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1. **Introduction**

The duties and liabilities of directors and other officers of Ukrainian companies are set out in a number of statutes. Some (albeit limited) guidance on this topic is also available in the resolutions of the Plenary Assembly of the Supreme Court of Ukraine. The Supreme Court reviews recent court practice of lower Ukrainian courts on a given subject (e.g., corporate disputes and invalidation of transactions) and gives recommendations. Although formally non-binding, such recommendations are generally taken into account when a court decides a similar case.

The main statutes on the matter of directors’ duties and liabilities are as follows:

- the 2003 Civil Code;
- the 2008 Law on Joint Stock Companies;
- the 1991 Law on Commercial Companies;
- the 2003 Commercial Code; and

Effective from May 1, 2016, changes were made to a number of laws with a view to enhancing investor protection. Those changes include rules for derivative actions, and provisions regarding non-executive members of a supervisory board (currently, only banks are required to have independent members on their supervisory board) – see also section 2.1 below. We discuss derivative actions in section 3.2 below. As regards independent members of the supervisory board, all public joint stock companies (i.e., joint stock companies that can offer their shares to the general public) and joint stock companies (public or private) where more than 50% of all shares are owned by the State of Ukraine will be required to ensure that at least two members of their respective supervisory boards are independent. The law now also includes detailed criteria for independent members – for instance, someone who, in the five years preceding the date of their appointment to a supervisory board, was an affiliate of a shareholder or was an officer of the company or a subsidiary of the company, cannot qualify as an independent member of the supervisory board.

Overall, Ukrainian law does not extensively regulate the duties of directors and other officers. Additional obligations may be set out in the employment contract or other agreements between an officer and the company, and in the company’s internal regulations.
2. Directors’ duties

2.1 Who is a director?
Under Ukrainian law, the managerial function is performed by a so-called ‘executive body’ of the company. The executive body can take the form either of a board (eg, a management board or a directorate) or of a sole director. In a narrow sense, a director is the person acting in the capacity of the sole director or a member of the management board. Only an individual (ie, a natural person) can act as a director of a Ukrainian company.

Apart from the managerial board (or a sole director) in charge of the day-to-day management, a Ukrainian company will often have a supervisory board. The supervisory board will be entrusted with protecting the interests of the shareholders and supervising the director(s). In some companies – for instance, in a joint stock company with 10 or more shareholders – a supervisory board is mandatory. Members of the supervisory board are appointed by the shareholders. It is the supervisory board that will normally appoint the directors.

In addition to a supervisory board, a Ukrainian company can also have a third board, functioning as an audit committee. The audit committee is set up to monitor the financial operations of the company, and is appointed by the shareholders directly or by the supervisory board (if any). The function of monitoring the financial operations of the company can be performed by a sole auditor instead of an audit committee if the shareholders do not wish to establish this third board. However, for joint stock companies with more than 100 shareholders, an audit committee is mandatory.

A sole director, members of the management board, members of the supervisory board and members of the audit committee (or a sole auditor) are all treated as officers of the company. In this overview we will refer to each of them as an officer. Where a distinction is required to be made between directors (ie, sole directors or members of the management board) and other officers, we will refer to the first category of officers as directors.

The concept of non-executive or independent directors is not common in Ukraine, although some larger Ukrainian companies (particularly in the banking sector) now have accomplished professionals as independent members of their boards.

2.2 Nature of duties
Under Ukrainian law, an officer of a company has the following duties:

- to act in the interests of the company;
- to comply with the law and the company's charter (ie, the Ukrainian equivalent of a constitution) and other governing documents;
- not to disclose the company’s commercial secrets or confidential information about the company; and
- in respect of officers other than members of the audit committee (or the sole auditor if this applies), to make available all documents in relation to the company's financial and commercial activities when requested to do so by the audit committee or the sole auditor.
In addition to the above, a director has the following statutory duties:

- to act in good faith and reasonably;
- not to exceed his powers;
- to organise the maintenance of proper bookkeeping by the company, and the filing of statutory accounts and other information with the authorities, as required by law; and
- to disclose information about the company (eg, annual accounts and minute books) to the shareholders at their request.

As a representative of the company before all third parties, a director is responsible for the accuracy of the information that is included in any forms signed by a director and filed with the authorities. This includes certain key information that is filed with the state registrar and regularly confirmed on behalf of the company, including information about the company's shareholders, beneficiaries and officers.

Ukrainian court practice regarding the duties of officers has to date primarily concerned directors acting beyond their powers. Where a director enters into a transaction on behalf of his company without the authority to do so, that transaction will normally be binding on the company only if the company subsequently ratifies it. The company has the right to seek invalidation of such a transaction on the grounds that the director, as an agent of the company, lacked legal capacity.

The powers of directors – and particularly any limitations on those powers – are mainly set out in the constituent documents of the company. It is market practice in Ukraine in relation to commercial contracts to state in the contract that the company is entering into that contract as represented by its director, who is himself acting on the basis of the company's charter. Based on court practice (in particular, as confirmed by the Plenary Assembly of the Supreme Commercial Court of Ukraine in its Resolution 11 from May 29 2013), the inclusion of this standard language in a contract generally means that a party is expected to check its counter-party's charter and, in particular, any limitations on the powers of the counter-party's director, and is presumed to be acting with the knowledge of any such limitations.

The limitations on the powers of officers are valid in relation to a third party where there is evidence that the third party was, or should have been, aware of them. Given changes in the Ukrainian corporate registration rules (effective as of January 1 2016), the constituent documents of Ukrainian companies will be available in the companies register and can be accessed by anyone in the online version of that register. Accordingly, it will become easier to find out about any limitations on the powers of officers, and more difficult to refute a claim by the company seeking invalidation of an ultra vires transaction.

(a) Conflicts of interest

There is a separate set of rules regarding conflicts of interest. However, these rules currently only apply to joint stock companies and do not apply to the other common corporate form, namely the limited liability company. A conflict of interest
is deemed to arise in respect of a transaction where an officer of a company, his close relative, or a company where that officer or his close relative hold 25% or more of the shares:

- is a party to that transaction, or is a director of a company that is a party to that transaction;
- receives benefit as a result of that transaction from the company or its officers, or from a person that is a party to that transaction;
- acquires property as a result of that transaction; and/or
- participates in that transaction as a representative or agent (other than as a representative of the company).

An officer of a company who has an interest in a transaction of that company has a duty to disclose that interest to the company within three business days of that interest arising. Further to such disclosure, it will be necessary to follow a special procedure for approval of that transaction, as prescribed by law. In particular, the full details of that transaction must be disclosed to the supervisory board or, where no supervisory board has been established, to the shareholders directly. If the special approval procedure is not followed, a person adversely affected by that transaction will have the right to seek invalidation of the transaction.

2.3 Standards of care and conduct

The concept of fiduciary duty is not well developed in Ukrainian law. There is also no Ukrainian law equivalent to the so-called ‘business judgment rule’. Hence, very limited guidance is available in either statute or court practice on the standards of conduct that should apply to officers as a matter of law. Indeed, the internal regulations of a company will often be more detailed on this matter. For instance, companies with a supervisory board would normally have regulations applying to the supervisory board. Also, based on such an internal document, members of the supervisory board of the company could be required to act diligently, with due care, and in the best interests of the company. A higher standard of care can be set in a contract between the company and an officer.

Article 92(3) of the Civil Code of Ukraine refers to the duty of a director to act in the interests of the company, in good faith and reasonably. This general requirement can be complemented by special rules applicable to specific types of company – eg, the 2000 Law on Banks and Banking (briefly) mentions that officers have to act in good faith, be objective and make unbiased decisions.

In 2014 the National Securities and Stock Market Commission of Ukraine approved a set of corporate governance principles in an attempt to guide Ukrainian companies on best practice in that area. Though not binding, the published Corporate Governance Principles document includes certain recommendations on, among other things, the duties of officers.

By way of example, it is recommended that members of a supervisory board devote sufficient time to their work on the supervisory board, and have access to complete, accurate and timely information, so that they are able make informed decisions. Furthermore, a recommendation in Note 3.3.1 to the Corporate
Governance Principles regarding the loyalty of officers says that acting in the interests of the company, in good faith and reasonably (which is the standard terminology on this point in Ukrainian law) implies that the officers “show care and diligence that are typically expected of a person making informed decisions in a similar situation”.

Officers should also:

- refrain from actions that can harm the interests of the company;
- avoid receiving any direct or indirect benefits in exchange for influencing the decisions of the company’s bodies;
- not use the property of the company to advance their own interests; and
- not harm their own reputation and the reputation of the company as a whole.

Note 3.3.6 to the Corporate Governance Principles, which talks about officers compensating the company for any damages resulting from actions in breach of their duties, says that in each individual case the company has to take into account the rules of ‘normal business risk’ in assessing the decisions of its officers.

2.4 To whom duties are owed

As a general rule, officers owe duties to the company and not to third parties. This will particularly be the case when an officer is an employee of the company. The engagement between a person as an officer usually takes the form of either employment or a so-called ‘civil law agreement’ – ie, a contractual arrangement based on an executive service contract. In a civil law agreement, it is possible to contractually impose duties on an officer in relation to, for instance, the holding company or the majority shareholder of the company.

Under Ukrainian law, damages caused by employees are to be reimbursed by the company that employs them. This provision is likely to apply even in circumstances where the company only has a civil law relationship with its officers. Thus, it does not appear possible for the company’s officers to be exposed to liability to third parties arising out of their acting as the company's officers and on its behalf; such third parties would generally only be entitled to sue the company itself. The company may have recourse against an officer – for instance, where the company suffered loss as a result of a related party transaction entered into by the officer on behalf of the company in contravention of the law. In a situation where there is more than one officer liable for loss to the company, those officers will be liable on a joint and several basis.

2.5 Common defences to, and exemptions from, liability

A claim by a company against an officer for damages may be brought, but only where there has been a breach of their duties, the company has suffered a loss, and there is causation between the breach and the loss.

Until June 2014 there was a significant difference in the scope of potential liability of officers, depending on whether the officer was employed by the company or was engaged by the company on the basis of a civil law agreement. This was due to an express statutory cap on the liability of employees under the 1971 Code of Labour Laws, which is a key part of Ukraine’s traditionally pro-employee employment laws. Officers who were employed by a company generally could only be liable for any loss
to the company resulting from their actions in an amount up to one month’s salary; in contrast, those officers who were engaged by the company under civil law agreements were potentially liable for the full amount of any loss that they caused to the company. The statutory cap was removed, in respect of officers, through Law 1255-VII On Amendments to Certain Legislative Acts Regarding Protection of Investors’ Rights, dating from May 13 2014 and taking effect from June 1 2014.

Another important change introduced by the 2014 legislative act is an express provision in the Code of Labour Laws that officers may be liable for lost profits of the company.

Even so, a number of specific limitations on the liability of officers who are employed by the company remain in the Code of Labour Laws. An employee cannot be liable for damage that arises because of what is considered normal production and commercial risk, or for damage caused by an employee when acting under extreme necessity (i.e., in circumstances where such actions were required in order to prevent damage to public order or to the property or rights of others – provided that such damage could not have been prevented otherwise, and provided further that the actual damage caused by such actions is less than the damage that would have been caused in the absence of such actions). As an example of action done out of extreme necessity, an employee would not generally be liable for damaging the company’s property (e.g., equipment) if such property was used in order to prevent a fire, flood or similar emergency.

There are no express provisions under the law on whether reliance on professional advice relieves an officer from liability. Officers are entitled to rely on another professional’s advice, but such reliance should not be deemed to constitute a proper discharge of their duties on behalf of the company – officers should not use reliance on other’s professional advice as a substitute for their own review and decision making. Arguably, an officer may be seen to be acting negligently rather than intentionally when relying on professional advice. In this case, it may be impossible to hold the officer liable for an intentional breach of the law but the officer may still be liable for negligence.

3. **Who can bring civil claims**

As a general principle of Ukrainian law, a claim can be brought against an officer by any person who has been adversely affected by that officer’s action or failure to act.

3.1 **The company and its liquidators**

(a) **Solvent company**

A company may bring a claim for damages against an officer on the basis of a breach of his duties, either in the employment context or where the officer is engaged on the basis of a civil law agreement. It is only employment law pecuniary liability (i.e., where an officer takes action causing damage to the company where that officer is employed by the company) and civil liability (i.e., where an officer takes action causing damage to the company where that officer is not employed by the company) that provide for the possibility of reimbursement for damage to the company by its
officers. The fact than an officer will be liable to reimburse the company for damage caused by his action does not preclude other types of liability – e.g., criminal liability penalised by imprisonment, administrative liability penalised by a fine, or disciplinary liability penalised by a reprimand.

The decision by the company to bring a claim is taken by the shareholders or by the supervisory board, as applicable pursuant to the company's constitutional documents. In respect of joint stock companies, the law expressly provides that the decision to bring a claim for damages against an officer is taken by a simple majority vote, and that the constitutional documents of the company may not require a qualified majority vote to pass that decision.

(b) Insolvent company

Officers of a company that is being wound up because it is insolvent can be made liable for the wrongful actions or inactions that brought the company into bankruptcy. In such cases a liquidator is entitled to bring a legal action for damages on behalf of the insolvent company against those of its officers (or former officers) who gave instructions or made decisions that caused the insolvency of the company.

3.2 Minority shareholders on behalf of the company (derivative actions)

The reintroduction into Ukrainian law of rules covering derivative actions was one of the most anticipated changes due to take place. Derivative actions are now possible on the basis of Law 289-VIII on Amendments to Certain Legislative Acts Regarding Protection of Investors' Rights, dating from April 7 2015, with the relevant provisions of that statute coming into effect on May 1 2016.

After May 1 2016, a shareholder who holds at least 10% of all shares in a company may initiate a court action in a local Ukrainian commercial court on behalf of the company against an officer of that company, to recover damages caused by that officer's actions toward the company. Shareholders who each hold less than 10% of all shares can join forces (so that their aggregate shareholding is 10% or more of all shares) in order to bring a derivative action. Such court action can be brought against a director or any other officer, including members of any specific bodies established in the company as per its constitutional documents. The law gives a non-exhaustive list of circumstances in which an officer can be liable for damages caused to the company; this list includes the officer acting in excess of his authority, providing inaccurate information to the shareholders, and/or failing to act where the officer's duties required him to take action.

An officer who is a defendant in a derivative action may not represent the company in the proceedings, or appoint a representative to participate in the proceedings on behalf of the company.

3.3 Minority shareholders on their own account

A claim by a minority shareholder on their own account against an officer would not generally be possible. This is because where the rights of a minority shareholder have been violated by the actions of an officer, it is normally the company itself that would be the defendant.
In the context of possible oppression of minority shareholders, there is no express requirement under the law that a director, or another officer, take into account the interests of any one shareholder. Instead, an officer has a duty to act in the interests of the company as a whole.

Where a minority shareholder voted against a key decision of the company (e.g., a significant transaction, a merger or a share issue), that minority shareholder has the right to use the ‘mandatory tender offer mechanism’ under the law and to leave the company in that way.

3.4 Third parties
As a general rule, officers of a company are not liable for the company's debts to creditors. An exception to this rule applies in very limited circumstances in the course of a liquidation of the company: an officer can be held liable for debts of an insolvent company before its creditors where the insolvency of the company resulted from the officer's actions (or his failure to act).

It is not generally possible for the company's officers to be exposed to liability to third parties arising out of their acting as the company's officers and on its behalf.

4. The regulatory and criminal liability landscape

4.1 Most common types of criminal offences alleged against directors
An officer can be criminally liable for tax evasion, money laundering, securities fraud and certain other serious offences, on the basis of the 2001 Criminal Code. But officers of Ukrainian companies can be criminally prosecuted only if they personally committed a crime or contributed to its commitment by acting as abettors or inciters.

Among the most common crimes alleged against officers of Ukrainian companies are:

- tax evasion;
- a grave violation of the labour laws, including wrongful dismissal of an employee for merely personal reasons;
- an intentional, groundless non-payment of salary to an employee for more than one month of work;
- money laundering; and
- forgery of documents or similar fraudulent actions.

Other criminal offences alleged against officers may include:

- abuse or negligent conduct of office;
- embezzlement;
- securities fraud, including insider trading;
- illegal disclosure of information protected by bank secrecy or of other confidential information; and
- the illegal opening of bank accounts abroad.

In most cases, even though some actions may share the characteristics of a crime, a case may not be successfully prosecuted in a criminal court against an officer unless...
the officer's act (or omission) was the result of a deliberate intention on the part of that officer to commit a crime. For example, in a case of non-payment of taxes, deliberate intention could be confirmed by means of retrieving copies of management accounts showing that the officer knew that he must pay taxes but deliberately decided not to make such a payment by falsifying tax statements or failing to declare sales.

Officers of Ukrainian companies may also be exposed to a so-called ‘administrative liability’. This liability applies for less serious offences that do not qualify as crimes, such as the untimely reporting to the tax inspectorate or the violation of safety-at-work regulations. The general grounds for administrative liability are set out in the 1984 Code of Administrative Offences. Article 9 of that code defines an administrative offence as any unlawful, intentional or negligent action or inactivity threatening public order, property and human rights and freedoms, if such action or inactivity cannot be classified as a crime. A fine is the most common sanction imposed for administrative offences, although sanctions such as the revocation of permits and licences can also be used in various industries (e.g., banking and TV/radio broadcasting).

It is primarily the managing director (or a person holding the equivalent top executive office) and the financial director of the company who can be found liable for administrative offences. Administrative offences alleged against them may include:

- carrying on a business without a licence or other permit, where one is required;
- failure to maintain proper accounting and tax records;
- failure to pay taxes in a timely manner;
- certain violations of the labour laws, including non-payment of salaries and the breach of safety-at-work regulations;
- breach of currency control regulations, including failure to repatriate currency proceeds under export contracts;
- failure to pay payroll taxes or other benefits paid to employees; and
- breach of fire protection rules.

4.2 Enforcement

Courts are the only authority to apply sanctions for criminal offences. The Prosecutor's Office or a criminal investigator has the authority to initiate a criminal proceeding by submitting relevant information for insertion in Ukraine's register of pre-trial investigations. Other regulatory agencies, for instance the tax authorities, can only initiate a criminal proceeding against an officer by first applying to the Prosecutor's Office.

In the course of criminal proceedings, possible interim measures against an officer may include:

- imposition of monetary penalties;
- suspension from office;
- restrictions on access to property or documents, temporary seizure of property or arrest of property;
- detention; and
- house arrest.
Unlike criminal offences, administrative offences can be applied not only by the
courts but also by municipal non-judicial authorities, the state department for
overseeing compliance with labour laws, and various other government agencies
(depending on the type of administrative offence).

4.3 Penalties
Sanctions for criminal offences include imprisonment, restriction on the ability to
hold certain positions, community service, seizure of property and monetary fines
paid to the state budget.

Sanctions for administrative offences primarily take the form of a monetary fine
to be paid to the state budget. Short-term arrest is another possible sanction, but it is
not normally used in practice for business-related offences.

4.4 Bribery and corruption
A law in relation to bribery and corruption was passed in Ukraine on October 14
2014 and took effect on April 26 2015. It is Law 1700-VII on Preventing Corruption.

‘Corruption’ is defined therein as the use by a public officer of his official powers
in order to obtain or accept undue benefit for himself or for other persons, or an offer
or the giving of undue benefit to a public officer, or to other persons at his request,
in order to induce that public officer to unlawfully use his official powers.

The law requires all Ukrainian companies that participate in large public tenders
to put in place an anti-corruption policy consisting of rules, standards and measures
for detecting, fighting and preventing corruption, and to designate a person to be
responsible for the implementation of that policy.

Officers and shareholders of all Ukrainian companies must ensure that a regular
assessment takes place of corruption risks in their operations. An officer must not
participate in any corrupt practices relating to the operations of the company and
must refrain from behaviour that may be interpreted as a willingness to participate
in corrupt practices relating to the operations of the company.

5. Claims culture

5.1 Litigation culture
Even though litigation costs in Ukraine are relatively low compared with many other
jurisdictions, Ukrainians are not particularly litigious. One of the reasons for this
could be the low effectiveness of the Ukrainian courts. Moreover, the Ukrainian
courts generally encourage amicable settlement and, as a result, disputes are often
settled outside court, in foreign courts or through arbitration.

That said, the number of court cases relating to the liability of officers has increased
since the mid-2000s. The majority of such cases relate to the non-payment of taxes.

The overwhelming majority of claims are claims to recover damages.

5.2 Impact of recent financial and economic trends on claims
We have not seen any significant impact in Ukraine of the international credit crisis
that started in 2008 on claims or cases against officers.
5.3 Collective redress systems

Ukrainian law does not currently recognise any form of collective redress system (ie, class action). However, the Supreme Court of Ukraine has expressed a view that a class action can be an efficient mechanism for the protection of legal rights. The introduction of rules permitting class actions could be included in the judicial reform that is currently being considered in Ukraine.

Notwithstanding the foregoing, a claim may be filed by multiple plaintiffs or against multiple defendants, each respective plaintiff or defendant acting in the proceedings individually against the other party. This may be relevant in actions relating to the protection of consumer rights.

Additional defendants and/or third parties can be joined in court proceedings by the court itself, where the court decides that their participation is necessary for the purposes of those proceedings. Under Ukraine's 2004 Civil Procedure Code, there are a number of requirements that, if met, enable the court to order joinder of the parties. These requirements are that:

- the common rights and/or duties of the multiple plaintiffs or defendants constitute the subject matter of the dispute;
- those common rights and/or duties arise from the same grounds (eg, on the basis of the same agreement); and
- those common rights and/or duties are of the same legal nature.

5.4 Funding of claims and whether losing party pays

As a general rule, the parties will bear their own procedural costs. Even so, procedural costs are paid by the losing party where the court resolves to fully satisfy the plaintiff’s claims.

As regards court fees, their amount is set by a special statute and depends on the type of claim (ie, pecuniary or non-pecuniary) and the amount of claim. For individual plaintiffs (ie, natural persons) the minimum court fee is currently around US$20 equivalent, and the maximum is around US$300. Where a legal person is the plaintiff, the minimum court fee is approximately US$50 and the maximum court fee is 1.5% of the amount claimed.

Ukrainian law does not prohibit conditional fee or contingency fee agreements. However, such arrangements are not common.

Based on the 2012 Law on the Bar and Legal Practice, the method of calculating an attorney’s fees and the related payment terms must each be set out in the legal services agreement between the attorney and the client. The 2012 act also requires that the attorney’s fee be reasonable in amount and generally take into account the time spent on the matter. Hence, the common approach is one of time-based legal fees.

Although the courts have discretion, generally the losing party is ordered to pay all procedural costs of both parties unless the claims of the plaintiff are satisfied in part. In the latter case, the procedural costs are paid by the parties in proportion to the claims satisfied/denied (as relevant).

Under the Code of Civil Procedure, the rule of ‘costs follow the event’ prevails. The losing party will be ordered to reimburse court fees, court experts’ fees, translators’ fees, legal costs and other expenses incurred by the winning party. If the
claim is awarded in part, the costs will be allocated to the losing party in proportion to
the amount of claims awarded, with the winning party paying the remainder. In a case of settlement, the costs are divided between the parties in equal parts, unless otherwise agreed by the parties in the settlement agreement.

The amount of legal costs that can be recovered is limited under the law. In particular, in civil proceedings a reimbursable counsel’s hourly fee must not exceed 40% of the level of Ukraine’s minimum statutory wage (approximately €20/US$18 as at late 2015). The recovery will only cover the time spent by counsel in court hearings, during familiarisation with case materials and participation in the legal proceedings outside court, such as the examination of evidence.

In so-called ‘commercial proceedings’ (ie, where both the defendant and the plaintiff are commercial companies), there is no statutory limitation on the recovery of legal fees but the court may reduce the awarded amount of legal costs to reasonable court expenses in the case.

5.5 Plaintiffs’ bar
There is no equivalent of a US-style plaintiffs’ bar in Ukraine because Ukrainian law does not explicitly provide for collective proceedings as they are known in common law countries.

5.6 Procedural barriers to the bringing of claims
There are no formalities required specifically for a claim against an officer. Certain procedural requirements will apply to derivative actions once derivative actions become possible in Ukraine (see section 3.2 above).

Under the 2003 Civil Code, claims for damages are subject to a general three-year limitation period that cannot be reduced by the parties. However, the parties can agree to extend this term. The limitation period starts on the day when a person became aware, or should have become aware, of a violation of his rights.

In criminal proceedings, different limitation periods apply, depending on the seriousness of the offence. The criminal limitation periods range from two years (for the least serious crimes) to 15 years (for the most serious crimes).

6. Indemnification rights
Ukrainian law does not presently contain any rules regarding indemnification of officers – eg, regarding the types of damage or loss that cannot be indemnified. Any indemnification rights for an officer, including any preconditions to being indemnified and/or types of liability for which there will be no indemnification, would need to be agreed contractually.

In respect of officers that are employees, the general rule is that the company will be the defendant in an action brought by a third party to recover damages caused to that third party by actions of an officer (see section 2.4 above).
7. **D&O Insurance**

7.1 **Ability to purchase D&O insurance**

Although possible as a matter of law and offered by some insurers, directors’ and officers’ (D&O) insurance is rarely obtained from domestic insurers. We have seen D&O insurance obtained for officers of Ukrainian companies mainly in two sets of circumstances. First, this could be done in preparation for an initial public offering of shares or in connection with expanding a Ukrainian business abroad. Secondly, D&O insurance can be taken out for an officer of a Ukrainian company by its foreign parent company where, for instance, the corporate policies of the group so require.

The recent removal of the statutory cap on liability of officers (see section 2.5 above) may fuel the D&O insurance market in Ukraine. However, we have not to date witnessed an increase in the popularity of D&O insurance among officers of Ukrainian companies.

7.2 **Local rules on D&O cover provided by foreign insurers**

As far as non-domestic D&O policies are concerned, a non-domestic insurer is not allowed to directly provide cover to a domestic company and its officers. This is because foreign insurers are not allowed to conduct direct insurance activity in Ukraine without incorporating in Ukraine and obtaining an insurance licence. Providing insurance cover in Ukraine without a valid insurance licence may lead to fines ranging from UAH17,000 to UAH85,000 (approximately US$680 to US$3,400).

Only a Ukrainian legal entity may become an insurer in Ukraine. Foreign insurers may establish Ukrainian subsidiaries by registering them with the State Commission for Regulation of Financial Services Markets of Ukraine and obtaining relevant licences for each separate type of insurance activity. There are certain specific requirements for a new insurer – eg, regarding the composition of its shareholders (there must be at least three shareholders) and the minimum amount of its share capital (currently at least €1 million for a non-life insurer and €10 million for a life insurer).

There are no restrictions under the law as to the territorial application of insurance cover. Specific territories may be excluded from the cover in accordance with the terms of the insurance agreement.

Nor does the foregoing preclude foreign insurers entering into reinsurance arrangements.

8. **Concluding remarks**

Overall, we expect to see changes in the Ukrainian judicial system in the next few years that are designed to make judicial recourse in Ukraine more effective. This may result in more cases being tried involving misconduct by officers, and may prompt improvements in the regulation of the duties and potential liability of officers (particularly regarding indemnification rights and D&O insurance).

We also expect to see an increased number of derivative actions after the legal changes that came into force at the beginning of May 2016. Derivative actions is an area where we think a number of interesting developments will arise. First of all, the
arsenal of remedies that may be awarded by the court might be extended. Under Ukrainian law there is an extensive list of such remedies (ie, invalidation of a transaction, restitution, an award for damages and specific performance); but such measures as a suspension of the relevant officer from his office or an injunction prohibiting the parties to the relevant contract from performing their obligations under that contract until the case is decided might prove to be appropriate additional remedies. Secondly, additional and more detailed regulation may be needed to make a derivative action a useful instrument. For instance, the rights of shareholders to information about the company may need to be extended so that shareholders may obtain sufficient evidence to substantiate their claims.

Finally, it should be noted that the Ukrainian corporate governance rules and practices are still largely under development, and it would be good for the Ukrainian market to see progress made in this area.