

# **The Special Legal Regime of Leasing Companies in the Legislation of Bosnia and Herzegovina and Neighboring Countries**

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## ABSTRACT

This paper analyzes the status of leasing companies in the legal system of Bosnia and Herzegovina and makes a comparison with legislations of neighboring countries. In recent years, leasing agreement became a widely used model of financing of procurement of goods including different types of equipment mostly for business purposes. From the beginning of the development of leasing, the practice of domestic and foreign trade and economy have defined its primary function as the financing of procurement of movable and immovable investment equipment without engaging personal investment funds by payment in cash and without indebtedness in classic loan form. Therefore, leasing companies as specialized legal entities appeared in most contemporary legal systems in order to offer to its clients new kind of financing different from the classical loans. This special kind of companies in most countries are introduced by *lex specialis* laws on leasing or if there is no such a law, they are formed under the general regime of national company law. Laws of leasing are enacted in Bosnia and Herzegovina on entity level beginning from 2007 in Republika Srpska and 2008 in Federation of Bosnia and Herzegovina. In neighboring countries, special leasing laws were enacted first in Macedonia in 2002, in Serbia 2003 and the last in Croatia in 2013. Although most of the leasing companies are directly or indirectly related to banks as financial institutions, nowadays we can surely talk about leasing companies as special and independent legal entities with specific legal personality.

**Keywords:** Leasing Agreement, Law on Leasing, Special Legal Regime, Company Formation, Leasing Company, Control.

## 1. INTRODUCTION

The leasing transactions of all different kinds are becoming more and more used in the practice of companies at both national and international level. Term „leasing“<sup>1</sup> has English origin<sup>2</sup> and its basic meaning is „renting“. In a contemporary business and legal environment, this term has derivative juridical meaning. According to Trifkovic et al. (2009), it becomes a technical term which indicates complex organizational, technical, technological, economic, commercial and legal operation intended for satisfying various needs of commercial and other entities related to acquiring use value of goods for a limited period of time. In a strictly legal sense, leasing agreement is complex legal transaction consisting of two contracts: delivery and leasing. (Vukadinovic, 2012)

Leasing was created in conditions of the developing markets of goods and capital and high technology which is rapidly advancing and it becomes difficult to follow this development by using the classic forms of business (Spasic, 1990). The lease agreement is complex legal and economic operation wherein a person that desires to procure and use certain goods addresses the specialized financial institution, which purchases the object of leasing for him/her, and then cedes it for utilization for a certain period of time (Medic, 2004).

Leasing agreement is a multi-layered and complex legal transaction that most frequently implies a three-dimensional relation and/or the existence of three entities of transaction: lessor, lessee, and supplier. The existence of deliverer is not mandatory because the goods may be made by a lessor. Likewise, it is not necessary that the lessor performs the purchase, because the goods may be purchased by the user of the lease, and the sold to the lessor. Subsequently, the lease may be taken from the lessor with the so-called sale and lease back<sup>3</sup> option.

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<sup>1</sup> Noun: a contract renting land, buildings, etc. to another, a contract or instrument conveying the property to another for a specified period or for a period determinable at the will of either lessor or lessee in consideration of rent or other compensation. Verb: to grant the temporary possession or use to another, usually for compensation at a fixed rate; to take or hold by the lease.

<sup>2</sup> According to Thesaurus dictionary the term leasing is of French and English speaking area, incurred in the period between 1350-1400 year.

<sup>3</sup> An arrangement where the seller of an asset leases back the same asset from the purchaser. In a leaseback arrangement, the specifics of the arrangement are made immediately after the sale of the asset, with the amount of the payments and the time

Thus, the owner gets his/her working capital. In a large number of cases, there is hidden a credit secured by the fiduciary transfer of the ownership (Culinovic 1998). Bearing in mind all the facts mentioned above regarding the complexity and wide application of this legal transaction, it is clear that modern legal systems have the necessity of creating special forms of legal entities whose main course of businesses would be all possible variations of leasing agreements.

## **2. DEFINITION OF LEASING COMPANY**

There are different types of companies developed in the theory of Company Law. The criteria for distinction can be the ownership of capital or liability of the founders for the debts of the company for the activities undertaken in the ordinary course of business. Referring to criteria of capital ownership, we can talk about public and private companies and regard liability criteria, there are limited and unlimited companies. According to applicable Companies Act of Federation of Bosnia and Herzegovina<sup>4</sup> and Republika Srpska<sup>5</sup>, there are four principle types of business organization: general partnerships, limited partnerships, public limited liability company (PLC or joint stock company) and private limited liability company (LLC or limited liability company). These types of business are classified as companies of persons (general partnership and limited partnership) and companies of capital (PLC and LLC).

The most common form of business entities in the economy of Bosnia and Herzegovina generally is limited liability company. The situation is similar in other contemporary legal systems. „The limited liability corporation is the greatest single discovery of modern times. Even steam and electricity are less important than limited liability company“ (Diamond 1982). Limited liability companies have the advantage that the member's liability to contribute to the debts of the company has a fixed limit which is always clear (Dine, Koutsisas, 2007). The essence of any type of company is that it has a legal personality distinct from the people who compose it. This means that even if the people running the company are continuously changing, the company itself retains its identity and the business

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period specified. Essentially, the seller of the asset becomes the lessee and the purchaser becomes the lessor in this arrangement.

<sup>4</sup> Official Gazette of Federation of Bosnia and Herzegovina no. 81/15 article 3.

<sup>5</sup> Official Gazette of Republika Srpska no. 127/08, 58/09, 100/11, 67/13. article 2.

need not to be stopped and restarted with every change in the managers or members of the business.

The leasing company as a specialized business form is relatively new in theory and practice and there is no adequate theoretical definition of leasing company itself. In accordance with the governing law<sup>6</sup>, leasing company can be defined as a company of capital with prescribed minimum amount of initial capital. In both entities laws on leasing in Bosnia and Herzegovina is specified that leasing company is always the company of capital. Therefore, it can be formed as limited liability company or joint stock company. This is the first characteristic of leasing companies in comparison with the general regim<sup>7</sup> of formation of companies in the B&H legislation. Besides this condition related to initial capital, leasing company can not be registered in the court register<sup>8</sup> without previously obtained the license from the competent state authority<sup>9</sup>. This license or approval is mandatory by its nature and is has to be issued before starting business activities.

The main course of business of leasing companies are operating and the finance leasing (Trifkovic et al. 2009). The leasing company as a party to the lease agreement is a lessor. Its main duty is to transfer possession rights and usage of the object of leasing to the lessee for the certain period of time, and the lessee's main obligation is to pay contractual reimbursement. At last, it is possible to infer that leasing company is voluntary specialized association formed as a company of capital with prescribed minimum initial capital and organized under special legal

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<sup>6</sup> Article 3 and 8 of The Law on Leasing of Federation of Bosnia and Herzegovina (Official Gazette of Federation B&H 85/08,39/09,65/13) and Article 10 and 14. of The Law on Leasing of Republika Srpska (Official Gazette of Republika Srpska 70/07, 116/11.)

<sup>7</sup>e General region of formation and business activities of a company refers to all types of companies which can be formed without any special conditions and licenses or permits issued by the competent state authority.

<sup>8</sup> There are special laws on entities level related to procedure of registration of business entities: Law on registration of business entities in Federation of Bosnia and Herzegovina (Official Gazette of Federation B&H 27/05, 68/05, 43/09 and 63/14) and Law on registration of business entities in Republika Srpska (Official Gazette of RS 42/05,118/09)

<sup>9</sup> Competence over formation and control of leasing companies in Bosnia and Herzegovina have banking agencies at the entity level. Banking agency of the Federation of Bosnia and Herzegovina: <http://www.fba.ba/> and banking agency of the Republika Srpska: <https://www.abrs.ba/>

regime by full fulfilling particular requirements referring to conditions for undertaking non-ordinary financial business activities by the relevant state authority.

### **3. FORMATION OF LEASING COMPANY**

The establishment of business entities implies more regulated legal and factual actions by the founder (one or more) and the competent authorities (Covic, 2003). For the establishment of the company according to the general regime requires two basic conditions: the decision on the establishment if the founder of the company is one single person, or the conclusion of the agreement on the establishment of the company if there are more than two founders and payment of initial capital in the amount specified by the decision or contract.<sup>10</sup> For companies in the special regime by particular regulations is required fulfillment of other, additional, conditions (Simic et al. 1999).

The analysis of applicable legislation in Federation of BiH shows that leasing companies can be established only in the form of limited liability company or joint-stock company,<sup>11</sup> while the Law on leasing in Republika Srpska stipulates that leasing transactions can be conducted only by legal entity formed as company of capital.<sup>12</sup> If the priority during formation of the company was given to the capital over the personalities of persons who are joining funds and labor, then we can talk about companies of capital (Barbic, 2000)

A limited liability company, in which the number of founders is not limited, is the legal entity in which one or more legal persons or individuals are entering their shares in accordance with the previously agreed conditions (Tolusic, 2012). This is the most common form of companies in the practice in Bosnia and Herzegovina.

Joint Stock Company is a company whose share capital is divided into shares<sup>13</sup> set up by one or more legal entities and / or individuals in the capacity of shareholders in order to perform certain activities under the same business name.<sup>14</sup>

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<sup>10</sup> In accordance with above-mentioned Companies Act at entity level in Bosnia and Herzegovina as well as law related to the procedure of registration of business entities in Federation Bosnia and Herzegovina and Republika Srpska.

<sup>11</sup> Article 3, point 3, The Law on leasing of Federation of Bosnia and Herzegovina

<sup>12</sup> Article 10, point 1, The Law of leasing of Republika Srpska.

<sup>13</sup> Article 105, point 1. of Companies Act of Federation of Bosnia and Herzegovina

<sup>14</sup> Article 179, point 1. of Companies Act of Republika Srpska.

The common characteristics of companies that are organized by the same group of people as a legal entity, but as a subject in legal system they differ from the persons who constitute it, and they all perform one or more specific business activities with the objective of making a profit by acting as an independent organization (Micovic, 2010).

The establishment of leasing companies at the territory of entities in Bosnia and Herzegovina is conditioned by the organizational form of the company and the minimum initial capital and the obligation to obtain approval to conduct leasing activities by the competent authority.<sup>15</sup> In Federation that is Banking agency of Federation of Bosnia and Herzegovina<sup>16</sup>, and in Republika Srpska Banking agency of Republika Srpska.<sup>17</sup> In both laws is prescribed the minimum of initial capital for leasing companies in the same amount of 250.000, 00 BAM.<sup>18</sup> The legislation of Federation of Bosnia and Herzegovina also established the obligation to obtain prior approval of the Banking Agency of the Federation of Bosnia and Herzegovina for the acquisition of a significant ownership interest in the leasing company. A significant ownership interest in the meaning of this provision refers to the individuals or legal entities to acquire or increase significant ownership interest in the leasing company for more than 10%, 20%, 33% or 50%.<sup>19</sup> The legislation of Republika Srpska does not proscribe this requirement. The unequal setting of obligations to the legal entities conducting leasing transactions at the entity level contributes to the establishment of disunited legal and economic environment. Bearing in mind that this is a very important condition for beginning of conducting leasing activities, the unification of entities regulations is mandatory. By existing regulations it is enabled to the subjects to apply the institute of „avoidance of law". Therefore, it is necessary to unify the law as much as possible. The remainder of this paper will present a comparative analysis of legislation in Bosnia and Herzegovina governing the establishment and formation of leasing companies, in the form of a table.

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<sup>15</sup> Article 3., point 2. of Law on leasing of Federation of Bosnia and Herzegovina; Article 10., point 1., a) of Law on leasing of Republika Srpska.

<sup>16</sup> According to article 3, point 1. of Law on leasing of Federation of Bosnia and Herzegovina

<sup>17</sup> According to Article 10 of Law on leasing of Republika Srpska.

<sup>18</sup> Article 8 of Federal leasing law and article 14, point 1 of leasing law of Republika Srpska.

<sup>19</sup> More on acquiring a significant ownership interest in the leasing company in the provisions of 9-11. Law on Leasing of the Federation.

**Table 1: Comparative analyzes of B&H Legislation**

No.	Description	FEDERATIONB&H	REPUBLIKA SRPSKA	BRČKO DISTRICT B&H
1.	The normative regulation of leasing as a business activity?	YES - Law on Leasing of Federation B&H enacted in 2008. amended in 2009 and 2013.	YES- Law on Leasing of Republika Srpska enacted in 2007. amended in 2011.	NO
2.	Special requirements and licence for formation?	YES- Pursuant to article 3., point 2. of Law on Leasing of Federation of B&H, leasing company can not be registered in Court register before obtaining a license (approval) by competent authority for doing leasing as the main course of business.	YES- Pursuant to article 10. point 1. of Law on Leasing of Republika Srpska, leasing business can be conducted only by the subject who has prior approval for doing leasing business activities.	NO- Companies conducting leasing business activities are treated equally as all other companies.
3.	The competent state authority for issuance of approval and control of leasing companies.	Federal Banking Agency under Article 3, paragraph 1 of the Law on Leasing of the Federation of Bosnia and Herzegovina for a leasing company established in the territory of the Federation of BiH and the subsidiaries of leasing companies from the Republica Srpska and Brcko District based in the Federation of BiH.	Banking Agency of the Republic of Srpska in accordance with Article 10 of the Law on Leasing of the Republic of Srpska, businesses based in the Republic of Srpska and business units based in the Republic of Srpska of leasing companies that are registered in the territory of the Federation of BiH and Brcko District.	-



4.	What is the minimum amount of initial capital of leasing companies?	250,000.00 KM and in full amount must be paid in cash prior to entry of the establishment or registration of the increase of the share capital of the leasing company in the court register (Article 8 of the Act)	An identical requirement is established by Article 14, paragraph 1 of the Law on leasing of the Republic of Srpska	As there is no lex special rule, the minimum nominal amount of the share capital is 15,000.00 under Article 136 of the Law on Corporations BD, for joint stock companies, or 2,000.00 for companies with limited liability companies under Article 343 of the same Act.
5.	The acquisition of a significant ownership interest in the leasing company only with the specific approval of the competent authority?	Yes, consent issued by the Banking Agency in accordance with Article 10 of the Act, which also determines the list of documents that leasing companies submitted with the request for approval.	NO, there is no provision of a significant ownership interest.	-
6.	Who are the subjects of leasing?	Lessor, Lessee, and supplier	Lessor, lessee, and supplier	Depending on the nature of the leasing contract as:  Contracts on the lease: the lessor and the lessee;  - The purchase contract with the retention of ownership: the buyer and the seller.

From the presented legal regulations governing the status of leasing companies in Bosnia and Herzegovina, it is clear that the unique legal framework for the establishment of leasing companies was not established at the state level. Aforementioned leads us to the conclusion that Bosnia and Herzegovina do not have an adequate constitutional framework for a corresponding dynamics of development of the leasing activities at the state level. This situation opens up the possibilities for abuse and contributes to the weakening of the mechanism that gives this business activity the opportunity to contribute to the development of the state economy.

#### **4. THE SUPERVISION OF LEASING COMPANIES IN B&H**

In the general and special regime of establishment and undertaking business activities of the leasing companies, the state through its organs can supervise leasing companies in two ways:

- a) checking compliance with prescribed requirements when issuing work permits and
- b) the continuous monitoring and supervision of the work of the banking agency after issuing of work permit.

Supervision of the business of leasing companies in Bosnia and Herzegovina is entrusted to entities banking agencies, depending on the place of business of leasing company. Agencies are doing indirect and direct control over the work of leasing companies in Bosnia and Herzegovina, by analyzing mandatory regulatory reports submitted by companies, and direct controls on the spot. The main objective of conducting supervision of the competent banking agencies is to ensure the compliance of business of leasing companies with the laws on leasing. In the case of identified deficiencies or violations of statutory provisions during the direct or indirect supervision of the work of leasing companies, agencies make administrative decisions which may order the removal of the lack or, in the case of serious violations, the leasing companies license can be revoked by the agencies. Bearing in mind that leasing business is at the beginning of its development and expansion in the market of Bosnia and Herzegovina, the practice has proved that significant omissions occurred in the terms of supervision and control of leasing companies.

#### **5. THE ANALYSIS OF NEIGHBORING COUNTRIES LEGISLATION**

Most of the neighboring countries have enacted special laws related to leasing companies and defined special conditions for undertaking this kind of business activities. For the purposes of this paper, the legislation of following legal systems will be analyzed in the form of a table: Croatia<sup>20</sup>, Montenegro<sup>21</sup>, FYR

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<sup>20</sup> Leasing Law, Official gazette of Republic Croatia, no. 141/13

<sup>21</sup> Financial Leasing Law, Official gazette of Montenegro no. 81/05

Macedonia<sup>22</sup>, Serbia<sup>23</sup> and Kosovo<sup>24</sup> as an example of relatively new system which has already introduced this law in its legal system.

**Table 2. Comparative Analysis of Neighboring Countries Legislation**

<b>DESCRIPTION</b>	<b>CROATIA</b>	<b>FYR MACEDONIA</b>	<b>MONTENEGRO</b>	<b>SERBIA</b>	<b>KOSOVO</b>
The form of leasing companies?	LLC and Joint stock company (article 3. Paragraph 2)	LLC and Joint stock company (article 3)	Legal entity or entrepreneur (Article 23)	LLC and Joint stock company (Article 10. paragraph 1)	LLC and Joint stock company (Article 29. paragraph 5)
Parties in leasing transactions?	Lessor, Lessee, and supplier	Lessor, lessee, and vendor	Lessor, lessee, and supplier	Lessor, lessee, and supplier	Lessor, lessee, and supplier
Types of leasing operations	Financial and operational leasing, direct, indirect and reversible (article 5)	Only financial leasing	Only financial leasing	Only financial leasing (article 10, point 3)	Financial and operational leasing (article 1)
Initial capital?	1.000.000,00 HRK (article 9)	6.000.000,00 MKD (article 3-a)	There is no prescribed minimum initial capital	For the performance of financial leasing which for the object has movable property, part of the initial capital leasing company (lessor) can not be less than 500,000.00 EUR (Article 10a, paragraph 3), and	It is not prescribed minimum initial capital according to, Article 29, paragraph 5 which indicates the mandatory registration company in accordance

<sup>22</sup> Leasing Law, Official gazette of Macedonia, no. 04/02, 49/03, 13/06, 88/08, 35/11, 51/11 and 148/13

<sup>23</sup> Financial leasing Law, Official gazette of Serbia, no. 55/03, 61/05, 31/11, 99/11.

<sup>24</sup> Leasing Law, Official gazette of Kosovo, no. 58/2009.

				to engage in financial leasing on real estates, the initial capital of lessor can not be less than 5,000,000.00 EUR (Article 10a, paragraph 4)	with the Companies Act no. 02 / L-123
A license for conducting leasing businesses?	Croatian Agency for Supervision of Financial Services (Article 3, paragraph 1)	Approval for the establishment of leasing company and conducting business activities is issued by the Ministry of Finance (Article 3-b)	It is not prescribed a special license to conduct leasing activities.	The license for performing financial leasing should be issued by the National Bank of Serbia (Article 10, paragraph 1)	The Central Bank of Kosovo (Article 29, paragraph 2)
Subsidiary regulations?	The Companies Act (Article 7)	The Companies Act (Article 1-g)	General Regulations (Article 1, Paragraph 2)	The Law on Enterprises, the Law on Obligations, Law on Administrative Procedure and the Law on Administrative Disputes (Article 8)	Law on Obligations (Article 28)

The Republic of Slovenia, as one of the countries in the region, but also a member of the European Union, has not yet regulated leasing activities by special legislation. In countries that have not enacted specific legislation on leasing, this legal transaction is governed by the general regulations in the field of contractual relations, and the status of companies by general statutory law or by banking regulations.

The comparative analysis shows the most significant differences in the conditions prescribed for the performance of the leasing activities as a main course of business. It is important to note that in certain legal systems only financial

leasing is regulated. Consequently, it can be concluded that the business of operating lease can perform company registered under the general regime of the establishment and conduction business of companies. This means that the activities of financial leasing can be carried out only by companies formed in accordance with a special legal regime, and the content of the mandatory elements of the contract are determined by the *lex special* regulations. That is the reason why this kind of business activities are of special importance (Sudzuka, 2016).

The legal system of Bosnia and Herzegovina does not differ significantly in terms of conditions and ways of establishment and operation of leasing companies from the neighboring legal systems and most European Union member states legislations. The legal systems of the region that have been the subject of this research, as well as Bosnia and Herzegovina prescribes relatively strict conditions for carrying out activities and supervision of the competent state authority. Of all the above-mentioned countries, the most liberal access to the performance of the leasing activities has legislation of Montenegro because it does not prescribe the minimum initial capital for the establishment of leasing companies and does not prescribe the obligation to obtain permission from a regulatory authority of the state. This means that the leasing industry in Montenegro is performed in accordance with the general regime of the establishment and conducting a business of companies.

## **6. CONCLUSION**

The establishment and conducting of business activities of leasing companies in the legal system of Bosnia and Herzegovina and countries in the region fall under two different regimes. The first is a general regime of establishment in accordance with the applicable law at the entity level in Bosnia and Herzegovina (Laws of Business Companies) which applies to the establishment of all possible form of companies. The second is a special regime establishment and operation of leasing companies, which consists of strict control over this kind of companies undertaken by competent state authorities in most cases that are banking agencies. They previously examine the compliance with the conditions for the establishment of leasing companies before beginning of business activities and lately they are undertaking strict supervision over the companies conducting this kind of business in order to ensure the legality of their business and compliance with the existing legal framework.

A special regime of formation of leasing companies in Bosnia and Herzegovina was established by placing leasing activities under the competence of the banking agencies at the entity level, which carry out a preliminary examination of the fulfillment of conditions for leasing activities regulated entity laws on leasing. The aforementioned public bodies also have and competence of undertaking supervision of the business activities of registered leasing companies in accordance with the rules of administrative law referring the control. In the case they detect the existence of irregularities or illegalities in the work of leasing companies, they are responsible for issuing binding instructions for their correction. The similar situation is in the legal systems of countries that were an object of this analysis.

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