

## CRIMINAL RESPONSIBILITY OF LEGAL PERSONS IN THE LEGISLATION REPUBLIC OF SERBIA AND THE REPUBLIC OF CROATIA

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### **ABSTRACT**

*The subject of this paper is a comparative analysis of corporate liability for offenses in the laws of the Republic of Serbia and the Republic of Croatia. In Croatia, the Law on the liability of legal persons for criminal offenses in 2004, in the Republic of Serbia, the adoption of the Law on liability of legal persons for criminal offenses in 2008, introduced the criminal liability of legal persons thus abandoning the principle *societas delinquere non potest*. The paper made a comparative and historical overview of the development of the Law Institute, and the prescribed criminal sanctions ordered the justification for its existence in the fight against economic crime since the purpose of the punishment can not be achieved only by punishing the responsible person in the legal person. The authors of the analysis will explore the legal provisions and the situation relating to reported, accused and convicted legal persons for specific types of crimes and the structure of reported crime during the period from the beginning of the application of the law to date.*

*A special emphasis will be given to the institute confiscation of proceeds of crime. In his concluding remarks, in accordance with the legal provisions of the two countries *de lege lata*, will try to indicate possible suggestions *de lege ferenda*.*

**Keywords:** *criminal liability of legal persons, Law on liability of legal persons for criminal offenses in the Republic of Croatia, the Law on liability of legal persons for criminal offenses in the Republic of Serbia, economic crime.*

## **1. INTRODUCTOIN: PERIOD BEFORE PASSING THE LAW ON THE LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES**

### **1.1. Republic of Serbia**

Until the adoption of the Law on the liability of legal persons for criminal offenses<sup>1</sup> (hereinafter LOLLPCO) criminal legislation on the responsibility of legal persons (mainly refers to business organizations) in Republic of Serbia did not exist, and the only responsibility of legal persons

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<sup>1</sup> OG of Republic of Serbia, No. 97/08

that existed was primarily related to the area of misdemeanors<sup>2</sup> and economic offenses<sup>3</sup>. Commercial offense as one of the more complete and stricter aspects of responsibility in relation to the offenses made by a legal entity is to sanction violations of the legality of their business in the area of economic and financial operations.<sup>4</sup> However, although until the moment of the adoption of the LOLPCO, sanctioning economic offenses represented the most rigorous form of "punishment" of a legal person, it should be noted that these types of offenses can neither be characterized nor fall under criminal offenses, on one hand, and under misdemeanors, on the other hand.<sup>5</sup> Table No.1. shows the number of Criminal charges, indictments and convictions of legal persons for economic offenses in the period from 2005 to 2013.

Table No.1. Criminal charges, indictments and convictions of legal persons for economic offenses from 2005 to 2013<sup>6</sup>

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Charges	6410	5830	3153	3711	2732	2265	2332	1607	1718
Indictments	4729	5161	4347	3444	4377	2796	2461	2250	2500
Convictions	3147	2734	2688	2139	2929	1945	1567	1535	1707

However, despite the fact that the Law on Economic Offences provides liability of legal persons, it should be noted that the expansive and explosive development of the capital market, especially the market arising in the former Yugoslavia, which until the beginning of the nineties was closed (without modern business mechanisms), creates basis for carrying out a series of speculative activities which often tend to be on the border of legally permitted activities. It is in these circumstances, when the legislation is underdeveloped, and often has its source in the business and social environment that is outdated, there is a possibility that the newly established legal entities realizing the weakness of the legal system take part in activities which can be characterized as criminal. Legal norms of corporate liability for criminal acts in the Republic of Serbia made a significant step forward in fuller, more complete and comprehensive legal

<sup>2</sup> Art. 27. "Legal person is liable for the offense that was committed by an act or omission of due supervision of the management body or person or by an act of another person which at the time the offense was authorized to act on behalf of a legal person. Legal person is liable for an offense if: 1) Managing Authority adopted an unlawful decision or order which enables the execution of offenses or the liable person makes a person to commit an offense; 2) a natural person commits the offense due to failure of the liable person to act as a supervisory or control. Under the terms of paragraph 2 of this Article legal person may be liable for an offense when: 1) misdemeanor proceedings were suspended against the liable person or that person was released from liability in accordance with the provisions of Article 250 of this Act; 2) there are legal or factual impediments to establishing the responsibility of the liable person in the legal entity or it can not be determined who is the liable person is. The liability of the physical or liable person in the legal person for the offense, criminal or civil offense does not exclude the liability of the legal persons for the offense. " Law on Misdemeanors, OG of Republic of Serbia , No. 65/13 and 13/16

<sup>3</sup> Art. 6. Par. 1. "Both legal person and a liable person in the legal entity can be held liable for an economic offense". Law on Economic Offences, OG of the SFRY, No. 4/77, 36/77 - corr., 14/85, 10/86 (consolidated text), 74/87, 57/89 and 3/90 and OG No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and OG of RS, No. 101/2005 – second law

<sup>4</sup> Art. 1. Ibid.

<sup>5</sup> Under the commercial offense is considered to be "(1) ... socially harmful violation of regulations on economic or financial operations that caused or could have caused serious consequences and that has designated as an economic offense by a regulation of the competent authority. (2) Violation of regulations on economic or financial operations which, although labeled as economic offense by a regulation, represents an insignificant social harmfulness because of little significance and because of the paucity or absence of harmful consequences is not considered an economic offense, " Art. 2.Ibid.

<sup>6</sup>Source: Republic Institute for Statistics of Republic of Serbia

regulations of Republic of Serbia. Although the passing of the LOLLPCO can be seen as a success of the domestic legislature, it should be noted that the passing of this law does not constitute a voluntary legal regulation of these areas by the legislator Republic of Serbia, but it is a result of commitments with the conclusion and ratification of international conventions<sup>7</sup> by the Republic of Serbia.

## 1.2. Republic of Croatia

We can say that the Republic of Croatia had a certain tradition concerning the criminal liability of legal persons given that the legal system included the liability of legal persons for economic offenses as specific types of criminal offenses that are neither crimes nor misdemeanors.

In 1991 Republic of Croatia took over the Law on Commercial Offenses<sup>8</sup> from 1977 that defined economic offenses as "a breach of the economic and financial operations".<sup>9</sup> However, the punishment of legal persons can not be achieved neither by prescribing economic offenses neither through criminalizing misdemeanors since it is necessary that legal persons are responsible for committed criminal acts that can only be prescribed by the Criminal Code.

Law on the liability of legal persons for criminal offenses (hereinafter LOLLPCO) was adopted by the Croatian Parliament on September 11, 2003 and entered into force six months later, which is a very long *vacatio legis*.<sup>10</sup> The reason for the adoption of this law lies in the fact that more and more crimes are being committed by legal persons who are responsible for criminal activity and who unlawfully acquire material gains,<sup>11</sup> which places the natural person as an individual in the background. The most common offenses which may be committed by a legal entity are related to its area of business and activity and thus the most common economic crimes for legal persons are from Title XXIV of the Criminal Code of Republic of Croatia.<sup>12</sup> Accused legal persons are mostly limited liability companies.<sup>13</sup> Criminal acts that are attributable to legal persons are mostly related to business fraud, violation of obligation to keep business books, causing bankruptcy, bribery in the bankruptcy proceedings, bribery in business operations, abuse in public procurement, misleading advertising, tax evasion and customs, avoidance of customs control, unauthorized use of another person's property, illicit production, trafficking and money laundering.

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<sup>7</sup> COUNCIL OF EUROPE COMMITTEE OF MINISTERS, 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 (Adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies).

<sup>8</sup> Law on economic offenses OG of SFRY No. 4/77, 14/85, 74/87, 57/89 and 3/90

ORDER on the promulgation of the Law on takeover of the Law on economic offenses, OG. 53/91

<sup>9</sup> Law on Offences envisaged the abolition of economic misdemeanors and their transformation into offenses, OG of Republic of Croatia, No 88/02

<sup>10</sup> Law on liability of legal persons for criminal offenses, OG of Republic of Croatia, No.151/03, 110/07, 45/11, 143/12

A longer period has been left between the enactment of legislation and its entry into force on the ground to achieve thorough preparations for its implementation.

<sup>11</sup> Government of Republic of Croatia: Final draft of the Law on liability of legal persons for criminal offenses, Zagreb, December 2002, available at:

<https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//49022.%20-%201.pdf>, viewed on 01/08/2016

<sup>12</sup> Crimes against the economy, Art.246 - Art.265 Criminal Code of Republic of Croatia, OG No. 125/11, 144/12, 56/15, 61/15

<sup>13</sup> Derenčinović D., Novosel D.: ACT ON THE CRIMINAL RESPONSIBILITY OF LEGAL ENTITIES – TEMPORARY CHILDHOOD DISEASES OR THE SQUARING OF THE CIRCLE?

Croatian Annual of Criminal Law and Practice (Zagreb), vol. 19, No 2/2012, p. 585-613.

Punishing legal persons has its own weight in cases where the share of individual perpetrators is negligible in regards to the overall gravity of the offense as well as in cases where the offender can not be determined. There are also cases when legal entities, whether as companies or as crafts, are established only for the purpose of committing criminal activities, thus there is complete support of the members of the legal entity who benefit from the criminal offense so that the purpose of punishment can only be achieved by punishing the legal person.

Punishing legal persons was proclaimed by the Recommendation of the Council of Europe No. R (88) called "Liability of enterprises for offences,"<sup>14</sup> from 18<sup>th</sup> to 20<sup>th</sup> of October 1988 ordering the introduction of corporate responsibility for crimes committed in the context of their activities, or in cases where the criminal act does not fall within the subject of activity of legal persons.

The Convention on Transnational Organized Crime requires prescription of liability of legal persons for criminal offenses of organized crime, corruption, money laundering and obstruction of justice.

Criminal Law Convention on Corruption of the Council of Europe, confirmed by the Croatian Parliament on September 27, 2000<sup>15</sup>, commits signatory states to provide in their national legislation for the liability of legal persons for the offenses of active bribery, trading in influence and money laundering.<sup>16</sup> It also states that the responsibility of legal persons does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accomplices to these crimes.<sup>17</sup> The intention of the Council of Europe is that its member states harmonize their national legislation in order to avoid that some of the legal persons evade liability by transferring their activities from the state who acknowledges the criminal liability of legal person to another state that does not acknowledge such responsibility.

And the Convention on Cybercrime<sup>18</sup> in Article 12 obliges each signatory party to adopt the necessary measures to ensure the possibility that a legal person is held accountable for criminal offenses defined in the Convention, which were for its benefit committed by a natural person, acting either individually or as part of the body of the legal person who has a leading position within the legal person.

Although the above mentioned laws of Republic of Serbia and Republic of Croatia represent a significant step forward in fuller, more complete legal regulation of corporate liability for the behavior on the market of goods, services and capital, it should be noted that one can ask a crucial question whether the administration of these laws is in the public interest. The answer to this question can move in two directions: a) that there is a sincere desire to see its application to preventively influence the behavior of legal and responsible persons and b) that the legal act is only in public interest in the field of fulfilling international commitments, and without sincere desire for its implementation. Exactly the possibility of diametrically different responses creates a gap between the theoretical and normative aspects of perceiving the law as an empty legal shell, on one hand, or regardless of the existing legal shortcomings that the application of the law may have in real life, resulting in the formation of certain effects, on the other hand.

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<sup>14</sup>Council of Europe: Liability of enterprises for offences; 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; available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c5d71>, viewed on 01/08/2016

<sup>15</sup>Criminal Law Convention of the Council of Europe Convention on Corruption, the Law on Ratification of the Criminal Law Convention on Corruption, OG of Republic of Croatia - International Agreements, No. 11/00

<sup>16</sup>Art.18. Ibid.

<sup>17</sup>Art.18, Par.3 Ibid.

<sup>18</sup>Convention on Cybercrime; Law on Ratification of the Convention on Cybercrime, OG of Republic of Croatia - International Agreements, No. 9/02

## 2. ARE LEGAL PERSONS MAY RESPONSIBLE IN TORT

In considering the issue of responsibility, and regardless of whether it is a civil law or criminal liability we always starts from the premise that only a person who possesses reason can be held responsible for undertaken actions. However, the emphasis in this paper is not placed on individuals as holders of responsibility, but the legal entities as persons that have the responsibility for the actions taken. Although legal persons appear as fiction because they do not poses reason they always appear as holders of rights and obligations, and therefore are responsible on a commitment basis. As with natural persons, statements *obligatio est iuris vinculum* and *solus consensus obligat* are also valid for legal persons. Undertaking certain obligations when operating under a contract that should be executed legal person appears as the holder of civil liability. However, as far as the legal person, it is necessary to emphasize the point that the legal person emerges as the bearer of rights and obligations. It is in the context of time of acquisition of opportunities that it is the bearer of rights and obligations<sup>19</sup> that it is necessary to distinguish between the time of acquisition of legal and business capacity. As for the moment of acquiring legal capacity, the legal person acquires it on the basis of the Constitution, the law, or by entering the appropriate register with the competent authority.<sup>20</sup> Unlike the legal capacity which is acquired on the basis of positive legal documents or relevant decisions of the competent authority, legal capacity of a legal entity is not the original it is derogated i.e. business capacity is taken out of the ability of their bodies which may be limited.<sup>21</sup> For reasons that the legal capacity of a legal person is drawn from the ability of its body, which consists of individuals who posses reason, the question arises whether legal persons in general can be held responsible for criminal acts. Although the question of liability of legal persons for criminal offenses can be placed in the context of irresponsibility, because of a lack of original business skills it should be emphasized that it is necessary to make a comparison with civil law liability of legal persons. According to the rules governing the civil law legal capacity of legal persons depends on the ability of their bodies including responsible persons.<sup>22</sup> Guided by this attitude, and using analogue methods we believe that there is no valid reason for challenging the view that legal persons with regard to the holders of liability in civil law can not be the bearers of responsibility in criminal law, i.e., that they can not be held responsible for criminal offenses. The fact that bodies carry out actions for legal entities, does not mean that those activities can not be attributed to legal persons, and by the fact that the actions of the body are in fact the actions of the legal person.<sup>23</sup> No matter that the legal capacity of a legal person is limited, it should be noted that responsibility for the crimes is not limited i.e. restrictions relating to the legal capacity can not be analogously applied to responsibility for criminal acts.<sup>24</sup>

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<sup>19</sup> Art. 54. (1) "A legal person may enter into contracts in legal transactions within its legal capacity" Code of Obligations (OG of the SFRY", No. 29/78, 39/85, 45/89 and decision USJ and 57/89, OG of the SFRY No. 31/93 and OG of Serbia and Montenegro, No. 1/03 - Constitutional Charter)

Also Art.274, Par.1 Law on Obligations, OG of Republic of Croatia No.35 / 05, 41/08, 125/11, 78/15

<sup>20</sup> Vrhovšek, M., A legal person as the perpetrator of the crime pursuant to the liability of legal persons for criminal offenses, *Journal of Crimanalistics and Law*, p. 19.

<sup>21</sup> Vrhovšek, M., *aforementioned work*, p. 19.; Art. 55. Civil Obligations Act of Republic of Serbia "When the general act of the legal entity specifies and enters into the registry that its agent may conclude a contract only with the consent of a body, consent can be given previously, simultaneously or subsequently, if anything else is not entered in the register" also Art.275, Par.1. Civil Obligations Act of Republic of Croatia "When a statute, association or the rules of the legal person specify and enter into the registry that its agent may enter into a contract only with the consent of some of its bodies, approval can be given previously, simultaneously or subsequently, if nothing else has been entered into the registry, OG of Republic of Croatia No.35 / 05, 41/08, 125/11, 78/15

<sup>22</sup> Vrhovšek, M., *aforementioned work*, p. 19.

<sup>23</sup> Ibid, p. 19.

<sup>24</sup> Ibid, p. 20.

Dilemma, but also the opposed and theoretical point of view on responsibility or irresponsibility of a legal person for criminal acts EU addresses by the adoption of Recommendation No. R (88)<sup>25</sup>, which provides that legal persons are responsible for criminal offenses, while Article 7<sup>26</sup> provides for penalties for criminal acts. With the adoption of proposed recommendations EU proclaims the principle that directors and senior management bodies act on behalf of the company, legally speaking they are the company, represent the "alter ego" of the company, with the result that their guilt is attributed to the company, making it liable to prosecution. Based on the doctrine of identification, or the theory of alter ego, we start from the premise that individuals (managers, directors) that make up the bodies of a company and constitute the brain of a legal person are not representatives of a legal person, because their actions are not regarded as acting in the name and on behalf of a legal entity, but are seen as actions of a legal entity.<sup>27</sup> One of the first legal documents that has sublimated the theory of identification is the French Penal Code, which provides that legal entities, except the state, criminally liable in accordance with the differences set forth by Articles 121-4 and 121-7.<sup>28</sup>

### 3. LAW ON THE LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES IN REPUBLIC OF CROATIA

Law on the liability of legal persons for criminal offenses is divided into four titles. First title consists of the basic provisions governing the subject and purpose of the Act and establishes the subsidiary application of the Criminal Code<sup>29</sup>, Criminal Procedure Code<sup>30</sup> and the Law on

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<sup>25</sup>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 (Adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies).

<sup>26</sup>Art. 7. "Consideration should be given to the introduction of sanctions and measures particularly suited to apply to enterprises. These may include the following:

- warning, reprimand, recognisance;
- a decision declaratory of responsibility, but no sanction;
- fine or other pecuniary sanction; - confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
- prohibition of certain activities, in particular exclusion from doing business with public authorities; - exclusion from fiscal advantages and subsidies; - prohibition upon advertising goods or services;
- annulment of licences; - removal of managers;
- appointment of a provisional caretaker management by the judicial authority; - closure of the enterprise;
- winding-up of the enterprise;
- compensation and/or restitution to the victim; - restoration of the former state;
- publication of the decision imposing a sanction or measure.

These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders". - RECOMMENDATION No. R (88) 18, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f3d0c>

<sup>27</sup>Vrhovšek, M., aforementioned work, p. 20.

<sup>28</sup>Art. 121-2. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3" – French Penal Code, available at: <http://www.legislationline.org/documents/section/criminal-codes/country/30>, viewed on 03/08/2016

<sup>29</sup>Criminal Code of the Republic of Croatia, OG, No. 125/11, 144/12, 56/15, 61/15

<sup>30</sup>Criminal Procedure Act of the Republic of Croatia, OG No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14

the Office for the Suppression of Corruption and Organized Crime.<sup>31</sup> Law on liability of legal persons for criminal offenses in relation to the said laws is *lex specialis* given that it addressed only the criminal law issues that are specific to the legal person. The second title lists the assumptions of culpability on the principle that the responsibility of legal person is based on the guilt of the person responsible,<sup>32</sup> but that the legal person will also be punished for the offense of the responsible person even if the existence of legal or factual obstacles to the establishment of responsibility of the responsible person is determined.<sup>33</sup> The responsible person in the legal person is a person who manages the business affairs of the legal person or is entrusted with carrying out businesses of a legal person.<sup>34</sup> The third title provides for criminal penalties, fines and the abolition of legal persons, and security measures. The main monetary penalty that may be imposed is in the amount of 5.000,00 to 8,000,000.00 HRK if a criminal offense is punishable by a fine or imprisonment with a maximum measure of one year in prison,<sup>35</sup> in the amount of 15,000.00 to 10,000.000.00 HRK if a criminal offense is punishable by imprisonment for a maximum of five years,<sup>36</sup> amounting to 30,000.00 to 12,000,000.00 HRK if a criminal offense is punishable by imprisonment for a maximum of ten years in prison,<sup>37</sup> in the amount of 50,000.00 to 15,000,000.00 HRK if a criminal offense is punishable by imprisonment for a maximum of fifteen years in prison or more severe punishment.<sup>38</sup> If a legal entity was established for the purpose of committing criminal offenses or has used its activities mainly to commit crimes, the legal entity may be imposed the sentence of abolition and a fine by the court.<sup>39</sup> The law provides for the optional exemption of legal persons from penalty<sup>40</sup> provided that the legal person reported the offense by a responsible person before being discovered or before knowing that the deed has been discovered. The law provides the court with the possibility of pronouncing a suspended sentence so that the sentence will not be executed if the legal person during the time determined by the court, which may not be less than one nor more than three years, does not commit another criminal offense, taking into account that the suspended sentence may be imposed for criminal offenses for which the court has convicted a legal person to a fine of less than 50,000.00 HRK.<sup>41</sup> The court may impose a sentence of one or more safety measures for a legal person. These measures include the prohibition of the performance of certain activities or businesses, a ban on the acquisition of licenses, authorizations, concessions or subsidies, ban on conduction business with the users of state and local budgets, as well as forfeiture of property gained, confiscation and publication of the judgment.<sup>42</sup> The economic benefit that the entity has made with a criminal offense, shall be confiscated by the judgment establishing the perpetration of the crime.<sup>43</sup>

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<sup>31</sup> Law on the Office for Combating Corruption and Organized Crime, OG of Republic of Croatia No 76/09, 116/10, 145/10, 57/11, 136/12, 148/13

<sup>32</sup> Cl.5.st.1. Law on liability of legal persons for criminal offenses, OG of Republic of Croatia No.151/03, 110/07, 45/11, 143/12

<sup>33</sup> Art.5, Par.2 Ibid.

<sup>34</sup> The same definition is given by the CC of the Republic of Croatia in Art.87, Par.6. "The liable person is a person who manages the business affairs of the legal person or has been explicitly or really entrusted with tasks in the field of activity of the legal person or government body or body of local and regional (regional) governments."

<sup>35</sup> Art.10, Par.1 LOLLPCO of Republic of Croatia

<sup>36</sup> Par.2 Ibid.

<sup>37</sup> Par.3 Ibid.

<sup>38</sup> Par.4 Ibid.

<sup>39</sup> Art.12, Par.1 and 3 Ibid.

<sup>40</sup> Art.12.a. Ibid.

<sup>41</sup> Art.13 Ibid.

<sup>42</sup> Art.15- 21. Ibid.

<sup>43</sup> Economic benefit is any increase or prevention of the decrease of property of a legal person which occurred by a criminal offense, Art.20, Par.2. Ibid.

If the impossibility of seizure of property is determined, the court shall oblige the legal person to pay equivalent sum of money, and if the material gain is at another person on any legal basis, it will be taken away from that other person if that other person knew or could and should have known that the gains were proceeds of crime.<sup>44</sup>

The fourth part contains the provisions relating to criminal proceedings conducted against a legal person. A single procedure will be carried out in respect of the criminal acts of the legal person and responsible persons and a single verdict will be passed.<sup>45</sup>

#### 4. LIABLE ENTITIES ACCORDING TO THE LAW ON THE LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES IN REPUBLIC OF SERBIA AND REPUBLIC OF CROATIA

##### 4.1. Legal person

The importance of LOLPCO of Republic of Serbia is that it provides that the liable entity can be a legal person (resident or a foreign legal entity) that is in accordance with applicable law considered a legal entity and responsible natural person who is legally or factually entrusted with certain business affairs in the legal entity as well as the person authorized, i.e. that may be deemed to be authorized to act on behalf of a legal entity.<sup>46</sup> According to LOLPCO of Republic of Croatia legal persons are considered as liable entities (including foreign entities that are by Croatian law considered legal persons)<sup>47</sup> as well as responsible persons (natural persons conducting business or legal persons entrusted with the businesses of a legal person). Based on the listed provisions there are two entities of criminal responsibility, namely: a) legal person (entity) and b) a natural person. In the following presentation, it is necessary to pay special attention to the interpretation of who and when can occur in the role of a legal person, and who might take the role of a natural person. When considering issues of criminal liability, it is especially necessary to further consider the liability of the legal person and the liability of the natural person.

The vagueness of the law in determining who should be considered a legal entity represents a specificum i.e. it does not specify precisely who can appear as a legal person.<sup>48</sup> However, this approach by the legislator can be considered a positive one because it allows for an extensive method of interpretation of that provision, and for the reasons of necessary familiarity with the positive legal provisions governing the status of a legal entity.

However, although we are talking about the status of the legal person it should be noted that in this case under the legal person we may consider only the legal person that was established for performing a business in accordance with positive legal regulations, and this is indicated by provisions which stipulate that "... the legal person is liable for a criminal offense that it performed in the context of its business operations ..."<sup>49</sup> "... legal person shall be punished for a criminal offense by the responsible person if it violates any of the duties of the legal person..."<sup>50</sup>

and in compliance with which provides that "...the legal person in bankruptcy shall be liable for a criminal offense committed before the start or during the bankruptcy proceedings."<sup>51</sup> In accordance with the above interpretation of the two laws we come to the conclusion that these

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<sup>44</sup> Art.20, Par.4. and Par. 5 Ibid.

<sup>45</sup> Art.23 Ibid.

<sup>46</sup> Art. 5. LOLPCO of Republic of Serbia

<sup>47</sup> Art. 1., Par.1 LOLPCO of Republic of Croatia

<sup>48</sup> Art. 5 Par. 1. Law on liability of legal persons for criminal offenses of Republic of Serbia

<sup>49</sup> Art. 6 Ibid.

<sup>50</sup> Art. 3. LOLPCO of Republic of Croatia

<sup>51</sup> Art. 9. LOLPCO of Republic of Serbia and Art.7 Par.3. LOLPCO of Republic of Croatia



are only legal persons that were established to exercise business activities. However, even though the law does not determine autonomously who has the status of a legal person, i.e. which organization that may be, it is necessary to fulfill the cumulative conditions, namely: a) that it is legally regulated; b) it is legally permissible and c) that the legal system recognizes its ability to acquire the rights and assume obligations.<sup>52</sup> It is this last condition that is defined as a legal person's ability and the measure of differentiation of the legal person from an organization that has no legal status.<sup>53</sup> Only those entities who acquire the status of a legal person may be liable in court, while those who do not have such a status can not be held liable as is the case with the partnership or secret society.<sup>54</sup> However, although the above interpretation is extensive it should be noted that this is not fully applicable when determining the legal person in accordance with the provisions and intent of the law. This position is justified by the fact that in accordance with the law it is explicitly provided that legal persons are responsible for those crimes, which are started in the context of their business, and during the performance of activities for which they were established. LOLLPCO of Republic of Serbia and LOLLPCO of Republic of Croatia stipulate that in the case when bankruptcy has been initiated or in process against a legal person that legal person shall be held liable, while in accordance with the Law on Companies of the Republic of Serbia<sup>55</sup> and the Companies Act of Republic of Croatia<sup>56</sup> explicitly state against which legal persons i.e. against which businesses can bankruptcy be initiated and held. The significance of the provision according to which a legal person in bankruptcy shall be liable for a criminal offense committed before the start or during the bankruptcy proceedings is in the fact that that bankruptcy that may be induced by intention, and which may serve as a basis to justify that a legal person - company does not have enough assets, can not serve or be used as a basis for potential exclusion or exemption from criminal liability. From the results obtained it can be concluded that the law primarily applies to companies that have been established to carry out lucrative activities, and that at some point during the performance of business activities criminal offense may be committed even though there was no initial intention with the founders to set up such a business organization.

Of importance to the law, the market, and we can freely say to the legal person is the provision which requires that the provisions of the law, in addition to national legal persons, apply to foreign legal persons as well.<sup>57</sup> A foreign legal person shall be liable for a criminal offense only if it is "...according the positive law of the Republic considered a legal person."<sup>58</sup> All those cumulative conditions which must be fulfilled by a domestic person to gain the status of a legal person shall also apply to a foreign legal person.

When determining the applicable law in respect of the application of laws we always starts with the nationality of a legal person. Nationality of legal person is determined by the seat of the management. Legal systems of the Republic of Serbia and Croatia, especially when it comes to business companies, have adopted the concept of the real seat of the company i.e. location of the management head office.<sup>59</sup> Management head office is the place that is used to run the company, but it can be registered in one country only if there is a main management head office

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<sup>52</sup>Stanković, O., Vodinelić, V.V.: *Introduction to Civil Law*, Nomos, 2004, Boograd, p. 71, 72, 91.

<sup>53</sup>Ilić, G.: Marginal notes to the Law on corporate liability for criminal offenses, CRIMEN (I) 2/2010, p. 247

<sup>54</sup>Stanković, O., Vodinelić, V. V., *aforementioned work*, also Government of Republic of Croatia: Final proposal of the Law on liability of legal persons for criminal offenses, Zagreb, December 2002, p.17.

<sup>55</sup>Law on Enterprises, OG of Republic of Serbia, No. 36/2011, 99/2011, 83/2014 – second law and 5/2015

<sup>56</sup>Companies Act, OG of Republic of Croatia No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15

<sup>57</sup>Art. 4. LOLLPCO of Republic of Serbia and Art.1 Par.2 LOLLPCO of Republic of Croatia <sup>58</sup>Art. 5.

Par. 1 LOLLPCO of Republic of Serbia and Art.1 Par.2 LOLLPCO of Republic of Croatia

<sup>59</sup>Art. 37. Companies Act of Republic of Croatia, OG No 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111 / 12, 68/13, 110/15

there.<sup>60</sup> In accordance with those provisions that relate to the foreign company the question is what happens in circumstances where a company in its home country has no legal status of a legal person. The answer to this question should always be sought in the Art. 5 Paragraph 1 of LOLLPCO of Republic of Serbia (Art.1 Par.2 LOLLPCO of Republic of Croatia); no matter that the foreign legal person does not have a status of a legal person in its home country<sup>61</sup> if it has one in accordance with the regulations of the Republic of Serbia and Republic of Croatia it shall be held liable for committing an offense. Using extensive interpretation is justified by the need to incriminate the criminal activities of legal persons even in cases when they do not have a status of a legal person under foreign law.<sup>62</sup> For the application of legal provisions it is irrelevant whether a legal person has a branch in the territory of the Republic of Serbia, because this is criminal activity.

#### 4.2. Natural person

The main characteristic of a legal person - company is that its assets consist of material and personnel substrate. While the law puts the emphasis on the liability of a legal person, as a person who possesses legal capacity and therefore can be held liable for a crime, individuals who poses reason, and which make the personal substrate of a legal person - company are important for its business. It is in this personal substrate as part of the assets of a legal person - company that includes persons whose decisions influence policy making. These are persons (directors, management) which are in the category of persons authorized by law or internal regulations.

Following the legal tradition provided by the provisions of the Economic Offences Act which point out that a liable person within a legal person can be held liable for the economic offense,<sup>63</sup> the law provides that a natural person is also held liable for the criminal acts that are attributable to the legal person.<sup>64</sup> In determining which natural persons may be held liable it should be stated that a liable person is considered "... a natural person who is legally or factually entrusted with certain jobs within a legal person, as well as the person authorized, or for which it is deemed to be authorized to act on behalf of a legal person".<sup>65</sup> Similar to this definition is the definition contained in the Act on Economic Offences of Republic of Serbia which provides that the liable person is "... a person who is entrusted with specific tasks in the field of economic and financial operations of a legal person ...".<sup>66</sup> LOLLPCO of Republic of Croatia united the above definitions to state that the liable person is ... "a natural person conducting business of a legal person or is entrusted with jobs from area of activity of a legal person."<sup>67</sup> However, although with the interpretation of both definitions of the liable person we come to the conclusion that this is a person who has been entrusted with a "specific scope of affairs" within the legal person, the definition contained in LOLLPCO RS and LOLLPCO of Republic of Croatia RH is more comprehensive. Liable can be considered any natural person within the legal person who is factually or legally assigned to perform certain tasks. It should be noted that here we have a *question facto* being evaluated in each case, with the need to take into account the internal regulations of the legal person, and especially the fact that their responsible persons are

<sup>60</sup> Vasiljević, M.: Company law, Beograd, 2010, p. 105

<sup>61</sup> Best example is a partnership society which in legal systems of Germany and England does not have a legal personality, while according to our positive law that business organization falls into the category of a legal person and as such possesses legal personality from the moment of registration. Vrhovšek, M., aforementioned work,

<sup>62</sup> Ilić, G.: Marginal notes to the Law on corporate liability for criminal offenses, CRIMEN (I) 2/2010, p. 246–256, p.248.

<sup>63</sup> Art. 6. Par. 1. Law on Economic Offences of Republic of Serbia

<sup>64</sup> Art. 5, LOLLPCO of Republic of Serbia and Art.4 and 5 of LOLLPCO of Republic of Croatia <sup>65</sup> Art. 5. Par. 2. Ibid.

<sup>66</sup> Art. 8. Par. 1. . Law on Economic Offences of Republic of

Serbia <sup>67</sup> Art. 4. LOLLPCO of Republic of Croatia

authorized to act on behalf of the legal person<sup>68</sup> that entrusted them with certain tasks.<sup>69</sup> Regulating the responsibilities of persons performing certain tasks on the legal basis legislator formalizes this kind of liability. However, a special form of liability which made a significant step forward in the area of responsibility of the natural person is: a) where a person within the legal person (employee) is without any legal basis entrusted to perform tasks for which it is not competent, or b) when a person who has no employment status is entrusted to perform certain tasks and it is not a case of a contractual relationship.<sup>70</sup> Finally it should be noted that by standardizing a specified mode of liability of natural persons by the legislature grounds for liability of legal persons for criminal offenses has been significantly expanded.<sup>71</sup>

## 5. ANALYSIS OF CRIMINALLY CHARGED, INDICTED AND CONVICTED LEGAL PERSONS IN REPUBLIC OF CROATIA

In this paper we have performed and presented the analysis of criminally charged, indicted and convicted legal persons in the five-year period, from 2011 to 2015. Further to the above, we have shown criminal offenses of legal persons for specific types of crimes and the very structure of the reported crime.

The table below No.2 shows the total number of criminally charged, indicted and convicted legal persons in that period. As for the number of criminally charged legal persons there is a notable fall from year to year. In fact, in 2011 there were 1508 charged legal persons, and in 2012 the number of charged legal persons has dropped by almost 30% and amounted to 1054. In 2013 it was even lower, with only 778, while in 2014 it reached the lowest number of only 717. In 2015 there was a small increase in legal persons charged for criminal acts of 812 on annual basis. The number of indicted legal persons in the period from 2011 to 2015 was relatively small compared to the actual number of charged legal persons. The largest number of indicted legal persons (406) was in 2013, and the lowest number (173) relates to the year 2015. The number of convicted legal persons in the five-year period varied from a minimum number (53) in 2015, up to a maximum number (193) in 2012. We can immediately notice that there is an appreciable discrepancy in relation to charged and convicted legal persons, for example, in 2011 for the total number of charges (1508) there were only 119 convicted legal persons or 7.89% of all criminally charged legal persons. Similar situation applies to 2015, with the total number of charged legal persons (812), and only 53 or 6.53% convicted.

Table No. 2. LEGAL ENTITIES PERPETRATORS OF CRIMINAL OFFENCES – REPORTED, ACCUSED AND RECOGNISED AS RESPONSIBLE<sup>72</sup>

2011.	2012.	2013.	2014.	2015.	
1 508	1 054	778	717	812	Reported
266	383	406	310	173	Accused
119	193	143	120	53	Recognised as responsible

<sup>68</sup> For example, procurator, legal representative, see Vasiljević, M., *mentioned work*, str. 113-120.

<sup>69</sup> Ilić, G., *mentioned work*, p. 249.

<sup>70</sup> Stojanović, Z.: *The Criminal Code Commentary*, Beograd, 2006, p. 311.

<sup>71</sup> Djurdjevic, Z.: *Commentary on the liability of legal persons for criminal offenses*, OG, Zagreb, p. 45.

<sup>72</sup> Croatian Bureau of Statistics, Republic of Croatia, Communication 27.04.2016., NUMBER: 10.1.4, LEGAL ENTITIES PERPETRATORS OF CRIMINAL OFFENCES, BY TYPE OF DECISION, 2015

Table No 3. COURTS' DECISIONS AND CRIMINAL PENALTIES OR OTHER MEASURES, BY TYPE OF CRIMINAL OFFENCES, 2015<sup>73</sup>

Criminal offences against										Indices 2015. 2014.	
Total	Labour relations and social insurance	Environment	Public safety	Property	Economy	Intellectual property	Official duty	Other criminal offences			
173	8	19	7	10	114	1	5	9	55,8	Total	
53	5	11	5	1	25	-	1	5	44,2	Recognised as responsible	
120	3	8	2	9	89	1	4	4	63,2	Not recognised as responsible	
10	-	-	-	2	8	-	-	-	62,5	Rebuff	
83	1	5	-	5	67	-	2	3	70,3	Terminated criminal proceeding	
14	2	2	1	1	5	-	2	1	43,7	Judgement of acquittal	
13	-	1	1	1	9	1	-	-	54,2	Judgement rejecting charges	
53	5	11	5	1	25	-	1	5	44,2	Criminal penalties and other measures – total	
53	5	11	5	1	25	-	1	5	44,2	Fine	
9	3	-	-	1	5	-	-	-	20,0	5 000 – 10 000	
22	2	4	4	-	8	-	1	3	52,4	10 001 – 20 000	
15	-	2	1	-	11	-	-	1	57,7	20 001 – 50 000	
2	-	1	-	-	1	-	-	-	33,3	50 001 – 100 000	
5	-	4	-	-	-	-	-	1	500,0	Above 100 000	
3	-	2	-	-	1	-	-	-	42,9	Confiscation of pecuniary benefit acquired by a criminal offence	

Table No.3 shows types of criminal offenses for which legal persons have been found responsible in 2015 as well as the types of criminal sanctions that are imposed on them. The total number of the accused legal persons in 2015 was 173, out of which only 53 legal persons were found responsible. Of the 53 convictions, criminal sanction of fine has been imposed in all of them, and in three cases there was also a forfeit of proceeds of crime. Most were convicted to a fine ranging from 10,001 to 20,000 HRK (22 legal persons), and a fine from 20,001 to 50,000kn (15 natural persons). Legal persons were convicted largely due to crimes committed against the employment and social security, environment, public safety, property, economy, intellectual property, official duty, and some other criminal offenses. In the first place are crimes relating to offenses against the economy (25), while in the second are crimes against the environment (11).

Let us compare the situation in relation to the charged, indicted and convicted legal persons for criminal offenses relating to the period immediately after the adoption of the LOLLPCO Croatia, for the period from 2005 to 2009. Overview can be seen in Table No.4.

Table No. 4 Criminally charged, indicted and convicted legal persons for criminal offenses from 2005 to 2009<sup>74</sup>

2005			2006			2007			2008			2009		
CH	IN	CO	CH	IN	CO	CH	IN	CO	CH	IN	CO	CH	IN	CO
149	11	8	310	23	17	597	64	39	666	130	80	844	133	84

<sup>73</sup> Ibid.

<sup>74</sup> Novosel D., Rogić-Hadžalić, D.: Criminal liability of legal persons for criminal offenses 2005 - 2009, Central Bureau of Statistics, Zagreb, 2010, p.10.

When LOLPCO of Republic of Croatia was first passed and in the early years of its implementation, in 2005, there was a relatively small number of legal persons charged for criminal offenses (149). However, the number of charges has increased from year to year, in 2006 (310), in 2007 (597), and in 2009 there were 844 criminally charged legal persons. 2011 with 1508 charged legal persons is the year with the highest number of criminal charges, and 2005 with only 149 charges is the year with the lowest number of charged legal persons. The same situation is with regard to convicted persons. Least convictions were recorded in 2005 (8), in order for that number to rise in the next few years and in 2009 there were in total 84 legal persons convicted.

## 6. CONCLUSION

In the process of joining the EU when we strive for more comprehensive unification of legal space, countries that belonged to the legal system of former Yugoslavia are required to adjust legal acts that have already been enacted and legal acts that are yet to be passed with the legal norms of the EU. The paper puts a special emphasis on the legal standardization of corporate liability for crimes from the perspective of the legal system of the Republic of Serbia and Croatia, because they use to both belong to a single legal system. When principle *societas delinquere non potest* was valid, therefore, before the introduction of criminal liability of legal persons, legal entities in the Republic of Serbia and Croatia were punished for economic offenses and misdemeanors.

Although the law on criminal liability of legal persons is a success of legislature, it should be noted that the legislation does not constitute voluntary legal regulations of the legislature of the Republic of Serbia and Croatia, but it is a result of international commitments. Legal persons are criminally liable according to the model of derived, subjective and cumulative liability, provided that the legal person will be punished for a criminal offense of a liable person and in the event that the existence of legal or factual obstacles to establishing the liability of the liable person is determined. The law on criminal liability of legal persons is *lex specialis* because of the possible objections on account of strict liability in criminal law.

The law represents a significant step forward in fuller and more complete legal regulations of corporate liability for the behavior of the market, however, there is one crucial questions of whether such a law in the public interest. The answer to this question can move in two directions: a) that there is a sincere desire to see its application to preventively influence the behavior of legal and responsible persons and b) that the legal act is only in public interest in the field of fulfilling international commitments, and without sincere wishes for its implementation.

Criminal liability of legal persons should be a necessary tool in the fight and crime prevention of each state because only the criminal law can achieve retribution, prevention and rehabilitation.

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