

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Liability of legal persons and especially their criminal liability no longer represents controversial point in majority of contemporary legal systems and present standpoint on subjection of the legal persons to the authority of criminal law has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 determent 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_Odgovornost_pravnih_osoba_u_hrvatskom_kaznenom_pravu.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 professionals⁵⁸ 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 chose 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).