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PREGLEDNI RAD

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Kontroverznost instituta probijanja pravne ličnosti društava kapitala u kompanijskom pravu

Controversy of the 'Piercing the Corporate Veil' Institute in Limited Companies in the Company Law

Rezime

U teorijskom, zakonodavnom i praktičnopravnom smislu, probijanje pravne ličnosti predstavlja vrlo kontroverzan institut kompanijskog prava. Sa pravne tačke gledišta, njegova kontroverznost se ispoljava već u samoj srži ovog instituta, koja dovodi do svojevrsne ekspanzije u pogledu odgovornosti članova društva kapitala, odnosno, preciznije, do povećanja u obimu njihove odgovornosti sa ograničene na neograničenu. Uporedna kompanijskopravna regulativa ovog instituta pokazuje različite pristupe, od onih koji njegov značaj i postojanje u potpunosti priznaju do onih koji ga u cijelosti negiraju. Primjetno je da pravna pažnja koja se ovom institutu poklanja umnogome zavisi od stepena razvijenosti zemalja čije zakonodavstvo reguliše predmetnu materiju. Tako države sa visokim nivoom pravne sigurnosti i kulture ne poznaju institut probijanja pravne ličnosti u zakonodavnom smislu, već njegovu „regulaciju" najčešće uobličavaju kroz sudske odluke bazirane na odgovarajućim sudskim precedentima i praksi, ili traže oslonac u provjerenim relevantnim pravnim teorijama, ili ga pak posredno ispoljavaju kroz primjenu odgovorajućih građanskopravnih instituta, poput delikta. Međutim, nasuprot tome, države čija kompanijskopravna regulativa nije na tako zavidnom nivou, kao što je slučaj sa Republikom Srpskom, pokazuju izvjesnu opredijeljenost ka ozakonjenju ovog instituta kroz opštu definiciju, odnosno kombinaciju generalne formule i karakterističnih praktičnih slučajeva. Ipak, srpsko pravosuđe pokazuje određenu skeptičnost i konzervativnost u primjeni ovog instituta, koju iskazuje kroz postavljanje neopravdano visokih dokaznih tereta za tužioca (povjerioca društva kapitala), što za posljedicu ima otežano dokazivanje ispunjenosti uslova njegove primjene. Vodeći se gorenavedenim delikatnim i kompleksnim pitanjima, odlučili smo da se pozabavimo dubljom analizom instituta probijanja pravne ličnosti, u nadi da će određena autorova zapažanja, sugestije i stavovi u ovom naučnom radu poslužiti kao instrument za rasvjetljavanje složenih problema čije izvorište pronalazimo u predmetnom institutu.

Ključne riječi: *probijanje pravne ličnosti, kontroverznost instituta, povećanje u obimu odgovornosti sa ograničene na neograničenu, otežano dokazivanje.*

Abstract

In theoretical, legislative and practical legal terms, „lifting the veil" or „piercing the corporate veil" is a very controversial institute of company law. From the legal point of view, its controversy is already manifested in the very core of this institute, which leads to a kind of expansion in terms of liability of members of limited companies, or more precisely, to increase the scope of their liability from limited to unlimited. The comparative company law regulations of this institute show different approaches, from those that fully recognize its importance and existence to those that completely deny it. It is noticeable that the legal attention paid to this institute largely depends on the level of development of the countries whose legislation regulates the subject matter. Thus, states with a high level of legal security and culture do not know the institute of „piercing the corporate veil" in the legislative sense, but most often shape its "regulation" through court decisions based on appropriate court precedents and practice, or seek support in proven relevant legal theories or they manifest it indirectly through the application of appropriate civil law institutes such as torts. However, in contrast, countries whose company regulations are not at such an enviable level, as is the case with the Republika Srpska, show a certain commitment to legalizing this institute through a general definition, ie a combination of general formula and characteristic practical cases. However, the Republic of Srpska judiciary shows a certain skepticism and conservatism in the application of this institute, which it expresses by placing unjustifiably high evidence burdens on the prosecutor (creditor of the limited company), which results in difficult proof of fulfilling the conditions of its application. Guided by the above delicate and complex issues, we decided to engage in a deeper analysis of the institute of „piercing the corporate veil", in the hope that certain author's observations, suggestions and views in this scientific work will serve as an instrument for clarifying complex issues whose source we find in the subject institute.

Keywords: *piercing the corporate veil, controversy of the institute, increase in the scope of liability from limited to unlimited, difficult to prove*

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UVOD

Da bismo pravilno objasnili suštinu kontroverznosti instituta probijanja pravne ličnosti, moramo krenuti od njegove terminologije. Zakonom o privrednim društvima Republike Srpske nije izričito naslovljen institut kojim se krši osnova principa ograničene odgovornosti članova društva kapitala, nego je iskorišćen generičan termin „zloupotreba pravnog lica", u kome je predviđeno da komanditori komanditnog društva, kao i članovi društva sa ograničenom odgovornošću i akcionari akcionarskog društva mogu prema trećim licima lično odgovarati za obaveze društva ako zloupotrijebe privredno društvo za nezakonite ili prevarne ciljeve ili ako imovinom privrednog društva raspolažu kao sopstvenom imovinom na način kao da privredno društvo kao pravno lice ne postoji, što za posljedicu ima da se opšti princip ograničene odgovornosti ne primjenjuje na pomenuta lica.[1] Primjetno je da zakonodavac, između ostalog, navodi i komanditore komanditnog društva kao lica koja mogu ugroziti princip ograničene odgovornosti. Uvažavajući činjenicu da se komanditna društva u našem zakonu svrstavaju u kategoriju društava lica, a u cilju pojednostavljenja materije, autor će u nastavku teksta koristiti izraz „društva kapitala", s tim da pomenuti termin u kontekstu ovog rada obuhvata, pored društava sa ograničenom odgovornošću i akcionarskih društava, i komanditna društva, ali samo u onom dijelu koji se odnosi na komanditore, budući da komplementari svakako odgovaraju svojom cijelokupnom imovinom za obaveze društva. U skladu s tim, u dotičnom naučnom radu, izrazom „članovi društva kapitala" označavaće se članovi društva sa ograničenom odgovornošću, akcionari akcionarskog društva, ali i komanditori komanditnog društva[2].

Nasuprot opštoj definiciji ovog instituta koja je prisutna u našem pravu, zakonodavac iz Republike Srbije precizno je i koncizno naslovio institut kojim se princip ograničene odgovornosti narušava, dajući mu naziv „probijanje pravne ličnosti", čime je doprinio njegovom značaju i prepoznatljivosti, i time bolje objasnio magnitudu uticaja predmetnog instituta na odgovornost članova društva kapitala. Tako se Zakonom o privrednim društvima Republike Srbije propisuje da komanditor, član društva s ograničenom odgovornošću i akcionar, kao i zakonski zastupnik tog lica ako je ono poslovno nesposobno fizičko lice, koji zloupotrijebi pravilo o ograničenoj odgovornosti, odgovara za obaveze društva, a naročito se smatra da postoji zloupotreba ako to lice upotrijebi društvo za postizanje cilja koji mu je inače zabranjen, zatim ako koristi imovinu društva ili njome raspolaže kao da je njegova lična imovina, ukoliko koristi društvo ili njegovu imovinu u cilju oštećenja povjerilaca društva, te ako radi sticanja koristi za sebe ili treća lica umanji imovinu društva, iako je znalo ili moralo znati da društvo neće moći da izvršava svoje obaveze.[3] Kao izuzetak od inače apsolutnog pravila ograničene odgovornosti članova društva kapitala, jedno vrijeme je bio aktuelan i izraz „zloupotreba pravnog subjektiviteta". Međutim, pravnologički posmatrano, „zloupotreba pravnog subjektiviteta" više ukazuje na osnov instituta, dok termin „probijanje pravne ličnosti" na posljedicu takve zloupotrebe, tako da bi praktično za ukus kontinentalnog pravnika romanske tradicije najbolji bio njihov spoj, uz modifikaciju izraza „zloupotreba pravnog subjektiviteta" u „zloupotreba ograničene odgovornosti", što bi najpreciznije odražavalo i osnov i posljedicu (Vasiljević, 2020). Ipak, u cilju sprečavanja dodatnog usložnjavanja tematike predmetnog instituta, a zbog već spomenutih prednosti u terminologiji koja se koristi u zakonodavstvu Srbije, autor će se u nastavku svog naučnog rada koristiti izrazom „probijanje pravne ličnosti" za označavanje izuzetka od principa ograničene odgovornosti članova društva kapitala.

Po pravilu, pravni subjektivitet društava kapitala odlikuje princip ograničene odgovornosti članova za rizik poslovanja. Međutim, institut probijanja pravne ličnosti predstavlja odstupanje od tog pravila, čime stvara posebnu sferu kompanijskog prava koju obilježavaju neka vrlo kontroverzna pitanja. U ovoj sferi kompanijskog prava izuzetno je bogata sudska praksa koja pokušava da dokuči i otkrije sve tajne ovog instituta, a pravna doktrina se u najvećoj mjeri bavi kritičkom analizom sudskih odluka, a u manjoj mjeri predstavlja i doktrinarnu elaboraciju ekonomske baze ograničene odgovornosti i pravne sigurnosti osnivača i kasnijih članova, koji jedino svojim nepoštovanjem principa ograničene odgovornosti članova društva kapitala mogu ugroziti sam princip i otvoriti put za primjenu njegovog korektora, odnosno do instituta probijanja pravne ličnosti (Vasiljević, 2020). Ovo i predstavlja logičan slijed okolnosti, uzimajući u obzir da društva kapitala imaju sopstveni pravni subjektivitet, posluju namjenskom imovinom, te samostalno preuzimaju obaveze institutom zastupanja u pravnom saobraćaju. Prema tome, vlasnike (osnivače, akcionare, članove) ovih formi privrednih društava, nezavisno od toga da li je riječ o pravnim ili fizičkim licima, štiti tzv. „ograda – veo" njihove pravne ličnosti, čime im se stvara svojevrsna pravna garancija da povjerioci društva kapitala neće moći da naplate svoja potraživanja prema društvu iz njihove lične imovine.

Ipak, činjenica da pravni subjektivitet i pravilo ograničene odgovornosti članova društva kapitala prati „anomalija" iskristalisana kroz institut probijanja pravne ličnosti, otvara pitanje vrste imperativnosti norme o ograničenoj odgovornosti. Naime, diskutabilno je da li je riječ o apsolutnom imperativnom pravilu koje ne dozvoljava nikakva odstupanja, ili se pak radi o relativnom imperativnom pravilu koje dopušta određene izuzetke koji nastaju kao posljedica faktičkih okolnosti datog ugovornog ili deliktnog slučaja. Činjenica da je institut probijanja pravne ličnosti upravo izuzetak od pravila o ograničenoj odgovornosti članova društva kapitala, kvalifikuje ovo pravilo u drugu kategoriju, s tim da do njega ne dolazi tzv. „zakonskom voljom", već voljom učesnika pravnog posla. Prema tome, zavisno od toga da li je pravilo ograničene odgovornosti članova društva kapitala upotrijebljeno u legitimne ili nelegitimne svrhe, zavisiće i primjena instituta probijanja pravne ličnosti kao izuzetka od tog pravila. Dakle, pravilo ograničene odgovornosti članova društva kapitala predstavlja apsolutnu kategoriju kada se koristi u zakonskim okvirima, odnosno kada se pravna ličnost društva kapitala ne koristi za nezakonite ciljeve (oštećenje povjerilaca, miješanje imovine sa imovinom vlasnika, prevarne radnje i sl.). Međutim, istupanjem iz tih zakonodavnih granica ovo pravilo postaje „ranjivo" i opravdano ustupa mjesto njegovom izuzetku – institutu probijanja pravne ličnosti, koje proširuje teren odgovornosti članova društva za obaveze društva kapitala i izvan ovog zakonskog ograničenja, ali time ujedno osiromašuje prednosti društava kapitala nad formama društava lica.

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1 Član 15. stavovi 1. i 3. Zakona o privrednim društvima Republike Srpske („Službeni glasnik Republike Srpske" br. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017. i 82/2019).

2 Komanditno društvo, u smislu Zakona o privrednim društvima Republike Srpske, jeste privredno društvo koje osnuju dva ili više fizičkih i/ili pravnih lica u svojstvu ortaka, radi obavljanja određene djelatnosti, pod zajedničkim poslovnim imenom, od kojih najmanje jedno lice odgovara neograničeno za njegove obaveze (komplementar), a najmanje jedno lice snosi rizik do visine svog ugovorenog uloga (komanditor). Budući da u redovnim okolnostima komanditori ne odgovaraju svojom cijelokupnom imovinom za obaveze društva, a uzimajući u obzir poentu postojanja instituta probijanja pravne ličnosti, postaje evidentno zbog čega je naš zakonodavac obuhvatio i ova lica kao potencijalnu kategoriju na koju se može primijeniti izuzetak od principa ograničene odgovornosti.

3 Član 18. stavovi 1. i 2. Zakona o privrednim društvima Republike Srbije („Službeni glasnik Republike Srbije" br. 36/2011, 99/2011, 83/2014 – dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019. i 109/2021).

INTRODUCTION

In order to correctly explain the essence of the controversy of the „ piercing the corporate veil“ institute, we must start from its terminology. The Company Law of Republic of Srpska does not explicitly address the institute which violates the principle of limited liability of members of limited companies, but uses the generic term "abuse of legal entity" which provides for limited partners, as well as members of limited liability companies and the shareholders of a joint stock company may be personally liable to third parties for the obligations of the company if they misuse the company for illegal or fraudulent purposes or if they dispose of the company's property as their own property as if the company did not exist as a legal entity and as a consequence, the general principle of limited liability does not apply to the mentioned persons.[1] It is noticeable that the legislator, among other things, mentions the limited partners of limited partnerships as persons who may endanger the principle of limited liability. Considering the fact that limited partnerships in our law are classified as partnerships, and in order to simplify the matter, the author will use the term limited companies in the following text, provided that the term in the context of this paper includes, in addition to limited liability companies and joint stock companies also limited partnerships, but only in the part that refers to limited partners, since general partners are certainly liable with their entire assets for the company's obligations. Accordingly, in the respective scientific paper, the term members of a limited company shall mean members of a limited liability company, shareholders of a joint stock company, but also limited partners of a limited partnership[2].

Contrary to the general definition of this institute that is present in our law, the legislator from the Republic of Serbia precisely and concisely titled the institute which violates the principle of limited liability, giving it the name "piercing the corporate veil", thus contributing to its importance and recognizability and thus better explained the magnitude of the influence of the institute in question on the liability of the members of the limited company. Thus, the Company Law of the Republic of Serbia stipulates that a limited partner, member of a limited liability company and shareholder, as well as the legal representative of that person if he is a natural person without legal capacity who abuses the limited liability rule is liable for the company's obligations and in particular it is considered that there is abuse if that person uses the company to achieve a goal that is otherwise prohibited, then if he uses the company's assets or disposes of it as if it were his personal property, if he uses the company or its assets to harm creditors, and if for the benefit of himself or third parties, reduces the company's assets, even though he knew or should have known that the company will not be able to meet its obligations.[3] As an exception to the otherwise absolute rule of limited liability of members of a limited company, the term "abuse of legal subjectivity" was also relevant for some time. However, from a legal and logical point of view, "abuse of legal subjectivity" indicates more on the basis of the institute, while the term "piercing the corporate veil" is a consequence of such abuse, so for a continental lawyer of Roman tradition, their combination would be best with the modification of the expression "abuse of legal personality" into "abuse of limited liability", which would most accurately reflect both the basis and the consequence (Vasiljevic, 2020) However, in order to prevent further complication of the subject of the institute, and due to the already mentioned advantages in the terminology used in Serbian legislation, the author will continue in his scientific work to use the term "piercing the corporate veil" to indicate an exception to the principle of limited liability of members of a limited company.

As a rule, the legal subjectivity of limited companies is characterized by the principle of limited liability of members for business risk. However, the institute of "piercing the corporate veil" is a deviation from that rule, thus creating a special sphere of company law marked by some very controversial issues. In this sphere of company law, there is an extremely rich jurisprudence that tries to understand all the secrets of this institute, and legal doctrine mostly deals with critical analysis of court decisions, and to a lesser extent the doctrinal elaboration of the economic base of limited liability and legal security of founders and later members, who only by disrespecting the principle of limited liability of members of the limited company can endanger the principle itself and enable the application of its corrector, ie the institute of "piercing the corporate veil" (Vasiljevic, 2020). This is a logical sequence of circumstances, taking into account that limited companies have their own legal personality, operate with special-purpose assets, and independently take on obligations through the institute of representation in legal transactions. Therefore, the owners (founders, shareholders, members) of these forms of companies, regardless of whether they are legal or natural persons, are protected by the so-called "fence-veil" of their legal personality, which creates a kind of legal guarantee that creditors will not be able to to collect their claims against the company from their personal property.

However, the fact that the legal subjectivity and the rule of limited liability of members of limited companies is accompanied by an "anomaly" crystallized through the "piercing the corporate veil" institute, raises the question of the kind of imperative norm of limited liability. Namely, it is debatable whether this is an absolute imperative rule that does not allow any deviations, or whether it is a relative imperative rule that allows certain exceptions that arise as a result of the factual circumstances of a contractual or tort case. Due to the fact that the „piercing the corporate veil“ institute is an exception to the rule on limited liability of members of a limited company, qualifies this rule in the second category, provided that it does not come by the so-called "legal will", but by the will of the participants in the legal transaction. Therefore, depending on whether the rule of limited liability of members of a limited company has been used for legitimate or illegitimate purposes, the application of the „piercing the corporate veil“ institute will also depend as an exception to that rule. Thus, the rule of limited liability of members of a limited company is an absolute category when used within the legal framework, ie when the legal personality of a limited company is not used for illegal purposes (damage to creditors, mixing assets with owner's assets, fraud, etc.). However, by stepping out of these legislative boundaries, this rule becomes "vulnerable" and justifiably gives way to its exception - the „piercing the corporate veil“ institute, which expands the scope of liability of company members for the obligations of limited companies and beyond this legal limit, but thus reduces the advantages of limited companies in comparison with partnerships.

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1 Article 15, paragraphs 1 and 3 of the Company Law of Republic of Srpska („'Official Gazette of the Republic of Srpska“, No. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017 and 82/2019).

2 A limited partnership under the Company Law of Republic of Srpska is a company founded by two or more natural and/or legal persons thereby gaining the status of partners of the company with the aim to conduct business under a common business name and in which at least one partner's liability is unlimited (a "general partner") and at least one partner's liability is limited to the height of his agreed contribution (a "limited partner"). Since in regular circumstances limited partners are not liable with their entire assets for the company's obligations, and taking into account the point of existence of the "piercing the corporate veil", it becomes evident why our legislator included these persons as a potential category to which the exception of limited liability can be applied.

3 Article 18 paragraphs 1 i 2 of Company Law of Republic of Serbia („Official Gazette of the Republic of Serbia", No. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021).

1. PREGLED LITERATURE

Pravilo ograničene odgovornosti je, u suštini, generalno i u principu zatvoreno, čime se ograničava poslovni rizik investitora i time posljedično podstiče investiranje i tržište kapitala (Glynn, 2004), smanjuju se troškovi investiranja, povećava pravna sigurnost investitora, afirmiše se predvidljivost sa mogućnošću utvrđivanja dometa *ex ante*, obezbjeđuje se koncentracija kapitala više investitora i zaštita vlasničkih i upravljačkih prava, osigurava izbor između više pravnih formi organizovanja zavisno od potreba investitora, jača transparentnost poslovanja otvorenih društava, omogućava se transfer vlasničkih prava, povećava likvidnost investicija, obezbjeđuje specijalizacija upravljanja i odvajanja vlasništva od upravljanja itd. (Ramsay, Noakes, 2001).

Imajući u vidu ulogu ustanove ograničene odgovornosti, ne čudi što je jedan dio pravne teorije pokazao tendenciju za njeno ukidanje, navodeći nepreciznost instituta, nesigurnost i arbitrarnost primjene, odvraćajući efekat od investiranja, te mogućnost postizanja istih rezultata pomoću opštih pravnih instituta i standarda kao osnovne razloge koje opravdavaju njihova zalaganja (Bainbridge, 2005). Ipak, postoje i umjereniji protivnici ove ustanove koji predlažu da se predmetni institut u odgovarajućim oblastima ukine, ili barem značajno ublaži restrikcijom osnova primjene ili užim poimanjem njegovog djelokruga (Smith, 2008). Tako npr., po njihovom tumačenju, oblast koja u prvom redu zaslužuje opisani drugačiji tretman vezana je za finansijski privredni sektor. Njega karakteriše jednostrana dominacija u ugovornim odnosima (banke, osiguravajuća društva), što djeluje kao olakšavajući faktor u zaštiti poslovnih interesa. Ako na to dodamo činjenicu da je ova oblast regulisana posebnim propisima, postaje očigledna suvišnost upotrebe kompanijskopravne ustanove probijanja pravne ličnosti u konkretnom slučaju.

Svakako da zaštitno dejstvo pravnog subjektiviteta predstavlja vrlo značajan princip kompanijskog prava, koji kroz ograničenje rizika i smanjenje troškova podstiče razvoj tržišne ekonomije i slobodu preduzetništva. Iako je nesporno da ove važne ekonomske postulate garantuje pravo, bitno je istaći da pravna zaštita djeluje samo do onog nivoa do kog navedeni postulati vrše svoju funkciju i podržavaju ekonomiju. Prekoračenjem pravno utemeljenih granica aktivira se institut probijanja pravne ličnosti kao rezervni pravni mehanizam, čime se proširuje obim odgovornosti članova društva kapitala koji inače odgovaraju ograničeno do visine svog uloga u dato društvo. Da bi aktivacija predmetnog instituta nastupila, neophodan je dokaz tužioca, odnosno povjerioca društva kapitala da je došlo do zlopotrebe pravnog subjektiviteta društva kapitala od strane tuženog (člana društva), s tim da je ovdje riječ o tzv. đavolskom dokazivanju (*probatio diabolica*) budući da je dokazni prag za tužioca izuzetno visoko postavljen (Wibberley et al., 2014). Pritom, prilikom odlučivanja u pravnoj stvari probijanja pravne ličnosti sudiji je povjerena velika arbitrarna moć, a isti ima obavezu da utvrdi sve relevantne činjenice koje bi eventualno opravdale sprovođenje ovog instituta, te da, ukoliko zaključi da one postoje, procijeni stepen njihovog uticaja u kontekstu predmetnog instituta i time značaja za njegovu primjenu, ili u suprotnom, odluči se za poštovanje pravnog subjektiviteta i principa ograničene odgovornosti i time isključi primjenu izuzetka sadržanog u ovom standardu. Međutim, zbog nepostojanja konciznih smjernica koje bi predstavljale vodilju u određivanju stepena dejstva protumačenih činjenica na potencijalno zanemarivanje pravnog subjektiviteta društava kapitala ili pak na njegovo poštovanje, nije iznenađujuće što dva suda mogu zauzeti potpuno oprečna mišljenja u ovoj materiji.

U suštini, probijanje pravne ličnosti predstavlja institut do čije aktivacije može doći nezavisno od oblika privrednog društva, pod uslovom da kod njih važi princip ograničene odgovornosti. O kojim privrednim društvima će u konkretnom smislu biti riječ zavisi od svakog nacionalnog prava ponaosob, odnosno od njegovog poznavanja različitih formi privrednih društava, te isti može obuhvatiti društva sa ograničenom odgovornošću, akcionarska društva (otvorena i zatvorena), komanditore komanditnog društva, ortakluke sa ograničenom odgovornošću itd. Ipak, iskustva sudske prakse pokazuju da se ovaj institut primjenjuje najviše kod formi zatvorenih društava (Glynn, 2004), posebno onih sa manjim brojem članova, za razliku od otvorenih društava, gdje je njegova primjena u suštini svedena na društva sa manjim brojem akcionara (Esterbrook, Fishel, 1985). S tim u vezi, prisutnost instituta probijanja pravne ličnosti najčešća je kod jednočlanih društava (Cohn, Simitis, 1963) ili društava sa manjim brojem članova i faktički je predmetni institut neprisutan kod javnih korporacija sa velikim brojem akcionara (Renno, 2014). Zajedničko za sva ova privredna društva jeste to da njihovi članovi postupaju nesavjesno, do te mjere da namjerno koriste prevarne radnje, čime direktno krše osnovu principa ograničene odgovornosti koja nalaže njihovo savjesno postupanje (Sedillo Lopez, 1982).

2. REZULTATI ISTRAŽIVANJA I DISKUSIJA

2.1. Probijanje pravne ličnosti sa aspekta kompanijskog prava

Ustanova probijanja pravne ličnosti predstavlja poseban institut kompanijskog prava. Intencija zakonodavca pri uvođenju predmetnog instituta u naše zakonodavstvo prevashodno je motivisana željom da se ugrozi „suverenitet" standarda ograničene odgovornosti članova društva za obaveze društva kapitala, kako bi se oni, snagom autoriteta zakona, zbog vlastitog nepoštovanja tog standarda i autonomnosti svog društva kao posebnog pravnog subjekta, priveli „pravdi neograničene odgovornosti" za obaveze svog društva prema povjeriocima njihovog društva, čime se ujedno obezbjeđuje i povećana sigurnost za povjerioce i dodatna sankcija za članove društva kapitala. Na taj način uspostavlja se specifičan pravni odnos ipso iure[4] između lica koja nisu u pravnom odnosu (nema pravnog posla u korist ili na teret trećeg lica kad je inače pravno moguć) i koja su međusobno treća lica – član društva i povjerilac društva, bez izražavanja volje učesnika ovog odnosa, kao i bez izražavanja volje samog društva (Vasiljević, 2020). Prema tome, namjera zakonodavca u zemljama koje su ovaj institut ozakonile, kao i praksa u zemljama koje to nisu učinile ispoljena je u težnji da se članovi drušva kapitala sankcionišu ili za nesavjesno ponašanje prema svom društvu, ili za zloupotrebu principa ograničene odgovornosti za obaveze prema društvu, budući da se na ovaj način ugrožava autonomija i suverenitet pravnog subjektiviteta društva i njegove imovine. Na ovoj osnovi, zakon ili praksa konstituišu institut probijanja pravne ličnosti, prilikom čega izraz „probijanje" ima dvostruku funkciju: najprije član društva neosnovano „ulazi u zabran društva kao pravnog subjekta i njegove imovine", a onda se kao posljedica toga daje pravo povjeriocu društva da „uđe u zabran člana društva kao pravnog subjekta ili fizičkog lica i njegove imovine" kako bi naplatio svoje potraživanje od svog ugovornog partnera (Vasiljević, 2020).

Ipak, potreba postojanja ustanove probijanja pravne ličnosti često se dovodi u pitanje. Osnovne pokretače koji čine upitnim egzistenciju predmetnog instituta možemo pronaći u sferi deliktnog i ugovornog

[4] U rimskoj pravnoj tradiciji, izraz *ipso iure* označava radnju kojom određeni pravni odnos, odnosno pravo i obaveza, nastaje, mijenja se ili prestaje direktno po sili zakona ili drugog pravnog propisa, bez ikakve potrebe da se o tome donosi poseban pravni akt ili da se preduzima posebna pravna radnja.

1. LITERATURE OVERVIEW

The rule of limited liability is, in essence, generally and in principle closed, which limits the business risk of investors and thus encourages investment and capital markets (Glynn, 2004), reduces investment costs, increases legal certainty for investors, affirms predictability with the ability to determine the range ex ante, provides concentration of capital of several investors and protection of ownership and management rights, ensures choice between several legal forms of organization depending on the needs of investors, strengthens transparency of open companies, enables transfer of ownership rights, increases liquidity of investments, provides management specialization and separation of ownership and management, etc. (Ramsay, Noakes, 2001).

Given the role of the limited liability institute, it is not surprising that one part of legal theory has shown a tendency to abolish it, citing the inaccuracy of the institute, uncertainty and arbitrariness of application, discouraging investment, and the possibility of achieving the same results with general legal institutes and standards as the underlying reasons justifying their efforts (Bainbridge, 2005). However, there are more moderate opponents of this institute who suggest that the institute in question be abolished in appropriate areas, or at least significantly mitigated by restricting the basis of application or a narrower understanding of its scope (Smith, 2008). Thus, for example, according to their interpretation, the area that primarily deserves the described different treatment is related to the financial sector. It is characterized by unilateral domination in contractual relations (banks, insurance companies) which acts as a mitigating factor in the protection of business interests. If we add to that the fact that this area is regulated by special regulations, the redundancy of the use of the „piercing the corporate veil" institute in a specific case becomes obvious.

Certainly, the protective effect of legal subjectivity is a very important principle of company law, which through risk reduction and cost reduction encourages the development of a market economy and freedom of enterprise. Although it is indisputable that these important economic postulates are guaranteed by law, it is important to point out that legal protection works only to the extent to which these postulates perform their function and support the economy. Exceeding the legally established boundaries activates the „piercing the corporate veil" institute as a reserve legal mechanism, which expands the scope of liabilities of members of the limited company who are otherwise liable to a limited amount of their share in the company. In order for the activation of the institute in question to occur, it is necessary for the plaintiff, ie the creditor of the limited company, to prove that the legal subjectivity of the limited company was abused by the defendant (member of the company), with the so-called diabolical proving (probatio diabolica) since the evidentiary threshold for the plaintiff is extremely high (Wibberley et al., 2014). At the same time, when deciding on the legal matter of the „piercing the corporate veil" institute, the judge is entrusted with great arbitrary power, and he has the obligation to determine all relevant facts that could justify the implementation of this institute, and to assess the degree of their influence in the context of the institute in question and thus relevant to its application, or otherwise, decides to respect legal personality and the principle of limited liability and thus excludes the application of the exception contained in this standard. However, due to the lack of concise guidelines that would guide the determination of the degree of effect of interpreted facts on the potential disregard for legal respect for limited companies or respect for it, it is not surprising that the two courts can take completely conflicting opinions in this matter.

In essence, the „piercing the corporate veil" is an institute whose activation can take place regardless of the form of the company, provided that the principle of limited liability applies to them. Which companies will be discussed in a specific sense depends on each national law individually, ie on its knowledge of different forms of companies, and it can include limited liability companies, joint stock companies (open and closed), limited partners of limited partnership, partnerships with limited liability, etc. However, the experience of case law shows that this institute is mostly used in the form of closed companies (Glynn, 2004), especially those with a smaller number of members, in contrast to open companies where its application is essentially reduced to companies with fewer shareholders (Esterbrook, Fishel, 1985). In this regard, the presence of the „piercing the corporate veil" institute is most common in one-member companies (Cohn, Simitis, 1963) or companies with a smaller number of members and in fact the institute is absent in public corporations with a large number of shareholders (Renno, 2014). Common to all these companies is that their members act unscrupulously, to the extent that they intentionally use fraudulent acts, thus directly violating the basis of the principle of limited liability that requires their conscientious conduct (Sedillo Lopez, 1982).

2. RESEARCH RESULTS AND DISCUSSION

2.1. „Piercing the Corporate Veil" from the Aspect of Company Law

The „piercing the corporate veil" institute is a special institute of company law. The intention of the legislator in introducing the institute in question in our legislation is primarily motivated by the desire to jeopardize the "sovereignty" of the standard of limited liability of members of the company for the obligations of the limited company, so that they, thanks to the strength of the authority of the law, because of their own non-compliance with that standard and the autonomy of their company as a separate legal entity, be brought to „justice of unlimited liability" for their company's obligations to creditors of their company, which provides increased security for creditors and additional sanctions for members of limited company. In this way, a specific legal relationship is established ipso iure[4] between persons who are not in a legal relationship (no legal transaction in favor or at the expense of a third party that is otherwise legally possible) and who are third parties - a company member and a creditor, without expression of will of participants in this relationship, as well as without expressing the will of the company itself (Vasiljevic, 2020). Therefore, the intention of the legislator in the countries that have legalized this institute, as well as the practice in the countries that have not done so, is manifested in the desire to sanction members of limited companies for unscrupulous behavior towards their company or for abusing the principle of limited liability for obligations towards the company since in this way the autonomy and sovereignty of the legal subjectivity of the company and its property is endangered. On this basis, the law or practice constitutes the „piercing the corporate veil" institute, where the term breaking through has a dual function: first a member of the company unjustifiably "enters into a ban on the company as a legal entity and its property", and then as a result „enters into a ban on a member of the company as a legal entity or a natural person and its property" in order to collect his claim from his contractual partner (Vasiljevic, 2020).

4 In the Roman legal tradition, the term ipso jure means an act by which a certain legal relationship, ie right and obligation, arises, changes or ceases directly by law or other legal regulation, without any need to pass a special legal act or take special legal action.

prava, koji kroz svoje pravne mehanizme mogu ostvariti isti efekat kao i kompanijskopravni institut probijanja pravne ličnosti. Međutim, odnos između različitih grana prava vrlo često je zasnovan na nepovjerenju u spremnost i sposobnost druge pravne oblasti da svojim institutima i aktivnostima uspješno ostvari zajedničke pravne ciljeve. U konkretnom slučaju, tačno je da kompanijsko pravo vrlo često zaboravlja na nepobitnu činjenicu da privredna društva kao srž njegovog istraživanja imaju mješovitu pravnu prirodu, u kojoj, između ostalog, dolaze do izražaja i elementi ugovornog i deliktnog prava. Upravo je ugovorna priroda privrednih društava imala ključnu ulogu u nametanju pitanja o nužnosti potrebe postojanja ove kompanijskopravne ustanove. S tim u vezi, kontroverznost instituta probijanja pravne ličnosti manje bi došla do izražaja da kompanijsko pravo nije zanemarilo svoju ugovornu prirodu i svoj dug po tom osnovu nesporno nekontroverznim ustanovama ugovornog i deliktnog prava (delikt, neosnovano obogaćenje, prevara, zabluda o ličnosti – *alter ego*), kao i stoljetnim pravnim standardima, poput standarda zloupotrebe prava i načela poštenja i savjesnosti (Vasiljević, 2020). Prema tome, ukoliko analiziramo predmetni institut uz pomoć pravnih mehanizama ugovornog i deliktnog prava, zaista dolazimo do dvoumljenja da li ustanovu probijanja pravne ličnosti treba izuzeti iz kompanijskopravne oblasti i time neaktuelizirati potrebu za određivanjem njene pravne prirode. Međutim, budući da je neupitna potreba postojanja ovog instituta u sferi stečajnog prava (iako značajno modifikovanog i potpomognutog drugim pravnim institutima sa istom ciljnom funkcijom – *actio pauliana*[5]), a kako postoji zona „ničije zemlje“ između kompanijskog i stečajnog prava, to se ipak čini da treba dati pozitivan odgovor na postavljeno pitanje, s tim što je njegov domašaj značajno ograničen pravnom osnovanošću primjene navedenih instituta ugovornog i deliktnog prava, kao i navedenih pravnih standarda (Vasiljević, 2020). Kao rezultat toga, ostaje potreba za određivanjem pravne prirode predmetne ustanove.

S tim u vezi, da bismo razjasnili pitanje pravne prirode ustanove probijanja pravne ličnosti, prvo moramo pojasniti da li je dužnost lojalnosti člana društva prema svom društvu osnova za primjenu ustanove probijanja pravne ličnosti ili alternativa za taj institut. Budući da je kompanijskopravna dužnost lojalnosti internog tipa (dužnost člana društva prema kompaniji), a ne eksternog (dužnost člana društva prema povjeriocima kao trećim licima), smatramo da ne postoji opravdan razlog da se probijanje pravne ličnosti svede isključivo na ovu osnovu. Međutim, ne treba zanemariti niti ignorisati specifičnost ove ustanove kompanijskog prava koja je sadržana u činjenici da se zakonodavac služi autoritetom zakona sa ciljem formiranja svojevrsnog pravnog odnosa između člana društva i povjerioca društva, bez obzira na to što je riječ o međusobnom odnosu trećih lica.

Pravna teorija nema intenciju da ovaj odnos podvede pod kompanijskopravnu obavezu lojalnosti člana prema svom društvu u slučaju sukoba ličnog interesa ili interesa povezanog lica sa interesom društva, ali ne pokušava da elaboriše zbog čega se isključivo kod instituta probijanja pravne ličnosti zakonodavac odlučio da uspostavi odnos član društva – povjerilac društva. Naime, čini se da je ovdje prisutna fiducijarna dužnost[6] lojalnosti člana društva prema svojim povjeriocima, posebno uzimajući u obzir mehanizme zaštite koji povjeriocima stoje na raspolaganju ukoliko dođe do probijanja pravne ličnosti. U vezi s tim, povjeriocima je ostavljena zakonska mogućnost naplate potraživanja ne samo od svog dužnika (društva kapitala), već direktno i od člana društva. Između ostalog, ukoliko se želi sačuvati apsolutnost principa ograničene odgovornosti na način da ostane „neprobojan“, neophodno je povećati prag obaveze lojalnosti člana društva kapitala. Pretpostavimo li, s druge strane, da dužnost lojalnosti članova društva ne postoji prema povjeriocima društva (izuzetak predstavlja kontekst kada se povjerioci posmatraju kao „interes kompanije“), onda se ni ustanova probijanja pravne ličnosti ne bi mogla zasnivati na povredi dužnosti koja i ne postoji prema tom aktivno legitimisanom licu u odnosu na kompaniju po pomenutom osnovu, te ne bi postojala direktna mogućnost naplate potraživanja povjerilaca društva od člana društva, a ona nesporno postoji (Vasiljević, 2020). Pritom, odgovornost po osnovu dužnosti lojalnosti člana društva prema svom društvu je interna, dok je prema povjeriocima društva eksterna.

Ovakvim određenjem pravne prirode instituta probijanja pravne ličnosti donekle se opravdava njegova svrha i potreba postojanja u kompanijskom pravu, ali se u suštini svodi na kategoriju „izuzetak izuzetka“, budući da prava povjerilaca na taj način nisu ugrožena, imajući u vidu da se u najvećem dijelu kauza ovog instituta postiže preko deliktne odgovornosti člana društva, ali i preko odgovarajućih instituta ugovornog prava i opštih pravnih standarda. Osim toga, dodatni sloj zaštite za povjerioce jeste interna odgovornost kontrolnih članova društva za povredu dužnosti lojalnosti kompaniji, čime se eliminišu neadekvatne kapitalizacije kompanije i povrede principa održanja osnovnog kapitala (Vasiljević, 2020). Uz to, povjerioci bitrebalo da imaju proceduralna sredstva poput derivativne tužbe[7] kojom bi ostvarivali potraživanja društva protiv svojih članova (i članova organa društva) za štetu koju oni prouzrokuju društvu, a što bi u svojoj ukupnosti moglo da bude značajna brana za stečaj kompanije (Singhof, 1999).

2.2. Aktivna legitimacija kod instituta probijanja pravne ličnosti

Domet i značaj instituta probijanja pravne ličnosti i principa ograničene odgovornosti članova društva umnogome zavisi od vrste povjerilaca na koje djeluje. U tom smislu potrebno je praviti razgraničenje između statusa ugovornih (voljnih) povjerilaca i neugovornih (nevoljnih, deliktnih) povjerilaca. Iako se u sudskoj praksi zahtijeva dokazivanje postojanja osnova primjene instituta probijanja pravne ličnosti kroz sprovođenje identičnih testova nelegitimnog korišćenja principa ograničene odgovornosti, ipak se pravi diskrepanca u ispunjenju standarda za ugovorne povjerioce sa jedne strane, i deliktne povjerioce i radnike angažovane ugovorom o radu s druge strane. S tim u vezi, pravilo je da se za ugovorne povjerioce zahtijeva zadovoljavanje strožih standarda nego za deliktne povjerioce i zaposlene, što čini daleko vjerovatnijom primjenu ustanove probijanja pravne ličnosti i zanemarivanje principa ograničene odgovornosti kod ove druge kategorije povjerilaca (Peterson, 2018).

Varijacije u pristupu zaštite interesa različitih vrsta povjerilaca su, prije svega, u domenu pravne politike i poštenja, a u svakom slučaju

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5 *Actio pauliana* predstavlja tužbu (ili prigovor) kojom se pobijaju dužnikove pravne radnje učinjene na štetu povjerilaca, odnosno pobijaju se pravne radnje dužnika kojima se umanjuje njegova imovina, a sve u cilju onemogućavanja povjerilaca da od njega naplate svoja potraživanja.

6 U redovnim okolnostima, fiducijarna dužnost predstavlja dužnost lojalnosti i dužnost pažnje kao zakonske dužnosti člana društva prema kompaniji na osnovu odgovarajućeg pravnog odnosa.

7 Derivativna tužba predstavlja tužbu koju komanditori komanditnog društva, članovi društva sa ograničenom odgovornošću ili akcionari akcionarskog društva imaju pravo da podnesu u svoje ime, a za račun društva protiv ortaka ortačkog društva i komplementara komanditnog društva, lica koja se u skladu sa ovim zakonom smatraju kontrolnim članovima društva sa ograničenom odgovornošću ili kontrolnim akcionarima akcionarskog društva, zastupnika društva, članova upravnog odbora, članova izvršnog odbora, članova odbora za reviziju i internog revizora društva sa ograničenom odgovornošću i akcionarskog društva, lica koja imaju ugovorna ovlašćenja da upravljaju poslovima privrednog društva i likvidacionog upravnika privrednog društva, radi naknade štete prouzrokovane privrednom društvu od tih lica povredom dužnosti koje imaju prema društvu u skladu sa Zakonom o privrednim društvima Republike Srpske.

However, the need for the "piercing the corporate veil" institute is often questioned. The basic drivers that make the existence of the institute in question questionable can be found in the sphere of tort and contract law, which through their legal mechanisms can achieve the same effect as the company law institute of "piercing the corporate veil". However, the relationship between different branches of law is very often based on distrust in the readiness and ability of another legal field to successfully achieve common legal goals through its institutes and activities. In this particular case, it is true that company law very often forgets the indisputable fact that companies, as the core of his research, have a mixed legal nature, in which, among other things, elements of contract and tort law come to the fore. It was the contractual nature of companies that played a key role in imposing the question of the necessity of the existence of this company law institute. In this regard, the controversy of the "piercing the corporate veil" institute would be less pronounced if the company law did not neglect its contractual nature and its debt on that basis indisputably non-controversial institutes of contract and tort law (tort, unjust enrichment, fraud, delusion of personality - alter ego), as well as centuries-old legal standards, such as the standard of abuse of rights and the principles of honesty and conscientiousness (Vasiljevic, 2020). Therefore, if we analyze the institute in question with the help of legal mechanisms of contract and tort law, we really come to doubt whether the "piercing the corporate veil" institute should be excluded from the field of company law and thus not aulectize the need to determine its legal nature. However, since there is an unquestionable need for the existence of this institute in the field of bankruptcy law (although significantly modified and supported by other legal institutes with the same target function – actio pauliana[5]), and as there is a zone of "no man's land" between company and bankruptcy law, it seems that a positive answer should be given to the question, but its scope is significantly limited by the legal basis of the application of these institutes of contract and tort law and legal standards. (Vasiljevic, 2020). As a result, there remains a need to determine the legal nature of the institute in question.

In this regard, in order to clarify the question of the legal nature of the „piercing the corporate veil" institute, we must first clarify whether the duty of loyalty of a member of the company to its company is the basis for applying the „piercing the corporate veil" institute or an alternative to that institute? Since the company law duty of loyalty is an internal type (the duty of a company member towards the company), and not an external one (the duty of a company member towards creditors as third parties), we believe that there is no justifiable reason to reduce the „piercing the corporate veil" institute solely on this basis. However, one should not ignore or ignore the specificity of this institute of company law, which is contained in the fact that the legislator uses the authority of law to form a kind of legal relationship between a company member and a creditor, regardless of the relationship between third parties.

Legal theory does not intend to bring this relationship under the company law obligation of loyalty of the member to his company in case of conflict of personal interest or the interest of a related person with the interests of the company, but it does not try to elaborate why exclusively at the „piercing the corporate veil" institute, the legislator decided to establish a relationship between a member of the company and the creditor of the company. Namely, it seems that the fiduciary duty of loyalty of a company member to his creditors is present here[6] especially taking into account the protection mechanisms that are available to creditors in the event of a „piercing the corporate veil". In this regard, creditors are left with the legal possibility of collecting receivables not only from their debtor (limited company), but also directly from a member of the company. Among other things, if the absolute principle of limited liability is to be preserved in such a way as to remain "unpierceable", it is necessary to increase the threshold of the loyalty obligation of a member of a limited company. If we assume, on the other hand, that the duty of loyalty of members of the company does not exist towards the creditors of the company (the exception is the context when creditors are seen as "company interest"), then the „piercing the corporate veil" institute could not be based on a breach of duty that does not exist towards that actively legitimized person in relation to the company on the mentioned basis, and there would be no direct possibility of collecting creditors' claims from a company member, and it undoubtedly exists (Vasiljevic, 2020). At the same time, the liability based on the duty of loyalty of a company member towards his company is internal, while towards the creditors of the company is external.

This determination of the legal nature of the "piercing the corporate veil" institute to some extent justifies its purpose and need for existence in company law, but in essence it comes down to the category of "exception exception", since the rights of creditors are not endangered bearing in mind that in most cases the cause of this institute is achieved through the tort liability of a member of the company, but also through the appropriate institutes of contract law and general legal standards. In addition, an additional layer of protection for creditors is the internal liability of the company's controlling members for violating the company's loyalty duty, which eliminates inadequate capitalization of the company and violation of the principle of maintaining share capital (Vasiljevic, 2020). In addition, creditors should have procedural means such as a derivative lawsuit[7] to enforce the company's claims against its members (and members of the company's bodies) for the damage they cause to the company, which in its entirety could be a significant barrier to company bankruptcy (Singhof, 1999).

2.2. Active Legitimacy of the „Piercing the Corporate Veil" Institute

The scope and importance of the „piercing the corporate veil" institute and the principle of limited liability of members of the company largely depends on the type of creditors it acts on. In this sense, it is necessary to distinguish between the status of contractual (voluntary) creditors and non-contractual (involuntary, tort) creditors. Although, in case law, it is required to prove the existence of the basis for the application of the „piercing the corporate veil" institute by conducting identical tests of illegitimate use of the principle of limited liability, there is still discrepancy in meeting the standards for contractual creditors on the one hand, and both tort creditors and workers hired on the basis of employment contracts, on the

5 Actio pauliana is a lawsuit (or objection) that refutes the debtor's legal actions taken to the detriment of creditors, ie refutes the debtor's legal actions that reduce his property, all in order to prevent creditors from collecting their claims from him.

6 In regular circumstances, a fiduciary duty is a duty of loyalty and a duty of care as a legal duty of a member of company towards the company on the basis of an appropriate legal relationship.

7 Derivative lawsuit is a lawsuit that limited partners of limited partnership, members of a limited liability company or shareholders of a joint stock company have the right to file in their own name and on behalf of the company against partners of the partnership and general partners, persons who are considered controlling members, limited liability company or controlling shareholders of the joint stock company, representatives of the company, members of the board of directors, members of the executive board, members of the audit board and internal auditor of the limited liability company and joint stock company, persons with contractual powers to manage the company and liquidation trustee, for the purpose of compensating the damage caused to the company by mentioned persons who violated the duties they have towards the company in accordance with Company Law of Republic of Srpska.

nalažu uzimanje svih okolnosti u obzir (zaštita u vrijeme kad je društvo solventno ili kad je pred bankrotom), balansiranje interesa različitih klasa povjerilaca, ujednačavanje odnosa troškova i koristi, balansiranje interesa povjerilaca i članova društva, balansiranje vrijednosti različitih subjekata odgovornosti i međusobnog međuuticaja različitih osnova odgovornosti, usaglašavanje vrijednosti pravila i standarda i slično (Mulbert, 2006).

Interesantno je da, u principu, institut probijanja pravne ličnosti nema svog posebnog opravdanja kod povjerilaca koji svojom voljom i iz sopstvenog interesa stupaju u ugovorni odnos sa društvom kapitala (potencijalnim dužnikom). U skladu sa tim, oni preuzimaju poslovni rizik eventualnog neizvršenja takvog ugovora od nesolidnog dužnika, s tim da već u trenutku ugovaranja nastoje da se osiguraju u mjeri u kojoj je to moguće zavisno od konkretnog slučaja. Sljedeće mjere obezbjeđenja se najčešće pojavljuju u praksi: izbor solventnog ugovornog partnera, lična i stvarna sredstva obezbjeđenja ugovora, ugovorne sankcije neispunjenja ugovora, zakonska odgovornost članova organa društva kapitala itd. Ipak, obezbjeđenje ugovora na ovaj način usložnjava njegovu sadržinu, što vrlo često ima odvraćajući efekat na ugovorne strane te rezultira njihovim izbjegavanjem da zaključe takve ugovore. Iz tih razloga, pomenuta sredstva obezbjeđenja uglavnom se ne preciziraju u samim ugovorima, što opravdava potrebu postojanja instituta probijanja pravne ličnosti i konstituiše ga kao „rezervnu zaštitu" za ugovorne povjerioce, s tim da se naglašava jedan njen nedostatak oličen u pravnoj nesigurnosti za investitore. Do pomenute pravne nesigurnosti dolazi zbog mogućih osnova koji uzrokuju aktuelizaciju instituta probijanja pravne ličnosti, među kojima su najsporniji oni vezani za pravičnost ili „neprikladno ponašanje", kao i primjenu pravila isključivo na „aktivne" članove društva koji su involvirani u upravljanje društvom, a ne i na „pasivne", bez obzira na nepobitnu činjenicu da se pravilo generalno odnosi na sve članove društva kapitala, što posljedično stvara odbojni efekat na potencijalne investicije.

Drugačija situacija je kod povjerilaca koji ne stupaju svojom voljom u pravni odnos sa društvom kapitala, već taj odnos nastaje određenim deliktom društva ili zaposlenih (i članova organa društva: odgovornost proizvođača proizvoda ili vršioca usluga trećim licima ili odgovornost za delikte zaposlenih prema trećim licima), te postavlja pitanje naknade prouzrokovane štete, posebno u slučaju insolventnosti dužnika štete, nedovoljne kapitalizacije društva kapitala, kao i nepostojanja odgovornosti članova organa društva u skladu sa pravilima vanugovorne odgovornosti (Anderson, 2009). I razne ekonomske analize pokazuju da svođenje ove odgovornosti isključivo na odgovornost društva kapitala prema trećim licima vodi povećanju troškova, što za posljedicu ima povećanje cijene proizvoda ili cijene vršenja usluga, čime se naglašava važnost odgovornosti članova tog društva kapitala. Princip ograničene odgovornosti koji štiti interese članova društva kapitala kada je riječ o neugovornim povjeriocima, u balansiranju interesa jednih i drugih, sa probijanjem pravne ličnosti kao izuzetkom, ipak je načelno upitan, posebno imajući u vidu da prilikom ujednačavanja interesa ugovornih i neugovornih povjerilaca u postupku bankrota, ugovorni povjerioci (posebno obezbijeđeni) imaju prednost u odnosu na neugovorne koji su redovno neobezbijeđeni povjerioci, što još više problematizuje i princip ograničene odgovornosti članova društva kapitala u pogledu ovih povjerilaca, a sve naglašeno u kontekstu tako lošeg tretmana u postupku bankrotstva (Vasiljević, 2020).

Pitanje pravnog tretmana zaposlenih kao povjerilaca po osnovu odgovornosti društva kapitala predstavlja zasebnu cijelinu, posebno jer se u pravnom smislu radi o ugovornom odnosu (potraživanja po osnovu ugovora o radu). Izuzetak su situacije kada je riječ o potraživanju po osnovu delikta, budući da tada pravni odnos nastaje kasnije, što ima za posljedicu nemogućnost pregovora i nepostojanje načina da se izvršilac delikta predvidi. Međutim, čak i u slučaju kad je osnov potraživanja ugovor, zbog izuzetne osjetljivosti položaja radnika i faktičke pozicije slabije ugovorne strane, po pravilu se i tada primjenjuju pravila o potrebi zaštite kao da je u pitanju potraživanje po osnovu delikta, što dodatno stvara prostor za primjenu instituta probijanja pravne ličnosti.

U kompanijskom pravu, redovno pravno sredstvo kojima se povjerioci društva služe da objelodane svoj osuđujući zahtjev prema članu društva kapitala i ostvare svoja prava po osnovu ustanove probijanja pravne ličnosti jeste kondemnatorna tužba. Međutim, da bi se ispunile pretpostavke za odgovornost člana prema povjeriocu društva kapitala, potrebno je da povjerilac prvo dokaže postojanje pretpostavki za odgovornost člana društva primjenom ustanove probijanja pravne ličnosti, što za posljedicu ima da se, u procesnom smislu, utvrđivanje pretpostavki za odgovornost članova društva kapitala javlja kao prethodno pitanje. Postavljanje ovako visokog dokaznog praga za tužioca (povjerioca), koji ne raspolaže dokaznom dokumentacijom (naprotiv, ona se nalazi u posjedu društva dužnika ili člana društva), predstavlja neopravdano rješenje koje iz očiglednih razloga nalaže da se što prije promijeni, te da se pomenuta modifikacija, uz poštovanje principa pravičnosti, ogleda u dovoljnosti dokaza *prima facie*[8], a da se nakon toga dokazni teret prebaci na tuženog člana društva kapitala. Osim tužbe, čini se da bi bila moguća i kompenzaciona protivtužba (ako je član društva po osnovu svog poslovnog odnosa sa povjeriocem društva podnio tužbu protiv njega), dok prigovor proboja potraživanja, kao procesno sredstvo, ne bi bio moguć zbog izostanka uslova uzajamnosti potraživanja između povjerioca društva i člana društva (Vasiljević, 2020).

2.3. Pasivna legitimacija kod ustanove probijanja pravne ličnosti

Kada je riječ o pasivnoj legitimaciji, postavlja se opravdano pitanje da li je namjera zakonodavca prilikom formiranja instituta probijanja pravne ličnosti bila da ustanovi podjednaku odgovornost za sve članove društva. Na prvi pogled, čini se da se zakonodavac upravo vodio principom ravnopravnog tretmana svih članova društva kapitala. Međutim, ukoliko se predmetni institut uporedi sa institutom propisanih dužnosti prema društvu, onda bi takva odgovornost obuhvatala samo kontrolne članove. Ako se pak zakonom urede obaveze prema društvu (dužnost lojalnosti, dužnost pažnje), a ne dužnosti članova društva kapitala prema povjeriocima društva, onda probijanje pravne ličnosti kao pravo povjerilaca društva kapitala po osnovu odgovornosti članova društva ne može direktno proizlaziti iz povrede njihovih dužnosti prema društvu, a imajući u vidu da povjerioci ne ostvaruju svoja prava derivativno, dovodi do zaključka da je pravo povjerilaca kao konstitutivnih elemenata društva kapitala samo indirektno zasnovano na povredi dužnosti prema društvu, a izvorno potraživanje po osnovu pravila probijanja pravne ličnosti je originalno i na samom zakonu utemeljeno potraživanje, pod uslovom da ovo pravo povjerioci društva ostvaruju u svoje ime i za svoj račun (Vasiljević, 2020).

Ukoliko se odgovornost za probijanje pravne ličnosti veže za kontrolne članove društva, imajući u vidu da oni imaju propisane dužnosti isključivo prema društvu kao pravnom subjektu, a ne i prema članovima koji nisu kontrolni (izuzetak je individualna tužba)

[8] U pravnom smislu, dokaz *prima facie* označava dokaz koji je, ukoliko se ne ospori, sam po sebi dovoljan odnosno očigledan da dokaže nečiji stav ili tvrdnju. Drugim riječima, to je dokaz pomoću koga se do saznanja pravno relevantne činjenice dolazi logičkim zaključivanjem o uzročno-posljedičnoj vezi na osnovu pravila životnog iskustva.

other hand. In this regard, the rule is that contractual creditors are required to meet stricter standards than tort creditors and employees, which makes it far more likely to apply the „piercing the corporate veil“ institute and disregard the principle of limited liability in this second category of creditors (Peterson, 2018).

Variations in the approach to protecting the interests of different types of creditors are primarily in the field of legal policy and honesty, and in any case require taking into account all circumstances (protection at a time when the company is solvent or on the verge of bankruptcy), balancing the interests of different classes of creditors. costs and benefits, balancing the interests of creditors and members of company, balancing the values of different subjects of liability and the mutual interaction of different bases of liability, harmonizing the values of rules and standards and the like (Mulbert, 2006).

It is interesting that, in principle, the “piercing the corporate veil” institute does not have its special justification for creditors who voluntarily and out of their own interest enter into a contractual relationship with a limited company (potential debtor). Accordingly, they assume the business risk of possible non-performance of such a contract from an unsound debtor, provided that at the time of contracting they seek to insure themselves to the extent possible depending on the specific case. The following security measures most often appear in practice: selection of a solvent contractual partner, personal and actual means of securing the contract, contractual sanctions for non-fulfillment of the contract, legal liability of members of the limited company, etc. However, securing a contract in this way complicates its content, which very often has a deterrent effect on the contracting parties and results in their avoidance of concluding such contracts. For these reasons, the mentioned collateral is mostly not specified in the contracts themselves, which justifies the need for the “piercing the corporate veil” institute and constitutes it as “reserve protection” for contractual creditors, emphasizing one of its flaws embodied in legal uncertainty for investors. The mentioned legal uncertainty is due to possible basis that cause the actualization of the “piercing the corporate veil” institute, among which the most controversial are those related to fairness or “inappropriate behavior”, as well as the application of rules exclusively to “active” members involved in corporate governance and not to the “passive”, regardless of the undeniable fact that the rule generally applies to all members of the limited company, which consequently creates a repulsive effect on potential investments.

The situation is different with creditors who do not voluntarily enter into a legal relationship with a limited company, but this relationship arises from a certain tort of the company or employees (and members of the company’s bodies: liability of product manufacturers or service providers to third parties or liability for employee offenses against third parties) and raises the issue of compensation for damages, especially in the case of insolvency of the debtor, insufficient capitalization of the limited company, as well as the lack of liability of members of the company’s bodies in accordance with the rules of non-contractual liability (Anderson, 2009). Various economic analyzes show that reducing this liability solely to the liability of a limited company towards third parties leads to an increase in costs, which results in an increase in the price of products or prices for services, emphasizing the importance of liability of members of that limited company. The principle of limited liability that protects the interests of members of the limited company when it comes to non-contractual creditors, in balancing the interests of both, with the „piercing the corporate veil“ as an exception, is still questionable, especially bearing in mind that in balancing the interests of contractual and non-contractual creditors, contractual creditors (especially secured) have an advantage over non-contractual ones who are regularly unsecured creditors, which further problematizes the principle of limited liability of limited company members in relation to these creditors, all emphasized in the context of such poor treatment in bankruptcy proceedings (Vasiljevic, 2020).

The issue of legal treatment of employees as creditors on the basis of the liability of the limited company represents a separate entity, especially because in the legal sense it is a contractual relationship (claims based on employment contracts). Exceptions are situations when it comes to a claim based on a tort, since the legal relationship arises later, which results in the impossibility of negotiations and the lack of a way to predict the perpetrator of the tort. However, even in the case when the basis of the claim is a contract, due to the extreme sensitivity of the position of the worker and the actual position of the weaker contracting party, as a rule, the rules on the need for protection apply as if it were a tort claim, which additionally creates space for the application of the „piercing the corporate veil“ institute.

In company law, the regular legal remedy used by the company’s creditors to disclose their condemnatory claim against a member of the limited company and exercise their rights on the basis of the “piercing the corporate veil” institute is a condemnation lawsuit. However, in order to meet the preconditions for the liability of a member towards the creditor of a limited company, it is necessary for the creditor to first prove the existence of preconditions for the liability of a member of the company by applying the „piercing the corporate veil“ institute, which in procedural terms, results in the fact that determining the preconditions for the liability of the members of the limited company, arises as a preliminary issue. Setting such a high threshold of evidence for the prosecutor (creditor), who does not have evidence (on the contrary, it is in the possession of the debtor’s company or a member of the company), is an unjustified solution that for obvious reasons requires to change as soon as possible, and that the mentioned modification, while respecting the principle of fairness, is reflected in the sufficiency evidence prima facie[8], and after that the burden of proof is transferred to the defendant member of the limited company. In addition to the lawsuit, it seems that a compensatory counterclaim would be possible (if a member of the company filed a lawsuit against him based on his business relationship with the company’s creditor), while the objection of breach of claims as a procedural means would not be possible due to lack of reciprocity of the company’s creditor and member of the company (Vasiljevic, 2020).

2.3. Passive Legitimacy of the „Piercing the Corporate Veil“ Institute

When it comes to passive legitimacy, a legitimate question arises as to whether the intention of the legislator when establishing the “piercing the corporate veil” institute was to establish equal liability for all members of company. At first glance, it seems that the legislator was guided by the principle of equal treatment of all members of the limited company. However, if the institute in question is compared to the institute of prescribed duties towards company, then such liability would cover only the controlling members. If, on the other hand, the law regulates the duties towards the company (duty of loyalty, duty of care) and not the duties of the members of the limited company towards the creditors of the company, then the “piercing

[8] In legal terms, prima facie evidence means evidence that, if not disputed, is in itself sufficient or obvious to prove one’s position or claim. In other words, it is the proof by which the legally relevant fact is learned by logical inference about the cause-and-effect relationship based on the rules of life experience.

i koji nisu aktivno legitimisana lica po osnovu probijanja pravne ličnosti, onda bi oni mogli protiv kontrolnih članova koji su povrijedili propisane dužnosti prema društvu podnijeti derivativne tužbe, i to za račun društva, ali i individualne tužbe po osnovu „povrede posebnih dužnosti prema društvu". Najzad, sve pretpostavke za primjenu ustanove probijanja pravne ličnosti u suštini označavaju i povrede dužnosti lojalnosti kontrolnih članova prema društvu, koje je u svakom slučaju neophodno dokazati ukoliko se namjerava iskoristiti predmetni institut, što bi praktično značilo da u tom režimu i status kontrolnog člana ne bi automatski vodio odgovornosti po osnovu probijanja pravne ličnosti. Na kraju, čak i onda kad se samim zakonima označava mogućnost pasivne legitimacije za sve članove društva (jednak i ravnopravan tretman članova društva), zbog činjenice da se ovaj institut praktično primjenjuje samo kod zatvorenih društava (ponajviše kod jednočlanih društava sa malim brojem članova), ipak se čini da je nemoguće ne pronaći konekciju između instituta probijanja pravne ličnosti i instituta povrede dužnosti kontrolnih članova prema društvu, što u konačnici može dovesti do njihove eventualne odgovornosti po osnovu probijanja pravne ličnosti, što se posebno ilustruje kod grupe društava (odgovornost kontrolnog društva kao člana zavisnog društva, kad su za to ispunjene zakonske pretpostavke). Još preciznije, ovakvoj odgovornosti mogu biti podvrgnuti isključivo aktivni kontrolni članovi društva koji učestvuju u radnjama koje predstavljaju osnov probijanja pravne ličnosti, s tim da se ova odgovornost može proširiti i na one članove koji nemaju poziciju kontrolnih ako u konkretnom slučaju preduzmu neke radnje za koje se osnovano može tvrditi da dovode do probijanja pravne ličnosti.

Kada je u pitanju zakonodavna regulativa, interesantan je izbor riječi koji je iskorišćen Zakonom o privrednim društvima Republike Srpske. Naime, njime se predviđa da komanditor komanditnog društva, kao i članovi društva sa ograničenom odgovornošću i akcionari akcionarskog društva mogu prema trećim licima lično odgovarati za obaveze društva ako zloupotrijebe privredno društvo za nezakonite ili prevarne ciljeve ili ako imovinom privrednog društva raspolažu kao sopstvenom imovinom na način kao da privredno društvo kao pravno lice ne postoji. Ukoliko prethodnu odredbu zakona jezički protumačimo, proizašlo bi da ona obuhvata sve članove društva, bez obzira na visinu njihovog učešća u kapitalu. Ipak, vodeći se gorenavedenim razlozima, te koristeći se ciljnim tumačenjem pomenute norme zakona, ispostavlja se da odgovornost za obaveze društva u smislu instituta probijanja pravne ličnosti obuhvata isključivo kontrolne članove društva, što je i logično, budući da mogućnost zloupotrebe pravila o ograničenoj odgovornosti pretpostavlja korporativnu moć odlučivanja, koja je kao pravo rezervisana jedino za takve vrste članova društva. Prema tome, ukoliko uzmemo u obzir da je, po pravilu, kontrolna korporativna moć zasnovana na učešću u kapitalu, proizlazi da je njeno postojanje direktno uslovljeno postojanjem većinskog učešća u kapitalu. Odgovor na pitanje kada postoji većinsko učešće u kapitalu možemo pronaći u odredbama Zakona o privrednim društvima Republike Srpske, gdje se navodi da kontrolni član društva s ograničenom odgovornošću ili kontrolni akcionar akcionarskog društva u smislu ovog zakona jeste lice koje samo ili sa drugim licima koja sa njim djeluju zajedno ima više od 50% glasačkih prava u privrednom društvu na osnovu običnih akcija. Osim toga, korporativna moć odlučivanja može se postići i kada je procentualno učešće u kapitalu sa pravom glasa ispod zakonskog minimuma (disperzija članova društva, njihov neaktivizam, dozvoljeni ugovori o glasanju itd.), kao i putem tzv. zajedničkog djelovanja sa drugim licima (što su sve činjenice koje se moraju dokazati jer se nijedna od njih ne pretpostavlja).

Ono što ostaje sporno jeste razlog koji je naveo našeg zakonodavca da uvrsti komanditore u pasivno legitimisana lica za odgovornost po osnovu instituta probijanja pravne ličnosti, imajući u vidu da se radi o licima koja nemaju kontrolnu korporativnu moć, odnosno ne upravljaju društvom niti mogu posjedovati upravljačku kontrolu nad društvom, te time postaju uskraćeni za mogućnost da uopšte zloupotrijebe princip ograničene odgovornosti kao nužne i nezaobilazne pretpostavke za odgovornost člana društva povjeriocima društva po osnovu probijanja pravne ličnosti. U svakom slučaju, lavirint ustanove probijanja pravne ličnosti u smislu članova društva kao subjekata odgovornosti prema povjeriocima društva, sa kojim ih zakon na ovaj način prinudno spaja i čini odgovornim, pored odgovornosti društva kao ugovornog partnera, pod pretpostavkom ispunjenosti uslova, ostaje nerazrješiv i pravno neobjašnjiv, osim djelimično sa koncepcijom povjerilaca kao konstitutivnog elementa „interesa društva", kome članovi društva moraju biti lojalni u slučaju sukoba svog ličnog interesa ili interesa povezanih lica sa „interesom društva", te da povredom tog interesa povređuju dužnost lojalnosti društvu koja uključuje i povredu dijela te dužnosti prema povjeriocima (Vasiljević, 2020).

Pravna zasnovanost i osnovanost ovog instituta u kompanijskom pravu mogla bi se iskristalisati ukoliko se prizna svojevrsna kompanijskopravna dužnost lojalnosti članova društva svojim povjeriocima po ovoj ustanovi, čijim kršenjem bi automatski i direktno postajali odgovorni. U praksi je to već i sada slučaj, ali bi u ovom kontekstu imali jasnu pravnu osnovu sa odgovarajućim kompanijskopravnim rješenjem, što bi bilo u saglasnosti sa već postojećim preovlađujućim mišljenjem pravne teorije da takva vrsta odgovornosti faktički i postoji. Na ovaj način, članovi društva ne bi izgubili, nego bi naprotiv, pojačali povjerenje povjerilaca njihovih društava, dok bi povjerioci dobili izvjestan suverenitet i u kompanijskom pravu, makar locirano samo na ustanovu probijanja pravne ličnosti, te bi se na taj način postigla ravnoteža interesa, a kompanijsko pravo bi dobilo na svom autoritetu i u odnosu na ugovorno i deliktno pravo, na čijem terenu u kontekstu ove ustanove, za sada gubi (Vasiljević, 2020).

2.4. Priroda odgovornosti kod probijanja pravne ličnosti

Budući da se u slučaju odgovornosti člana društva za obaveze društva prema povjeriocima društva primjenom ustanove probijanja pravne ličnosti, radi o postojanju ugovornog odnosa društva i trećeg lica, a ne i člana društva, čini se da, ukoliko nema ugovornog aranžmana, ovaj odnos može ipak imati samo neugovornu prirodu. Ovim se ne ukida odgovornost člana društva za obaveze društva prema trećim licima po osnovu ugovora ili delikta i po osnovu sopstvene deliktne odgovornosti, kad u njegovim radnjama prema svojoj kompaniji ima elemenata delikta, kao što se ne dovodi u pitanje ni potencijalna odgovornost članova organa društva prema samom društvu, drugim članovima društva, prema povjeriocima društva, kao i prema trećim licima, kad postoje odgovarajuće zakonske pretpostavke.

U pogledu odgovornosti članova za imovinske obaveze društva prema trećim licima, bitno je istaći da približavanje pravne prirode društava kapitala pravnoj prirodi društava lica korišćenjem ustanove probijanja pravne ličnosti može ići do određene mjere, ali se između njih ne može postaviti znak jednakosti. Naime, kod društava lica odgovaraju svi članovi društva (ortaci) ili samo jedna kategorija članova (komplementari), i to svojom sopstvenom imovinom, za razliku od društava kapitala gdje odgovornost ličnom imovinom nastupa tek ukoliko se utvrdi da je došlo do zloupotrebe pravnog subjektiviteta društva, odnosno do probijanja pravne ličnosti.

Odgovornost članova društva kapitala za obaveze društva prema povjeriocima društva, primjenom instituta probijanja pravne ličnosti na zakonu je zasnovana (zakonska obaveza), imperativna, akcesorna (po pravilu, zavisna od punovažnosti obaveze sa društvom), direktna, konkretna (odnos konkretnog povjerioca i člana društva

the corporate veil" as the right of creditors of the limited company towards the company, and bearing in mind that creditors do not exercise their rights derivatively, leads to the conclusion that the right of creditors as constitutive elements of the limited company is only indirectly based on breach of duty to the company, and the original claim is, based on the rules of the "piercing the corporate veil", an original claim based on the law itself, provided that the creditors of the company exercise this right in their own name and for their own account (Vasiljevic, 2020).

If the liability for "piercing the corporate veil" is related to the controlling members of the company, and having in mind that they have prescribed duties exclusively towards the company as a legal entity, and not towards members who are not controlling (exception is an individual lawsuit) and who are not actively based on the "piercing the corporate veil" case, then they could file derivative lawsuits against control members who violated the prescribed duties towards the company on behalf of the company, but also individual lawsuits based on "violation of special duties towards the company". Finally, all the preconditions for the application of the "piercing the corporate veil" institute essentially mean violations of the duty of loyalty of control members towards the company, which in any case must be proven if the institute is intended to be used, which would practically mean that in that regime, also the status of a controlling member would not automatically lead to liability based on the „piercing the corporate veil". In the end, even when the laws themselves indicate the possibility of passive legitimacy for all members of company (equal treatment of company members), due to the fact that this institute is practically applied only to closed companies (mostly single-member companies with fewer members), makes it impossible not to find a connection between the „piercing the corporate veil" institute and the institute of breach of duties of controlling members towards company, which may ultimately lead to their eventual liability based on „piercing the corporate veil", which is especially illustrated by a group of companies (liability of the controlling company as a member of the subsidiary, when the legal preconditions are met). More precisely, such liability can be subjected only to active control members of the company who participate in actions that are the basis for „piercing the corporate veil", but this liability can be extended to those members who do not have a position of control if they take some action which can reasonably be claimed to lead to „piercing the corporate veil".

When it comes to legislative regulations, the choice of words used by the Company Law of the Republic of Srpska is interesting. Namely, it stipulates that a limited partner in a limited partnership, as well as members of a limited liability company and shareholders of a joint stock company may be personally liable to third parties for the company's obligations if they abuse the company for illegal or fraudulent purposes or if they dispose of the company's assets as if it were their own, in a way as if the company as a legal entity does not exist. If we interpret the previous provision of the law linguistically, it would turn out that it includes all members of a company, regardless of the amount of their share in the capital. However, guided by the above reasons, and using a targeted interpretation of the said rule of law, it turns out that liability for the obligations of the company in terms of the „piercing the corporate veil" institute includes only controlling members of the company, which is logical, since the possibility of abusing the limited liability rules presupposes corporate decision-making power, which as a right is reserved only for such types of members of a company. Therefore, if we take into account that, as a rule, the controlling corporate power is based on share in the capital, it follows that its existence is directly conditioned by the existence of majority share in the capital. The answer to the question of when there is a majority share in the capital can be found in the provisions of the Company Law of Republic of Srpska, which states that the controlling member of a limited liability company or controlling shareholder of a joint stock company in terms of this law is a person who alone or together with other persons has more than 50% of the voting power in the company on the basis of ordinary shares. In addition, corporate decision-making power can be achieved when the percentage share in the capital with voting rights is below the legal minimum (dispersion of company members, their inactivity, allowed voting agreements, etc.), as well as through so-called joint action with others (which are all facts that must be proven because none of them are assumed).

What remains controversial is the reason that led our legislator to include limited partners in passively legitimized persons for liability based on the "piercing the corporate veil" institute, bearing in mind that these are persons who do not have control over corporate power, that is, they do not manage the company nor can they have managerial control over the company, thus becoming deprived of the opportunity to abuse the principle of limited liability as a necessary and unavoidable precondition for the liability of a company member to the company's creditors on the basis of "piercing the corporate veil". In any case, the labyrinth of the "piercing the corporate veil" institute in terms of members of the company as subjects of liability to creditors of the company by which the law in this way forcibly unites them and makes them liable, in addition to the company's responsibility as a contractual partner, assuming the conditions are met, it remains unsolvable and legally inexplicable, except in part with the concept of creditors as a constitutive element of "company's interests", to which members of a company must be loyal in case of conflict of personal interest or interests of related parties with "company's interest", and that by violating that interest, they violate the duty of loyalty to company, which includes the violation of part of that duty towards creditors (Vasiljevic, 2020). The legal basis and validity of this institute in company law could crystallize if a kind of company law duty of loyalty of company members to their creditors in this institute is recognized, whose violation would automatically and directly make them liable. In practice, this is already the case, but in this context we would have a clear legal basis with an appropriate company law solution, which would be in line with the prevailing opinion of legal theory that this type of liability actually exists. In this way, members of the company would not lose, but on the contrary, strengthen the trust of creditors in their companies, while creditors would gain some sovereignty in company law, even if located only on the „piercing the corporate veil" institute, and thus achieve a balance of interests and company law would gain in its authority and in relation to contract and tort law, in whose field, in the context of this institute, it loses for now (Vasiljevic, 2020).

2.4. The Nature of Liability of the „Piercing the Corporate Veil"

Since in the case of liability of a member of the company for the obligations of the company to the creditors of the company, applying the „piercing the corporate veil" institute, it is a contractual relationship between the company and a third party, but not a member of the company, it seems that if there is no contractual arrangement, this relationship can, however, only have a non-contractual nature. This does not eliminate the liability of a member of the company for the company's obligations to third parties under the contract or tort and on the basis of its own tort liability, when in its actions towards its company there are elements of tort, just as the potential liability of the members of the company's bodies towards the company itself, other members of the company, towards the

potencijalno odgovornog po ovom osnovu), sa funkcijom dodatne zaštite povjerilaca (Vasiljević, 2020). Ovdje je riječ o odgovornosti za drugog, koja obuhvata cijelokupnu odgovornost društva, što uključuje predugovorne, ugovorne i vanugovorne obaveze, budući da se ipak ne pravi razlika u pogledu načina nastanka obaveze za angažovanje odgovornosti člana društva u kontekstu ove ustanove. Autonomna i zakonska odgovornost za tuđe obaveze predstavlja odgovornost *in abstracto*, a ne odgovornost *in concreto*, i riječ je o blanko odgovornosti za sve buduće obaveze (Vasiljević, 2020). Zbog toga je potrebno ovu odgovornost razlikovati od fakultativne odgovornosti *in concreto* za obaveze drugog (ugovor o jemstvu, ugovor o garanciji i sl.), posebno iz razloga što se kod ustanove probijanja pravne ličnosti radi o obaveznoj odgovornosti, čije se pravno utemeljenje može pronaći u samom zakonu.

Postoje različite vrste odgovornosti za drugoga, od solidarne i supsidijarne do ograničene i neograničene, te je potrebno utvrditi o kojoj vrsti i obimu odgovornosti je riječ kod ustanove probijanja pravne ličnosti. Za razliku od Zakona o privrednim društvima Republike Srbije, u kojoj ova oblast ostaje prepuštena tumačenju, Zakonom o privrednim društvima Republike Srpske koncizno se navodi da komanditori komanditnog društva, kao i članovi društva sa ograničenom odgovornošću i akcionari akcionarskog društva, odgovaraju solidarno za probijanje pravne ličnosti. Pritom, u Zakonu o privrednim društvima Republike Srpske navodi se da opšti pravni princip ograničene odgovornosti članova društva ne važi u slučaju pomenutih zloupotreba privrednog društva od navedenih lica, što znači da se ujedno radi i o neograničenoj odgovornosti. Imajući u vidu da je u središtu instituta probijanja pravne ličnosti zaštita interesa povjerilaca društva, te uzimajući u obzir da se ta protekcija najbolje ostvaruje kroz solidarnu neograničenu odgovornost članova društva, jasno proizlazi zbog čega se zakonodavac opredijelio za ovakvu vrstu i obim odgovornosti.

Solidarni dužnik koji ispuni obavezu prema povjeriocu „za drugoga“ ima pravo regresa prema ostalim dužnicima, na osnovu pravila kojima se regulišu njihovi interni odnosi, a u njihovom nedostatku, prema pravilima Zakona o obligacionim odnosima. Kod ostvarivanja prava na regres razlikujemo aktivnu i pasivnu legitimaciju. S tim u vezi, pravo na regres (aktivna legitimacija) ima onaj dužnik koji je platio više nego što je po pravilu o regulisanju unutrašnjih odnosa obavezan, dok pasivna legitimacija nastupa onog trenutka kada se regres zahtjeva od onih dužnika za čiji račun je obaveza izvršena. Treba naglasiti da obaveza može biti zaključena u isključivom interesu jednog dužnika, te ukoliko je to slučaj, a dođe do namirenja obaveze od strane sudužnika, postoji obaveza dužnika da istom naknadi cijeli iznos obaveze. Ako to nije slučaj, a ništa drugo nije ugovoreno ili ništa drugačije ne proizlazi iz pravnih odnosa učesnika u poslu, na svakog dužnika otpada podjednak dio obaveze. Prema tome, u unutrašnjim odnosima članova društva nema solidarne odgovornosti, već dolazi do podjele obaveze (Vasiljević, 2020).

ZAKLJUČAK

Institut probijanja pravne ličnosti osvjetljava sve aspekte problema limita pravne ličnosti. Suština je da princip ograničene odgovornosti članova društva kapitala i dalje ostaje pravilo, što za sobom povlači i odvojenost subjektiviteta tog društva od subjektiviteta vlasnika odnosno člana, a samim time i odvojenost njihove odgovornosti. Međutim, zbog opšteg pravnog principa da se na vlastitom nepravu ne može zasnovati bilo kakvo pravo proizlazi da zloupotreba ograničene odgovornosti članova društva opravdava nastanak izuzetka od tog pravila, koji na temeljima sopstvenog delikta lišava člana društva njegovog prava na ograničenu odgovornosti i ulazi na teren njegove neograničene odgovornosti. Time se i „probija“ pravni subjektivitet društva, koji je služio kao garant postojanja ograničene odgovornosti člana društva. Ovdje je neophodno istaći da član društva ne može zloupotrijebiti pravni subjektivitet svog društva, budući da on pripada isključivo društvu, već samo pravo koje pripada njemu lično, a to je pravo ograničene odgovornosti. Upravo na taj način, kroz zloupotrebu ograničene odgovornosti, dešava se probijanje subjektiviteta društva za potrebe odgovornosti člana društva povjeriocu društva. Ipak, da bi u potpunosti došlo do izražaja, kompanijsko pravo treba da ustanovu probijanja pravne ličnosti „osvježi“ određenim novinama koje ćemo ovdje navesti.

Za početak, bilo bi poželjno da se Zakonom o privrednim društvima Republike Srpske uvede kompanijskopravna dužnost člana društva prema povjeriocima društva u kontekstu ustanove probijanja pravne ličnosti, što bi kompanijskopravnu prirodu ovog instituta učinilo nespornom, a time bi i prestala biti u „sjenci“ ugovornog i deliktnog prava. Zatim, potrebno je uspostaviti vezu između upravljačke moći u društvu i zloupotrebe principa ograničene odgovornosti i to na način da se upravljačka moć pojavi kao neophodna pretpostavka da do zloupotrebe ograničene odgovornosti uopšte dođe. Nadalje, potrebno je razjasniti kada tačno postoji osnova za primjenu ove ustanove u određenim slučajevima s pozivom na odgovarajuće građanskopravne institute ukoliko se ispune svi uslovi za njihovu primjenu, a to posebno važi kod deliktne odgovornosti s obzirom na činjenicu da ne postoji ugovorna veza između člana i povjerioca društva. Pored toga, imajući u vidu da je zloupotreba prava ograničene odgovornosti od strane članova društva zasnovana na krivici, poželjno bi bilo kad bi se jasno naznačilo da je riječ o standardu pažnje *in abstracto*, prema kojem zahtijevani prosječni standard pažnje člana društva predstavlja pažnja običnog građanina.

Sumirajući sve navedeno, primjetno je da je opravdanost ovog instituta i dalje upitna, što je i razlog postojanja širokog diverziteta u uporednopravnom pristupu njegove regulative. Osim raznolikosti kod zakonodavnog aspekta, još uvijek postoje neslaganja i u teorijskom smislu vezana za potrebu postojanja ustanove probijanja pravne ličnosti kod solventnih kompanija, koju karakteriše redovnost i konzistentnost u ispunjavanju ugovornih i vanugovornih obaveza, čime se direktno štite ugovorni i vanugovorni povjerioci. U svakom slučaju, nesporno je da je ovaj institut potreban kod kompanija u stečajnom postupku, radi povećanja zaštite i sigurnosti povjerilaca, ali to ujedno ne znači da ne postoji obaveza onih društava kapitala koja se nalaze u vanstečajnoj poziciji da vode računa o zaštiti i interesu povjerilaca, s tim da je, prema dominantnoj kompanijskopravnoj formuli, uprava društva prevashodno dužna da radi i djeluje u interesu društva, pošto bi u suprotnom, odnosno, u slučaju favorizovanja interesa povjerilaca, činila povredu svojih propisanih dužnosti.

IZVORI

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company's creditors, as well as towards third parties, when there are appropriate legal preconditions, is not questioned.

Regarding the liability of members for the company's property obligations towards third parties, it is important to point out that bringing the legal nature of limited companies closer to the legal nature of partnerships using the „piercing the corporate veil" institute can go to a certain extent, but no sign of equality can be placed between them. Namely, in the case of partnerships, all members of the company (partners) or only one category of members (general partners) are liable with their personal property, unlike limited companies where liability with personal property occurs only if it is determined that the company's legal personality has been abused that is, until the event of „piercing the corporate veil" occurs.

The liability of the members of the limited company for the obligations of the company towards the creditors of the company, by applying the „piercing the corporate veil" institute is based on law (legal obligation), imperative, accessory (usually depending on the validity of the obligation with the company), direct, specific (relationship between a specific creditor and a member of the company potentially liable on this basis), with the function of additional protection of creditors (Vasiljevic, 2020). This is a liability for others, which includes the entire liability of the company, which includes pre-contractual, contractual and non-contractual obligations, since no distinction is made regarding the manner of incurring the obligation to engage the liability of a company member in the context of this institute. Autonomous and legal liability for other people's obligations is liability in abstracto, not liability in concreto, and it is a blank liability for all future obligations (Vasiljevic, 2020). Therefore, it is necessary to distinguish this liability from the optional liability in concreto for the obligations of others (guarantee agreement, etc.), especially because the „piercing the corporate veil" institute is a mandatory liability, the legal basis of which can be found in the law itself.

There are different types of liability for others, from joint and several and subsidiary to limited and unlimited, and it is necessary to determine the type and scope of liability regarding the „piercing the corporate veil" institute. Unlike the Company Law of the Republic of Serbia, in which this area remains to be interpreted, the Company Law of the Republic of Srpska concisely states that limited partners in limited partnership, as well as members of limited liability companies and shareholders are jointly and severally liable for „piercing the corporate veil". At the same time, the Company Law of the Republic of Srpska states that the general legal principle of limited liability of company members does not apply in the case of the mentioned abuses of the company by these persons, which means that it is also unlimited liability. Having in mind that the protection of the interests of the company's creditors is at the center of the „piercing the corporate veil" institute, and taking into account that this protection is best achieved through joint and several unlimited liability of company members, it is clear why the legislator opted for this type and scope of liability.

A joint and several debtor who fulfills the obligation to the creditor "for others" has the right of recourse against other debtors, based on the rules governing their internal relations, and in their absence, according to the rules of the Law on Contracts and Torts. When exercising the right to recourse, we distinguish between active and passive legitimacy. In this regard, the right to recourse (active legitimacy) has the debtor who has paid more than is required by the rule governing internal relations, while passive legitimacy occurs when recourse is required from those debtors on whose behalf the obligation is performed. It should be emphasized that the obligation can be concluded in the exclusive interest of one debtor, and if this is the case, and there is a settlement of the obligation by the co-debtor, there is an obligation of the debtor to reimburse the entire amount. If this is not the case, and nothing else has been agreed or nothing else arises from the legal relations of the participants in the transaction, each debtor has an equal part of the obligation. Therefore, there is no solidarity in the internal relations of the members of the company, but there is a separation of obligations (Vasiljevic, 2020).

CONCLUSION

The „piercing the corporate veil" institute sheds light on all aspects of the problem of the limit of legal personality. The essence is that the principle of limited liability of members of a limited company remains the rule, which entails the separation of the subjectivity of the company from the subjectivity of the owner or member, and thus the separation of their liabilities. However, due to the general legal principle that no right can be based on one's own non-right, it follows that the abuse of the limited liability of members of company justifies the emergence of an exception to that rule, which, on the basis of its own tort, deprives a member of company of his right to limited liability and enters the field of his unlimited liabilities. This causes the „piercing" of legal subjectivity of the company, which served as a guarantor of the existence of limited liability of a member of the company. It is necessary to point out here that a member of a company cannot abuse the legal subjectivity of his company, since he belongs exclusively to the company, but only the right that belongs to him personally, and that is the right of limited liability. It is in this way, through the abuse of limited liability, that the subjectivity of the company is „pierced" for the needs of the liability of a member of the company to the creditor of the company. However, in order to be fully expressed, company law should "refresh" the „piercing the corporate veil" institute with certain novelties that we will list here.

To begin with, it would be desirable for the Company Law of the Republic of Srpska to introduce the company law duty of a member of the company towards the company's creditors in the context of the „piercing the corporate veil" institute, which would make the company law nature of this institute indisputable, and thus would cease to be in the "shadow" of contract and tort law. Next, it is necessary to establish a link between the managerial power in a company and the abuse of the principle of limited liability in such a way that the managerial power appears as a necessary prerequisite that there is no abuse of limited liability at all. Furthermore, it is necessary to clarify when exactly there is a basis for the application of this institute in certain cases with reference to the relevant civil law institutes if all conditions for their application are met, especially in tortious liability given the fact that there is no contractual relationship between member and creditors of the company. In addition, given that the abuse of limited liability by members of company is based on guilt, it would be desirable to clearly indicate that this is a standard of due diligence in abstracto, according to which the required average standard of due diligence of a member of company is the due diligence of an ordinary citizen.

Summarizing all the above, it is noticeable that the justification of this institute is still questionable, which is the reason for the existence of a wide diversity in the comparative legal approach of its regulations. Apart from the diversity in the legislative aspect, there are still disagreements in the theoretical sense related to the need for the „piercing the corporate veil" institute in solvent companies, which is characterized by regularity and consistency in fulfilling its contractual and non-contractual obligations, which

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directly protects contractual and non-contractual creditors. In any case, it is indisputable that this institute is needed by companies in bankruptcy proceedings to increase the protection and security of creditors, but this does not mean that there is no obligation of those limited companies that are in a non-bankruptcy position to take care of protection and interest of creditors, provided that, according to the dominant company law formula, the company's management is primarily obliged to work and act in the interest of the company, because otherwise, in the case of favoring the interests of creditors, it would violate its prescribed duties.

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