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Commitment of Fraud Activities in Relation with Corporate Governance

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Abstract

Corporate Governance of legal entities is very important on determination of criminal responsibility. The theory and practice of criminal law, not only in our jurisdiction but also in a wider area, has elaborated. regarding 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. Furthermore, we would like to emphasize the distinguish of criminal responsibility of the employee (employees) and how it is combined and separated from that of the legal entity. In our analysis below, we will show the Prosecutor interpretation of the criteria provided by the special law. Specifically, articles 3 and 4 of Law 9754/2007 "On the criminal liability of legal persons", which is the legal basis on which the criminal liability of any legal organization, in the form of a legal person, is based, according to the provisions of the Civil Code, the Law on Non-Profit Organizations (8788/2001) and the Law on Commercial Companies (9901/2008). To this we must also add the arguments that show that the evidence brought during trial, are not placed in the context of the criminal fact alleged to have been committed by the legal entity, moreover in some cases were deliberately distorted. As we emphasized above, we think that the strategy of the investigation was clear and not in the function of providing justice, i.e. confronting the criminal responsibility of the legal entity, in order to have a future argument for a trial possible civil, to seek civil liability from the latter, in the absence of the ability to pay of the one who caused this civil and non-criminal conflict, the Company and the party itself that claims to be the victim of this criminal process. We think that, in the event that an investigation developed and defended in this trial, in function of this strategy, would create a dangerous precedent for the business environment and would make it liable not only criminally but also civilly, for any action illegal actions carried out by its employees during the exercise of their functional duties,

regardless of the fact that its governing bodies have authorized it, or moreover have been aware of these actions. The article presents concrete analysis of the legal interpretation of the legal person's criminal responsibility, but also of the evidence taken during trial in its function, we would like to dwell on some general considerations of criminal theory and practice, for the criminal liability of the legal person, since it was born as such, how it has been developed and adopted in practice in our jurisdiction, after the entry into force of the law. 9754/2004 "On the criminal liability of legal entities", seeing it in the context of the charge brought by the Prosecution body, against the person protected by me, the Legal Entity.

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

Introduction

The Criminal Liability of the Legal Entity and its Impact on the Claim of Criminal Liability

Since the birth of the legal entities that separated the responsibility of the individual from that of the organization, issues of civil and administrative responsibility have been developed for the actions of its representatives (we emphasize its representatives), in front of the legal entity itself and towards third parties. Based on this view of the civil and administrative responsibility 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 responsibility for criminal offenses[1] committed in its name and his beneficial.

While the civil liability of the legal entity is a matter of the branch of private law (civil[2] and commercial law[3]), the criminal liability of legal entities is a relationship report that is protected by a special law and treated in the light of the theory of criminal law. But it cannot be understood the criminal responsibility of the legal person without first understanding the civil responsibility of it and its legal representatives and, moreover, their organization and internal functioning.

The latter (civil liability) is a responsibility that is seen not only as a relationship between the company and third parties (the external function of the legal entity) but

[1] Elezi I., Kaçupi S., Haxhia M., "Commentary on the Criminal Code of the Republic of Albania" Tirana, University Book Publishing House, 1999, pg. 115.

[2] Civil Code of the Republic of Albania Law no. 7850/1994 amended by law no. 8536, date 18.10.1999, no. 8781,date 3.5.2001, no. 17/2012, date 16.2.2012, no.121/2013, date 18.4.2013, no.113/2016, date 3.11.2016; VGJK no. 69, date 27.12.2023) ; https://qbz.gov.al/share/d5M-UVQGTBmotCO3lDALMg (accessed May 2024).

[3] Commercial Law no.9901/2008 https://qbz.gov.al/eli/ligj/2008/04/14/9901

also as a relationship between the legal representatives themselves and the bodies of the company (its internal function).

To understand these types of liability of legal entities, including civil, administrative and criminal, it is important to understand the internal function of the legal entity (company) and its external function during its business activity.

The internal functions of a commercial company has to establish internal policies and procedures based on regulatory acts and norms for managing the company's activity, especially on legal regulations such as (the law on traders and commercial companies) and statutory ones, in our case there are also specific regulations (lex specialis) derived from Law No. 9662, dated 18.12.2006 "For Banks in the Republic of Albania", as well as the internal acts of this company, including the article of association and statute, 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 te Republic of Albania.

The judicial practice developed in our country Albania (below we will bring some decisions of the Criminal Colleges of the Supreme Court), but also the theory of law[1], for the criminal responsibility[2] of the Legal Entities, have elaborated the existence of an organizational culture (corporate culture) that provide an environment for the exercise of the activity in a logical manner, respecting the rules of the internal function of the company. In our case, 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 have emerged and are emerging on the basis of and for its implementation in the banking sector by the Bank of Albania.

In addition, to determine the guilt or innocence of the legal entity for the acts committed by its representatives, we emphasize its representative, in the sense of the civil law, the commercial law and the specific law for 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 absence of such a model also represents the basis of doubt about the guilt of the legal entity.

Analysis of Law 9754/2007 "On Criminal Liability of Legal Entities[3]

Legal analyse on Article 3 and 4 of the law

Usually the Prosecution arguments, in order to arrive at the request for the criminal liability of the legal entity, make an analysis of articles 3 and 4 of the law, which is the

[1] Omari, L., Principles and Institutions of the Public Law, published “Pegi” Tirane, 2005, pg104.
[2] Elezi, I., and Hysi, V., “Criminal Policy”, PEGI, Tiranë, 2006, pg. 78.
[3] Law 9754/2007 "On Criminal Liability of Legal Entities”, https://www.pp.gov.al/rc/doc/ligj_pergjegjesia_penale_e_personave_juridike_38.pdf accessed May 2024.

basis of the criminal liability[1] of the legal entity. We suppose that this analysis has major defects and unfair interpretations, which are out of the context of the criminal fact attributed to a legal entity.

The analysis of point "c" of Article 3 of Law 9754/2004, contains in its foundation, issues of the existence of programs of control and supervision by the legal entity. Before we analyse the criteria that the letter of the law should contain, and show why the Prosecution has interpreted it wrongly and outside the context of the article, we have to quote it. "...The legal person is responsible for criminal offenses committed: .... c) on his behalf or for his benefit, due to the lack of control or supervision by the person who directs, represents and administers the legal entity....".

This clause of the law, from the doctrine and jurisprudence in this field, has been elaborated as a matter of "Compliance program", which means the internal programs (measures) applied by a legal entity in order to comply with the laws in force and other rules, as well as a control body for the design and effective implementation of these programs. In order to avoid 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 made by the prosecution body in this regard, shows that it did not investigate this issue, and moreover shows extreme poverty of knowledge of the organization and control programs used by second tier levels banks in the Republic of Albania. The Prosecution was satisfied in its arguments of the final conclusions, in a reading of the provisions of the law on the second tiers level banks of Republic of Albania, but the prosecution must be presenting facts in the implementation of this law. Moreover, prosecution must submit clear and accurate analysis of how a second tier level bank is organized, and which point of the acts of the Bank of Albania and of the internal acts of the legal entity, has been violated by the legal representatives of legal entity, which could lead to the failure to establish an accurate model of organization and control of this entity.

Only in the event that the prosecutor[2] would prove such a fact, then he could reach the conclusion that the actions or inactions performed by the employees of the legal entity where the alleged criminal fact occurred, were the result of the lack of a clear program organization and control of legal entity, and that its legal representatives were aware of it and influenced the arrival of unwanted consequences for legal entity. This argument, is the fundamental requirement of point "c" of Article 3 of Law

[1] Law Drafting Manual - A guide for drafting laws in Albania, published by the European Union, Ministry of Justice and EURALIUS, Tirana 2010, pg. 17.

[2] Balla, R., "Constitutional Reform, Criminal Justice Reform in the Prevention of Organized Crime and Corruption", Proceedings of the International Conference Faculty of Law, 2017, pg. 557.

9754/2007, where the Prosecution based a large part of its conclusions, to prove the guilt of the legal entity.

All second-tier level banks have a clear organization and control program that originates from several legal sources regulated by special laws and acts of Central Bank of Albania and its internal acts. This must be the focus of the process, as far as the discussion of the criminal responsibility of banks is concerned.

Firstly, the law on commercial companies, the statute, the law on Banks in the Republic of Albania, the regulations and orders as well as the instructions issued in the banking sector by the Bank of Albania, are the acts that must be carefully analysed before reaching a conclusion as to whether they are in the scope of action of point "c" of Article 3 of Law 9754/2004, the actions of the legal entity, the commercial company. When we say legal person, we mean the actions of its legal representatives, recognized as such by the law on commercial companies and the law on banks in the Republic of Albania, as the only law that gives the form of organization and operation of a commercial legal person bank, and not the actions of its employees, at every level and structure of the bank.

In the analysis of point "c" of Article 3 of Law 9754/2007, the subjective aspect of the criminal liability of legal entities should be based precisely on the assessment of the existence or not of a program (measures) for the prevention of criminal offenses that may be committed in their name and benefit. The application or not of a program or measures for the prevention of criminal offenses is also an indicator of the orientation (will) of the legal entity in relation to respecting the values of society protected by the laws in force.

The analysis of the prosecuting body regarding the subjective aspect of criminal responsibility is overlooked in a completely professional manner, and the criminal responsibility according to this analysis that it imposes on the bank comes out as an objective responsibility and that derives directly from the responsibility of the natural person, the bank's employees and not as an analysis of every criminal offense in all its elements, including its subjective element, as required by the criteria of Article 2 of Law 9754/2004 on the Criminal Liability of Legal Entities.

Analysing the provisions of the law on the criminal responsibility of the legal person, specifically its articles 2, 3 and 4, we come to the conclusion that the concept of ruling culpability[1] should be considered as the "key" to the affirmation of criminal responsibility for the legal person, that as a criterion of culpability must take into consideration two essential aspects:

[1] Islami H., Hoxha A., Panda I., “Commentary on the Criminal Proceeding Code”, Tirane, 2010, pg. 154.

1- proving whether the act committed in its name is a consequence of the legal person's interest in benefiting (directly or indirectly) from the criminal act (Article 3/b of the law) and that;

2- the offense is a consequence of the negligence of the legal entity to take the necessary measures to prevent the damage, namely the criminal offense (Article 3/c of the law).

Until the criminal responsibility of the legal person in our case is derived from the criminal offense of the natural person (its employees), then one of the conditions to conceive this responsibility is the identification of natural persons whom can act in the name and on behalf of the legal entities, and under what conditions the criminal offense committed by them can be the basis of criminal liability for the legal entity as well. This is an important determination that emerges from the content of Article 3 and 4 of Law no. 9754, dated 14. 06. 2007, "On Criminal Liability of Legal Entities".

According to the meaning of this provision (Article 3 of the law), as well as the elaboration made by our jurisprudence, but as well as the experience of those countries from which our law was taken as a model, the basis of the criminal responsibility of the legal person in relation to the act of natural persons, has been determined in several ways:

1- the explicit definition of the persons who are in the structure of the legal entity, whom can commit criminal offenses in its name;

2- by identifying the responsibility of the legal entity, only with the actions of the higher bodies, as its legal representative and not as an employee in the company;

3- based on the non-adequate system of organization and the lack of control and measures for the prevention of criminal offenses (Compliance programs);

4- by specifying the entities that, according to the hierarchical position in the legal entity, can commit a criminal offense on its behalf;

5- by identifying the person or persons who have the authorization to act on its behalf and with the committed act, also benefited the legal entity;

6- the criminal liability of the legal entity can only arise from criminal offenses committed by natural persons who have certain qualities and are part of its management hierarchy (legal representatives of the legal entity) and can be proven to have acted on behalf and benefit of the legal entity, in each specific case of criminal proceedings against the legal entity;

Finally, in the analysis of these provisions of the law, criminal liability consists in proving whether the criminal offense was also the will (intention) of the legal entity.

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 means the body of the legal entity or its legal representative, recognized by law and statute). In the interpretation of this part of the provision (Article 3/b of the law), the goal of a responsible person who causes a violation during its activity, whether is an employee or a legal representative of the legal entity, does not always match the goal of the legal entity itself.

Therefore, regardless of the will of the person responsible, in the specific case of natural persons (employees of the company), who are alleged to have committed the violation attributed to them, according to the criminal offense of fraud, Article 143/3 criminal code in cooperation, it must be proven if the legal entity, intended or allowed such an offense through the conduct of its representative bodies, determined according to the legal sources of the organization, the law on commercial companies, the Statute, the law on second level banks in Republic of Albania, Bank of Albania by-laws, as well as its internal regulations. Moreover, in this analysis we must take into account that when we talk about a legal entity, we are talking about its governing bodies and those representing it, and with which it is identified in the civil legal circulation, since the legal entity is a fiction and acts in relation to the third parties, being represented by the persons[1] who are its legal representatives. Not every employee can be considered a representative of the legal entity. This analysis is missing in the Prosecution's conclusions not without purpose.

As long as the basic conditions of the responsibility of the legal person must be the fact that the act must have been committed "on behalf" and "for the benefit" of it, in the practical plan to prove the guilt of the legal person, the basic duty of the prosecution body and more to the court that judges the case, we think that it is the correct interpretation of these two conditions of the law:

1- for the criminal offense to have been committed "in the name" (Article 3 point b) of the legal entity, it is not enough to prove that a natural person, from the structure of employees of the legal entity, is suspected of having committed the criminal offense, but it must be proven that he acted on its behalf and moreover had authorization for such action from the legal entity.

Based on this condition of the law, the question arises, for which illegal action claimed by the Prosecution, did the employees of the legal entity have authorization? Which of these actions were the representatives of legal entity aware of and moreover gave their consent? Otherwise, the legal entity cannot have criminal responsibility and further plead guilty.

2- it must be proven whether the legal person had benefit, (Article 3 point b of the law), or gained exclusive interest from the criminal offense that was

[1] Damaska, M. (1975). Structures of Authority and Comparative Criminal Procedure. Yale Law Journal, 84, p. 480–544.

committed. The benefit of the legal entity can be direct or indirect. In our case, what is the benefit that legal entity has derived from these actions of its employees, in case they would be considered illegal from the point of view of criminal law. The answer is clear, based on the evidence presented, not only from our side, but also those presented by the prosecution, there is zero benefit and benefit for legal entity at the end of the day and at the end of the financial year.

We presume that this analysis is not done on the part of by the prosecution office, or at best, it is only mentioned as an expression that ... "the bank was saved from a big loss". This proves our analysis that legal entity has had no benefiting, this is a necessary criterion to prove its criminal responsibility.

In addition to other criteria, these two conditions (that is, the action of the authorized employee in the name and benefit of the legal entity) must exist cumulatively in order to prove the criminal liability of the legal entity. In the request for trial and in the evidence presented by the prosecution body, there is no direct or indirect evidence to prove the knowledge of the legal entity, i.e. the first condition of letter b of Article 3 of the law, the action on behalf of the representative bodies of bank and furthermore for the second benefit condition (benefit condition) that legal entity had from these actions performed by these employees.

Analysis of the causal relationship of the criminal offense

Continuing our analysis, another basis of the legal person's guilt according to the provisions of the special law (Article 2 of the law) and the principles of the criminal law for criminal liability, is the existence of a causal relationship between the damage received and the actions or omissions of the legal entity. The legal entity can be declared guilty if it is proven that the damage is the result of any interest of the legal entity or the latter did not adhere to the necessary standards during the exercise of its activity. So, if such a causal relationship cannot be proven between the actions of the legal entity (its management and legal representative bodies) and the damage caused, there can be no criminal liability. Causing damage as a basis for criminal liability makes sense only if it is proven that there is a causal connection with an interest (actions) or negligence (omissions) of the legal entity in relation to its legal obligations. What is the damage caused in our case by legal entity? and can this damage claimed by the Prosecution be equated with what is claimed to have been caused by its employees, when they are not among those persons defined by Article 4 of the law? This analysis in the prosecution's conclusions is missing, moreover, it is misinterpreted.

Article 4 of Law 9754, dated 14. 06. 2007, has foreseen an exhaustive definition of what is meant by representative bodies of a legal entity according to the definitions of Article 3 letter a. According to the provision of (Article 4), the bodies that act on behalf and for the benefit of the legal entity, in the sense of Article 3 letter a, are any

natural person whom, according to the law or acts of the legal entity, is charged with the representation, direction, administration or control of the field of activity of the legal entity and its structures.

The term used by the provisions in the analysis, "according to the law or acts of the legal entity", is a definition that leads to the special laws that regulate the activity of legal entities, in our case commercial law, the law for banks in Republic of Albania, the normative acts based on and its implementation by Bank of Albania and the charter of the Trading Company the bank, as well as its internal regulations of organization and operation.

According to the civil law, from the time the theories were born and the first concepts of legal entities were standardized, the responsibilities of the legal entity and those of its governing bodies were clearly defined. This is embodied in the definition that our Civil Code makes of this responsibility that arises between the legal entity and third parties in the civil legal circulation, from the unjust actions of its governing and representative bodies.

Article 31 of the Civil Code clearly defines that, "The legal entity acts through its bodies provided for in the law, in the act of foundation or in the statute, which express its will. The legal actions performed by the bodies of the legal entity, within their competences, are called 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 responsible for the damages caused by its units during the fulfilment of their duties. The legal entity is responsible for its obligations within the limits of its assets. The persons who acted in the capacity of the body of the legal entity, have personal responsibility for the compensation of the damages that were caused due to their fault".

So it is clearly defined that there is a dividing line between the civil liability of the legal entity towards third parties, due to the actions of its governing bodies, and the personal liability of the latter for damages caused by their fault.

This clear relationship of interaction between the legal entity, its governing and representative bodies according to the law or its acts of foundation, finds the same treatment in the law in the analysis of our arguments, that "On Criminal Liability of Legal Entities", no. 9754, dated 14. 06. 2007.

Article 4 of the law in the title cannot be overlooked in our analysis: "Bodies and representatives acting on behalf or for the benefit of the legal entity", that is, only those bodies and representatives acting on behalf and for the benefit of the legal entity are defined in this provision as follows. The provision has the following content:

"In the sense of Article 3 letter "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 charged for the representation,

direction, administration or control of the field of activity of the legal entity and its structures".

This definition leaves no room for any other fantasy in interpretation. Therefore, the employee in the company cannot be a representative of the legal entity. Simply employees of the legal entity can be responsible and hold liability based on a work contract and with clearly defined duties, the violation of which in any case would burden each of them with individual responsibility, and never the legal entity.

Analysis of the Subjective Aspect

The culpability of the legal entity must be based on its internal organization, the existence and implementation of a model for the prevention of criminal offenses or not, or any other act for this purpose (these criteria are defined in point "c" of the article 3 and in article 4 of the law 9754/2007). In this aspect and in the analysis of these criteria to determine the subjective side of the guilt of the legal person, generally in practice, the criminal offenses that are committed in the name and benefit of the legal person in many cases are a direct consequence of a weak organization of the legal entity, to avoid the commission of criminal offenses[1] by its employees. On this basis, the guilt of the legal entity and its punishment is justified if it is proven that the specific criminal offense is a consequence of the weak organization of the legal entity to avoid it, until the legal entity itself cannot prove the opposite in the process.

The opposite exists for banks as a category of legal entities, which have specific laws governing their organization and operation and, moreover, exercise their activity under the instructions and control and supervision of the Bank of Albania. Only this approach of the banking system in a certain regulated market made our case easier to solve and in favor of not blaming the legal entity. We did not find such an analysis in the investigations conducted by the prosecution body in the conduct of arguments of guilt in the subjective aspect of the legal entity due to the way of its internal organization, the existence and implementation of a model for the prevention of crimes, either in the application for judgment and moreover in its final conclusions.

Criminal offenses by legal entities as well as natural persons can be committed both intentionally and negligently. Intent exists when the act expresses 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 poor organization and insufficient of the legal entity to avoid such offense (culpa in vigilando). This should be the basis of the guilt of legal

[1] Balla, R., "Combating Money Laundering and Terrorist Financing, Amendments to the Law on Prevention of Money Laundering, published by the European Institute, SEE I EU Cluster of Excellence in European and International Law, Verlag Alma Mater, Saarbrucken, Germany, December 2018, pg 304.

persons for criminal offenses also according to the provisions of the special law "On Criminal Liability of Legal Persons", no. 9754, dated 14. 06. 2007.

Analysis of Control and Surveillance Programs

In the framework of our entire legal analysis, the legal entity the commercial company especially the banks must adopted and implemented such a provision, because it is also an obligation deriving from the special law on banks in Republic of Albania, regulations, orders and instructions of Bank of Albania as well as continuous supervision through periodic controls and audits of the Bank of Albania as a comprehensive supervisory authority. In implementation of this legal obligation and due to the fact that the banking system occupies an important position in a country with a market economy, banks should approve a policy of the organization and control model (so called compliance program), approving a series of internal acts that practically embody all these obligations.

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

Actually, this fact and these internal policies and procedures must be analysed by the prosecution body in accordance with Article 3 point "c" of Law 9754/2007, a criterion on which the prosecutor must supported almost all of its analysis in the final conclusions. In order to reach a clear and legal conclusion of the criminal responsibility of the legal entity, the prosecution body must administer these policies and procedures during the investigation and the analyse of these internal documents would help to determine the accusation against the legal entity.

According to article 2 of the special law, it is stated that: "...the provisions of this law are applied to legal entities as far as it is not provided otherwise in the Criminal Code, or in Criminal Proceedings Code and in other criminal provisions....". So, it is the court's duty to interpret this law in harmony with other criminal provisions, since the special law lacks the basic criteria for determining the guilt of a legal entity. This means that the legal person cannot be punished only on the basis of the objective fact, that a criminal offense was committed by one of the employees, in the exercise of their functions according to the employment agreement. Prosecution must evaluate the claims and analyse the actions of the employees, in order to determine the criminal responsibility 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 these employees then it must be clear to the prosecution that the criminal responsibility must not be changed to the legal entity.

Based on Article 14 of the Criminal Code[1]: "No one can be punished for an action or omission provided by the law as a criminal offense, if the offense was not committed with guilt. The person who commits the crime intentionally or negligently is called guilty".

So, for the natural person, based on this principle, it is required to prove that the criminal offense for which he is accused is a consequence of his actions or omissions committed intentionally or carelessly.

But this cannot be said in relation to legal entities that the act committed was intended by the legal entity, since the latter is a fiction. This means that the legal person cannot be held criminally responsible and cannot be punished further in the framework of the application of the theory of the subjective concept, i.e. as a psychological connection between his actions or omissions and the resulting consequence, but according to a system well-defined provided by the special legal norm, according to which the guilt of the legal entity should be understood as a punishment for disobeying the rules. The prosecution must consider such a fact in its analysis when claiming the guilt of a legal entity, which are the legal or statutory rules that the bank as a legal entity violated in the occurrence of the alleged illegal consequence.

At this point of view, we think that it is the obligation of the court to analyse, in accordance with Article 30 of the Constitution[2], regarding the guilty or not of the legal entity. This is because it is not possible to bind the criminal responsibility of legal entity only as a responsibility that derives objectively from the criminal responsibility of each natural person who is its employee. We emphasize that the court should not overlook the analysis of the subjective responsibility of the legal entity, responsibility that is expressed through the bodies that represent it and that are correctly defined not only in Article 4 of the law, but also emerge from the two specific laws, namely the one that regulates the organization and the operation of second tier level banks as well as the Commercial Law.

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

Analysis of the Organization of Banks

Based on the above, it is necessary to determine that the activity of second level banks in the Republic of Albania is regulated on the basis of a special law, specifically on the

[1] Criminal Code of Republic of Albania Law no. 7895/1995 https://qbz.gov.al/preview/a2b117e6-69b2-4355-aa49-78967c31bf4d accessed May 2024.
[2] Omari, L., Anastasi A., Constitutional Law, published by ABC, Tirana 2008, pg 55.

basis of law[1] no. 9662, dated 18.12.2006 "On Banks in the Republic of Albania" Amended.

Article 3 thereof determines that the banking system in the Republic of Albania consists of the Bank of Albania, whose status is determined by the law[2] "On the Bank of Albania", as well as by banks and branches of foreign banks, whose status is determined through this law. Article 4, item 19 defines who will be considered Bank Administrator "Administrator of a bank or branch of a foreign bank" is an individual who is: a) a member of the management council or the control committee of the bank; or b) executive director; or c) 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, which indicates that the supervision of the Bank's own activity consists of a very structured and well-organized control system, and not of a structure or individual, specifically:

1. The bank or branch of the foreign bank organizes the internal control system, with the aim of monitoring the implementation of internal policies and procedures, evaluating the effectiveness of banking activity and monitoring compliance with legal and by-laws.

2. The purpose of internal control is to identify the exposure of the bank or foreign bank branch to the types of risks, measurement, administration and monitoring of their level.

3. 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 above, we presented a description of the nature of the organization and the functioning of the banking system in the Republic of Albania, and more specifically of a second tier level bank, according to the special purpose to show that the Prosecution must search and bring to the trial evidences to show whether it lacked any organizational or control structure according to this law, and that the legal entity had failed to take the organizational and control measures required by this law, the orders and instructions of the Bank of Albania. In addition, the prosecution must bring evidence or indication that Bank of Albania has supervised during its activity in the

[1] Law no. 9662 dated 18.12.2006 “On Banks of the Republic of Albania” amended, published on Official Journal https://www.bankofalbania.org/Rreth_Bankes/Legjislacioni/Ligj_9662_2006_Per_bankat_ne_Republiken_e_Shqiperise_version_i_integruar.html (accessed May 2024)

[2] 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 (accessed May 2024)

Albanian jurisdiction and whether it found any organizational and structural deficiencies, which might lead to business risks and damages to its customers, in order to determine the criminal responsibility of the legal entity.

Jurisprudence of the Criminal College of the Supreme Court

Based in Decision no. 17, dated 04. 02. 2015[1], the Criminal College of the Supreme Court, states that ".... The Criminal College of the Supreme Court finds the conclusion of the appeal court wrong that the legal entity "Nika" shpk should also be held responsible, for the actions carried out by the defendant Zef Nika; who turns out to be a person simply employed by this entity, and did not have any management function.... The legal entity "Nika" shpk cannot be held responsible for the criminal offense of using forged documents, provided for by Article 186 /1 of the Criminal Code, if he was not aware, and cannot answer for the charge against him, since the crime of using subjectively falsified documents is committed only with direct intent ……. Taking into consideration Article 3 of the law "On the criminal responsibility of legal entities", which provides that: "The legal entity is responsible for criminal offenses committed: a. In his name or for his benefit, by his bodies and representatives; b. In its name or for its benefit, by a person who is under the authority of the person who represents, directs and administers the legal entity; c. In its name or for its benefit, 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, in order to be before the criminal offense committed by the legal entity, two conditions must be fulfilled at the same time: i) The criminal offense was committed by the circle of persons which include the category of employees with representative, administration or management functions and persons who are under the authority of the person who represents, directs and administers the legal entity, i.e. the employees of the executive level and ii) The criminal offense was committed "in the name" or "for the benefit" of the legal entity....

Based in Decision no. 181, dated 28. 10. 2015 of the Criminal College[2] of the Supreme Court, reasons that "……Regarding the claim of the prosecution body on the criminal responsibility of the legal entity, the company "Komunitete" sh.p.k., this College notes that this claim does not stand, since, as both courts have rightly reasoned, the criminal case against him, for both charges, should not have started and therefore should 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, these charges are criminally responsible for the judge M. Ç., who is also the sole administrator, i.e. the legal representative of the company and in the case when the

[1] Criminal College of the Supreme Court Decision no.17 dates 04.02.2015. https://app.gjykataelarte.gov.al/vendime-kolegji-penal-seance-Gjyqesore (accessed May 2024).
[2] 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).

illegal actions are carried out by the administrator also on behalf of the company, he is the one who must bear criminal responsibility. If a justification was made "a contrario", that is, if the guilt of the legal entity defendant was accepted, we would be faced with a situation where this defendant had to answer for the commission of the criminal offense in collaboration with the defendant M. Ç. However, cooperation means an agreement to commit one or several criminal offenses and the agreement itself is between two or more persons. If this reasoning were to be accepted in the case under trial, it would result that the agreement was concluded by the defendant M. Ç. with the administrator of the defendant "Community" sh.p.k., again M. Ç....".

Criminal Liability in International Law

The significance of criminal liability for legal entities (e.g., international corporations) in international law is relevant in today's globalized world. With the increasing influence of multinational corporations on the global economy, ensuring that these entities are held accountable for criminal actions is crucial for maintaining international legal order and protecting human rights.

Nowadays, there are existing international legal frameworks and treaties that address or relate to the criminal liability of legal entities such as: Rome Statute of the International Criminal Court (ICC): While the ICC currently only prosecutes natural persons, there have been discussions about extending jurisdiction to legal entities. United Nations Convention against Corruption (UNCAC): This convention includes provisions that encourage states to hold legal entities accountable for corrupt practices. OECD Anti-Bribery Convention: It mandates member countries to establish the liability of legal persons for bribery of foreign public officials.

We have to mention that our analyse will go further on how different jurisdictions handle the criminal liability of legal entities. There are differences and similarities between national laws and their implementation. United States: The U.S. has a well-developed system for corporate criminal liability, primarily under the Foreign Corrupt Practices Act (FCPA) and other federal statutes. European Union: Various EU directives, such as the Directive on combating the sexual abuse and exploitation of children and child pornography, require member states to establish corporate liability. France: France's Sapin II law focuses on anti-corruption measures and includes provisions for corporate criminal liability.

We would like to Identify and discuss the challenges and criticisms associated with holding legal entities criminally liable on an international level. We can emphasis that one of the most challenging is the Jurisdictional Issues: Difficulty in determining which country has jurisdiction over a multinational corporation. Another challenge is Corporate Structure: Complex corporate structures can obscure accountability. As well as the enforcement is another specific challenge: Ensuring international cooperation and effective enforcement mechanisms.

Furthermore we must mention that there is lack of effectiveness on imposing fines or penalties on corporations. Shall it deter criminal behaviour. We are very concerned regarding justice, fairness, particularly when corporate penalties impact innocent employees and stakeholders.

We would like to illustrate how legal principles are applied in practice and to highlight the successes and shortcomings of current frameworks. Examples: Enron Scandal: Demonstrates the impact of corporate fraud and the importance of stringent regulatory oversight. Volkswagen Emissions Scandal: Highlights issues related to corporate deception and environmental harm. BP Oil Spill: Examines corporate accountability for environmental disasters and the role of international law in addressing such incidents.

Conclusions

Based on the interpretation of Articles 3 and 4 of the Law on Criminal Responsibility of Legal Entities, it must be crucial to the prosecution and even 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 responsibility of the legal entity.

Furthermore the authorised actions must be performed on behalf of the legal entity. So the legal entity must be beneficial owner from the illegal activity. These two criterion of the law must determine the criminal responsibility of the legal entity.

Based on the arguments analysed we would suggest for improving the international legal framework concerning the criminal liability of legal entities. One of 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 we explain it is necessary to reinforce the importance of addressing the criminal liability of legal entities in international law. In order to ensure justice and uphold the rule of law in the global arena, it is imperative to address 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 above mentioned especially the legal analyses we recommend to the law enforcement agencies to draft guidelines to the prosecution officers and to the judges to facilitate their performance on determining the right and balanced criminal responsibility to the banks in the Republic of Albania.

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