

CORPORATE CRIMINAL LIABILITY: COMPARISON OF UKRAINIAN AND THE US MODEL

by Orest Shcherbai

LL.M. SHORT THESIS
COURSE: U.S. Corporations and Partnerships
PROFESSOR: Jessica Charles Lawrence, Dr.
Central European University
1051 Budapest, Nador utca 9.
Hungary

© Central European University March 29, 2019

Table of contents

Abstract	iii
Introduction	1
Chapter 1. The relevance of corporate criminal liability	6
1.1. Historical development	6
1.2. Rules of attribution for corporate criminal liability	11
1.2.1. Vicarious liability	12
1.2.2. Identification Doctrine	15
1.2.3. Aggregation theory	17
1.2.4. Corporate culture theory	19
1.3 Alternatives to corporate criminal liability	21
Chapter 2. American experience.....	27
2.1. Evolution of the corporate criminal liability in the US	27
2.1.1. Nuisance	28
2.1.2. Nonfeasance and misfeasance	29
2.1.3. Intentional crimes	31
2.2. Guidelines for prosecutors	34
2.3. Criminal sanctions for corporation.....	39
Chapter 3. Ukrainian experience in the field of implementing the concept of corporate criminal liability.....	47
3.1. History of the development of corporate criminal liability within the territory of Ukraine	47
3.2. The Essence of Amendments that Introduce Corporate Criminal Liability	53
3.3. Scientific approaches to corporate criminal liability in Ukraine	58
3.4. Case analysis	63
Chapter 4. Lessons to be learnt.....	67
Conclusion.....	72
Bibliography	74
Laws, legislation and related materials	74
Cases.....	76
Books, periodic materials, and monographies	78
Internet resources:	84

Abstract

The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities” was adopted by Ukrainian Parliament on 23 May 2013 and introduced the previously non-existent concept of corporate criminal liability in the forms of specific criminal law measures into Ukrainian legislation. Even though such legislative steps are considered to promote democracy and rule of law, this concept is hardly accepted in Ukrainian legal community because of its novelty and the absence of comprehensive doctrinal explanation. In view of these legislative changes, this thesis is focused on the evaluation of pros and cons of the concept of corporate criminal liability in Ukraine, as well as on the examination of features of the corporate criminal liability in the US and on the possibility of implementation the US experience into Ukrainian legislation to enhance this newly introduced concept.

The comparative examination of legislation and relevant court practice of both Ukraine and USA is the core basis of the analysis. The first part of the thesis describes the general concept of corporate criminal liability and rules of attribution. The second part of the thesis is dedicated to the history of American experience in the field of corporate criminal liability. Meanwhile the third part is devoted to the essence of criminal law measures imposed on corporations in Ukraine. Finally, the thesis proposes to provide some implications of the US approach and amendments in Ukraine.

Introduction

Corporate criminal liability is considered to be a unique legal concept as it presents difficulties in its enforcement and complex uncertainty because laws created for humans have to be now applied for artificial entities, namely companies. Due to significant number of legal entities and their impact on economy, undoubtedly, such concept has to be applied to companies to ensure that these organizations are held liable for their actions. Nevertheless, while imposing criminal law measures on legal entities, it is important to remember that even though they are fictitious, such entities are merely collections of people who suffer real and significant consequences of extension of criminal liability to companies. As such, every effort must be made to ensure corporate criminal liability is applied to organizations and a fair and consistent manner, as if the corporations were the very people who fill their ranks.¹

The history of development of concept of corporate criminal liability in Ukraine has started since the proclamation of independence in 1991. During the period of adoption of The Criminal Code of Ukraine in 2001 there were several proposals of implementing concept of criminal liability of legal entities which were rejected. However, the first real attempt to bring this idea to life was made in 2009 when Ukrainian government adopted The Law of Ukraine ‘On Liability of Legal Entities for Corruption Offences’. At the beginning of 2010 this law was supposed to come into force but it was postponed due to the consideration of Ukrainian legislators that Ukraine was not yet ready for such a development. Afterwards, the above-mentioned law was cancelled at all.

Nonetheless, a successful attempt was made a few years later. The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal

¹ L.E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 14 (2011).

Entities”² was adopted by Ukrainian Parliament on 23 May 2013 and introduced the previously non-existent concept of corporate criminal liability in the forms of specific criminal law measures into Ukrainian legislation. To be more precise, The Criminal Code of Ukraine was amended and supplemented with new XIV-1 chapter, namely “Criminal Law Measures for Legal Persons”³, which contains nine articles that cover statutory mechanisms and legal foundations for imposing quasi-criminal liability on organizations.

Such developments regarding the possibility of imposition criminal liability on companies will have a crucial effect on the Ukrainian economy. Since the independence the owners of largest business conglomerates in Ukraine continue to employ different criminal methods, fraud schemas and political bribery to preserve and to expand their businesses, which might have caused detrimental losses, sometimes even bankruptcy, to their business competitors.⁴ Thus, the implementation of corporate criminal liability will serve as a useful tool in for eliminating economic misconducts, causing both financial and reputational harm to legal entities, even if its employees are not prosecuted. Moreover, the implementation of this concept into Ukrainian realities assures not only national but also potential foreign investors about their business being protected from different illegal actions of their competitors, causing an increase of capital flow and further development of economy.

Even though such legislative steps are considered to promote democracy and rule of law, this concept is hardly accepted in the legal community because of its novelty and the absence of comprehensive doctrinal explanation.

² The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities” [23 May 2013], No. 314-VII, < <http://zakon.rada.gov.ua/laws/show/314-18>> accessed 16 October 2018.

³ Criminal Code of Ukraine [5 April 2001], No. 2341-III < <http://zakon.rada.gov.ua/laws/show/2341-14>> accessed 16 October 2018.

⁴ В Україні є Проблема і з Олігархами [There Is also a Problem with Oligarchs in Ukraine], Nat’l Anticorruption Portal “Antikor”, available at https://antikor.com.ua/articles/36855-v_ukrajini_je_problema_i_z_oligarhami.

Research questions and the main thesis problems are connected with the introduction of concept of corporate criminal liability in Ukraine. The questions are examined through a comparative analysis and address the problems of development of concept of corporate criminal liability, its scope and the existence of different guidelines for different governmental officials involved into the criminal proceedings.

The main idea of the thesis is the comparative examination of the US and Ukrainian approach of corporate criminal liability with respect to its regulations and the possibility of implementation of the US provisions and guidelines into Ukrainian national legislation. The US approach in this respect could play a crucial role to enhance the concept corporate criminal liability in Ukraine which has certain number of drawbacks. Apart from the abovementioned examination of both jurisdictions, the thesis focuses on inconsistencies of the concept of corporate criminal liability with Ukrainian national doctrine (for instance, the fact that introduction of corporate criminal liability is contradictory with number of legal principles in Ukraine). Therefore, the thesis proposes amendments to the Criminal Code of Ukraine in order to eliminate such discrepancies.

Apparently, this thesis covers two jurisdictions: Ukraine (as a country which only has recently implemented the concept of corporate criminal liability) and the US (as one of the first countries that recognized the criminal liability of legal entities). The reason of such comparison between Ukraine and USA is the following.

First of all, we cannot ignore the fact that the evolution of the concept of corporate criminal liability in the US has been a long and complicated process which lasted for more than one century. The US was one of the first countries that introduced this concept in 1909 in the landmark decision of the Supreme Court in the *New York Central & Hudson River Railroad*

Co. v. United States case,⁵ meanwhile attempts of implementing this concept in Europe started only at the 1980's and more than a decade ago in Ukraine.

Secondly, with the introduction of such type of criminal liability to Ukrainian realities, detailed guidelines for prosecutors and judges have to be enacted in order to provide responsible and effective use of the newly created provisions. American experience in the sphere of corporate criminal liability, being a powerful law enforcement tool in protecting society of misconducts and deterring business from lawful deviations, serves as a comprehensive source for such guidelines.

Thirdly, the number of criminal law measures imposed on Ukrainian legal entities is limited to three types: fine, confiscation and liquidation of the company. Meanwhile, the US approach with this respect is much broader which also reveals number of different tools that can be used against Ukrainian corporations involved in criminal activities (for example, aggressive probation or publication regarding such activity on governmental web-sites or in mass media).

The method of comparative analysis of the legislation, relevant court practice and scholarly materials of both Ukraine and USA is the core basis of the examination the aspect of concept of corporate criminal liability in the-above mentioned states. Moreover, the historical method is used for the analysis of the development of corporate criminal liability in the USA, illustrating its long nature and all difficulties it faced, as well as in Ukraine.

The thesis consists of four parts. The first part deal with the general notion of concept of corporate criminal liability, particularly with its roots, development, rules of attribution and its alternatives. The second part is concerned with the criminal liability of corporations in the

⁵ *River RR Co. v. United States*, 212 U.S. 481, 29 S. Ct. 304 (1909).

US. Particularly, it examines the cases, types of crimes for which corporation can be held liable and prosecutorial guidelines. The third part is dedicated to the evolution and essence of concept of corporate criminal liability in Ukraine. Finally, the thesis assesses the possibility of implementation relevant US experience in Ukraine and proposes certain amendments in this regard to Ukrainian legislation.

Chapter 1. The relevance of corporate criminal liability

Before elaborating various lessons for Ukraine within the concept of corporate criminal to be learnt from American perspective, initially it is necessary to understand how the concept has developed. Moreover, there is a need to examine number of theories of corporate criminal liability to have certain perception regarding US approach in this field. In addition, some academics argue that there is no need of corporate criminal liability due to the existence of its alternatives. Therefore, this chapter also examines the appropriates of implementation criminal sanctions to be imposed on corporations as opposed to civil and administrative measures.

1.1. Historical development

Theories regarding the corporate criminal liability and related researches have existed for approximately two centuries, illustrating their relative novelty.

Nevertheless, since the ancient times, long time before the development of any of these theories, different collective entities have been held criminally liable for actions of its members. Society at that time was not seen merely as a collection of individuals, but rather as an aggregation of families and any actions of individual, including offences, were viewed as actions of the group to which such individual belonged.⁶ Illegal behavior was a sign which illustrated that the community lost the internal and external harmony and, thus, was not controllable. Consequently, it had an obligation to maintain control over the members and prevent them from committing any wrongdoings.⁷

As opposed to ancient times, the period of Western Roman Empire gave the preferences to individualism rather than to collectivism and, therefore, can be named as a period of individual emancipation.⁸ Despite the fact that scholars at that time had an individualistic view

⁶ SIR HENRY SUMNER MAINE, *ANCIENT LAW* 143 (10th ed., 1930).

⁷ F. MCAULEY, & J. P. MCCUTCHEON, *CRIMINAL LIABILITY* 273 (2000).

⁸ CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOUR* 1 (1975).

of society, there was a demand to regulate different aspects of activities of legal entities since they were increasing in numbers. Hence, the only solution which was found by Roman scientists and practitioners to reconcile the prevailing individualistic view with existing corporations was not to match them up among themselves.⁹ At that time legal entities were mainly in the form of civil organizations, which were associations of persons, and unlike contemporary corporations, they served only the function of passive device to hold a property or privileges. The existence of such organizations pushed scholars to develop the concept of “juristic persons” that had property rights but could not have intention and commit were incapable of committing crimes since they were fictions unities.¹⁰ The recognition of the existence of independent legal entities that have certain rights and obligations provided the basis for further theoretical and practical evolution of corporations in the medieval.

At the edge of 12-13th century the concept of corporate criminal liability started to evolve. In particular, according to the provisions of Romanic law *universitas* (translated as “community”) could be held criminally liable but only as a result of collective actions of its individuals.¹¹

Moreover, during the medieval times the church played influential role in the development of corporate criminal liability. Evidently, society at that time was better developed comparing to the Roman times and had a richer structure with different elements such as villages, cities, ecclesiastical bodies and universities which consisted of faculties and colleges. There was a need for some kind of theory to meet these institutions.¹² Such theory

⁹ *Id.* at 11.

¹⁰ *Id.*

¹¹ Shekhovtsova L.I., *Pro docil'nis't vstanovlennyya krymina'noi vidpovidal'nosti yurydychnykh osib (dosvid inozemnykh derzhav)* 12 [Appropriateness of criminal liability of legal entities (international experience)] (Internet Conference on Criminal Justice 2010), available at <http://jurlugansk.ucoz.org/publ/9-1-0-20>.

¹² Daniela Holler Branco, *Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons From Common Law Developments* 21 (Spring 2016) (unpublished thesis, National College of Business Administration and Economic).

was created by Pope Innocent IV and it became the basis for the maxim of *societas delinquere non potest* and introduced the principle that *universitas*, communities or corporations were merely a fiction.¹³ According to this theory “[t]he corporate body is not in reality a person, but is made a person by fiction of the law” or by divine power in case of certain clerical bodies.¹⁴ It established supreme authority of the medieval papacy among such ecclesiastic bodies and positioned them in a protective and favorable position.¹⁵ Therefore, other groups, except for such spiritual bodies, in order to get a status of legal person had to be recognized by the law by receiving approval of a competent authority.

However, starting from the 17th century the concept of criminal liability of legal persons had started to be accepted under certain conditions among religionists due to practical needs. Particularly, Bologna School demanded for imposition of sanctions on communities.¹⁶ For example, a city that provided a shelter for criminal or did not assist officials in his arrest should be held liable. As regarding conditions, such community could only be responsible for such act committed by an individual only if it was a consequence either of the community’s will or the will of the majority of its members. Different sanctions were imposed on the wrongdoing “community” including fines, rights restrictions and dissolution.¹⁷ The same approach used by governmental officials is described in the following chapter related to the historical development of concept of corporate criminal liability within Ukraine.

Still, until the 17th century it was not reasonable to think that a corporation could be held criminally liable for any illegal actions due to its artificial nature which, actually, played the greatest obstacle in imposing such liability on it.¹⁸ Baron Thurlow reflected this idea in his

¹³ *Id.* at 22.

¹⁴ W.M. Geldart, *Legal Personality*, 27 THE LAW QUARTERLY REVIEW 90, 92 (1911).

¹⁵ Branco, *supra* note 12, at 23.

¹⁶ *Id.* at 24.

¹⁷ *Id.*

¹⁸ A. Nwafor, *Corporate Criminal Responsibility: A Comparative Analysis*, 57 JOURNAL OF AFRICAN LAW, 81, 82 (2013).

famous statement saying that “[c]orporations have neither body to punished, nor soul to be condemned; they therefore do as they like”.¹⁹ These words are representation of the legal maxim “*actus non facit reum, nisi mens sit rea*”, meaning that an act does not make a defendant guilty without a guilty mind.²⁰

Sanctioning a corporation with criminal measures had been accepted practice on European continent until French Revolution. In 1670 the French Grande Ordonnance Criminelle was enacted the criminal liability of corporations. The criminal offence committed by legal entity should have been a result of a collective decision. Even though the corporations were considered still as artificial creatures, the presence of corporate criminal liability implied that this concept was not inconsistent with the nature of legal entity.²¹ However, the subsequent French Revolution brought negative changes to the progress of this concept since the Revolution was based on the principle of humanization of institutions.²² Consequently, the corporate criminal liability was eliminated since it was incompatible with individualistic approach. Corporations were considered as potential threat to the sovereignty of the State because of the political and economic influence on the situation in the country. Moreover, as any post-revolution government, French government needed instant funds and the easiest solution was to liquidate and immediately confiscate the property of corporation.²³ Hence, the French Penal Code 1810 did not contain any provisions related to the corporations not because of incompatibility of this concept with existing doctrine but “given the prevailing economic liberalism, the drafters of the Code simply did not pay any attention to the idea of corporate liability.”²⁴

¹⁹ J. POYNER, LITERALLY EXTRACTS 268 (1844).

²⁰ Duhaime's Encyclopedia of Law, available at <http://www.duhaime.org/>.

²¹ Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 494 (1994).

²² Branco, *supra* note 12, at 22.

²³ *Id.* at 26.

²⁴ Stessens, *supra* note 21, at 495.

Number of European countries at that time were influenced by the French experience and changed the opinions regarding corporate criminal liability and followed the same individualistic conception.²⁵ Consequently, corporations became undesirable entities which lost their power and influence both on economic and political processes. As a result, number of scholars started to develop different theories main aim of which was to find a basis for the impossibility of holding corporations criminally liable.²⁶ Moreover, the concept of corporate criminal liability was considered to violate core principle of criminal law – principle of individual punishment.²⁷ Savigny, the representative of “fiction theory”, was one of the first in 19th century who supported the principle *societas delinquere non potest*, stating that corporation is merely a legal fiction without body and soul and, therefore, can not possess guilty mind (*mens rea*) and act on its own behalf.²⁸

On the other hand, the development of common law systems, as well as the concept of corporate criminal liability in these systems, has not been based on the Roman concepts and differed from civil law systems. Initially, the concept of collective guilt or corporate criminal liability was rejected by English law that was based on idea that only natural persons who committed an illegal act with guilty mind could be subject to criminal liability.²⁹ Such view was sustained by Lord Holt who reported in 1701 that “[a] corporation is not indictable, but the particular members of it are.”³⁰ However, due to increasing role of corporations the very first step to hold them criminally liable in England was taken in the middle of 19th century. Initially, the criminal liability was imposed on corporations only in case of committing a

²⁵ Hryshchuk V.K. & Pasieka O.F., *Kryminalna vidpovidalnist yurydychnyh osib: porivnialno-pravove doslidzhennia* [Hryshchuk V.K., Pasieka O.F. Corporate criminal liability: legal comparison] (monography), 350, at 34.

²⁶ *Id.* at 35.

²⁷ L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1509 (1982).

²⁸ Hryshchuk & Pasieka, *supra* note 25, at 36.

²⁹ Khanna, *Corporate Criminal Liability: What Purposes Does It Serve?*, 109 HARV. L. REV. 1477, 1479 (1996).

³⁰ Anonymous Case [1701] 12 Mod 559.

nonfeasance crime (the failure to perform an obligation imposed by law).³¹ Eventually, the scope of corporate criminal liability extended to the improper performance of an obligation or in other words – to the misfeasance crimes.³² For example, in *The Queen v Great North Of England Railway Co* case, the court held that the corporation was criminally liable for a failure to build a bridge over a road according to all existing statutory requirements.³³ Later, English courts started to impose vicarious liability on corporations as well as on natural persons.³⁴

The United States being influenced by English law followed the same approach but the development of the concept of corporate criminal liability was more rapid.³⁵ American experience is discussed in the following chapter.

During the 20th century number of countries around the world started to enact and ratify various international conventions and treaties related to corporate criminal liability and, consequently, implement this concept into national legal doctrine. Ukraine is not an exception as it introduced possibility of imposition of criminal law measures on corporations in 2013, which is discussed in the third Chapter.

1.2. Rules of attribution for corporate criminal liability

Glazbrook states that any action in the world is done by human beings either individually or collectively.³⁶ Further he explains that:

When lawyers say or think that a corporate body has done something, this is meaningful only because there are legal rules which attribute (only) certain actions of (only) certain individuals in (only) certain circumstances to the organisation that

³¹ See Case of Langforth Bridge 79 ER 919 (KB 1635) cited in Brickey.

³² Ved Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, in MARK PIETH & RADHA IVORY ED., *CORPORATE CRIMINAL LIABILITY* 66 (Springer, London, 2011).

³³ *The Queen v Great North Of England Railway Co* [1846] EngR 803 at [325]-[327].

³⁴ *Regina v. Stephens*, (1866) L.R. 1 Q.B. 702 (nuisance case); *Regina v. Holbrook*, (1878) 4 Q.B.D. 42.

³⁵ KATHLEEN BRICKEY, *CORPORATE CRIMINAL LIABILITY* 63 (2nd ed., 1992).

³⁶ PR Glazebrook, *A Better Way of Convicting Businesses of Avoidable Deaths and Injuries*, *THE CAMBRIDGE LAW JOURNAL* 405, 406 (2002).

has been given this legal identity. The juristic concept would be deprived of all utility if everything done by everyone associated with the organisation were attributed to it, for then no one would know where they stood.³⁷

In addition, some authors state that the rules of attribution stem from the legal entity's state of being unable to think and act:

On the assumption that a corporation could neither act nor think itself, the courts were confronted with the problem of how, if at all, a corporation could commit a criminal offence; if it could not act, how could it cause a certain event forbidden by the criminal law (the *actus reus*), and if it could not think, how could it form the requisite state of mind in relation to the causing of the event forbidden by law (the *mens rea*)? Over time the courts developed two distinct rules of attribution, first vicarious liability, and, much later, the doctrine of identification.³⁸

Various rules of attribution of corporate criminal liability have been developed and have been mainly based on different jurisdictions.³⁹ Despite the fact, that Pinto and Evans in their work described only two theories or rules of attribution, most scholars usually refer to three or even four most significant ones that establish the corporate guilt⁴⁰ which are explained in the following sub-chapters.

1.2.1. Vicarious liability

Vicarious liability is the strictest and the most conservative theory of corporate criminal liability among the four above-mentioned models which is based on the civil law doctrine of

³⁷ *Id.*

³⁸ A. PINTO & M. EVANS, CORPORATE CRIMINAL LIABILITY 18-19 (2nd ed., 2008).

³⁹ *Id.* at 17.

⁴⁰ M. PIETH & R. IVORY ED., CORPORATE CRIMINAL LIABILITY – EMERGENCE, CONVERGENCE, AND RISK 13 (2011).

respodeat superior.⁴¹ It originates from the law of the torts whereby one part is subject to liability as a result of wrongful act of another party.⁴² Under this theory of corporate criminal liability “[t]he actus reus – the performance of a legally prohibited act – and the mens rea – criminal intent – of an individual who acts on behalf of the corporation are automatically imputed to the corporation.”⁴³ Therefore, it is a two-staged process which requires: 1) examination of whether agent’s conduct contained the elements of the offense; 2) in case such elements are established, this conduct is ascribed to employer or principal.⁴⁴ Also it has to be based on the existing legal relations between the parties which has to be in the form of employment or agency.⁴⁵ Another peculiarity is that employer or principal cannot be held liable for criminal violation of an employee or an agent, whereby the latter was not acting within the scope of his responsibilities, i.e. on his own capacity, and without an intent to benefit his principal or employer.⁴⁶

Lederman, referring to number of cases⁴⁷, explains that the theory of vicarious liability was extended by courts which “[c]opied the technique that had been developed for imposing liability on human principal or human employer for the acts of an agent or employee” to situations where such employee or agent is a legal entity.⁴⁸ As opposed to the identification doctrine which only takes into consideration actions of high-ranking corporate officers, under the vicarious liability theory to impose criminal liability on the corporation the rank of a corporate employee is disregarded.

⁴¹ A. PINTO & M. EVANS, *supra* note 38, at 18.

⁴² D. ORMEROD SMITH & HOGAN, *CRIMINAL LAW* 140 (12th ed., 2008).

⁴³ Ved Nanda, *supra* note 32, at 607.

⁴⁴ E. Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 *BUFFALO CRIMINAL LAW REVIEW* 642, 651 (2000).

⁴⁵ L.N. LACEY & C. WELLS, *RECONSTRUCTING CRIMINAL LAW: CRITICAL PERSPECTIVES ON CRIME AND THE CRIMINAL PROCESS* 515 (2nd ed., 1998).

⁴⁶ E. Lederman, *supra* note 44, at 610.

⁴⁷ *Tesco Stores Ltd. v. Brent London Borough Council*, 2 All E.R. 718 (Q.B. 1993) (Eng.) [All England Law Reports]; *F.E. Charman Ltd. v. Clow*, 3 All E.R. 371 (Q.B. 1974) (Eng.); *John Henshall (Quarries) Ltd. v. Harvey*, 2 Q.B. 233 (1965) (Eng.).

⁴⁸ E. Lederman, *supra* note 44, at 653.

Furthermore, another feature of vicarious liability which can be compared with identification doctrine according to Lederman is that actions of an employee are not equal to the actions of corporation itself since the former acts on behalf of the latter:

The law knows that reality is different and that these are two separate and independent entities, only one of which the agent or employer is actually involved in the actions or thoughts at stake. Yet, due to considerations of proper legal policy anchored in the association and the relationship of subordination between them, a fiction is devised, whereby the behavior and the thoughts of one individual, following the orders of another, appear as the behavior and the thoughts of that other.⁴⁹

The vicarious liability theory has developed due to three circumstances. Firstly, unlikely the employee, the employer has better opportunities to provide compensation to the victim. Secondly, the employer is in the position to provide sufficient instructions to his employees which have to be conducted to prevent any wrongdoing. Thirdly, because the employer gains profits from the conducts of his employees "...[i]t is fair for the law to demand that the employer bear the losses occasioned because of the employment relations."⁵⁰

Therefore, it can be concluded that vicarious liability is a concept according to which corporations are held criminally liable for offences committed by its employees or agents when they acted within their scope of authority and for the benefits of the corporation. Insight regarding this doctrine is essential since the corporate criminal liability in the US has evolved from it in one of the landmark cases and, beside this, it helps to make a comparison with the following concepts of attribution and to outline their pros and cons.

⁴⁹ E. Lederman, *supra* note 44, at 652-653.

⁵⁰ D. Hanna, *Corporate Criminal Liability*, 31 CRIMINAL LAW QUARTERLY 452, 454 (1988 – 1989).

1.2.2. Identification Doctrine

According to this theory “[t]hose who control or manage the affairs of a company are regarded as embodying the company itself.”⁵¹ Basically, the corporation is held liable as a result of close relations between the corporation and the employee who has committed criminal offence and such employee is “identified” with the company. Within the previous theory, vicarious liability, the *actus reus* and the *mens rea* of the agent or employee lead to the criminal liability of the corporations, meanwhile under the identification doctrine these necessary elements of crime are imputed to the corporation itself. Identification theory is also often referred as “alter ego” doctrine or the “directing mind” theory.⁵²

It originated from the civil case of *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd*.⁵³ The company was convicted for the loss of cargo because of fire on its ship due to fault of the owner of the ship, who was managing the vessel on behalf of the company. The judge searched for “[t]he directing mind and will of the corporation, the very ego and center of the personality of corporation.”⁵⁴ Ultimately, the court held that within the law of torts it is the conduct of the most senior officer of the company that will be considered as the conduct of the company.⁵⁵

Moreover, in another case Lord Denning stated that:

A company may in many ways be likened to the human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and

⁵¹ Law Commission Legislating the Criminal Code Involuntary Manslaughter (Law Com No 237, 1996) at [6.27].

⁵² See FARRAR, FARRAR'S COMPANY LAW 759-760 (3rd ed., 1991).

⁵³ *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd*; H.L. Parsons, *The Doctrine of Identification, causation and Corporate Liability for Manslaughter*, 67 THE JOURNAL OF CRIMINAL LAW 69, 69 (2003).

⁵⁴ *Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd* [1915] 705.

⁵⁵ *Id.* at 713.

managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such.⁵⁶

One of the leading cases establishing identification doctrine is *Tesco Supermarkets Ltd v. Nattrass*. Speaking about the facts of the case, Tesco supermarket was selling a washing powder with discounted price and after some time they run out of this product. The storages were replaced with powder of regular price. However, the manager of Tesco forgot to take down the old signs of discounted price after having replaced the storages. Consequently, a customer was charged at a higher price and sued the Tesco under Trade Description Act 1968, which establishes liability for offering and selling products at the price different than the actual price offered. The outcome of the case is that House of Lords did not find any reasons to attribute conduct of the manager to the corporation as he was not part of the “directing mind”.⁵⁷ Lord Reid in this case held that for criminal liability to attach to the conduct of the employee of a company certain conditions must be met: “The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.”⁵⁸ As opposed to the vicarious liability doctrine, it can be concluded that the board of directors or any other senior officers of the company perform the management function and, therefore, speak and act as a company.⁵⁹ Moreover, senior officials have to act within the scope of their employment and their actions have to be forwarded to the benefit of corporation.⁶⁰

⁵⁶ Bolton Co Ltd v TJ Graham and Sons Ltd [1972] A.C. 153.

⁵⁷ Tesco Supermarkets Ltd v Nattrass [1971] UKHL.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁶⁰ FARRAR, *supra* note 52, at 760.

As opposed to vicarious liability concept, agents within this theory of corporate liability act as the company but not for the company. Owing to restricted number of people whose illegal conduct can be attributed to the legal entity the application of identification doctrine is, as a result, also limited. The theory described in the next sub-chapter takes totally different position as it considers the legal entity as a group of individuals.

1.2.3. Aggregation theory

Another set of rules of attribution is named as an “aggregation” which, as opposed to the identification doctrine which relies on the actions of a single senior officer, “[a]llows the acts, omissions and mental states of more than one person within a company to be combined in order to satisfy the elements of a crime”.⁶¹

Brickey refers to aggregation theory to as “collective knowledge” and explains that the corporation may be held criminally liable for a criminal offence even though there is no guilty employee, meaning that such an individual acting within the scope of its responsibilities has not been or even could not been convicted:

A corporation may be deemed to have knowingly engaged in conduct constituting a crime on the basis of evidence that agent Doe knew facts relating to one element of the offense, agent Jones knew facts relating to another, and agent Smith knew facts relating to yet a third. Had any of the three agents possessed all the facts, he could have become personally liable for knowingly violating the statute. But in this case neither Doe, Jones, nor Smith is liable because when the facts are considered in isolation from each other, they have no real legal significance.⁶²

⁶¹ James Gobert, *The Evolving Legal Test of Corporate Criminal Liability* in JOHN MINKES & LEONARD MINKES ED., *CORPORATE AND WHITE-COLLAR CRIME* 66 (Sage Publications, London, 2008).

⁶² Kathleen F. Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129, 136-137 (1984).

The aggregation theory originates from decisions of American courts. The most illustrative case is *United States v Bank of New England*.⁶³ On the word of the Currency Transactions Reporting Act a bank is obliged to report transaction of its customers which are above ten thousand dollars. In case bank intentionally neglected such an obligation it would be then prosecuted since such action is regarded as a crime. The bank involved various individuals which were assigned with different responsibilities in relation to reporting requirements of the Currency Transactions Reporting Act and, hence, compartmentalized the operation.⁶⁴ The court's main task was to determine the knowledge of the bank and its constituting elements. Its conclusion was similar to the above-mentioned Brickey's explanation of the aggregation theory. The court stated that the collective knowledge of bank's employees constituted such knowledge:

If employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.⁶⁵

However, it is worth mentioning that the collective knowledge is not similar with collective intent and has to be differentiated since the collective knowledge is easier to aggregate from employees than collective intent.⁶⁶ Lederman explains that it is possible to gather different information from different individuals into one whole but “emotional element

⁶³ *United States v Bank of New England* 820, 844 F 2d (1st Cir. 1987).

⁶⁴ *Id.* cited in Gobert (*supra* note 61).

⁶⁵ *Id.* at 44.

⁶⁶ E. Lederman, *supra* note 44, at 666.

is perceived as unique to human beings”.⁶⁷ As have been explained, in case two employees know two different things, the corporation knows both of these. Taking about the intent, if one employee wants one thing and another employee wants another thing, it is impossible for the corporation to want both of these things at the same time. Despite the fact that the knowledge can be aggregated from several employees, at least one employee has to accomplish the “[e]motional element of desire or indifference that is required to fulfill the *mens rea*.”⁶⁸

Hence, aggregation rules of attribution entail that corporation is capable of being a criminal offender through the aggregation of individual thoughts and behaviors. However, in my opinion, this theory is more complicated comparing to the previous two describe since it involves more actors and raises issues of intent.

1.2.4. Corporate culture theory

The essence of the fourth theory of corporate culture or self-identity is far from the principle that a corporation can not be held criminally liable (*societas delinquere non protest*). Lederman admits that the corporation is autonomous legal entity and should be positioned above its employees.⁶⁹ This theory of corporate criminal liability explores “organisational processes, structures, goals, cultures, and hierarchies” of the corporation.⁷⁰ Considering all these elements, it then tries to determine whether such corporate culture encourages and approves the commission of a criminal offence.⁷¹ In case of determination that corporate culture does not comply with the law then it is possible to attribute *mens rea* to the legal entity itself.⁷² In order to establish the liability of corporation initially functional mechanisms have to be analyzed as well as “[t]he link between the performance of corporate systems and the

⁶⁷ *Id.* at p. 668.

⁶⁸ *Id.* at p. 669.

⁶⁹ *Id.* at p. 679.

⁷⁰ W. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY LAW JOURNAL 647, 666 (1994).

⁷¹ *Id.*

⁷² A. PINTO & M. EVANS, *supra* note 38, at 20.

propriety of its processes on the one hand, and the commission of the offense in question on the other”.⁷³

The acknowledgement of the corporate culture theory has occurred in Australia after enactment of 1995 Australian Criminal Code (hereinafter – the Code) which considers the existence of corporation independent of its employees. Relevant provisions can be found in the Part 2.5 of the Code which demonstrates the mixed nature of corporate criminal liability.

According to the Section 12.2 of the Code vicarious liability is imputed to the corporation as a result of *actus reus* (“physical element of an offence” as stated in the Code) of its employees within their employment.⁷⁴

However, bigger concern is related to the *mens rea* (“fault element” as stated in the Code). Section 12.3 (1) of the Code provides that “[i]f intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence”.⁷⁵

In the following section it illustrates how such an authorization or permission may be established. Identification doctrine approach is implied in the Section 12.3 (2) (a) and (b) which state that (a) “[p]roving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence”⁷⁶ and (b) “proving that a high managerial agent of

⁷³ E. Lederman, *supra* note 44, at 681.

⁷⁴ Australian Criminal Code § 12.2.

⁷⁵ *Id.* §12.3 (1).

⁷⁶ *Id.* §12.3 (2) (a).

the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence”.⁷⁷

Moreover, another section explains that a corporation has authorized or permitted the commission of the offence provided that “[a] corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision”⁷⁸

The Code defines the notion of “corporate culture” as “[a]n attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place”⁷⁹.

Therefore, it can be stated that the corporation can be imposed to criminal sanctions by using either the identification theory deriving liability from the guiltiness from the board of directors or other employees as illustrated in the Section 12.3 (2) (a) and (b) or by establishing that certain corporate culture led to the commission of a crime according to the Section 12.3 (6).

In contrast to three previous corporate criminal liability models where the corporation is considered just as collection of natural persons, within this model it is a separate entity which can perpetrate offences on its own.

1.3 Alternatives to corporate criminal liability

In case a corporation commits illegal action in the form either of act or omission it shall be subject to imposition of liability by means of criminal, civil or administrative measures. A corporation can be exposed to both civil and criminal liability for their wrongful actions. Such

⁷⁷ *Id.* § 12.3 (2) (b).

⁷⁸ *Id.* § 12.3 (2) (c).

⁷⁹ *Id.* § 12.3 (6).

imposition to both forms of liability follows various aims which are described by Levenue as the following:

The civil law provided the legal means by which the victims of crime sought pecuniary or other compensation from the offender for the harm or damage caused by the crime. Criminal law on the other hand, provided sentencing to an offender either in terms of a prison sentence, the payment of a fine, or both to redress society for the harm caused to the general public. Theoretically, the civil-criminal system maintained a balance between the demands of society, which were addressed by the civil law.⁸⁰

Hence, civil liability is needed to compensate the injured party for damages caused by corporation whereas corporate criminal liability aims to serve justice and punish the offender for the harm caused by certain actions. In both instances the corporation is held liable for its illegal actions and, as a result, in most cases will pay certain amount of money through fine (criminal sanction) or compensation to the victim (civil law measure).⁸¹

It can be then stated that the main aim of these forms of liability is to hold the corporation liable for its actions and to deter it from committing any illegal actions.⁸² However, while civil and criminal corporate liability have the same aims it can be questioned whether there is a need for existence of the latter type of liability when one can rely on the former type of corporate liability leading to the same effect.

In many jurisdictions, especially in the developing countries, filing a civil lawsuit may be a costly procedure and injured party may be not in the position to afford it and to receive

⁸⁰ L.M. Lavenue, *The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victim and Witness Protection Act by the Federal Sentencing Guidelines for Organisations*, 18(3) THE JOURNAL OF CORPORATION LAW 441, 446 (1993).

⁸¹ *Id.* at 445.

⁸² Khanna, *supra* note 29, at 1524.

proper legal assistance. In case the civil lawsuit is already filed against the corporation, there is no assurance that such action will be successful. Moreover, if the civil action against the corporation turns out to be successful it will not always cause some negative effects on corporation's affairs since usually corporations are capable of providing compensation to the victims; and such successful civil action is not going to cause detrimental consequences to the reputation of the corporation.⁸³

Therefore, in some cases the justice is not be properly served until the corporate offender is not charged and prosecuted within criminal proceedings.⁸⁴ Furthermore, there can be situations of impossibility to file a civil lawsuit against the offender as is illustrated in the s. 35 (1) of South Africa's Compensation for Occupational Injuries and Diseases Act 130 of 1993:

No action shall lie by an employee or any dependant of employee for the recovery of damages in the respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise under the provisions of such Act in respect of such disablement or death.⁸⁵

Therefore, the importance of corporate criminal liability is increasing. It is stated that the effect of ruining corporation's reputation is greater within corporate criminal liability as compared to corporate civil liability since it will lead to corporation's stigmatization and further deterrence from committing offences.⁸⁶ Even though Khanna states that "[i]t is hard to believe that consumers would ascribe stigma to a corporation solely on the basis of the category of legal proceedings in which it was involved"⁸⁷ and further indicates that irrespective of the

⁸³ S.S. SIMPSON, *CORPORATE CRIME, LAW AND SOCIAL CONTROL* 20 (2002).

⁸⁴ *Id.* at 22.

⁸⁵ Section 35(1) of South Africa's Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁸⁶ M. Bowden & T. Quigley, *Pinstripes or Prison stripes? The Liability of Corporations and Directors for Environmental Offences*, 1 *JOURNAL OF ENVIRONMENTAL LAW AND PRACTICE* 5, 15 (1995).

⁸⁷ Khanna, *supra* note 29, p. 1508

prosecution individuals are not going to disassociate themselves from the corporation⁸⁸, still, in case there are developed criminal sanctions for the corporation within the criminal prosecution it will inevitably lead to such disassociation and stigmatization. Normally, no one wants to be treated as any kind of criminal, and as correctly Simpson points out “[o]ffenders are shamed by a ‘criminal’ label” which is a result of imposition of criminal law measures on corporation leading to its stigmatization.⁸⁹ One commentator explains, referring to certain jurisdictions of developing countries, that the availability of fine as the only criminal sanction for corporations that are prosecuted hinders the process of their stigmatization and deterrence from committing crimes.⁹⁰ He continues that civil liability does not necessarily prevent the corporation from committing further illegal actions as its main purpose is to compensate whereas severe criminal punishment are likely to succeed in deterring.⁹¹

Another point of view is presented by Podgor who rejects the necessity of concept of corporate criminal liability by reason of appropriate effect of deterrence of civil law measures.⁹² Moreover, he supports his negative attitude towards corporate criminal liability by promotion of compliance with the law by corporations:

For major companies, corporate compliance is a branch within the company. Attorneys, both in-house and outside counsel, as well as compliance officers are employed to assure maximum respect for the rules and regulations established within the company. Some companies will have guidance focused on specific problems that can accrue within the company, such as compliance with the Foreign Corrupt Practices Act.⁹³

⁸⁸ *Id.*

⁸⁹ S.S. SIMPSON, *supra* note 83, at 20.

⁹⁰ Hryshchuk V.K., *supra* note 25, at 148.

⁹¹ *Id.*

⁹² Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1534 (2009).

⁹³ *Id.* at 1528-1529.

However, Hryshchuk points out totally different position regarding the law compliance as a feature which should replace corporate criminal liability. Firstly, such compliance programs are likely to be costly and many of small and mid-scale companies will not be able to afford them.⁹⁴ Secondly, he states that when corporation does not comply with law and there is no criminal law measures to be imposed on such offender, it is highly likely that number of violations by corporations will increase and legal entities would escape from the liability.⁹⁵

Another alternative to criminal corporate liability is administrative liability in the form of administrative sanctions. At the beginning of 20th century Germany and Italy were reluctant to adopt the concept of corporate criminal liability and mainly relied on administrative penalties to control crimes committed by corporations.⁹⁶ However, in both countries such systems revealed the weakness in combating corporate crimes. Since the penalties are marked as administrative but not as criminal, the community perceive them to be not as serious as criminal sanctions because of “[l]ack of fundamental feature unique to criminal law: the stigma...Other branches of the legal system do not express the same moral disapproval”.⁹⁷

On the whole, various types of liability may be imposed to legal entities for their illegal conduct. However, depending on certain circumstances, the efficiency of these types of liability differs. Undoubtedly, criminal liability is a serious tool for achieving justice and punishment for corporations that were involved in illegal activity, especially when other alternatives are not likely to reach the same effect.

⁹⁴ Hryshchuk V.K., *supra* note 25, at 150.

⁹⁵ *Id.*

⁹⁶ Cristina De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASH. U. GLOBAL STUD. L. REV. 547, 560 (2005).

⁹⁷ *Id.* at 562.

Chapter 1 Conclusion

The history of corporate criminal liability is traced since the ancient times and has been developing until nowadays. Initially, society was regarded as aggregative unit consisting of families and any illegal conduct of individual was attributed to such society. Afterwards, with the beginning of individualism era, the concept of corporate criminal liability evolved in different ways: during different period of times it was both rejected and accepted in various parts of the world. However, starting from the 18th century when the role of corporations started to have great political and economical impact on each country, both academics and practitioners accepted the importance of corporate criminal liability. Therefore, number of rules of attribution were designed and established four most common concepts of corporate criminal liability: vicarious liability, identification doctrine, aggregation theory and corporate culture doctrine. Still, it is argued whether there is a need for criminal liability of corporations since there are number of other alternatives, namely civil and administrative liability. The reality shows that in some cases the latter types of liability can not reach the aims of punishment and justice, meanwhile corporate criminal liability is most likely to achieve these goals. After discussing general notions regarding the concept of corporate criminal liability, the next part of this thesis is focused on the US experience which is essential for relevant comparison with Ukrainian approach regarding attributing legal entities to criminal liability.

Chapter 2. American experience.

In the United States attitude towards impossibility of holding corporations criminally liable started to soften in 19th century when corporations began playing a crucial role in economic development of the country. Basically, since corporations revealed their potential to cause harm to the society, treatment of these legal entities changed dramatically and eventually “[c]ommon law judges devised a theory of corporate accountability for crime”.⁹⁸ The concept of corporate criminal liability has a two-century long history in the US. Mainly, it has developed through the judicial practice which extended the types of criminal wrongs that can be committed by the corporation. Moreover, the US is a great source for those countries who has just recently introduced or are about to introduce the concept of corporate criminal liability since this jurisdiction contains detailed procedural guidelines for those actors who are involved in criminal proceeding regarding corporation. Furthermore, the US experience shows the great balance among sanctions that can be imposed on corporations. Therefore, it is essential to dig into features of this system in order to provide relevant comparison. This chapter starts with the explanation of evolution of illegal conducts that could lead to criminal liability for the US corporations.

2.1. Evolution of the corporate criminal liability in the US

The concept of corporate criminal liability has evolved for more than two centuries in the US. Initially, there were only certain types of illegal actions that a corporation could conduct. But as can be seen, after years of judicial practice, number of scientific works and views the list of such criminal wrongs has been expanded causing the possibility to impose criminal liability on corporation for almost every criminal offence.

⁹⁸ Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393, 397 (1982).

2.1.1. Nuisance

Judicial decisions related to the sphere of public nuisance placed the first brick in the wall named as “corporate criminal liability” in the USA.⁹⁹ In one of the first cases the court defined nuisance as “an offence against the public either by doing a thing which tends to the annoyance of all the king’s subjects, or by neglecting to do a thing which the common good requires”.¹⁰⁰ Brickey referring to number of cases of corporate criminal prosecution states that the types of nuisances can be really broad and include “[p]olluted river basins, deteriorated roads, decaying bridges and malodorous slaughterhouses”.¹⁰¹ Interestingly, that first steps of imposition of corporate criminal liability were forwarded towards quasi-public corporations as, for example, municipalities and cities which failed to perform some kind of obligation leading to the commission of certain type of public wrong.¹⁰²

For instance, in 1834 the City of Albany was charged for failing to clean the basin of Hudson River from different kind of rubbish, mud and dead bodies of animals.¹⁰³ As a result, such conditions of the river’s basin resulted in detrimental conditions of water and emission of poisonous fumes which threatened public health. Legal counsel claimed that even though city had such obligation of cleaning the basin, it cannot be prosecuted in its corporate capacity but rather officers, individuals, who were responsible for preventing and reducing the consequences of such nuisance. The court further reasoned that when corporations and individuals are responsible for repairing any public highway, they shall be subject to liability and indictment for neglect of such obligation.¹⁰⁴ Furthermore, it pointed out that “[a]n

⁹⁹ See e.g., *People v. Corporation of Albany*, 11 Wend. 539 (N.Y. Sup. Ct. 1834); *Commonwealth v. Hancock Free Bridge Corp.*, 68 Mass. 58 (1854).

¹⁰⁰ *People v. Corporation of Albany*, 539, 543 11 Wend.

¹⁰¹ Kathleen F. Brickey, *supra* note 98, at 405.

¹⁰² Dudurov O. & Kamenskiy D., *Kryminal'na vidpovidal'nist Amerykan'skyh korporaciy za ekonomichni zlochyny: vid vytokiv do sohodennya* [Criminal liability of American corporations for economical crimes: from the origins to the present days], 2 PRAVO I HROMADYANS'KE SUSPIL'STVO, 103, 107 (Ukr) (2015).

¹⁰³ *People v. Corporation of Albany*, *supra* note 100, at 539.

¹⁰⁴ *Id.* at 543.

indictment and an informotion are the only remedies to which the public can resort for a redress of their grievances in this respect. If an individual has suffered a particular injury, he may recover his loss by an action on the case”.¹⁰⁵

Therefore, such decision settled the rule that corporations may be held criminally liable for a failure to perform an act that is required by law, or in other words for nonfeasance, and emphasized the public nature of the harm and the necessity of effective remedies.

2.1.2. Nonfeasance and misfeasance

The issue whether corporation can be imposed to criminal sanctions for affirmative act as well as for omission to act was settled in the middle of 19th century by two court decisions.

First of these decisions can be found in the case *State v. Morris & Essex Railroad*¹⁰⁶ where the company was prosecuted for nuisance as a result of construction of building upon a public highway and creating an obstruction for the road with railroad cars. Counsel of the Morris and Essex Railroad company argued that it is possible to hold a company liable for failure to perform an act (nonfeasance), and at the same time disagreed with indictment of corporation on the basis of affirmative act (misfeasance).

As for the corporate criminal liability, court stated that since it is accepted that corporation can be prosecuted for nonfeasance, objections related to the holding a corporation criminally liable due to its artificial nature, inability to appear before court and be arrested or to be imprisoned must be disregarded because they are equally applicable to indictments for misfeasance and nonfeasance.¹⁰⁷ Afterwards, the court explained that “[i]f a corporation has itself no hands with which to strike, it may employ the hands of others”¹⁰⁸, meaning that the

¹⁰⁵ *Id.*

¹⁰⁶ *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852).

¹⁰⁷ *Id.* at 366.

¹⁰⁸ *Id.* at 367

corporation can be held civilly liable for torts of its employees and, thus, there is no basis for rejection the possibility of imposition of sanctions on corporation for the same acts of its employees but only within criminal proceedings.¹⁰⁹

The last argument raised by counsel was that those individuals who took part in the decision regarding the construction of building upon the railroad and those who actually committed such wrong shall be held individually liable but not the company as an aggregate entity. Ultimately, the court rejected such argument stating that the corporation incited and benefited from such act and, moreover, it would be difficult to determine those individuals who performed the work and to receive financial compensation from them.¹¹⁰

In another significant case the court held a corporation criminally liable for constructing a bridge across the river in the way that obstructed the navigation leading to public nuisance.¹¹¹ According to the Brickey's explanation the court made a conclusion that it would be unreasonable to distinguish nonfeasance and misfeasance:

In this case, for example, it would have been possible to characterize the wrong as either failure to construct a proper bridge (nonfeasance) or construction of an improper bridge (misfeasance). In either event the nuisance-obstruction of the waterway-arose from the presence of a bridge that otherwise would not have impeded navigation had not the corporation exercised its power to cause the bridge to be built there.¹¹²

Therefore, these two cases reveal the possibility to hold a corporation criminally liable for failure to perform any act as well as for the inappropriate actions. The following sub-chapter

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 369.

¹¹¹ *Commonwealth v. Proprietors of New Bedford Bridge*, 668 Mass 339 (1854).

¹¹² Kathleen F. Brickey, *supra* note 98, at 409-410.

discusses the next type of criminal offences for which a corporation can be punished – those which require intent.

2.1.3. Intentional crimes

Despite the fact that the evolution of corporate criminal liability was swift, the issue regarding the imputing corporations to criminal liability for crimes requiring intent had not been solved for a quite long period. In two previously described cases related to the distinction of nonfeasance and misfeasance courts also had accepted the impossibility of holding a corporation criminally liable for crimes requiring intent which could be only committed by individuals, i.e. felony, violent crimes against the person, etc.¹¹³

According to Brickey there were two main arguments against the possibility of perpetration intentional crime by a corporation which would be then held criminally liable.¹¹⁴ The first argument is related to the nature of a corporation which is considered to have artificial character – it can not commit crimes on its own as it does not have any tools and therefore can be guilty of offences requiring evil intent.¹¹⁵ The next argument is connected with the concept of *ultra vires* (acting within the powers) as the corporation is unable to commit certain acts which are far beyond the purposes and powers of the corporation declared by its governing documents.¹¹⁶

It is further explained that owing to the theory of corporate acting the increasing number of judges supported the idea imputing the corporation to criminal liability because “[w]hen

¹¹³ Commonwealth v. Proprietors of New Bedford Bridge, *supra* note 111, at 345; State v. Morris & Essex R.R., 23 N.J.L. 360, 364 (1852).

¹¹⁴ Kathleen F. Brickey, *supra* note 98, at 411.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

they [directors, officers, employees] act on behalf of the corporation, their motives and intentions, as well as the acts themselves, are imputable to the corporation”.¹¹⁷

The most important and explanatory case in this instance is *New York Central & Hudson River Railroad v. United States*¹¹⁸, where the Supreme Court held that criminal sanctions can be imposed on the corporation for committing a crime requiring evil intent. It is worth mentioning that in this case Elkins Act was involved which regulates tariffs for freight transportation by railroad cars and imposes a restriction to provide rebates for privileged carriers.¹¹⁹ Evidently, New York Central, by having violated certain provisions of the Elkins Act, was prosecuted and found guilty for granting rebates to the American Sugar Refine Company.¹²⁰ The counsel of the company appealed arguing that: 1) Elkins Act, particularly section 1, which stated that the acts of agents and employees of the carrier were the acts of the carrier, violated constitutional provisions; 2) it was contrary to due process to punish shareholders for the acts of employees of the company; 3) the statutory imputation of corporate criminal liability was in contradiction with existing legal principles.¹²¹

The court decided that the Congress was empowered to regulate interstate commerce and to impose certain restrictions and that in case of absence of corporate criminal liability such legal instruments as Elkins Act would have no purpose to continue its existence.¹²²

Even though the Supreme Court did not support the idea that corporations are capable of committing all types of crimes, it ruled that in this case the offense could be regarded as one which requires intentional action which is prohibited by statute (Elkins Act).¹²³ Hence, this

¹¹⁷ *Id.* at 412.

¹¹⁸ *United States v. N.Y. Central R. R. Co.*, 212 U.S. 481 (1909).

¹¹⁹ Elkins Act (Mann-Elkins Act amendment to the Interstate Commerce Act).

¹²⁰ *United States v. N.Y. Central R. R. Co.*, *supra* note 118, at 481.

¹²¹ Kathleen F. Brickey, *supra* note 98, at 413.

¹²² *United States v. N.Y. Central R. R. Co.*, *supra* note 118, at 496.

¹²³ *Id.* at 494.

court recognized for the first time the criminal liability of corporations for intentional crimes and as correctly Brickey points out “[i]n cases involving this class of crimes, logic and policy dictated imposition of corporate liability for wrongs committed by agents acting within the scope of their authority”.¹²⁴

During the end of 19th and beginning of the 20th American courts further elaborated the concept of corporate criminal liability by convicting corporations for committing number of offenses which previously were considered as the offenses committed only by natural persons. In one of the cases the court ruled that a newspaper company was criminally liable for contempt of court due to disrespectful character of its publications.¹²⁵ Also the Supreme Court explained that corporation can not be imprisoned but its property can be subject to confiscation.¹²⁶ Another significant case is *United States v. Van Schaick*¹²⁷ where court decided that a corporation can be imputed to criminal liability for manslaughter. Briefly, the fire occurred on the vessel owned by the corporation and as a result of violation of safety measures by employees of the company and their incompetence many people died.

There are number modern cases where the corporations were also subject to criminal liability. One of the most disastrous and famous is named as *Deepwater Horizon Oil Spill*. In 2010 on the territory of oil-extracting platform “Deepwater Horizon” owned by “British Petroleum” corporation occurred an explosion which resulted in death of eleven people. Moreover, the platform itself sunk and 780 million gallons of crude leaked into the sea. Consequently, damages caused to environment were incredible, e.g. such damages accounted to 2.5 billion USDs only in the sphere of US fish farming business. The prosecution revealed that the actions of “British Petroleum” were aimed at decreasing both the production costs and

¹²⁴ Kathleen F. Brickey, *supra* note 98, at 413.

¹²⁵ *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 52 N.E. 445 (1899).

¹²⁶ *Id.*

¹²⁷ *United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904).

financial losses related to the improving safety and environmental measures of the company. As a result, the corporation was held criminally liable and agreed to pay the biggest in US history fine – 18.7 billion of USDs.¹²⁸

All in all, after the leading *New York Central* case courts were not restricted only by the framework of certain statutes with specified purpose but expanded the corporate criminal liability for violation of criminal provisions of general character.¹²⁹ Therefore, the evolution of this concept led to development of two-prong test which allows to impute legal entity to criminal liability only if: 1) its agents acted within the scope of the given authority; and 2) main purpose of agent's actions is to benefit the corporation.

Now it is necessary to explore rules which are designed to assist prosecutors with number of issues that may arise during the investigation and criminal proceedings of corporate crimes.

2.2. Guidelines for prosecutors

Over the last three decades the US Department of Justice has enacted variety of guidelines which respond to different critiques of the concept of corporate criminal liability based on the *respodeat superior*.¹³⁰

One of such legal acts is United States Justice Manual (hereinafter – JM) which declares general standards for prosecutor's discretion regarding the charge in all cases as well as specific standards for prosecution of corporations for committed crimes.¹³¹ Within the JM the Principles of Federal Prosecution of Business Organizations (*hereinafter- The Principles of Prosecution*) can be found which illustrate the position of Department of Justice that the federal

¹²⁸ Daniel De Wolf & Mohamed Mejri, *Crisis communication failures: The BP Case Study*, 2 INTERNATIONAL JOURNAL OF ADVANCES IN MANAGEMENT AND ECONOMICS, 48, 49 (2013) available at <https://pdfs.semanticscholar.org/5812/c05e679bd9a2d2a513dd98ff6df5a5071b11.pdf>.

¹²⁹ Dudurov O. & Kamenskiy D., *supra* note 102, at 113.

¹³⁰ Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 50 (2016).

¹³¹ Justice Manual, Section 9: Criminal (2018), available at <https://www.justice.gov/jm/title-9-criminal>.

prosecutors shall not base their charge merely on the *respodeat superior* but rather various other types of factors which “[i]dentify corporate blameworthiness and assess the adequacy of alternatives to federal prosecution”.¹³² The Principles of Prosecution lists 10 factors which have to be considered by the prosecutor before starting the criminal proceeding:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. The corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation’s willingness to cooperate, including as to potential wrongdoing by its agents;
5. The adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision;
6. The corporation’s timely and voluntary disclosure of wrongdoing;
7. The corporation’s remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
8. Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

¹³² Sara Sun Beale, *supra* note 130, at 51.

9. The adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and

10. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.¹³³

Commenting this provision, Firestone models a situation of bribery of governmental official by a corporation.¹³⁴ He states that it is highly likely that the corporation would not be convicted provided that the bribery was a separate action of corporation's employee, such entity had a corporate compliance program, cooperated with the investigation and fired the employee. On the other hand, when the bribery was sanctioned by the corporation's board of directors which also ordered its employee to mislead the investigators, then the indictment of such corporation would be appropriate.

Another feature that has to be taken into account while assessing the possibility to impose criminal sanctions on corporation is the existence of corporate compliance program described by the JM as to "[e]nsure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules".¹³⁵ However, the mere existence of the compliance program does not preclude a corporation from the responsibility. According to the commentary, prosecutors must determine "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives".¹³⁶ Moreover, prosecutors

¹³³ Justice Manual, *supra* note 131, Section 9-28.010.

¹³⁴ Fayrstoun T. *Ugolovnaya otvetstvennost yuridicheskikh lits v SShA* [Criminal liability of legal entities in the US], 2 ROSSIYSKIY EZHEGODNIK UGOLOVNOGO PRAVA 597, 609 (2007) (Rus).

¹³⁵ Justice Manual, *supra* note 131, Section 9-28.800.

¹³⁶ *Id.*

have to examine number of peculiarities in order to evaluate the appropriateness of the program: the design of the program; whether it is applied in a good faith; how many employees are involved and in the program and; how many of them were informed about the program; whether such program can adequately prevent future misconducts; the audit of the program; etc.¹³⁷

Moreover, post-offence conduct of the corporation shall also be examined by prosecutors which include corporation's cooperation in investigation; whether the corporation made a restitution for any harm; or any other form of remedial actions.¹³⁸ As for the cooperation, the most valuable type of such measure is disclosure by the corporation of relevant facts of misconducts of its employees, officers, directors. In addition, the facts of obstructing the investigation play crucial role in the prosecutor's evaluation. The commentary exemplifies such corporation's actions as "inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records".¹³⁹ In order to determine whether to prosecute corporation or not, the commentary suggests to consider which remedial measures have been provided by the corporation stating that

A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes

¹³⁷ *Id.*

¹³⁸ *Id.* Sections 9-28.700 to 9-28.760.

¹³⁹ *Id.* Section 9-28.730.

necessary to establish an awareness among employees that criminal conduct will not be tolerated.¹⁴⁰

Finally, the Principles of Prosecution allows prosecutors to enter into deferred prosecution agreements and non-prosecution agreements in cases when the collateral consequences of such prosecution would be detrimental to innocent third parties and further explain that:

Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or nonprosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.¹⁴¹

Even though such agreements relate to financial sanctions of large amount, still they are perceived by federal prosecutors as well as by corporations as optimal measures for the illegal activity. At the same time, these agreements might lead to the “death” of the corporation, i.e. bankruptcy, caused by loss of business in highly competitive economic environment. Apparently, non-legal consequences of either convicting a corporation or its entering into one of the above-mentioned agreements with the prosecution are more serious than criminal ones.

¹⁴⁰ *Id.* Section 9-29.1000.

¹⁴¹ *Id.* Section 9-28.1100.

These include the loss of present clients and impossibility of new client's involvement, reputational losses, loss of trust among corporation's partners and loss of "corporate spirit" among the employees.¹⁴²

Hence, prosecution of corporations for their illegal activities is a complex and difficult process which requires number of rules that are aimed at supporting law enforcement officers in conducting their authorities. The Principles of Federal Prosecution of Business Organizations can be considered as a detailed legal instrument in this respect which can be used a source for implications in Ukraine. Further it is necessary to identify all possible criminal sanctions that are imposed on legal entities in the US for creating general picture of the concept of corporate criminal liability in this country.

2.3. Criminal sanctions for corporation

Punishment is a main tool for serving justice and deterring companies from possible misconduct. Owing to specific nature of legal entities number of criminal sanctions that may be imposed on such entities is restricted. Still, the US elaborated an environment in which criminal activities of corporations are followed by just and proper sanctions.

The sentencing process in US is based on the Sentencing Guidelines¹⁴³ (hereinafter – Guidelines) enacted by United States Sentencing Commission in 1991 which are often renewed.¹⁴⁴ Sentencing of corporations is governed by Chapter Eight of the Sentencing Guidelines. The notion of "organization" is defined as "a person other than an individual"¹⁴⁵ which includes different types of legal entities such as: "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated

¹⁴² Dudurov O. & Kamenskiy D., *supra* note 102, at 135.

¹⁴³ 2018 Guidelines Manual (United States Sentencing Commission), available at <https://www.ussc.gov/guidelines/2018-guidelines-manual>.

¹⁴⁴ Ronald J. Maurer, *Federal Sentencing Guidelines for Organizations: How Do They Work and What Are They Supposed to Do*, 18 U. DAYTON L. REV. 799, 800 (1993).

¹⁴⁵ 2018 Guidelines Manual, *supra* note 143, at §8A1.1.

organizations, governments and political subdivisions thereof, and non-profit organization”.¹⁴⁶ Generally, legal society positively accepted enactment of such Sentencing Guidelines, even though some of the commentators referred to this legislation as to “draconian”.¹⁴⁷ Furthermore, the Guidelines promote two main aims of sentencing: just punishment, which is related to the degree of blameworthiness of the offender, and deterrence, meaning that the corporation has to provide system of preventive and detection measures in order to identify criminal offenders and avoid further misconduct by its employees.¹⁴⁸

One of the most powerful tools offered by Chapter Eight of the Guidelines for combating criminal activity is implementation of the “effective compliance and ethics program”¹⁴⁹ within the corporation. Such concept is based on the following features: 1) establishment by the corporation of standards and procedures which are aimed at preventing and detection present and future criminal conduct; 2) the highest level authorities of the corporation shall be informed about compliance and ethics program and shall systematically supervise the implementation of such program and its effectiveness; 3) unhindered process of exchange of the information within the corporation shall be ensured by the corporation itself; 4) the corporation shall provide adequate measures to respond “to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.”¹⁵⁰

The Guidelines comprehensively determine three types of sanctions imposed on the corporation for its illegal conduct, namely fine, restitution and probation. Fine is the most used sanction for corporate criminal offender.¹⁵¹ Once the type of crime has been established for

¹⁴⁶ *Id.*

¹⁴⁷ Ronald J. Maurer, *supra* note 144, at 799.

¹⁴⁸ Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 WAKE FOREST L. REV. 559, 559 (2004)

¹⁴⁹ 2018 Guidelines Manual, *supra* note 143, at §8B2.1.

¹⁵⁰ *Id.*

¹⁵¹ Dudurov O. & Kamenskiy D., *supra* note 102, at 130.

which a corporation can be convicted, the judge must determine the range of the fine. First and foremost, the fine will not be imposed on a corporation in case it is “readily ascertainable that organization cannot and is not likely to become able to pay restitution”.¹⁵² On the other hand, when restitution can be paid, the Guidelines offer “Offense Level Table” with thirty-three levels of offenses to determine base fine, starting with \$8,500 at the lowest level and ending up with \$150,000,00 at the highest level.¹⁵³ Moreover, amount of the fine imposed on a corporation also depends on other relevant factors such as the pecuniary gain from the offence, and pecuniary losses caused by the offense “to the extent the loss was caused intentionally, knowingly or recklessly”.¹⁵⁴

Using fine as a punishment has both benefits and drawbacks for the corporation. Speaking about the benefits, the most significant is relatively easy way of its enforcement comparing to other types of sanctions. Moreover, the “life” of the company continues, meaning that it preserves work places, regularly pays taxes, declares and distributes dividends to its shareholders and consumers receive goods and services, etc. Moreover, paying taxes enriches budgets of law enforcement bodies which are aimed at combating illegal activity. Finally, American courts are entitled to use part of the fine as a compensation to victims in order to restore and remedy their violated rights.¹⁵⁵ In 2014, a global financial institution “BNP Paribas S.A.”, headquartered in Paris, entered into agreement with prosecutors according to which it was guilty in conspiring to violate number of legal acts “by processing billions of dollars of U.S. dollar transactions through the U.S. financial system on behalf of Sudanese, Iranian, and Cuban entities subject to U.S. economic sanctions”.¹⁵⁶ This sum of processed money amounted

¹⁵² 2018 Guidelines Manual, *supra* note 143, at §8C2.2.

¹⁵³ *Id.* at §8C2.4.

¹⁵⁴ *Id.*

¹⁵⁵ Dudurov O. & Kamenskiy D., *supra* note 102, at 131.

¹⁵⁶ Department of Justice, U.S. Attorney’s Office, Southern District of New York, *BNP Paribas Agrees To Plead Guilty To Conspiring To Process Transactions Through The U.S. Financial System For Sudanese, Iranian, And Cuban Entities Subject To U.S. Economic Sanctions* (June 30, 2014), <https://www.justice.gov/usao-sdny/pr/bnp-paribas-agrees-plead-guilty-conspiring-process-transactions-through-us-financial>.

to \$8.8 billion. Based on the agreement the “BNP Paribas S.A.” was obliged to pay total amount of more than \$8.9 billion financial penalties, including \$8.8 billion of forfeiture and \$140 million as a fine.¹⁵⁷

Regarding the drawbacks, the amount of fine has to be quite big so as to pursue corporation’s punishment and deterrence from any further illegal conduct. It is stated that the fine must exceed the pecuniary gain to the corporation from the offense and to include different risks of detection of such illegal activity. For instance, if the corporation is planning to receive \$100 million from the committed offense and the possibility of detection of the crime amounts to 25 per cent, then for the fine to effective it shall be approximately \$400 million.¹⁵⁸ However, if the amount of the fine is way too excessive, then the corporation might claim that such sanction violates the Eight Amendment of the US Constitution.¹⁵⁹ Still, there are cases when legal entities paid huge fine owing to their illegal activity as, for example, Swiss Bank “UBS AG” which paid \$740 million of fine as a result of tax evasion related to the involvement of American customers’ accounts in offshore jurisdictions.¹⁶⁰

Probation is also among other criminal sanctions proposed by the Guidelines for sentencing the corporation.¹⁶¹ It is defined as a sentence handed down to wrongdoers that permits them to stay out of the jail under governmental supervision and obliges them to follow certain requirements and conditions.¹⁶² Generally, the probation lasts for not more than one year, and another condition for imposition of probation is that when a corporation commits a felony the term of probation shall be at least one year.¹⁶³ In the USA main aims of probation

¹⁵⁷ *Id.*

¹⁵⁸ Dudurov O. & Kamenskiy D., *supra* note 102, at 131.

¹⁵⁹ U.S. Const. amend. VIII, stating that “in this case excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”.

¹⁶⁰ Department of Justice, Office of Public Affairs, UBS Enters into Deferred Prosecution Agreement (February 18, 2009), <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>.

¹⁶¹ 2018 Guidelines Manual, *supra* note 143, at §8D1.2.

¹⁶² Hryshchuk V.K., *supra* note 25, at 154.

¹⁶³ 2018 Guidelines Manual, *supra* note 143, at §8D1.2.

differ with regard to the type of offender. For example, the probation of individual criminals is mainly directed at rehabilitation and restriction of legal status whereas the probation of legal entities is designed for prevention of further illegal conduct and compensation.¹⁶⁴

American practitioners recognize two main types of corporate probation – aggressive and passive.¹⁶⁵ Aggressive probation provides for external interference into company's affairs by means of changing its structure, production cycle or business practice with the aim of preventing further illegal activities.¹⁶⁶ Apparently, court can order to change the management, appoint a special supervision board or elaborate special conditions for compensation in case the top management of the company fails to comply with imposed conditions.

One of good examples of aggressive probation can be *Moore v. Allied Chemical Corp.* case where the corporation was convicted for contamination of the Chesapeake Bay and humans by dangerous toxic compound Kepone. Owing to the public pressure and number of criminal proceedings the company was obliged to adopt new environmental-friendly policy, according to which one-third of the top-management's salary depended on the quality of supervision of safety conditions of chemical production. Consequently, the amount of diseases and accidents decreased significantly.¹⁶⁷

This type of probation has been criticized because such external intervention into business affairs of the company is often inefficient and conducted by non-professionals. As a result, shareholder's interests may be damaged, and company may even incur losses.¹⁶⁸

Under the so-called passive or non-aggressive type of probation court imposes an obligation on the corporation to carry out or finance different social programs related to the

¹⁶⁴ Dudurov O. & Kamenskiy D., *supra* note 102, at 134.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Moore v. Allied Chemical Corp.*, 480 F. Supp. 364, 367 (E.D. Va. 1979).

¹⁶⁸ Hryshchuk V.K., *supra* note 25, at 195.

liquidation of consequences of the illegal activity (for example, to create charitable fund or scientific or education center, to support other cultural, educational projects, to promote or finance the foundation of medical institutions, etc).¹⁶⁹ However, some critiques argue that there is a danger of favoritism from the court which will promote its own vision or sympathy towards certain social projects that have to be supported by the corporation.¹⁷⁰

Passive probation can be illustrated in *United States v. Danilow Pastry* where the court imposed the fine corporations and ordered to donate a certain number of fresh baked goods to specified organizations and people in need. The court explained that such criminal sanctions would have the best effect since the corporations are involved in baking business and lead to social benefit.¹⁷¹

Nowadays, number of other sanctions that have mixed nature and do not always possess criminal character are elaborated in the United States. To be more precise, illustration of crime committed by corporation in any media space can be considered as a quasi-sanction. Relevant publications at official web-sites of law enforcement bodies or mass-medias, at social medias are going to create negative image of the company within certain society.¹⁷² For example, on its web-site U.S. Department of Justice regularly posts information regarding corporate crimes and the corporate offenders and imposes obligation on its local offices to do the same.¹⁷³

Any message either at web-site of official bodies or social/mass-medias about the crime committed by the corporations leads to detrimental decrease of business reputation of the offender. In some cases, it can even be more effective rather than other sanctions since it does not have any time framework and it directly effects the management and shareholders of the

¹⁶⁹ Levin M., *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 FORDHAM LAW REVIEW 637, 662 (1984).

¹⁷⁰ *Id.* at 640.

¹⁷¹ *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983).

¹⁷² Dudurov O. & Kamenskiy D., *supra* note 102, at 136.

¹⁷³ *Id.* at 137.

corporation.¹⁷⁴ Due to the loss of business reputation, price of shares is likely to decrease causing loss of capital as well as reduction of compensation for company's management.

In addition, it is worth mentioning that there are number of other but less frequently used sanctions. One of them is the so-called "corporate quarantine" under which the corporation which conducted a crime is forbidden to conduct its business activity for certain amount of time in specified state; governmental procurement contracts of such corporation might be annulled as well as its licenses or orders.¹⁷⁵ Finally, the corporation can be liquidated. However, in practice this sanction is almost not used in the USA. Federal legislation permits to liquidate the corporation for the severest violations of antitrust law. One of the most significant drawbacks is that it causes negative social effects in case of liquidation of legal entity – loss of jobs for great deal of people.¹⁷⁶

Chapter 2 Conclusion

In the 19th century the role of corporation in the US had significantly increased and required the development of new means that would deter and prevent those entities from illegal conduct. The concept of corporate criminal liability became one of these means which illustrates long history of development. Initially, in the US the courts ruled that corporations could be held criminally liable only for affirmative acts. Afterwards, criminal sanctions could be imposed on the corporations for omissions to act. Finally, the courts came to the conclusion that intentional crimes, as well as other types of crimes could be committed by legal entities. Thus, in order to conduct proper investigation the Principles of Federal Prosecution of Business Organizations were enacted. The Principles set forth number of guidelines for prosecutors to provide comprehensive charge. In order not to base the charge mainly on the *respondeat*

¹⁷⁴ Hryshchuk V.K., *supra* note 25, at 210.

¹⁷⁵ Dudurov O. & Kamenskiy D., *supra* note 102, at 138.

¹⁷⁶ *Id.*

superior The Principles list various other factors that have to be taken into account by prosecutors in assessing corporate blameworthiness and other types of alternatives to prosecution. Moreover, within the development of concept of corporate criminal liability the US practitioners elaborated various criminal sanctions imposed on corporations for the illegal conduct illustrated in the Sentencing Guidelines. The US experience in this regard shows flexible approach since the sanctions are not always of criminal nature. Therefore, it can be seen that the development of the US concept of corporate criminal liability has lasted for two centuries and is still evolving, meaning that implementation of this concept by other countries will not lead to instant success.

Chapter 3. Ukrainian experience in the field of implementing the concept of corporate criminal liability

While the US approach to holding legal entities criminally liable has proved to be useful tool in combating negative actions of artificial creatures, it cannot be automatically stated that the same approach would bring the same results in other jurisdictions. Therefore, before learning some lessons from American experience, it is necessary firstly to introduce the historical development of this concept in Ukraine and its ancestors. As in any other jurisdiction, such development has started long time before the industrial revolution. However, due to the fact that Ukraine was a part of Soviet Union where most of legal entities were governmental and there was a perception that state being represented by these entities simply cannot commit crimes led to inheritance of negative attitude towards the corporate criminal liability. Nevertheless, European vector of Ukrainian development stimulated our scholars and practitioners to set aside soviet values and move forward leading to introduction of quasi-criminal liability in 2013. Alongside with the development, it is really important to highlight the reforms which brought this new concept into Ukrainian legal doctrine and essence of such changes. In addition, in order to evaluate the efficiency of the newly introduced corporate criminal liability it is essential to outline the views of scholars and practitioners as well as judicial practice.

3.1. History of the development of corporate criminal liability within the territory of Ukraine

With the development of capitalism and increasing number of corporations, various countries started to implement the concept of corporate criminal liability into their national legal systems in order to enhance their influence on economic processes and to establish prevention measures related to the commitment of crimes by corporations. Therefore, in the

middle of 19th century the possibility of imposition of different criminal sanctions on companies was introduced in a number of countries¹⁷⁷.

However, the situation in soviet countries was totally different. At the end of 19th and the beginning of 20th century representatives of dominative classical school of criminal law in USSR recognized only individuals as the only possible criminal offenders and rejected the concept of corporate criminal liability at all¹⁷⁸. One of the most famous soviet scholars in the criminal law field of that time, Tagancev, argued that state cannot recognize legal capacity of legal entities in the criminal activity field; criminal liability is only caused by either direct or indirect intention of individual, *mens rea*, which cannot be attributed to the corporations as they act only through their representatives¹⁷⁹.

Examples of holding collective creatures (analogues of contemporary legal entities) liable can be found in different historical periods. There are plenty of historic sources which illustrates that criminal offence committed by individual in certain circumstances led to the liability of his family, third persons or even the whole community in which the offender lived¹⁸⁰. In other words, the community was responsible for its members. According to the provisions of legal code of Kievan Rus', Russka Pravda (Justice of Rus' Law), not only the person who committed one of the severest crimes at that time- robbery, but also his wife and children were subject to various punishments – most often they became slaves and their property was confiscated. become slaves and his property was confiscated¹⁸¹. Moreover, the so-called “verv”, a small rural municipality of Kievan Rus', on the territory of which a corpse

¹⁷⁷ Hryshchuk V.K., *supra* note 25, at 33.

¹⁷⁸ *Id.*

¹⁷⁹ TAGANCEV N.S., LEKCHII PO RUSKOMY UGOLOVNOMU PRAVU. CHAST' OBSHCHAYA [Lectures on Russian criminal law. General Part] 89-90 (1888) (Rus).

¹⁸⁰ Hryshchuk V.K., *supra* note 25, at 40.

¹⁸¹ SERGEEVICH V.S., LEKCHII I ISLEDOVANIYA PO DREVNEY ISTORII RUSKOGO PRAVA [Lectures on ancient history of Russian criminal law] 398 (1910) (Rus).

was found, usually was wholly hold liable because of that¹⁸². Eventually, this provision was changed, and the municipality was subject to liability only if its inhabitants did not assist in searching the murder¹⁸³.

During the period of Russian Empire (1721-1917), which at that included most territory of modern Ukraine, there were several resolutions related to the Penal Code of 1845 which imposed criminal liability on whole village as a collective community. More precisely, these provisions were akin to the above-mentioned and proclaimed that during the period of Civil War in case of harboring of deserter or failure to provide assistance in his search, the whole village or county would be held liable¹⁸⁴. Moreover, the Penal Code of 1885 provided for liability of Jewish community in case it helped with harboring of Jewish military deserters. According to the provision related to this kind of crime the community, which harbored a deserter or where a deserter was hiding, was subject to fine in amount of 300 rubles for each deserter in case this community did not reveal and extradite the offender to the authorities of law enforcement bodies¹⁸⁵.

One of the first provisions related to the imposition of criminal liability is Article 661 of the Penal Code of 1885. It is stated that companies involved in the production of salt shall be held liable because of failure to perform management duties within such activity¹⁸⁶.

Even though these examples illustrate collective liability of individuals rather than liability of legal entities, introduction of such provisions is considered as a prerequisite for further scientific discussions about the possibility of implementing the concept of corporate

¹⁸² *Id.* at 243.

¹⁸³ *Id.* at 245.

¹⁸⁴ TAGANCEV N.S., RUSSKOYE UGOLOVNOE PARVO. LEKCII: CHAST' OBSHCHAYA [Russian criminal law. Lectures: general part] 378 (1994) (Rus).

¹⁸⁵ *Id.* at 177-178.

¹⁸⁶ TAGANCEV N.S., Ulozheniye o nakazaniyakh ugovolnykh i ispravitelnykh 1885 goda [Penal Code of 1885] 819 (1908).

criminal liability and the development of this concept itself¹⁸⁷. Tagancev specified that at that time only Penal Code of 1885 of Russian Empire and The Penal Code of the State of New York of 1881 were among very few legal acts in the world that recognized not only individual as criminal perpetrator, but also legal entities as certain exception to this rule¹⁸⁸.

Another period starts from the foundation of the Soviet Union. The soviet criminal law doctrine introduced negative attitude towards the concept of corporate criminal liability which was used by capitalistic states as a tool for combating progressive corporations.¹⁸⁹ Famous Lenin phrase that "...we do not recognize anything "private", and regard everything in the economic sphere as falling under public and not private law. We only allow state capitalism, and as has been said, it is we who are the state"¹⁹⁰ negatively affected the question related to the independent public status of corporations. Moreover, full liquidation of private sector led to the existence of legal entities only as a part of command-administrative system of economic governance¹⁹¹. Consequently, this caused the elimination of the corporate criminal liability as the state could not commit offences using state-owned companies and punish itself simultaneously¹⁹². Therefore, most of Criminal Codes of the Soviet Union, including Criminal Code of Ukrainian RSR 1922, 1927, 1960, were based on the principle of personal liability.

Furthermore, the governments of Soviet Union and its republics in 1961 enacted number of decrees¹⁹³ which restricted the imposition of administrative fines on legal entities and, hence, destroyed the concept of administrative liability of companies¹⁹⁴. However, after some time

¹⁸⁷ TAGANCEV N.S., *supra* note 179, at 90.

¹⁸⁸ *Id.*

¹⁸⁹ Lyhova S., *Yurydychni osoby yak subyekty kryiminalnoi vidpovidalnosti za KK Ukrainy* [Legal entities as subjects of criminal liability in Criminal Code of Ukraine], 4, *Yurydychny Visnyk*, 128, 130 (2014) (Ukr).

¹⁹⁰ V. I. Lenin, *On the Tasks of The People's Commissariat for Justice Under The New Economic Policy*, 36 *LENIN COLLECTED WORKS* 560, 565 (1924), available at <https://www.marxists.org/archive/lenin/works/1922/feb/20c.htm>.

¹⁹¹ Hryshchuk V.K., *supra* note 25, at 45.

¹⁹² *Id.*

¹⁹³ One of them is Decree of Presidium of Verkhovna Rada RSRS 1961 "About further restriction of fine imposition within administrative legal framework".

¹⁹⁴ Hryshchuk V.K., *supra* note 25, at 46

legislator implemented number of administrative wrongs for which legal entity could be held administratively liable.¹⁹⁵

In the following years the development of concept of criminal liability remained at the same level, meaning that soviet states refused to accept it. The idea of holding legal entities criminally liable for committed offences started developing only at the beginning of 90's when post-soviet countries started the transition from command-administrative to market economy system. Ukraine is not an exception.

The first attempt of implementing this concept into the legislation of independent Ukraine started with the discussion in the Verkhovna Rada (Ukrainian Parliament) of the draft of new Criminal Code of Ukraine at 1993. However, scholars, practitioners and Ukrainian parliamentarians did not reach any consensus after three years of discussions regarding the possibility of holding legal entities criminally liable. Therefore, deputies upheld another draft of the Criminal Code of Ukraine which did not contain the institute of corporate criminal liability. The underlying rationale for such decision were arguments against this concept of both academics and legal practitioners which still are relevant nowadays. Even though this topic had been one of the most debated among lawyers, another effort of implementation it into reality was conducted in 2009, 8 years after the adoption of the Criminal Code of Ukraine. The legislator enacted the Law of Ukraine "On Liability of Legal Entities for Corruption-Related Offences"¹⁹⁶ which recognized artificial corporation as a subject of number of corrupt-related illegal acts. However, it was not specified which type of liability – either administrative or criminal - would be applicable to legal entities. From the context of the law it can be concluded that it was a mixture of criminal liability with elements of different administrative law

¹⁹⁵ Nikiforov A.S., *Yuredicheskoye litso kak subyekt prestupleniya* [Legal entity as a subject of a crime], 8 GOSUDARSTVO I PRAVO 1, 19 (2000) (Rus).

¹⁹⁶ The Law of Ukraine "On Liability of Legal Entities for Corruption-Related Offences" (June 9, 2009), No. 1507-VI <https://zakon.rada.gov.ua/laws/annot/en/1507-17/sp:java-:max100>.

measures.¹⁹⁷ Moreover, this law came into force in 2011 and was effective only for 5 days after which it was abolished.

Nonetheless, a successful attempt was made a few years later by adoption of the Euro-Integration Laws Package. The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities”¹⁹⁸ was adopted by Ukrainian Parliament on 23 May 2013 and introduced the previously non-existent concept of quasi-criminal corporate liability in the forms of specific criminal law measures into Ukrainian legislation. The name of the law, which brought serious changes into Ukrainian national criminal legislation, illustrates the aspiration of Ukraine to become a member of European Union.

Moreover, Ukraine has ratified number of international treaties which contain provisions and recommendations regarding corporate criminal liability and related offences and incorporated them into national legal system. Therefore, Ukraine follows its international obligations of establishing standards of corporate criminal liability in its national legislation by adopting related provisions from international treaties.¹⁹⁹ One of such examples is Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism²⁰⁰ which was ratified by Ukraine in 2010.²⁰¹

¹⁹⁷ Demskyi E.F., *Vidpovidalnist' yurydychnyh osib za korupciyni pravoporushennia* [Liability of legal entities for corruption crimes], 7 KRYMINAL'NO-PRAVOVINAUKY 90, 89-94 (2014) (Ukr).

¹⁹⁸ The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities” [23 May 2013], No. 314-VII, < <http://zakon.rada.gov.ua/laws/show/314-18> > accessed 16 October 2018.

¹⁹⁹ Andrushko P.P. *Shchodo Vidpovidalnosti Yurydychnyh Osib za Korupciyni Pravoporushennia u Vyhiadi Zastosuvannia do Nyh Zahodiv Kryminalno-Pravovoho Harakteru* [On Liability of Legal Persons for Corruption Offenses by Application of Criminal Law Measures to Them], 3 BULLETIN OF MINISTRY OF JUSTICE OF UKRAINE 104, 109 (2013) (Ukr).

²⁰⁰ Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, May 16, 2005, C.E.T.S. No. 198, available at <https://rm.coe.int/168008371f>.

²⁰¹ The Law of Ukraine “On Ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”, 12 BULLETIN OF VERKHOVNA RADA OF UKRAINE 81 (2011), https://zakon.rada.gov.ua/laws/show/994_948 accessed 13 January 2019.

According to Article 10 of the above-mentioned Convention every member-state is encouraged to “...adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this 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...”.²⁰²

After the examination of development of the concept of corporate criminal liability it is necessary to move on to its peculiarities.

3.2. The Essence of Amendments that Introduce Corporate Criminal Liability

After the adoption of The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities” The Criminal Code of Ukraine was amended and supplemented with new XIV-1 Chapter, namely “Criminal Law Measures for Legal Persons”.²⁰³ This chapter contains nine articles that regulate the mechanism and legal features of imposition corporate criminal liability on corporations.²⁰⁴

To start with, this chapter initially provides exceptional list of relevant crimes for which a legal entity can be imposed criminal law measures as a result of the actions of its representative employee who acted on its behalf and in its interest. According to Article 96-3 of the Criminal Code of Ukraine these offences are the following²⁰⁵:

1. Money “laundering” or legalization of criminally obtained money and other property (illustrated in Article 209 of the Criminal Code of Ukraine).

²⁰² *Id.*

²⁰³ Criminal Code of Ukraine, *supra* note 3.

²⁰⁴ Kamensky D., *Introducing Corporate Criminal Liability in Ukraine: Terra Incognita*, 46(1) STETSON L REV 89, 99 (2016).

²⁰⁵ Criminal Code of Ukraine, *supra* note 3, Art. 96.

2. The use of proceeds from illicit trafficking of narcotic drugs, psychotropic substances, their analogues, precursors, toxic or drastic substances or toxic and drastic drugs (illustrated in the Article 306 of the Criminal Code of Ukraine).

3. Bribery of a private legal entity's official regardless of the organizational type of entity, (illustrated in the Part 1 and 2 of Article 368-3 of the Criminal Code of Ukraine); bribery of a public servant (auditor, notary, etc.) (illustrated in the Part 1 and 2 of Article 368-4 of the Criminal Code of Ukraine); offering or promising of giving a bribe to a public official (illustrated in the Part 1 and 2 of Article 369 of the Criminal Code of Ukraine); abuse of power (illustrated in Article 369-2 of the Criminal Code of Ukraine).

4. Crimes related to the terrorism: terrorism acts, involvement in the commission of a terrorist act; public instigation of commitment of terrorist act, the creation of terrorist group or organization, financing terrorism, facilitation of terrorist activity (illustrated in the Art. 258, 258-2 of the Criminal Code of Ukraine correspondingly).

5. Some other crimes such as: actions aimed at forcible change or overthrow of the constitutional order (Article 109 of the CCU); violation of territorial integrity and sovereignty of Ukraine (Article 110 of the CCU); sabotage (Article 113 of the CCU); hostage-taking (Article 147 of the CCU); violation of the provisions related to the national referendum (Article 160 of the CCU); creation of illegal military armed groups and forces (Article 260 of the CCU); stealing, appropriation or extortion of firearms, ammunition, explosives or radioactive material, or obtaining them by fraud or abuse of office (Article 262 of the CCU); war propaganda (Article 436 of the CCU); war planning or its preparation (Article 437 of the CCU); genocide (Article 442 of the CCU); criminal offences against internationally protected persons and institutions (Article 444 of the CCU); mercenary business (Article 447 of the CCU).

Consequently, after committing or being involved in any of these above-listed crimes, legal entities shall be penalized by criminal law measures exhaustively named within XIV-1 Chapter of the Criminal Code of Ukraine. Ukrainian legislator entitled court to impose only three types of such criminal law measures on legal entities: fines, confiscation of the property and forced liquidation.²⁰⁶ Two types of these measures, namely fine and forced liquidation can be ordered by court as separate penalties on a stand-alone basis. However, confiscation of the property can only be imposed in connection with forced liquidation.²⁰⁷ Moreover, the Criminal Code obligate the legal entity to pay full compensation to victims for damage the entity caused and to return any bribe or other unlawful advantage it obtained as a result of criminal activity.²⁰⁸

According to one commentator, the principle of the individualization of criminal law measures imposed on legal entities can be found in the Article 96-10 of the Criminal Code of Ukraine.²⁰⁹ Basically, it means that the consideration of the court about imposition of certain type of criminal law measure shall be based on the degree of severity of the criminal offence committed by the representative of legal entity, criminal intent, amount and character of damages, amount and type of received bribe or unlawful advantage and measures provided by legal entity or its representatives for prevention of the crime.²¹⁰

Apparently, the first prerequisite for the imposition of criminal law measures on legal entity is determination of severity of committed offence. Ukrainian legislator classified criminal offences on several types basing on the criteria of severity: minor offences, medium severity offences, severe offences, specifically severe offences.²¹¹ Therefore, the court initially

²⁰⁶ *Id.* Part 1, Art. 96-6.

²⁰⁷ *Id.* Part 2, Art. 96-6.

²⁰⁸ *Id.* Part 2, Art 96-6.

²⁰⁹ Yashchenko A.M., *Zastosyvannia zaxodi kryminalno-pravovoho harakteru shchodo yurydychnyh osib: teoretychnui aspekt* [Imposition of criminal law measures on legal entities: theoretical aspect], 7 *NAUKOVYI VISNYK MIZHNARODNOHO HUMANITARNOHO UNIVERSYTETU* 199, 199 (2014) (Ukr).

²¹⁰ Bazhanov B.V., *Deiaki problemy kryminalnoi vidpovidalnosti yurydychnyh osib v Ukraini* [Some aspects of corporate criminal liability in Ukraine], 9 *PRAVO I SUSPILSTVO* 687, 689 (2017) (Ukr).

²¹¹ Criminal Code of Ukraine, *supra* note 3, Art. 12.

has to establish the type of committed offence listed in the Article 96-3 of the CCU. Despite the fact that legislator has separated other prerequisites such as amount and character of damages, amount and type of received bribe or unlawful advantage from severity of criminal offence, they shall be determined in conjunction with each other. As was stated by Yashchenko, these features may not come separately as they are crucial in determination of the severity of committed crime.²¹² Furthermore, besides the severity of the criminal offence, court shall take into account other circumstances which characterize legal entity as a social creature and the subject of criminal relationships²¹³ such as measures provided by legal entity or its representative for prevention of the crime. Having examined the provisions of the Law of Ukraine “On Prevention of Corruption”²¹⁴, it can be concluded that such prevention measures mainly include timely granting of information provided by legal entity and its representatives to competent governmental bodies.

Apart from that, the Criminal Code of Ukraine provides specification regarding the types of legal entities which can be held criminally liable. Criminal law measures rules are applicable to private-owned and governmental companies as well as state and municipal agencies.²¹⁵ Related provision further explains that state-owned entities cannot be penalized for corruption-related crimes and money laundering but only for remaining offences.²¹⁶ The last part of the Article 96-4 states that in case the government owns at least 25 percent of company’s stock or has considerable control over such legal entity, therefore, such legal person is held civilly liable for all the received illegal proceeds resulting from its employee’s crime and obligated to fully retribute such proceeds.²¹⁷

²¹² Yashchenko A.M., *supra* note 209, at 200.

²¹³ Kuts V.M., *Problemy kriminalnoi vidpovidalnosti* [Problems of criminal liability] 116 (2015) (Ukr).

²¹⁴ The Law of Ukraine “On Prevention of Corruption” [10 October 2014], №1700-VII, available at <https://zakon.rada.gov.ua/laws/show/1700-18>, last accessed 13 January 2019.

²¹⁵ Criminal Code of Ukraine, *supra* note 3, Art. 96-4.

²¹⁶ *Id.* Part 2.

²¹⁷ *Id.* Part 3.

Usually, fine is considered to be a default penalty used by courts in most cases. The amount of fine depends on the type of severity of committed crime by legal entity or its employees. In case of minor offence such entity shall be punished by fine from 5 to 10 thousands of tax-free minimum incomes²¹⁸, for medium severity crimes – from 10 to 20 thousands of tax-free minimum incomes, for severe crimes – from 20 to 50 thousands of tax-free minimum incomes and for specifically severe crimes- from 50 to 70 thousands of tax-free minimum incomes.²¹⁹ In case legal entity is involved into the bribery crime, the amount of fine determined by the court shall be as twice as amount of bribe or up to twice the amount of illegally derived profits.²²⁰ However, in case of committing number of serious crimes mainly related to the national security of Ukraine (for example, acts against the sovereignty and territorial integrity of the State, different acts of terrorism, planning war) and to the restraint of freedom (for example, kidnapping) the court will order a liquidation of legal entity involved in these crimes.²²¹

Although the number of crimes related to illegal activity of corporation and its agents is relatively broad, scholars still debate about the possibility of extension of such list. Ukrainian scholar, Kamensky, in his article dedicated to the introduction of corporate criminal liability in Ukraine argues that “[i]t remains unclear why the Ukrainian legislature has focused on these crimes while ignoring the crimes that are widely committed with corporate authorization and for the benefit of organizations, such as tax evasion, smuggling, securities violations, and crimes committed against justice or to undermine official investigative proceedings.”²²²

²¹⁸ As of 01.01.2019, the tax-free minimum income is 17 hryvnias (Ukrainian national currency).

²¹⁹ Criminal Code of Ukraine, *supra* note 3, Part 2 Art. 96-7.

²²⁰ *Id.*

²²¹ Fris P.L., *Do pytan'ia pro kryminalny vidpovidalnist yurydychnoi ysoby* [To the question of criminal liability of legal entity], 2, YURYDYCHNUI VISNYK 35, 36 (2015) (Ukr).

²²² Kamensky D., *supra* note 204, at 99-100.

Evidently, the introduction of criminal law measures which can be imposed on legal entities has also brought many procedural changes into the Criminal Procedure Code of Ukraine. The Code was enriched with number of provisions related to the commencement and termination of criminal investigation of crimes committed by corporations, initiation of criminal charge, to the rights and obligations of representative of legal entity involved in criminal activity, the possibility of providing guilty pleas and the most important - the procedure of imposition of criminal law measures on legal entities.²²³

3.3. Scientific approaches to corporate criminal liability in Ukraine

The possibility of imposition criminal liability on legal persons has always been a highly debated issue not only in Ukraine, but also by scientists and practitioners all over the world. Therefore, there is a great deal of scientific works of different formats, sizes and levels of plausibility related to this concept. Even though the solution for the problem of corporate criminal liability had been de facto introduced in Ukraine in the form of quasi-criminal liability, it still is one of the most controversial issues in the national legal doctrine.²²⁴ The position of two opposing groups of Ukrainian commentators – those who support and those who oppose criminal liability on legal entities - is analyzed in this sub-chapter.

As regarding the opponents, one of the most famous Ukrainian legal scholars, Tacy, criticized the concept of corporate criminal liability stating that “[b]asing on the general notions of the Criminal Code of Ukraine legal entity can not be held criminally liability.”²²⁵ In his book²²⁶ he referred to certain provisions as, for example, Article 11 of the CCU which states that “[a] criminal offense shall mean a socially dangerous culpable act (action or omission)

²²³ Criminal Procedural Code of Ukraine [13 April 2012], No. 4651-VI <<https://zakon.rada.gov.ua/laws/show/4651-17>> accessed 16 October 2018.

²²⁴ DUDUROV O.O. & HAVRONIUK M.I., KRYMINAL'NE PARVO: NAVCHALNYI POSIBNYK [Criminal Law: Tutorial] 390 (2014) (Ukr).

²²⁵ BAZHANOV V.V., KRYMINA'LNE PRAVO UKRAINY: ZAHAL'NA CHASTYNA: PIDRUCHNYK [Criminal law of Ukraine: General Part: book] 480 (2005) (Ukr).

²²⁶ *Id.*

prescribed by this Code and committed by offender.”²²⁷ Moreover, the CCU does not include legal entity into the notion of “offender” referring it only to individual persons.²²⁸ Beside this, Article 2 of the CCU defines commission of crime by person as the only ground for criminal liability²²⁹, without stating any other possible types of offenders.

Another scholar notes the nature of legal entity pointing out that it is “a special civil form of realization of interests of its founders – individual persons”²³⁰ and further explains that any action of corporation is conducted by its governance bodies which consist of people who define the will of such corporation by conducting certain activities which lead to certain legal consequences.²³¹ Therefore, such juristic persons do not have the ability to think and act with intent.²³² Furthermore, recognition of legal entity as probable criminal offender and opportunity of holding it criminally liable is contrary to the one of the main criminal law principles – principle of individual liability.²³³

According to another opposing opinion there is no necessity in subjecting corporations to criminal sanctions since there is already a great deal of effective civil, administrative and financial measures in our legislation - “[d]ulution of criminal law by provisions of other laws might lead to its liquidation not only as an independent law field, but also as a legal course and convert it into the collection of diverse provisions which would be difficult to enforce in

²²⁷ Criminal Code of Ukraine, *supra* note 3, Art. 11.

²²⁸ *Id.* Art. 18.

²²⁹ *Id.* Art. 2, stating that “[c]ommission by a person of a socially dangerous act which contains all elements of the crime and prescribed by this Code is ground for criminal liability”.

²³⁰ Ohman O.V., *Kharakterystyka sub'yekta zlochynu za kruminal'nyh zakonodavstvom Ukrainy* [Characteristic of subject of crime according to Ukrainian criminal legislation], 2(18) UNIVERSYTETS'KI ZAPYSKY 247, 251 (2006) (Ukr).

²³¹ *Id.* at 252.

²³² DUDUROV O.O. & HAVRONIUK M.I., *supra* note 224, at 445.

²³³ MYCHKO N.I., UGOLOVNOYE PRAVO UKRAINY. OBSHCAYA CHAST': TEORIYA, SKHEMI, TABLICY, SLOVAR' TERMINOV: YCHEBNOE POSOBIYE [Criminal Law of Ukraine. General Part: theory, schemes, charts, vocabulary: scientific work] 550 (2006) (Rus).

combating the criminality.”²³⁴ Moreover, such approach would not increase the effectiveness of criminal law measures but would rather decrease their social value and efficacy.²³⁵

The fragmentary solution to the concept of corporate criminal liability, which was introduced in 2013 in Ukraine, is criticized and will be criticized in future by many academics. Despite the fact that the possibility of imposition of criminal liability on legal entities has been discussed since the independence, “[i]t is quite difficult to accept the fact that such concept is implemented at all as it does not “fit in” Ukrainian criminal legal doctrine.”²³⁶ The author of this statement specifically mentions the problems related to the recognition of corporations as subjects of crime (offenders) such as existence of intent, complicity (the opportunity of corporation’s willful co-operation with other types criminal offenders such as individual persons and other legal entities) and the principles of sentencing legal entities.²³⁷

Also, it is notable that the main scientific expertise department of Ukrainian parliament issued a mostly negative report regarding the framework for criminal law measures when they were introduced in a draft law.²³⁸ It brought another portion of skepticism related to the corporate criminal law provisions to both Ukrainian scholars and practitioners.²³⁹ First of all, the report illustrated contradiction of the draft of the law with international legislation, which does not impose an obligation on establishing the criminal liability for legal entities, but rather use national legal measures to combat related crimes. The report refers to Article 18 of the

²³⁴ Miheyev R.I., *Ugolovnaya otvetstvennost’ yuredicheskikh lits: za i protiv: monografiya* [Criminal liability of legal entities: pros and cons], (monography), IZDATEL’STVO DALNECOSTOCHNOGO INSTITUTA, 120, 16 (1999) (Rus).

²³⁵ *Id.*

²³⁶ Lyhova S., *supra* note 189, at 128.

²³⁷ *Id.* at 129.

²³⁸ Висновок Головного Науково-Експертного Управління Верховної Ради України на Проект Закону України “Про Внесення Змін до Деяких Законодавчих Актів України щодо Виконання Плану Дій щодо Лібералізації Європейським Союзом Візового Режиму для України Стосовно Відповідальності Юридичних Осіб” [Report of the Chief Scientific Expert Department of Verkhovna Rada of Ukraine on the Draft Law of Ukraine, “On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize the European Union Visa Regime for Ukraine, on Legal Persons’ Liability”], http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46901 (hereinafter - Report).

²³⁹ Kamensky D., *supra* note 204, at 16.

Criminal Law Convention on Corruption which states that “[e]ach Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering.”²⁴⁰ Therefore, the report of the proposed bill illustrates how Ukrainian legislator tried to implement the concept of criminal law measures which is not balanced with international legislation. Moreover, the report supports one of the main arguments of opponents of the criminal liability of legal entities, stating that such amendments would violate certain Ukrainian criminal law principles, namely the principle of guilty liability and the principle of personal liability, referring to the absence of a guilty mind of corporations.²⁴¹ In addition, the report again mentioned the necessity to enforce already existing administrative penalties, in particular, those related to the regulation of tax, custom, environmental laws, for legal person’s law violations instead of criminal law measures.²⁴² Finally, the report concluded that such proposed legislation would possibly lead to the negative effect on the economy system and business climate since there is still a low level of legal culture, high level of corruption and unfavorable sociopolitical conditions.²⁴³

On the other hand, arguments of proponents of implementing the criminal liability of legal entities are specular to those who rejects this idea. Pro-western vector of Ukrainian development means integration with European institutions which requires essential compliance of domestic legal doctrine with European standards.²⁴⁴ Hence, Ukrainian government shall implement legal concepts, including corporate criminal liability elaborated by developed countries to enhance its domestic legal order. This point of view is supported by Shevtsova,

²⁴⁰ Council of Europe, Criminal Law Convention on Corruption, C.E.T.S. No. 173 (Jan. 27, 1999), available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5>.

²⁴¹ Report, *supra* note 238.

²⁴² *Id.*

²⁴³ Kamensky D., *supra* note 204, at 16.

²⁴⁴ Hryshchuk V.K., Pasieka O.F., *supra* note 25, at 315.

who states that “experience of not only civil law countries (France, Denmark, Sweden) but also of common law countries (US, Great Britain) demonstrates the opportunity of effective influence on criminogenic situation by introducing criminal liability of legal entities.”²⁴⁵

Additionally, some scholars promote the idea that legal entities do possess criminal intent, explaining that such intent is equally related to both individual and juristic persons, and, hence, they can be guilty. For instance, as was illustrated in one scientific work “[a] corporation do have guilt which is represented by the guilty behavior of its employees, officers and directors during activities conducted within the scope of their duties.”²⁴⁶ Moreover, Nikiforov pointed out that principal grounds for acknowledgement of legal entity as a criminal offender are specific causality and guilt. He mentions that juristic person delegates its powers to special governance body, which provides strategic development and makes business decisions; and the behavior of employees which is based on such decisions and decisions themselves are behavior and decisions of legal entity which lead to legal consequences.²⁴⁷

As can be seen from the statements of opponents – there are a lot of concerns regarding the appropriateness of implementation of the concept of corporate criminal liability into domestic legal doctrine as it would be contradictory to basic Ukrainian criminal law principles. However, there is a polar opinion along with which criminal liability of legal entity can supplement and “[c]o-exist” with the principle of personal liability, according to which only a person who commits a crime can be held criminally liable and be subject to punishment.²⁴⁸ Furthermore, Hryshchuk even argue that any legal entity should be considered as criminal

²⁴⁵ Shekhovtsova L.I., *supra* note 11.

²⁴⁶ Bohdanov E.V., *Sutnist' i vidpovidal'nist' yurydychnoyi osoby* [The nature and liability of legal entity], 10 DERZHAVA I PRAVO 97, 99 (1997) (Ukr).

²⁴⁷ NIKIFOROV A.S., YUREDICHESKOYE LITSO KAK SUBYEKT PRESTUPLENIYA I UGOLOVNAYA *otvetsvennost'* [Legal entity as a subject of criminal offense and its criminal liability]17 (2002) (Rus).

²⁴⁸ Bazhanov B.V., *supra* note 210, at 145.

offender the same way as individuals are and, therefore, there is no need to supplement or “co-exist” with the principle of personal liability since concept of corporate liability is its subset.²⁴⁹

As one scholar correctly noted “[t]he implementation of concept of corporate criminal liability into domestic legal doctrine is a problematic and time-consuming process which requires rethinking of existing criminal legal principles, namely the criminal intention and individualization of criminal punishment, and development of new principles which will follow contemporary demands of criminal law legislation.”²⁵⁰ Given that US experience in this field, it can be concluded that it is a long and onerous process which always has both proponents and opponents but at the end it contributes to the development of society which is ready to prevent and combat negative activities of corporations. Legislative acts on criminal liability of legal entities is just first step in introduction of this concept in Ukraine, which requires further amendments to improve the law enforcement.

3.4. Case analysis

Despite the fact that quasi-criminal liability has been implemented in Ukrainian national legislation for more than five years, still there are very few court decisions regarding the imposition of criminal law measures on legal entities that committed or were involved in criminal activity. This Chapter provides analysis of the cases, as well as addresses certain issues related to the criminal law measures.

Most of the cases are related to the confiscation of legal entity’s property that was engaged in crimes related to the money laundering, bribery of financing terrorists and pro-Russian separatists’ groups at the Eastern part of Ukraine. Particularly, the Appellate Court of Zaporizhya Region held that the manager of the company intentionally falsified the documents

²⁴⁹ Hryshchuk V.K., Pasioka O.F., *supra* note 25, at 147.

²⁵⁰ Kashkarov O.O., *Peredumovy reformuvannia Kryminal’noho kodeksu Ukrainy ta stvorennia zakonodavstva pro kruminal’ni prostupky* [Prerequisites for Criminal Code of Ukraine reformation and development of misdemeanor legislation], 1 FORUM PRAVA 236, 238 (2009) (Ukr).

related to the sale of coal and the proceeds of such sale were used for financing terrorists of Donetsk's People Republic.²⁵¹ As a result, company, being charged for financing terrorism, was correctly prosecuted and penalized with confiscation of its property due to illegal actions of its management.²⁵²

Unfortunately, my research within the national court ruling database revealed that there is only one case when the fine was imposed on the legal entity due to illegal actions of its employees. According to the decision of the Zhovtnevyi District Court of Mariupol City of Donetsk Region, the director of the company "Karneol", which provides retail and logistic services, wanted to avoid different weight inspections of company's trucks and any related liability. Usually, trucks of his company were overloaded and according to the set statutory standards the weight limit was exceeded and damaged roads and highways.²⁵³ Therefore, the director of "Karneol" turned to the officer of Security Service of Ukraine with the proposition of a monthly bribe in lieu of favorable treatment with respect to his affairs, particularly with the aim to avoid inspection of his trucks conducted by the Security Service of Ukraine. The court convicted the director of "Karneol" to fine in the amount of 10000 UAH for giving a bribe, as well as imposed the fine on the company in the amount of 20000 UAH because the illegal actions were conducted by the director with the aim of benefiting the company.²⁵⁴

Although it has already been five years since the introduction of criminal law measures for legal entities, still there is no single case in the national court ruling database, whereby the legal entity is convicted to the liquidation, as one of the three possible "punishments" for such entities. At the same time, Kamensky in his work analyzes the same problem related to lack of

²⁵¹ The Decision of the Appellate Court of Zaporizhzhya Region dated 31 March 2015 in case No. 235/918/15-к; <http://www.reyestr.court.gov.ua/Review/48561181> accessed 11 March 2019.

²⁵² *Id.*

²⁵³ The Decision of Zhovtnevyi District Court of Mariupol City of Donetsk Region dated 01 September 2016 in case No. 263/9687/16-к; <http://www.reyestr.court.gov.ua/Review/60185433> accessed 11 March 2019.

²⁵⁴ *Id.*

organizational liability tools and its rare usage by courts and argues that “such uncertainty is temporary, as prosecutors will become more determined and zealous in their pursuit of corporate wrongdoers, while the judiciary will become more confident in using the new tools of statutory interpretation to bring corporate wrongdoers to justice”.²⁵⁵

Hence, taking into account the US experience, it is necessary to implement number of guidelines for prosecutors and to provide certain amendments into Ukrainian national legislation to make criminal law measures a powerful tool in combating illegal conduct of legal entities.

Chapter 3 Conclusion.

The development of the concept of corporate criminal liability within the territory of Ukraine can be traced back to Kievan Rus. The possibility of imposition of criminal sanctions on legal entities was refused, as well as accepted during different periods of time. Having inherited Soviet principles, Ukraine at the beginning of its independence was reluctant to develop the concept of corporate criminal liability. It was only in 2013 when the concept was finally implemented into Ukrainian national doctrine. It brought number of amendments into various legal acts, in particular into the Criminal Code of Ukraine. The newly introduced XIV-1 Chapter is dedicated to the criminal law measures imposed on corporations. It lists types of entities which can be prosecuted and convicted, number of crimes which corporation can commit or be involved and three main penalties, namely the fine, confiscation and liquidation. However, such amendments brought serious discussions among scholars and practitioners since many of them are of opinion that the concept contradicts with many of national legal principles. Moreover, it has already been five years since the concept has been introduced and there are only few cases and convictions for illegal conduct of legal entities. It illustrates that

²⁵⁵ Kamensky D., *supra* note 204, at 108.

Ukrainian prosecutors are not properly “equipped” with procedural measures (in Ukrainian case – with discretionary powers) and that, evidently, number of further changes have to be introduced in this respect in order to eliminate the above-mentioned contradiction.

Chapter 4. Lessons to be learnt

In general, the introduction of the concept of corporate criminal liability illustrates intention of Ukrainian society to follow international model which help to solve issues of illegal conduct of corporation and to ensure the rule of law. However, since this concept has been recently implemented into our legislation, it has number of drawbacks, which have to be solved, and American experience can serve as a good basis for necessary solutions. Therefore, this Chapter provides number of recommendations as how to address these issues by introducing further improvements that can be used by Ukrainian legislator.

Comparative analysis of Ukrainian legislation related to the corporate criminal liability shows that even though there were number of amendments in the Criminal Code and the Criminal Procedural Code, they still can not reach out all practical issues that may arise. Consequently, such situations are not likely to have one unambiguous way of solution.

To start with, despite the fact the criminal liability was de-facto presented in Ukraine in the form of quasi-criminal liability represented by the criminal law measures, this concept is still highly debated owing to its contradiction to national legal doctrine. As was described in the previous Chapter, the CCU does not refer to legal entity as to the possible criminal perpetrator.²⁵⁶

Moreover, some authors support such position of legislator stating that possibility of holding a corporation criminal liable as opposed to imposition of criminal law measures would be contradictive to number of criminal law principles, namely the principle of personal and of guilty liability.²⁵⁷ Kuts states that such criminal law measures shall not be considered as

²⁵⁶ Criminal Code of Ukraine, *supra* note 3, Art. 2,11.

²⁵⁷ See *supra* note 234.

criminal liability since legal entities cannot understand the essence of such liability and feel its consequences due to their artificial nature and absence of guilty mind.²⁵⁸

Such position cannot be followed for several reasons. Firstly, it is necessary to examine one of the proposed criminal law measures for legal entities. Provisions of the CCU ignore the legal nature of fine and defines it not as punishment but rather as a “criminal law measure” which is not the same as former notion. However, as Khavronyuk correctly points out, the fine pursues aims of punishment and shall be considered as such.²⁵⁹ Secondly, such gaps in the legislation may equip attorneys with powerful tool to abuse such situation in favor of prosecuted corporation and as a result avoid justice. This leads us to the conclusion that basing on the American experience, particularly on number of judicial precedents, Ukrainian legislator shall provide further amendments into the criminal legislation to introduce full corporate criminal liability rather than quasi-criminal. Particularly, Article 2, and 11 of the CCU shall be modified and include notion of legal entity as one of criminal perpetrators.

Moreover, even though the Criminal Procedural Code regulates general aspects of corporate’s prosecution, still the absence of specific instructions within the General Prosecution Office of Ukraine or Ministry of Justice of Ukraine only worsens this situation. As opposed to American approach, Ukrainian legislator dictates imperative method of legal regulations and do not confer prosecutors with discretionary authorities. It would be great to follow approach of the US Principles of Federal Prosecution of Business Organizations in this regard which grants number of discretionary powers for prosecutors during the investigation.

²⁵⁸ Kuts V.M. Vid Dykhotomii «Zlochyn – Pokarannia» Do Kryminalnoho Pravoporushennia Ta Kryminalno-Pravovykh Zasobiv Reahuvannia [From Dichotomy "Crime - Punishment" To A Criminal Offense And Criminal-Law Response] 53-55 (as part of conference “New tasks and directions of the development of legal science in the XXI century”) (15-16 November 2013).

²⁵⁹ Shekhovtsova L.I., *supra* note 11, at 393-394.

Particularly, the General Prosecution of Ukraine shall enact instructions for prosecutors to entitle them with number of discretionary powers in order to evaluate the possibility of criminal prosecution of corporation. Consequently, this would decrease costs and time of investigation in case prosecutor found it irrelevant to start proceeding on the grounds of his evaluation. For instance, Ukrainian prosecutors shall have to possibility of taking such decision basing on the same facts as described in the Principles of Federal Prosecution of Business Organizations in the US - whether the corporation was interested in conducting illegal action using its employees; corporation's willingness to cooperate with law enforcement bodies to haste the proceedings; corporation's unwillingness to cooperate and further actions which only slow down the investigation; etc.

In Ukrainian reality companies and their management are not either interested or stimulated by Ukrainian legislator to independently detect illegal activity within such entity and inform law enforcement bodies about such violations. This issue does not find any solutions since there is no regulations enacted either by the General Prosecution of Ukraine or the Ministry of Justice of Ukraine. In my opinion, this is the cause not only of the gaps in the legislation, but also, and mostly, of soviet inheritance. The legal doctrine of Soviet Union provided severe criminal sanctions for individual offenders, which did not rely on the level of cooperation between the offender and investigation, leading to total reluctance towards such cooperation.

Therefore, the US experience plays important role for further improvements for Ukrainian concept of corporate criminal liability. Legal entities in Ukraine shall be obliged to implement adequate and effective compliance programs which are used by American corporations.

Another problematic feature which is typical not only for the sphere of corporate criminal liability but rather for the whole system of criminal law in Ukraine is the absence of effective measures which would prevent and deter criminal offences as well as quickly remedy consequences of such illegal actions.

Ukrainian state does not eliminate reasons and conditions under which management of big companies commit crimes. One of the recent examples is state joint-stock company “Khlib Ukrainy” which is leading player in Ukrainian grain market. The main aim of the company is to supply other smaller companies, retailers and people with grain and bread products. Moreover, the company provides services related to the storage, processing and selling other agricultural products. According to the interlocutory court decisions the CEO of state joint-stock company “Khlib Ukrainy”, Poliakov, is charged with receiving the bribe in the amount of 100.000 UAH (Ukrainian national currency) for granting private companies the right to rent state owned property of the company.²⁶⁰ Moreover, it is worth stating that the previous CEO of the “Khlib Ukrainy” is also charged with bribery related to the renting state owned property and the trial is still ongoing.²⁶¹

Another related example is Ukrainian “United Mining and Chemical Company” (hereinafter- “UMCC”). The director of the company is prosecuted for elaborating the scheme according to which titanium ores were sold for undervalued prices through related and controlled foreign companies during 2014-2016 years. As a result, state Ukraine suffered damages in the amount of almost 13 million US dollars. In order to prevent the conduct of such illegal actions, the court ordered to remove the director and prohibited the cooperation with

²⁶⁰ The award of the Supreme Court dated 05 February 2019 in case No. 757/54106/18-к; <http://www.reyestr.court.gov.ua/Review/79684860> accessed 02 March 2019.

²⁶¹ The petition of the investigator, the prosecutor, the parties to the criminal proceedings dated 03 October 2018 in case No. 1-кк/711/3309/18; <http://www.reyestr.court.gov.ua/Review/76926479>.

two related foreign companies.²⁶² Despite the fact that there are criminal proceedings against the former director, the newly appointed director of the “UMCC” pleaded to dismiss such prohibition in order to continue the conduct of the illegal actions.²⁶³

Therefore, there is a necessity to introduce aggressive probation, which is popular in the US, into Ukrainian legislation in order to provide courts with the possibility to appoint impartial and fair management of the companies directors of which were involved in criminal activities. Moreover, court can order to appoint a special supervision board or elaborate special conditions for compensation in case the top management of the company fails to comply with imposed conditions.

Chapter 4 Conclusion

This Chapter focused on certain problems of the concept of corporate criminal liability in Ukraine. Basing on the US approach, it proposed certain substantial implications and amendments into Ukrainian legislation. First of all, notion of legal entity shall be included into number of criminal provisions related to the subject of the crime. Secondly, it is necessary for Ukrainian legislator to implement procedural guidelines for prosecutors to enhance the investigation. Moreover, it is important to enrich criminal law measures imposed on corporations with probation, as well as to oblige Ukrainian companies to enact and follow compliance programs. These amendments will improve the legislation in the sphere of corporate criminal liability and enhance prosecutors with discretionary powers.

²⁶² The petition of the investigator, the prosecutor, the parties to the criminal proceedings; <http://www.reyestr.court.gov.ua/Review/64525748> (detailed information is encrypted pursuant to Ukrainian law).

²⁶³ *Id.*

Conclusion

The concept of corporate criminal liability is one of the means which ensures the rule of law. The corporate criminal liability determines to what extent legal entity can be held criminally liable for acts and omissions of its employees. Despite its contradictory nature, most of the countries follow the approach of its implementation into national legal system since it has beneficial effect on the economy, as well as on the deterrence and prevention of further misconduct of the legal entities. The concept itself has a long history during which various attribution theories have been developed and followed by different jurisdictions. Although these theories are distinct in many aspects, their main essence is that a legal entity can be subject to criminal sanctions. Still, there is an ongoing debate about appropriateness of existence of criminal liability for misconduct of legal entities alongside with other types of liability. Nevertheless, the criminal liability for corporations is likely to achieve the greatest effect with respect to deterrence and prevention of further corporate wrongs comparing to other types of liability.

Even though Ukraine and the US belong to different legal families, both of them have provisions related to the corporate criminal liability.

Undoubtedly, the US experience in this field is wealthier since the first real attempts to hold legal entity liable for actions of its employees has started in the 19th century. Initially, there was a perception that a corporation could commit only limited number of crimes, i.e. those related to nuisance. However, with the development of judicial practice this list has been expanded to almost all types of crimes for which the legal entity can be held liable. During two-century long development of the concept, comprehensive guidelines have been developed for those who play main role in accusation of the corporations and proving them to be guilty – for the prosecutors. The Principles of Federal Prosecution of Business Organizations provide prosecutors with number of discretionary powers that ensure fast and comprehensive

investigation. Moreover, alongside with three possible criminal sanctions for corporations offered by Sentencing Guidelines, the US elaborated number of other quasi-criminal measures that contribute to further prevention of criminal activities of legal entities.

Owing to inherited soviet values in Ukrainian legal society, the concept of corporate criminal liability has only been recently implemented into national legal doctrine. Still, number of scientists and practitioners argue about its contradiction to Ukrainian legal system. Furthermore, despite the fact that the Criminal Code of Ukraine has been expanded by introducing new Chapter related to the criminal law measures, number of provisions shall be amended in order to be consistent with national legal doctrine. A few criminal cases where corporations were convicted for illegal actions of its employees illustrates that Ukrainian prosecutors are not “equipped” with all necessary tools for proper accusation.

Therefore, the US experience shall serve as a great source for further improvements of concept of corporate criminal liability in Ukraine. The types of measures used for deterrence and prevention of corporate misconduct should be enriched by probation, different compliance programs within legal entities, as well as implementation of guidelines for Ukrainian prosecutors granting them discretionary powers. Moreover, the notion of legal entity shall be included in the Article related to the criminal perpetrator within the Criminal Code of Ukraine.

Of course, the process of reformation is time consuming and it is impossible to predict whether it is going to be successful. However, such reforms are inevitable in Ukrainian realities since the concept of the corporate criminal liability has not led to excellent results due to its discrepancies which could be solved basing on the US experience.

Bibliography

Laws, legislation and related materials

1. 2018 Guidelines Manual (United States Sentencing Commission), available at <https://www.ussc.gov/guidelines/2018-guidelines-manual>.
2. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, May 16, 2005, C.E.T.S. No. 198, available at <https://rm.coe.int/168008371f>.
3. Council of Europe, Criminal Law Convention on Corruption, C.E.T.S. No. 173 (Jan. 27, 1999), available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5>.
4. Elkins Act (Mann-Elkins Act amendment to the Interstate Commerce Act).
5. Justice Manual, Section 9: Criminal (2018), available at <https://www.justice.gov/jm/title-9-criminal>.
6. Law Commission Legislating the Criminal Code Involuntary Manslaughter (Law Com No 237, 1996) at [6.27].
7. Section 35(1) of South Africa's Compensation for Occupational Injuries and Diseases Act 130 of 1993.
8. The Decree of Presidium of Verkhovna Rada RSRS 1961 "About further restriction of fine imposition within administrative legal framework".
9. The Law of Ukraine "On Liability of Legal Entities for Corruption-Related Offences" (June 9, 2009), No. 1507-VI <https://zakon.rada.gov.ua/laws/not/en/1507-17/sp:java-max100>.
10. The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime

- for Ukraine Regarding Liability of Legal Entities” [23 May 2013], No. 314-VII, <
<http://zakon.rada.gov.ua/laws/show/314-18>> accessed 16 October 2018.
11. The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Implement the Action Plan for the European Union Liberalisation of the Visa Regime for Ukraine Regarding Liability of Legal Entities” [23 May 2013], No. 314-VII, <
<http://zakon.rada.gov.ua/laws/show/314-18>> accessed 16 October 2018.
 12. The Law of Ukraine “On Ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”, 12 BULLETIN OF VERKHOVNA RADA OF UKRAINE 81 (2011),
https://zakon.rada.gov.ua/laws/show/994_948 accessed 13 January 2019.
 13. Висновок Головного Науково-Експертного Управління Верховної Ради України на Проект Закону України “Про Внесення Змін до Деяких Законодавчих Актів України щодо Виконання Плану Дій щодо Лібералізації Європейським Союзом Візового Режиму для України Стосовно Відповідальності Юридичних Осіб” [Report of the Chief Scientific Expert Department of Verkhovna Rada of Ukraine on the Draft Law of Ukraine, “On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize the European Union Visa Regime for Ukraine, on Legal Persons’ Liability”], http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46901 (hereinafter - Report).
 14. Criminal Code of Ukraine [5 April 2001], No. 2341-III <
<http://zakon.rada.gov.ua/laws/show/2341-14>> accessed 16 October 2018.
 15. Criminal Procedural Code of Ukraine [13 April 2012], No. 4651-VI <
<https://zakon.rada.gov.ua/laws/show/4651-17>> accessed 16 October 2018.

16. The Law of Ukraine “On Prevention of Corruption” [10 October 2014], №1700-VII, available at <https://zakon.rada.gov.ua/laws/show/1700-18>, last accessed 13 January 2019.
17. Australian Criminal Code § 12.2.

Cases

1. Anonymous Case [1701] 12 Mod 559.
2. Bolton Co Ltd v TJ Graham and Sons Ltd [1972] A.C. 153.
3. Case of Langforth Bridge 79 ER 919 (KB 1635) cited in Brickey.
4. Commonwealth v. Hancock Free Bridge Corp., 68 Mass. 58 (1854).
5. Commonwealth v. Proprietors of New Bedford Bridge, 668 Mass 339 (1854).
6. Department of Justice, Office of Public Affairs, UBS Enters into Deferred Prosecution Agreement (February 18, 2009), <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>.
7. Department of Justice, U.S. Attorney’s Office, Southern District of New York, *BNP Paribas Agrees To Plead Guilty To Conspiring To Process Transactions Through The U.S. Financial System For Sudanese, Iranian, And Cuban Entities Subject To U.S. Economic Sanctions* (June 30, 2014), <https://www.justice.gov/usao-sdny/pr/bnp-paribas-agrees-plead-guilty-conspiring-process-transactions-through-us-financial>.
8. F.E. Charman Ltd. v. Clow, 3 All E.R. 371 (Q.B. 1974) (Eng.).
9. John Henshall (Quarries) Ltd. v. Harvey, 2 Q.B. 233 (1965) (Eng.).
10. Lennards Carrying Co. Ltd v Asiatic Petroleum Ltd [1915] 705.
11. Moore v. Allied Chemical Corp., 480 F. Supp. 364, 367 (E.D. Va. 1979).
12. People v. Corporation of Albany, 11 Wend. 539 (N.Y. Sup. Ct. 1834).
13. People v. Corporation of Albany, 539, 543 11 Wend.
14. Regina v. Holbrook, (1878) 4 Q.B.D. 42.

15. Regina v. Stephens, (1866) L.R. 1 Q.B. 702 (nuisance case).
16. River RR Co. v. United States, 212 U.S. 481, 29 S. Ct. 304 (1909).
17. State v. Morris & Essex R.R., 23 N.J.L. 360 (1852).
18. State v. Morris & Essex R.R., 23 N.J.L. 360, 364 (1852).
19. Telegram Newspaper Co. v. Commonwealth, 172 Mass. 52 N.E. 445 (1899).
20. Tesco Stores Ltd. v. Brent London Borough Council, 2 All E.R. 718 (Q.B. 1993) (Eng.)
[All England Law Reports].
21. Tesco Supermarkets Ltd v Natrass [1971] UKHL.
22. The award of the Supreme Court dated 05 February 2019 in case No. 757/54106/18-к;
<http://www.reyestr.court.gov.ua/Review/79684860> accessed 02 March 2019.
23. The Decision of the Appellate Court of Zaporizhzhya Region dated 31 March 2015 in
case No. 235/918/15-к; <http://www.reyestr.court.gov.ua/Review/48561181> accessed
11 March 2019.
24. The Decision of Zhovtnevyi District Court of Mariupol City of Donetsk Region dated
01 September 2016 in case No. 263/9687/16-к;
<http://www.reyestr.court.gov.ua/Review/60185433> accessed 11 March 2019.
25. The petition of the investigator, the prosecutor, the parties to the criminal proceedings
dated 03 October 2018 in case No. 1-кк/711/3309/18;
<http://www.reyestr.court.gov.ua/Review/76926479>.
26. The petition of the investigator, the prosecutor, the parties to the criminal proceedings;
<http://www.reyestr.court.gov.ua/Review/64525748> (detailed information is encrypted
pursuant to Ukrainian law).
27. The Queen v Great North Of England Railway Co [1846] EngR 803 at [325]-[327].
28. United States v Bank of New England 820, 844 F 2d (1st Cir. 1987).
29. United States v. Danilow Pastry Co., 563 F. Supp. 1159 (S.D.N.Y. 1983).

30. United States v. N.Y. Central R. R. Co., 212 U.S. 481 (1909).

31. United States v. Van Schaick, 134 F. 592 (C.C.S.D.N.Y. 1904).

Books, periodic materials, and monographies

1. Andrushko P.P. *Shchodo Vidpovidalnosti Yurydychnyh Osib za Korupciyni Pravoporushennia u Vyhiadi Zastosuvannia do Nyh Zahodiv Kryminalno-Pravovoho Harakteru* [On Liability of Legal Persons for Corruption Offenses by Application of Criminal Law Measures to Them], 3 BULLETIN OF MINISTRY OF JUSTICE OF UKRAINE 104, 109 (2013) (Ukr).
2. Bazhanov B.V., *Deiaki problemy kryminalnoi vidpovidalnosti yurydychnych osib v Ukraini* [Some aspects of corporate criminal liability in Ukraine], 9 PRAVO I SUSPILSTVO 687, 689 (2017) (Ukr).
3. BAZHANOV V.V., KRYMINA'LNE PRAVO UKRAINY: ZAHAL'NA CHASTYNA: PIDRUCHNYK [Criminal law of Ukraine: General Part: book] 480 (2005) (Ukr).
4. Beale, Sara Sun, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 50 (2016).
5. Bohdanov E.V., *Sutnist' i vidpovidal'nist' yurydychnoyi osoby* [The nature and liability of legal entity], 10 DERZHAVA I PRAVO 97, 99 (1997) (Ukr).
6. Bowden, M. & Quigley, T., *Pinstripes or Prison stripes? The Liability of Corporations and Directors for Environmental Offences*, 1 JOURNAL OF ENVIRONMENTAL LAW AND PRACTICE 5, 15 (1995).
7. Branco, Daniela Holler, *Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons From Common Law Developments* 21 (Spring 2016) (unpublished thesis, National College of Business Administration and Economic).
8. Brickey, Kathleen F., *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393, 397 (1982).

9. Brickey, Kathleen F., *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129, 136-137 (1984).
10. BRICKEY, KATHLEEN, *CORPORATE CRIMINAL LIABILITY* 63 (2nd ed., 1992).
11. De Maglie, Cristina, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASH. U. GLOBAL STUD. L. REV. 547, 560 (2005).
12. Demskyi E.F., *Vidpovidalnist' yurydychnyh osib za korupciyni pravoporushennia* [Liability of legal entities for corruption crimes], 7 KRYMINAL'NO-PRAVOVI NAUKY 90, 89-94 (2014) (Ukr).
13. Dervan L.E., *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 14 (2011).
14. Desio, Paula J., *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 WAKE FOREST L. REV. 559, 559 (2004).
15. Dudurov O. & Kamenskiy D., *Kryminal'na vidpovidal'nist Amerykan'skyh korporacij za ekonomichni zlochyny: vid vytykiv do sohodennya* [Criminal liability of American corporations for economical crimes: from the origins to the present days], 2 PRAVO I HROMADYANS'KE SUSPIL'STVO, 103, 107 (Ukr) (2015).
16. DUDUROV O.O. & HAVRONIUK M.I., *KRYMINAL'NE PARVO: NAVCHALNYI POSIBNYK* [Criminal Law: Tutorial] 390 (2014) (Ukr).
17. Duhaime's Encyclopedia of Law, available at <http://www.duhaime.org/>.
18. FARRAR, *FARRAR'S COMPANY LAW* 759-760 (3rd ed., 1991).
19. Fayrstoun T. *Ugolovnaya otvetstvennost yuridicheskikh lits v SShA* [Criminal liability of legal entities in the US], 2 ROSSIYSKIY EZHEGODNIK UGOLOVNOGO PRAVA 597, 609 (2007) (Rus).

20. Fris P.L., *Do pytannia pro kryminalny vidpovidalnist yurydychnoi ysoby* [To the question of criminal liability of legal entity], 2, YURYDYCHNUI VISNYK 35, 36 (2015) (Ukr).
21. Geldart, W.M., *Legal Personality*, 27 THE LAW QUARTERLY REVIEW 90, 92 (1911).
22. Glazebrook, PR, *A Better Way of Convicting Businesses of Avoidable Deaths and Injuries*, THE CAMBRIDGE LAW JOURNAL 405, 406 (2002).
23. Gobert, James, *The Evolving Legal Test of Corporate Criminal Liability* in JOHN MINKES & LEONARD MINKES ED., CORPORATE AND WHITE-COLLAR CRIME 66 (Sage Publications, London, 2008).
24. Hanna, D., *Corporate Criminal Liability*, 31 CRIMINAL LAW QUARTERLY 452, 454 (1988 – 1989).
25. Hryshchuk V.K., Pasioka O.F., *Kryminalna vidpovidalnist yurydychnykh osib: porivnialno-pravove doslidzhennia* [Hryshchuk V.K., Pasioka O.F. Corporate criminal liability: legal comparison] (monography), 350, at 34.
26. Kamensky D., *Introducing Corporate Criminal Liability in Ukraine: Terra Incognita*, 46(1) STETSON L REV 89, 99 (2016).
27. Kashkarov O.O., *Peredumovy reformuvannia Kryminal'noho kodeksu Ukrainy ta stvorennia zakonodavstva pro kruminal'ni prostupy* [Prerequisites for Criminal Code of Ukraine reformation and development of misdemeanor legislation], 1 FORUM PRAVA 236, 238 (2009) (Ukr).
28. Khanna, *Corporate Criminal Liability: What Purposes Does It Serve?*, 109 HARV. L. REV. 1477, 1479 (1996).
29. Kuts V.M. *Vid Dykhotomii «Zlochyn – Pokarannia» Do Kryminalnoho Pravoporushennia Ta Kryminalno-Pravovykh Zasobiv Reahuvannia* [From Dichotomy "Crime - Punishment" To A Criminal Offense And Criminal-Law Response] 53-55 (as

- part of conference “New tasks and directions of the development of legal science in the XXI century”) (15-16 November 2013).
30. Kuts V.M., *Problemy kryminalnoi vidpovidalnosti* [Problems of criminal liability] 116 (2015) (Ukr).
 31. LACEY, L.N. & WELLS C., RECONSTRUCTING CRIMINAL LAW: CRITICAL PERSPECTIVES ON CRIME AND THE CRIMINAL PROCESS 515 (2nd ed., 1998).
 32. Laufer, W., *Corporate Bodies and Guilty Minds*, 43 EMORY LAW JOURNAL 647, 666 (1994).
 33. Lavenue, L.M., *The Corporation as a Criminal Defendant and Restitution as a Criminal Remedy: Application of the Victim and Witness Protection Act by the Federal Sentencing Guidelines for Organisations*, 18(3) THE JOURNAL OF CORPORATION LAW 441, 446 (1993).
 34. Lederman, E., *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFFALO CRIMINAL LAW REVIEW 642, 651 (2000).
 35. Leigh, L.H., *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1509 (1982).
 36. Lenin V. I., *On the Tasks of The People’s Commissariat for Justice Under The New Economic Policy*, 36 LENIN COLLECTED WORKS 560, 565 (1924), available at <https://www.marxists.org/archive/lenin/works/1922/feb/20c.htm>.
 37. Levin M., *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 52 FORDHAM LAW REVIEW 637, 662 (1984).
 38. Lyhova S., *Yurydychni osoby yak subyekty kryminalnoi vidpovidalnosti za KK Ukrainy* [Legal entities as subjects of criminal liability in Criminal Code of Ukraine], 4, Yurydychny Visnyk, 128, 130 (2014) (Ukr).

39. Maurer, Ronald J., *Federal Sentencing Guidelines for Organizations: How Do They Work and What Are They Supposed to Do*, 18 U. DAYTON L. REV. 799, 800 (1993).
40. MCAULEY, F., & MCCUTCHEON, J. P., CRIMINAL LIABILITY 273 (2000).
41. Miheyev R.I., *Ugolovnaya otvetstvennost' yuredicheskikh lits: za I protiv: monografiya* [Criminal liability of legal entities: pros and cons], (monography), IZDATEL'STVO DALNECOSTOCHNOGO INSTITUTA, 120, 16 (1999) (Rus).
42. MYCHKO N.I., UGOLOVNOYE PRAVO UKRAINY. OBSHCHAYA CHAST': TEORIYA, SKHEMI, TABLICY, SLOVAR' TERMINOV: YCHEBNOE POSOBIYE [Criminal Law of Ukraine. General Part: theory, schemes, charts, vocabulary: scientific work] 550 (2006) (Rus).
43. Nanda, Ved, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, in MARK PIETH & RADHA IVORY ED., CORPORATE CRIMINAL LIABILITY 66 (Springer, London, 2011).
44. Nikiforov A.S., *Yuredicheskoye litso kak subyekt prestupleniya* [Legal entity as a subject of a crime], 8 GOSUDARSTVO I PRAVO 1, 19 (2000) (Rus).
45. NIKIFOROV A.S., YUREDICHESKOYE LITSO KAK SUBYEKT PRESTUPLENIYA I UGOLOVNAYA *otvetstvennost'* [Legal entity as a subject of criminal offense and its criminal liability]17 (2002) (Rus).
46. Nwafor, A., *Corporate Criminal Responsibility: A Comparative Analysis*, 57 JOURNAL OF AFRICAN LAW, 81, 82 (2013).
47. Ohman O.V., *Kharakterystyka subyekta zlochynu za kruminal'nym zakonodavstvom Ukrainy* [Characteristic of subject of crime according to Ukrainian criminal legislation], 2(18) UNIVERSYTETS'KI ZAPYSKY 247, 251 (2006) (Ukr).
48. Parsons, H.L., *The Doctrine of Identification, causation and Corporate Liability for Manslaughter*, 67 THE JOURNAL OF CRIMINAL LAW 69, 69 (2003).

49. PIETH, M. & IVORY, R. ED., CORPORATE CRIMINAL LIABILITY – EMERGENCE, CONVERGENCE, AND RISK 13 (2011).
50. PINTO, A.& EVANS, M., CORPORATE CRIMINAL LIABILITY 18-19 (2nd ed., 2008).
51. Podgor, Ellen S., *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1534 (2009).
52. POYNER J., LITERALLY EXTRACTS 268 (1844).
53. S.S. SIMPSON, CORPORATE CRIME, LAW AND SOCIAL CONTROL 20 (2002).
54. SERGEEIVICH V.S., *LEKCH I ISLEDOVANIYA PO DREVNEY ISTORII RUSKOGO PRAVA* [Lectures on ancient history of Russian criminal law] 398 (1910) (Rus).
55. SIR HENRY SUMNER MAINE, ANCIENT LAW 143 (10th ed., 1930).
56. SMITH, D. ORMEROD & HOGAN, CRIMINAL LAW 140 (12th ed., 2008).
57. Stessens, Guy, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT’L & COMP. L.Q. 493, 494 (1994).
58. STONE, CHRISTOPHER D., WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOUR 1 (1975).
59. TAGANCEV N.S., *LEKCH PO RUSKOMY UGOLOVNOMU PRAVU. CHAST’ OBSHCHAYA* [Lectures on Russian criminal law. General Part] 89-90 (1888) (Rus).
60. TAGANCEV N.S., *RUSSKOYE UGOLOVNOE PARVO. LEKCH: CHAST’ OBSHCHAYA* [Russian criminal law. Lectures: general part] 378 (1994) (Rus).
61. TAGANCEV N.S., *Ulozheniye o nakazaniyakh ugovnykh i ispravitelnykh 1885 goda* [Penal Code of 1885] 819 (1908).
62. Yashchenko A.M., *Zastosyvannia zaxodi kryiminalno-pravovoho harakteru shchodo yurydychnyh osib: teoretychnui aspect* [Imposition of criminal law measures on legal entities: theoretical aspect], 7 NAUKOVYI VISNYK MIZHNARODNOHO HUMANITARNOHO UNIVERSYTETU 199, 199 (2014) (Ukr).

Internet resources:

1. De Wolf, Daniel & Mejri, Mohamed, *Crisis communication failures: The BP Case Study*, 2 INTERNATIONAL JOURNAL OF ADVANCES IN MANAGEMENT AND ECONOMICS, 48, 49 (2013) available at <https://pdfs.semanticscholar.org/5812/c05e679bd9a2d2a513dd98ff6df5a5071b11.pdf>.
jurlugansk.ucoz.org/publ/9-1-0-20.
2. Shekhovtsova L.I., *Pro docil'nis't vstanovlennya krymina'noi vidpovidal'nosti yurydychnykh osib (dosvid inozemnykh derzhav)* 12 [Appropriateness of criminal liability of legal entities (international experience)] (Internet Conference on Criminal Justice 2010), available at <http://>
3. В Україні є Проблема і з Олігархами [There Is also a Problem with Oligarchs in Ukraine], Nat'l Anticorruption Portal "Antikor", available at https://antikor.com.ua/articles/36855-v_ukrajini_je_problema_i_z_oligarhami.