially driven non-violent crime committed by business and government professionals¹³⁴. In our sample limited liability companies were found liable in 77.8%, cases for criminal offence of tax evasion or fraud, in 11.11% of cases for organized crime in relation to money laundering; 3.7% case for organized crime in relation to tax evasion or fraud, and in 7.4% cases for customs fraud. This result is in accordance with other research¹³⁵, which established the most common motive – tax evasion for the use of creative accounting techniques with the aim to present a lower financial result than was achieved, i.e. attempt to pay less on the name of tax obligations.

However, the legal opinions on specifics of criminal liability of legal person in B&H legal framework, i.e. accepted approach that legal person cannot be guilty but only liable for criminal offence, which was committed by natural person on the behalf, for the account and in favor of legal person, were neglected in certain cases in our sample. Namely, in 26% cases in our sample was incorrectly and contrary to law indicated that legal person is guilty for criminal offence.

In criminal law of B&H is adopted concept of derivative model of liability of legal person for criminal offence, that provides liability of legal person for criminal offences under the following two conditions: 1. perpetrator committed criminal offence on behalf, for account or benefit of the legal person; and 2. presence of one or more legally prescribed forms of contribution of legal person (i.e. its managerial or supervisory

¹²⁹ Čović, 2003, p. 292.

¹³⁰ Vermeulen et al. 2012, p. 11.

¹³¹ See: Filipović and Ikanović, 2010, p. 26.

¹³² See: Derenčinović, 2002.

¹³³ Picket and Picket, 2002, p. 3.

¹³⁴ Tupman, 2015, p. 4.

¹³⁵ Isaković-Kaplan, Š. (2016), *Forenzičko računovodstvo*. Fojnica: Štamparija Fojnica, p. 285.

bodies) to committing criminal offence by perpetrator. As previously noted, the first condition for establishment of liability of legal person refers to actions of the perpetrator of the criminal offence and second to the actions of managerial or supervisory bodies of legal person. In B&H law position of perpetrator within the legal person is immaterial, i.e. it is irrelevant whether that person has leading position within the legal person or has status of employee or a member or a non-member. In all cases in our sample, perpetrator was within the structure of limited liability company: in 90,5% cases in our sample perpetrator was director without limitation of powers, and in 9,5% cases it was employee of the company.

First condition for liability of legal person is that perpetrator committed criminal offence on behalf, for account or benefit of that legal person. Consequently, there must be circumstance that links committed criminal offence of perpetrator with particular legal person in a manner which allows legal attribution of his/her acts to the legal person. That circumstance is the authority of perpetrator to act on behalf, for account or benefit of the legal person on some legal basis. In our sample in 74% of the cases was just indicated that first condition is fulfilled but without any elaboration.

Second stipulated condition further limits liability of legal person by requesting the presence of one or more alternatively prescribed forms of contribution of a legal person (i.e. its managerial or supervisory bodies) to committing criminal offence by perpetrator) when purpose of the committed criminal offence stems from conclusion, order or permission of managerial or supervisory bodies of legal person; or b) when managerial or supervisory bodies of legal person have influenced perpetrator or enabled him/her to commit a criminal offence; or c) when legal person disposes with illegally acquired financial gain or uses objects obtained by the criminal offence; or d) when managerial or supervisory bodies of legal person failed to perform due supervision over the legality of employees' work". In regard to the second requirement for establishment of liability of legal person for criminal offence, in 96,3% of cases in our sample it was indicated that contribution of managerial or supervisory bodies of legal persons was determined – in 80% cases limited liability company disposed with illegally acquired financial gain; and in 20% of cases court did not offer clarification which form of contribution exist in relevant case but it was noted that the activity of the legal person was used for the commission of the criminal offence (legal person acted as criminal organization).

Criminal law of B&H doesn't tie liability of legal person for criminal offence to establishment of guilt of the natural person as perpetrator. Consequently, even in situations when grounds for exclusion of perpetrator's guilt for criminal offence, which is committed on behalf, for account or in favor of legal person, are present, liability of legal person for criminal offence still can be established if one of the forms of contribution of managerial or supervisory bodies to committing criminal offence exists. In our sample in 7,4% of cases legal person was found liable for criminal offence although guilt of the perpetrator was not established. In one case criminal proceedings couldn't be instigated due to death of perpetrator.

In two cases from our sample it was established that beside perpetrator, within the companies no other person or bodies existed that could direct or supervise perpetrator. In such situation, when complete personal overlap exists between perpetrator and legal person i.e. between perpetrator and managerial or supervisory bodies of legal person, it is not possible to establish contribution of legal person to committing criminal offence separately from actions of perpetrator which represent criminal offence. Thus, for establishing of liability of legal person for criminal offence it is not necessary to

determine some form of contribution of managerial or supervisory bodies of legal person prescribed in Article 124 of the CC B&H because liability of legal person is directly related to criminal liability of perpetrator. According to this approach, both companies in our sample were found liable for perpetrated criminal offence within the limits of the perpetrator's liability.

IX. Concluding remarks

Criminal law transformation initiated by the introduction of a new layer of criminal liability – liability of legal persons or entities is evident in many national systems and current discussion is focused on its further development with focus on concepts such as corporate negligence and corporate culture in context of global economy. B&H adopted the concept of extensive derivative model of liability of legal person in 2003 and after more than decade of its implementation it is time for evaluation of its results. One of the areas where is expected that introduction of liability of legal persons had significant impact was financial crime, due to involvement of legal persons in every segment of the economy and consequently in serious financial criminal offences. However, it is little is known about extent, structure and control of those criminal offences in context of liability of legal persons in B&H. In attempt to fill that void, we conducted research of legal framework and available case law. Results of the research described in this paper should improve knowledge on liability of legal persons for financial criminal offences, and reveal specificities of implementation of new legal solutions in practice in B&H. However, this research represents only small insight in case law of one judicial body - the Court of B&H, and thus it shouldn't be used for generalization.

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