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## Criminal liability of legal entities

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DOI: <https://doi.org/10.2478/bjir-2024-0027>

### Abstract

This article dwells on the criminal liability of legal entities, especially of well-organized companies, such as second-tier banks, for the very position they occupy in a market and in the economy of a given country. We would like to emphasize the distinction of criminal responsibility of the employee (employees) and how it is linked and separated from that of the legal entity. In the following analysis, we will show the Prosecutor's interpretation of the criteria prescribed by ad hoc law. Specifically, Articles 3 and 4 of Law 9754/2007 "On the criminal liability of legal entities", which provides the legal basis on which is founded the criminal liability of any legal organization, in the form of a legal entity, according to the provisions of the Civil Code, Law on Non-Profit Organizations (8788/2001) and Law on Commercial Companies (9901/2008). In addition, we must point out the arguments that show that the evidence brought during trial, is not placed in the context of the criminal fact alleged to have been committed by the legal entity, or when in some cases those were deliberately distorted.

The article presents a concrete analysis of the legal interpretation of the legal person's criminal liability, but also of the evidence taken in its function during trial. We would like to elaborate on some general considerations of criminal theory and practice, on the criminal liability of the legal entity, such as when it was born as such, how it has been developed and adopted in practice in our jurisdiction upon the entry into force of Law 9754/2004 "On the criminal liability of legal entities", analysing it in the context of the charge brought by the Prosecution.

**Keywords:** criminal liability; legal entity; commercial fraud; financial institutions; joint stock ventures.

### 1. Introduction

Since the beginning of legal entities that separated the liability of the individual from that of the organization, issues of civil and administrative liability have been raised for the actions of its representatives (we emphasize its representatives), before the legal entity itself and towards third parties. Based on the view of civil and administrative liability of the legal entity and its representatives, according to a logical interpretation

and under certain legal and factual conditions, the latter must also bear criminal liability for criminal offenses (Elezi, Kaçupi and Haxhia, 1999) committed on his/her behalf and for his/her benefit. While the civil liability of the legal entity is a matter of the private law branch (civil<sup>1</sup> and commercial law<sup>2</sup>), the criminal liability of legal entities is a relationship that is protected by an ad hoc law and treated in the light of the criminal law theory. In order to understand the criminal liability of the legal entity, it must first be understood his/her civil liability and its legal representatives and, further their organization and internal functioning.

The latter (civil liability) is viewed not only as a relationship between the company and third parties (the external function of the legal entity) but also as a relationship between the legal representatives themselves and the bodies of the company (its internal function).

To understand legal entities' liability, including civil, administrative, and criminal liability, it is important to understand the legal entity's (company) internal and external functions during its business activities.

The internal function of a commercial company is to establish internal policies and procedures based on regulatory acts and norms for managing the company's activity, especially on legal regulations such as Law on traders and trade companies and statutory ones. In this paper there are also specific regulations (*lex specialis*) derived from Law No. 9662, dated 18.12.2006 "On Banks in the Republic of Albania", as well as the internal acts of this company, including the articles of association, the internal regulations of the organization and its operation, as well as the regulations and instructions issued by the Bank of Albania as a supervisor body and regulator of the banking system in the Republic of Albania.

The judicial practice developed in Albania, but also the theory of law (Omari, 2005) for the criminal liability (Elezi and Hysi, 2006) of legal entities have elaborated on the existence of an organizational culture (corporate culture) that provides an environment for the exercise of the activity logically complying with the rules of the internal function of the company. In this case we have the legal provisions of the commercial law, the statute, the internal regulations of the operation and organization of the legal entities, the law on banks in the Republic of Albania and the rules that are published and are being published for implementation in the banking sector by the Bank of Albania.

In addition, to determine whether the legal entity is guilty or innocent for the acts committed by its representatives, in the sense of civil, commercial law and the ad hoc law on Banks in the Republic of Albania, the existence of an organization and control model is required (compliance program) in order to prevent criminal offenses. On the contrary, the lack of such model would indicate grounds for doubt about the legal entity's guilt.

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<sup>1</sup> Civil Code of the Republic of Albania Law no.7850/1994 amended by law no.8536, dated 18.10.1999, no. 8781, dated 3.5.2001, no. 17/2012, dated 16.2.2012, no.121/2013, dated 18.4.2013, no.113/2016, dated 3.11.2016; <https://qbz.gov.al/share/d5M-UVQGTBmotCO3IDALMg> (accessed May 2024).

<sup>2</sup> Commercial Law no.9901/2008 <https://qbz.gov.al/eli/ligj/2008/04/14/9901>.

## 2. Analysis of Law 9754/2007 “On Criminal Liability of Legal Entities”<sup>3</sup>

### 2.1 Legal analysis of the Law on Article 3 and 4

Generally, the Prosecution in order to attain the request for the criminal liability of the legal entity arguments or, makes an analysis of articles 3 and 4 of the law, which is the basis of the legal entity’s criminal liability. We assume that this analysis has major defects and unfair interpretations, which are out of the criminal context attributed to a legal entity.

The analysis of paragraph “c” of Article 3 of Law 9754/2004, essentially provides issues of the existence of programs of control and supervision by the legal entity. Before elaborating on the criteria that the paragraph of the law should contain and show why the Prosecution has interpreted it inaccurately and out of the context of the article, let us quote it. “...The legal entity is responsible for criminal offenses committed: .... c) on his/her behalf or for his/her benefit, due to the lack of control or supervision by the person who directs, represents and administers the legal entity....”. This clause of law, from the doctrine and jurisprudence point of view, has been elaborated as a matter of “Compliance program”, which means the internal measures are applied by a legal entity in order to comply with the laws in force and other rules, as well as a control body to design and effectively implement these programs. With the aim of avoiding the liability of the legal entity for criminal offenses committed by its representatives, this program must contain clear measures for the prevention of such offenses that could potentially be committed by these legal representatives. The analysis performed by the prosecution body in this regard demonstrates that it did not investigate into this matter, and moreover indicates extreme lack of knowledge of the organization and control programs employed by second-tier banks in the Republic of Albania. The Prosecution was content with its arguments regarding the final conclusions, as it relied on the legal provisions governing second-tiers banks of Republic of Albania. However, it is essential for the prosecution to present factual evidence regarding the actual implementation of these laws. Furthermore, the prosecution is obligated to submit a clear and accurate analysis of the organizational structure of a second-tier bank, identifying which paragraph of the provisions of the Bank of Albania’s regulations, as well as the internal acts of the legal entity, has been violated by its legal representatives. This demonstrates how such violations could have led to the failure to establish an effective model of organization and control within the entity.

If the prosecutor can prove this fact, he can then determine that the actions or omission of actions performed by the employees at the legal entity where the alleged crime occurred were due to a lack of proper program organization and control within the entity (Balla, 2017). Additionally, it must be shown that the legal representatives were aware of this and had a hand in causing the unwanted consequences for the entity.

<sup>3</sup> Law 9754/2007 “On Criminal Liability of Legal Entities”, [https://www.pp.gov.al/rc/doc/ligj\\_pergjegjesia\\_penale\\_e\\_personave\\_juridike\\_38.pdf](https://www.pp.gov.al/rc/doc/ligj_pergjegjesia_penale_e_personave_juridike_38.pdf) accessed May 2024.

This argument constitutes a fundamental requirement of Article 3, paragraph “c” of Law 9754/2007, which serves as the primary basis for much of the Prosecution’s conclusions in establishing the legal entity’s guilt. All second-tier banks operate with a clearly defined organization and control program that originates from several legal sources regulated by special laws and regulations issued by the Central Bank of Albania, and the internal policies of each bank. This should be the focus of the proceedings, particularly when addressing the criminal liability of the banks. First and foremost, the law on Commercial Companies, the statute, the law on Banks in the Republic of Albania, as well as the regulations, orders, and instructions issued by the Bank of Albania, must be thoroughly analysed before any conclusions can be drawn regarding the applicability of paragraph “c” of Article 3 of Law 9754/2004 to the actions of the legal entity, the commercial company. When referring to a legal entity, we are specifically addressing the actions of its legal representatives, as recognized under the law on Commercial Companies and the Law on Banks in the Republic of Albania. This pertains solely to the actions of the legal representatives, not to those of the bank’s employees at various levels or within internal structures.

In analysing paragraph “c” of Article 3 of Law 9754/2007, the subjective aspect of the criminal liability of legal entities must be based on a precise assessment of whether or not there exists a program (or set of measures) designated to prevent criminal offenses that may be committed in the name of, or for the benefit of the entity. The application, or lack thereof, of a program or measures to prevent criminal offenses serves as an indicator of the commitment (will) of the legal entity to upholding the values of society protected by the applicable laws.

The prosecuting body’s analysis of the subjective aspect of criminal liability is entirely overlooked in a professional manner. Consequently, the criminal liability imposed on the bank appears to be treated as an objective liability derived from the actions of the bank’s employees, rather than an examination of each individual criminal offense including its subjective element, as required by the criteria outlined in Article 2 of Law 9754/2004 on the Criminal Liability of Legal Entities.

Upon analysing the provisions of the law on the criminal liability of the legal entities, specifically articles 2, 3 and 4, it becomes evident that the concept of “ruling culpability” should be considered as the “key” in affirming criminal liability for the legal entity (Islami, Hoxha and Panda, 2010). As a criterion of culpability, it must take into account two essential aspects:

- proving whether the act committed in the legal entity’s name is driven by the entity’s interest in benefiting (either directly or indirectly) from the criminal act (Article 3/b of the law) and;
- establishing that the offense is a consequence of the legal entity’s negligence in failing to implement the necessary measures to prevent damage, namely the criminal offense (Article 3/c of the law).

In cases where the criminal liability of the legal entity is derived from the criminal offense of the natural persons (its employees), then one of the conditions for establishing this liability is identifying the natural persons who are authorized to

act on behalf of the legal entity, and under what conditions the criminal offenses committed by them can form the basis of for the legal entity's criminal liability. This is an important determination outlined in Article 3 and 4 of Law No. 9754, dated 14. 06. 2007, "On Criminal Liability of Legal Entities".

According to the interpretation of this provision (Article 3 of the law), as well as the elaborations found in Albania's jurisprudence, but as well as the experience of the countries whose legal systems served as models for our own, the foundation of the criminal liability of the legal entity in relation to the act of natural persons has been established in several ways:

- the explicit definition of the individuals within the structure of the legal entity, who can commit criminal offenses on its behalf;
- the identification the of the legal entity's liability, limited to the actions of the higher bodies, such as its legal representatives, and does not extend to the actions of employees in the company;
- The liability arising from an inadequate system of organization and the failure to implement proper controls and preventive measures against criminal offenses (Compliance programs);
- the specification of the entities within the legal entity, according to their hierarchical position who can commit a criminal offense on its behalf;
- the identification of the person or persons authorized to act on behalf of the legal entity and demonstrating that the criminal act committed also benefited the legal entity;
- the criminal liability of the legal entity can only arise from offenses committed by natural persons who hold certain positions within its management hierarchy (legal representatives of the legal entity) and it must be proven that these individuals acted on behalf of and for the benefit of the legal entity in each specific case of criminal proceedings against it;

Finally, in analysing these provisions of the law, criminal liability hinges in proving whether the criminal offense was also the result of the legal entity's will (intention).

## ***2.2 Analysis of the law on "within the framework of authorizations"***

The term "for the benefit of..." must foresee a specific intention of the responsible person (which refers to the governing body of the legal entity or its legal representative as recognized by law and statute). In interpreting this aspect of the provision (Article 3/b of the law), it is important to note that the goal of a responsible person who causes a violation -whether an employee or a legal representative - does not always align with the goal of the legal entity itself.

Therefore, regardless of the will of the responsible individual, in the case of natural persons (employees of the company) who are alleged to have committed the violation attributed to them, specifically under the criminal offense of fraud, as outlined in Article 143/3 Criminal Code in cooperation, it must be proven if the legal entity intended or permitted such an offense through the actions of its governing bodies.

This determination must be based on the legal sources of the organization, the Law on Commercial Companies, the Statute, the law on second-tier banks in Republic of Albania, Bank of Albania's by-laws, and the entity's internal regulations. Moreover, in this analysis, it is essential to take into account that when referring to a legal entity, we are addressing its governing bodies and those who represent it, and with whom it is identified in the civil legal transactions, since the legal entity is a construct and operates in relation to third parties, through its legal representatives (Damaska, 1975). Not every employee can be considered a representative of the legal entity. This analysis is missing in the Prosecution's conclusions, and its omission is not without significance.

Given that the basic conditions of the liability of the legal entity are that the act must have been committed "on behalf of" and "for the benefit" of the entity, it is the primary responsibility of the prosecution body and ultimately, the court adjudicating the case to correctly interpret and prove these two conditions in practice.

1. In order for a criminal offense to be considered as having been committed "in the name of" (Article 3 paragraph b) the legal entity, it is not sufficient to prove that a natural person, from within the entity's structure is suspected of committing the criminal offense, but it must be proven that he/she acted on behalf of the entity and, moreover, they had authorization to perform such action from the entity.

Based on this legal condition, the question arises: for which illegal actions, as alleged by the Prosecution, did the employees of the legal entity have authorization? Which of these actions were the legal entity's representatives of aware of and more importantly, did they grant consent to? Otherwise, the legal entity cannot be held criminally responsible, nor can it plead guilty.

2. It must be proven whether the legal entity derived a benefit, (Article 3 paragraph b of the law), or gained an exclusive interest from the criminal offense committed. The benefit can be either direct or indirect. In the present case, what benefit did the legal entity derive from the actions of its employees, assuming those actions are deemed illegal from the criminal law point of view. The answer is clear: based on the evidence presented, not only by our analysis, but also by the prosecution, there was no benefit to legal entity, either at the time or at the end of the financial year.

We assume that this analysis has not been adequately conducted by the prosecuting authority or at best, it has been addressed as an expression that ... "the bank was saved from a significant loss". This proves the argument that the legal entity has not derived any benefit from the alleged actions, which is a necessary criterion for establishing its criminal liability.

In addition to other criteria, both of the following conditions must be met cumulatively to establish the criminal liability of a legal entity: (1) the action must be performed by an authorized employee acting on behalf of and for the benefit of the entity. In the prosecution's request for trial and the evidence presented there is no direct or indirect proof of the legal entity's knowledge of the actions, i.e. as required under the first condition of Article 3 paragraph b of the law. Furthermore, there is insufficient evidence to demonstrate that the legal entity derived any benefit from the actions of its employees, thus failing to satisfy the second condition concerning benefit.

### 3. Analysis of the causal link of the criminal offense

Another basis for holding the legal entity liable according to the provisions of the special law (Article 2) and the principles of criminal law, is the establishment of a causal link between the damage incurred and the actions or omissions of the legal entity. A legal entity can be found guilty if it is proven that the damage resulted from an interest of the legal entity itself, or if the latter failed to adhere to the necessary standards in the course of its activities. Thus, if a causal link between the actions of the legal entity (its management and legal representatives) and the damage incurred cannot be proven, criminal liability cannot be imposed on the entity. The concept of damage as a basis for criminal liability is only relevant if it can be proven that there is a causal link between the damage and the legal entity's (actions) or (omissions), whether intentional or negligent, in relation to its legal obligations. The question arises: What damage has the legal entity caused, and can this damage claimed by the Prosecution be attributed to actions of the entity's employees, when they are not among those defined by Article 4 of the law? This analysis from the prosecution's conclusions is missing, and moreover, it appears to be misinterpreted.

Article 4 of Law 9754, dated 14. 06. 2007, has foreseen an exhaustive definition of what constitutes the representative bodies of a legal entity, according to the definitions of Article 3 paragraph a. Based on Article 4, the bodies that act on behalf of and for the benefit of the legal entity, in the sense of Article 3 (a), include any natural person who, according to the law or acts of the legal entity, is entrusted with the representation, management, administration or control of the entity's operations and structures.

The term, "according to the law or acts of the legal entity", as used in the provisions under analysis, refers to the body of special laws governing the activities of legal entities. In our case, this includes commercial law, the law on banks in Republic of Albania, and the normative acts issued by the Bank of Albania, along with their interpretation. It also encompasses the charter of the Commercial bank, as well as its internal regulations regarding organization and operation.

Under civil law, since the development of early legal theories and the standardization of the concept of legal entities the responsibilities of the legal entity and its governing bodies have been clearly defined. This is embodied in the definition provided by our Civil Code which establishes the liability that arises between the legal entity and third parties in the civil legal transactions, stemming from the unjust actions of its governing and representative bodies.

Article 31 of the Civil Code clearly states: "The legal entity shall act through its bodies as provided by law, in the act of establishment or in its statute, which express its will. The legal transactions performed by the bodies of the legal entity, within their competences, are considered as performed by the legal entity itself".

While Article 32 of the Civil Code defines the responsibility of the legal entity as follows: "The legal entity is liable for the damages caused by its bodies during the fulfilment of their duties. The legal entity is responsible for its obligations within the

limits of its property. The persons who acted in the capacity of the body of the legal entity, have personal liability to re-compensate damages caused by their fault”.

It is thus clearly defined that there is a distinction between the civil liability of the legal entity towards third parties, arising from the actions of its governing bodies, and the personal liability of the latter for damages caused by their fault.

Article 4 of the law cannot be overlooked in this analysis. It defines the: “Bodies and representatives acting on behalf of or for the benefit of the legal entity”, that is, only those bodies and representatives acting on behalf of and for the benefit of the legal entity are defined in the following provision. The provision has the following content: “In the sense of Article 3 paragraph “a” of this law, the body and representative of the legal entity, acting on behalf of or for the benefit of the legal entity, is any natural person who, according to the law or acts of the legal entity, is entrusted for the representation, management, administration or control of the entity’s operations and structures. This definition leaves no room for misinterpretation. Consequently, an employee of the company cannot be a representative of the legal entity. While employees can bear personal responsibility and liability under their employment contracts and with clearly defined duties, any breach of these duties would result in individual responsibility for the employee, not for the legal entity itself.

#### **4. Analysis of the subjective aspect**

The culpability of the legal entity must be assessed based on its internal organization, including the existence and implementation of a model for preventing criminal offenses or any other measures taken for this purpose (these criteria are outlined in paragraph “c” of the article 3 and in article 4 of the law 9754/2007). In analysing the criteria for determining the subjective aspect of a legal entity’s criminal liability, it is generally observed that the criminal offenses committed on behalf of and for the benefit of the entity are a direct consequence of its weak organization, which fails to prevent the commission of criminal offenses by its employees (Balla, 2018). In such cases, the legal entity’s culpability and subsequent punishment are justified if it is proven that the specific criminal offense resulted from this weak organization, unless the legal entity can prove the opposite during the proceedings.

The opposite is for banks, as a category of legal entities, which are governed by specific laws regulating their organization and operations. Banks also exercise their activity under the guidance, control, and supervision of the Bank of Albania. This approach to the banking system within a certain regulated market made our case easier to resolve, ultimately in favour of not attributing criminal liability to the legal entity. However, we found that the prosecution’s investigation lacked a thorough analysis of the legal entity’s internal organization, the existence and implementation of a model for preventing crimes, and the subjective aspects of its guilt. This oversight is evident both in the application for judgment and in the prosecution’s final conclusions.

Criminal offenses can be committed by legal entities, just as they can by natural persons either intentionally or negligently. Intent exists when the act reflects the

will of the legal entity (example: corrupt or fraudulent actions instigated by the legal entity itself), while the act is considered to have been committed by negligence in cases where the same situation was the result of weak organization or insufficient measures of the legal entity to prevent such conduct (*culpa in vigilando*). This forms the basis for the criminal liability of legal entities according to the provisions of the special law "On Criminal Liability of Legal Entities", no. 9754, dated 14. 06. 2007.

## 5. Analysis of Control and Surveillance Programs

In the framework of our overall legal analysis, the legal entity, particularly the commercial banks must adopt and implement such provisions. This obligation stems not only from the special law on banks in Republic of Albania, but also from regulations, orders and instructions of Bank of Albania as well as continuous supervision through periodic inspections and audits conducted by the Bank of Albania, as the comprehensive supervisory authority. In implementation of this legal obligation, and given the fact that the banking system occupies an important position in a country with a market economy, banks are required to adopt a policy of the organization and control model (the so-called compliance program), including the approval a series of internal acts that practically embody all these obligations.

In this way, the bank must approve and implement the Employee Code of Conduct; Human Resources Policies and Procedures Manual; the Risk Management Policy; Code of Business Ethics and Data Collection Procedure; the Anti-Fraud Policy; Department of Treasury Operations Manual; the Insurance Regulation of Branches; Regulations and Manual regarding Training Policies; the Whistle-blower Procedure Regulations; as well as the Employee Performance Evaluation Manual, the Employee Career Development Policy and the Written Test Manual for Employees Promotions. All these internal acts must be established as internal policies and must be evaluated by us, in the framework of the analysis of paragraph "c" of Article 3 of the law.

Actually, these internal policies and procedures must be analysed by the prosecution body in accordance with Article 3 paragraph "c" of Law 9754/2007. This criterion should form the grounds on which the prosecutor must support much of its analysis in the final conclusions. To reach a clear and legal conclusion of the legal entity's criminal liability, the prosecution body must administer these policies and procedures during the investigation and analysing these internal documents would help in assessing the accusation against the legal entity.

According to article 2 of the special law, it is stated: "...the provisions of this law apply to legal entities insofar as they are not otherwise provided for in the Criminal Code, the Criminal Procedure Code or other criminal provisions...". Hence, it is the court's duty to interpret this law in harmony with other criminal provisions, given that the special law itself lacks the basic criteria for determining the guilt of a legal entity. This means that a legal entity cannot be punished solely based on the objective fact that a criminal offense was committed by one of the employees while exercising their functions under the employment agreement. The Prosecution must evaluate the

claims and analyse the actions of the employees, to determine the criminal liability of the legal entity. Meanwhile, if it does not result in anything determined in the regulatory acts of the legal entity, the employment contract, or the job description that would link the employees' actions to the entity's liability, it must be clear to the prosecution that the criminal liability should not be attributed to the legal entity.

Based on Article 14 of the Criminal Code: "No one shall be sentenced for an action or omission that is provided for by the law as a criminal offense, as long as the offense has not been committed due to his/her guilt. A person shall be guilty if he commits the criminal offense intentionally or negligently.

Thus, for a natural person, based on this principle, it is necessary to prove that the criminal offense for which they are accused is a consequence of their actions or omissions, whether committed intentionally or negligently.

Nevertheless, this cannot be said in relation to legal entities, as the act committed cannot be directly attributed to the legal entity itself, since it is a legal fiction. This means that the legal entity cannot be held criminally responsible or punished further based on the subjective theory of guilt which involves, a psychological connection between his actions or omissions and the resulting consequence. Instead, the criminal liability of the legal entity must be understood within a well-defined framework provided by the special legal provisions, where its guilt is viewed as a punishment for disobeying the rules. The prosecution must consider such facts in its analysis when claiming the guilt of a legal entity, specifically identifying which legal or statutory rules the bank, as a legal entity, violated in the occurrence of the alleged illegal consequence.

From this perspective, we believe that it is the obligation of the court to analyse, in accordance with Article 30 of the Constitution, whether the legal entity is guilty or not (Omari and Anastasi, 2008). This is because it is not appropriate to bind the criminal liability of legal entity solely based on the criminal liability of each natural person employed by it. We emphasize that the court must not overlook the analysis of the subjective responsibility of the legal entity, which is expressed through the bodies that represent it and that are clearly defined not only in Article 4 of the law, but also emerges from the two specific laws, namely the one that regulates the organization and the operation of second-tier banks as well as the Commercial Law.

Within the theory of proving the criminal liability of the legal entity, the prosecution has the obligation to prove whether a model of control and supervision measures exists and whether it has been implemented by the legal entity.

## **6. Analysis of the organization of Banks**

Based on the above, it is necessary to recognize that the activities of second-tier banks in the Republic of Albania are regulated by a special law, specifically Law no. 9662, dated 18.12.2006 "On Banks in the Republic of Albania", as amended.

Article 3 thereof determines that the banking system in the Republic of Albania consists of the Bank of Albania, whose status is governed by the law "On the Bank of

Albania”, as well as by banks and branches of foreign banks, whose status is regulated by this law.<sup>4</sup> Article 4, item 19 defines the role of Bank Administrator as follows: a “Bank Administrator” is an individual who holds one of the following positions: a) a member of the management council or the control committee of the bank; or b) an executive director; or c) the head of the control unit.

The Bank’s Internal Control System must be established in accordance with Article 45 of the Law on Banks in the Republic of Albania, which clearly defines the organization, operation and election of the members of the Control Committee and the Internal Control Unit. These provisions indicates that the supervision of the Bank’s activities consists of a highly structured and well-organized control system, rather than being dependent on a single structure or individual. Specifically:

- The bank or branch of the foreign bank organizes the internal control system to monitor the implementation of internal policies and procedures, evaluate the effectiveness of banking activity and ensure compliance with legal and by-laws.
- The purpose of internal control is to identify the exposure of the bank or foreign bank branch to various types of risks, as well as to measure, manage and monitor their levels.
- The internal control system of the bank or branch of the foreign bank consists of a set of procedures, rules and structures that exist within it.

As outlined above, we have presented a description of the nature of the organization and the functioning of the banking system in the Republic of Albania, with a particular focus on second-tier level banks. Additionally, the prosecution must submit evidence or indications that Bank of Albania has supervised during the bank’s activity in the Albanian jurisdiction and whether it ascertained any organizational and structural deficiencies, that could have led to business risks and damages to its customers, in order to determine the criminal liability of the legal entity.

## 7. Jurisprudence of the Criminal College of the Albanian Supreme Court

Based in Decision no. 17, dated 04. 02. 2015,<sup>5</sup> the Criminal Chamber of the Supreme Court, states “.... The Criminal Chamber of the Supreme Court finds the appeal court’s conclusion of to be incorrect that the legal entity “Nika” shpk should be held responsible, for the actions carried out by the defendant Zef Nika; who was merely an employee of the entity, and did not hold any management position.... The legal entity “Nika” shpk cannot be held responsible for the criminal offense of using forged documents, as stipulated in Article 186 /1 of the Criminal Code, if he was not aware of the offense. The legal entity cannot be held liable for the charge, as the crime of using falsified documents is a subjective offense that requires direct intent. .... Taking into consideration Article 3 of the law “On the criminal liability

<sup>4</sup> Law no. 8269 dated 23.12.1997 “On the Bank of Albania” amended, published at Official Journal [https://www.bankofalbania.org/Rreth\\_Bankes/Legjislacioni/Ligjet/Ligj\\_Per\\_Banken\\_e\\_Shqiperise\\_i\\_ndryshuar.html](https://www.bankofalbania.org/Rreth_Bankes/Legjislacioni/Ligjet/Ligj_Per_Banken_e_Shqiperise_i_ndryshuar.html) (accessed May 2024)

<sup>5</sup> Criminal College of the Supreme Court Decision no. 17 dated 04.02.2015. <https://app.gjykataelarte.gov.al/vendime-kolegji-penal-seance-Gjyqesore> (accessed May 2024).

of legal entities”, which provides that: “The legal entity is liable for criminal offenses committed: a. On behalf of or for the benefit of, by his bodies and representatives; b. On behalf of or for the benefit of, by a person who is under the authority of the person who represents, manages and administers the legal entity; c. On behalf of or for the benefit of, due to the lack of control or supervision by the person who directs, represents and administers the legal entity”, it results that in the analysis of this provision, it follows that for a criminal offense to be attributed to the legal entity, two conditions must be fulfilled simultaneously: i) The offense must have been committed by individuals within the category of employees holding representative, administration or managerial functions, as well as those under the authority of the person who represents, directs and administers the legal entity- in other words the employees of the executive level and ii) The offense must have been committed “on behalf of” or “for the benefit of” the legal entity....

Based in Decision no. 181, dated 28. 10. 2015 the Criminal Chamber of the Supreme Court,<sup>6</sup> reasons that “.....Regarding the prosecution body’s claim of the criminal liability of the legal entity, the company “Komunitete” sh.p.k., this Chamber notes that this claim is unfounded., As both courts have rightly reasoned, the criminal case against the company, for both charges, should not have been initiated and should therefore be dismissed. Thus, the company “Komunitete” sh.p.k. is accused of having committed the criminal offense of “Fraud” more than once and with serious consequences. The person criminally liable for these charges is judge M. Ç., who also serves as the sole administrator on behalf of the company. In cases where illegal actions are performed by the administrator on behalf of the company, it is the administrator who must bear criminal liability. If the justification was made “a contrario”, that is, if the guilt of the legal entity defendant were accepted, we would face a situation where this defendant would be liable for the commission of the criminal offense in complicity with the defendant M. Ç. However, complicity implies an agreement to commit one or several criminal offenses and such an agreement must exist between two or more persons. If this reasoning were accepted in the case under trial, it would mean that the agreement was concluded by the defendant M. Ç. and the administrator of the defendant “Komunitete” sh.p.k., who is also M. Ç....».

## 8. Conclusions

Based on the interpretation of Articles 3 and 4 of the Law on Criminal Liability of Legal Entities, it must be crucial both for the prosecution and the court to analyse whether specific actions are authorised to be performed by its legal representatives of the legal entity, in order to determine the criminal liability of the legal entity. Furthermore, the authorised actions must be performed on behalf of the legal entity and the legal entity must be the beneficial owner of the illegal activity. Those two criteria of the law must determine the criminal liability of the legal entity.

<sup>6</sup> Criminal College of the Supreme Court Decision no. 181, dated 28. 10. 2015. <https://app.gjykataelarte.gov.al/vendime-kolegji-penal-seance-Gjyqesore> (accessed May 2024).

Based on the arguments analysed we would propose several measures to improve the international legal framework concerning the criminal liability of legal entities. One of the proposals that we consider important is the enhancing of international cooperation: Strengthen mechanisms for cross-border cooperation in investigations and enforcement. Extended Jurisdiction of the ICC: Consider expanding the ICC's mandate to include legal entities. Standardized Regulations: Develop international standards and guidelines to ensure consistency in how legal entities are held accountable.

As it was explained, it is crucial to reinforce the importance of addressing the criminal liability of legal entities within international law. To ensure justice and uphold the rule of law in the global scale, it is imperative to establish the criminal liability of legal entities. By enhancing international cooperation, extending the jurisdiction of international courts, and standardizing regulations, we can create a more robust and effective framework for corporate accountability.

Considering the legal analysis presented above, it is recommended for the law enforcement agencies to draft guidelines for prosecution officers and judges to facilitate their performance on determining the right and balanced criminal liability to the banks in the Republic of Albania.

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