

**The Concept of Shadow Directors' Liability under the United Kingdom  
and Ukrainian Legislation**

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A company is a separate legal entity. Its activities are regulated by the law that stipulates the features of its legal status. in its own legal personality. The company owns the assets. Money invested in the company (e.g. through loans to the company or by owners or investors buying shares in the company) belongs to the company and must be used for the statutory (own) company purposes. The company is generally responsible for repaying company's debts. However, sometimes the responsibility for the company's debts can be imposed on the persons who manage the company. These are the officials (directors, board members) and shadow directors of the company.

Recently research in the field of persons' liability managing joint stock companies has become urgent. Issues of the liability of corporate relations members have been studied in the writings the following scholars: A. V. Habov, O. M. Vinnyk, I. I. Hryshyna, V. V. Dolynska, O. R Kibenko, S. Konovalov, V. M. Kravchuk, D. V. Lomakin, I.V. Lukach, Yu. M. Zhornokui, A. Ye. Molotnikov, I.V. Spasibo-Fatieieva and others.

The Law of Ukraine «On Amendments to Some Legislative Acts of Ukraine on the Protection of Investors Rights» dated from April 7, 2015<sup>1</sup>, the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Concerning the Definition of the Ultimate Beneficiaries of Legal Entities and Public Persons» 2014<sup>2</sup>, have been recently adopted in Ukraine. The judicial practice within corporate disputes has been summarized by the Supreme Economic Court of Ukraine<sup>3</sup>. Ratio decidendi in regard to the corporate legal nature of relations between the company and persons entrusted to manage the company has been developed

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<sup>1</sup> Про внесення змін до деяких законодавчих актів України щодо захисту прав інвесторів: Закон України від 7.04.2015 р. № 289 – VIII // Відомості Верховної Ради. – 2015. – № 25. – Ст.188

<sup>2</sup> Про внесення змін до деяких законодавчих актів України щодо визначення кінцевих вигодоодержувачів юридичних осіб та публічних діячів: Закон України від 14.10.2014 р № 1701-VII // Відомості Верховної Ради. – 2014. – № 46. – Ст.2048.

<sup>3</sup> Про деякі питання практики вирішення спорів, що виникають з корпоративних правовідносин: Постанова Пленуму від 25.02.2016 р. № 4. [Електронний ресурс]. Режим доступу: <http://zakon3.rada.gov.ua/laws/show/v0004600-16>

by the Supreme Court of Ukraine. All this makes urgency of researching the grounds, types and procedure of bringing to responsibility of persons engaged who manage a joint stock company. The objective of the article has been defined to study the UK experience in regulating the liability of persons who are responsible for managing the company's business in order to implement the best achievements of the foreign law.

A director of a company is a person who is responsible for managing the company's business activities. If a company has many directors who collectively manage the business of the company they are often referred to as a «board of directors» or «board members». The director and the board of directors of the company must carry out the duties of a director in accordance with certain rules. These rules are contained in the Joint Stock Companies Law, 2008<sup>4</sup> and the company articles of association in the form of legal obligations that are imposed on company directors, which set out how directors must perform their duties and how they are expected to manage the affairs of the company.

There is a difference between directors and members. Directors, on the other hand, are responsible for the management of the

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<sup>4</sup> Про акціонерні товариства : Закон України від 17 вересня 2008 р. № 514-VI // Відомості Верховної Ради України. – 2008. – № 50–51. – Ст. 384.

company's business activities. When a person is acting as a director, he must act in the best interests of the company (even if this may conflict with own personal interests). Members of a company, commonly referred to as «shareholders», collectively own the company. Members are generally free to act in their own interests. Each type of a company must have at least one member and one director. A director can also be a member of a company, which is common with small types of companies. A director can also operate independently from the members, which is often the case with larger types of companies. If the director is not also a member, the director's role is to manage or control the affairs of the company without having any ownership of the company<sup>5</sup>.

The definition of «shadow director» can be traced back to the Companies (Particulars as to Directors) Act 1917. At that time, the Companies Act 1908 required details of directors to be given in a company's annual returns (section 26(2)) and register of directors (section 75); an overseas company with a United Kingdom presence had, moreover, to file details of its directors at Companies House (section 274). Section 3 of

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<sup>5</sup> What it means to be a director of a company. ASIC (Australian Securities and Investments Commission). Electronic resource. – Access mode: <http://asic.gov.au/for-business/your-business/small-business/small-business-resources/asic-guide-for-small-business-directors/what-it-means-to-be-a-director-of-a-company/>.

the 1917 Act extended the definition of a «director» applicable in relation to these provisions so that it included «any person in accordance with whose directions or instructions the directors of a company are accustomed to act». The same form of words was used in the Companies Act 1928 to impose criminal liability on a person who would now be termed a «shadow director», if he failed to cooperate with a liquidator, and the concept was also used in the Companies Acts of 1948 and 1967. It was not, however, until 1980 that the expression «shadow director» first featured in the legislation. Section 63 of the Companies Act 1980 provided for a «shadow director» to be treated as a director for the purposes of Part IV of the Act (which dealt with duties of directors and conflicts of interest).

In the Companies Acts 2006<sup>6</sup>, Section 251 a «shadow director», in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. Under this definition, it is possible that a director, or the whole board, of a holding company, and the holding company itself, could be treated as a shadow director of a subsidiary.

In short, a shadow director is anyone who is directly calling the shots at a company

or an area within the company. A founder or significant shareholder who wishes to escape the disclosure requirements of a directorship might still be counted as a «shadow» director and held responsible for actions as if he or she were a formal director. However, the better view is that the shadow director is to be regarded as akin to a de facto director and that he can incur the liability of a de jure director under the general law where he effectively acts as a director through the people whom he can influence.

According to the Companies Acts 2006, Section 251 a person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity. The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.

The instructions that a shadow director gives (and which the de jure director acts upon) may be quite inimical to the company's interests. The shadow director has been acting throughout in furtherance of his own, rather than the company's, interests. It would be odd if, in those circumstances, a person who has no direct relationship with the company and who consistently gives instructions inimical to its interests were nevertheless held to have undertaken a duty of loyalty to the company;

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<sup>6</sup>The Companies Acts of the United Kingdom, 2006. Electronic resource. – Access mode: [http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf)

and to have agreed to subordinate his own interest to those of the company. More over the wider the interpretation of the statutory definition, the less easy it becomes to impose upon one who falls within the definition the full range of fiduciary duties imposed upon a de jure or de facto director. The mere fact that a person falls within the statutory definition of a 'shadow director' is enough to impose upon him the same fiduciary duties to the relevant company as are owed by a de jure or de facto director<sup>7</sup>.

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion, which will affect the interests of that other person in a legal or practical sense<sup>8</sup>. A person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest<sup>9</sup>.

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<sup>7</sup> Lewison J, the paragraph 1284 of the conclusion in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).

<sup>8</sup> Mason J, the paragraph 68 of the conclusion in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41:

<sup>9</sup> The Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 (the paragraph 177).

Lurking in the shadows may occur, but it is not an essential ingredient to the recognition of the shadow director. For example, we deal with a person resident abroad who owns all the shares in a company, but chooses to operate it through a local board of directors. The ultimate beneficial owner, to the knowledge of all to whom it may be of concern, gives directions to the local board what to do, but takes no part in the management of the company himself. In my view such an owner may be a shadow director notwithstanding that he takes or does not step to hide the part he plays in the affairs of the company. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director.

A shadow director is treated in many ways as a real director of the company concerned and so will be bound by the same duties and obligations. «General obligations» of directors are stipulated by Articles 171-177 of the Companies Act 2006 and include the obligation to comply with the company's charter, to act in good faith and in the interest of the company, to exercise reasonable care to avoid conflicts of interest, to disclose any interest in the transactions, and others. The application of the directors general duties to shadow directors (including the features of this application, the withdrawal of it) can be additionally constituted by-law.

However, in most cases the shadow director is unaware of his/her need to comply

with the laws relating to directors and accordingly takes no protective action. Furthermore, the shadow director may not be covered by the company's directors and officers' liability insurance (D&O).

The concept of shadow directors' liability is that the shadow director is responsible for actions and losses of the company as if he or she were a formal director. In particular, this concerns cases where it is proved that the shadow director of the company directors was given instructions for the commission of illegal acts.

While the interests of a company are normally identified with those of its members, the interests of creditors can become relevant, if a company has financial difficulties. Shadow directorships might face a person with a serious personal consequences:

- a liability to contribute to the company's assets following the company's insolvency;
- disqualification from being a director following the company's insolvency;
- criminal sanctions for violations of directors' duties;
- personal liability for violations of directors' duties.

Following insolvency, creditors and (now insolvent) the company can claim back losses from directors who violated their duties prior to the business breaking down. But it is not just formal directors – it is any individuals who actually control the company – «shadow

directors». In this way, creditors can recoup funds to meet the company's debts from the individual directors who caused the loss of such funds.

The England and Wales High Court, Chancery division in *Vivendi SA Centenary Holdings Iii Ltd v Richards & Ors*<sup>10</sup> [2013] EWHC 3006 (Ch) (09 October 2013) has brought some clarity to the previously uncertain issue of shadow directors' duties and obligations<sup>11</sup>. The Court has considered the circumstances, where a person would become subject to fiduciary duties to the company on the basis of being a shadow director. Moreover, if such a director will be convicted of «fraudulent behavior», the statute of limitations in respect of them are not applied.

In this case Scottish company Centenary Holdings III Limited («CH3») was called Seagram Distillers plc until May 2002. CH3 became part of the Vivendi group in 2000. By 2003, CH3 was no longer trading,

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<sup>10</sup> England and Wales High Court (Chancery Division) Decisions. The *Vivendi SA Centenary Holdings Iii Ltd v Richards & Ors* [2013] EWHC 3006 (Ch) (09 October 2013). Electronic resource. – Access mode: <http://www.bailii.org/ew/cases/EWHC/Ch/2013/3006.html>.

<sup>11</sup> Иванец Ю. Дело о теневом директоре. Электронный ресурс. – Режим доступа: [https://zakon.ru/blog/2014/2/4/delo\\_o\\_tenevom\\_direktore](https://zakon.ru/blog/2014/2/4/delo_o_tenevom_direktore). England and Wales High Court (Chancery Division) Decisions. Electronic resource. – Access mode: <http://www.bailii.org/ew/cases/EWHC/Ch/2013/3006.html>.

but it had some very valuable assets, including a shareholding in the company that held the Vivendi group's core film and entertainment industry interests. CH3 also held a number of leases. Mr Richard Constant was a director (and latterly sole director) of CH3 between 2001 and 22 January, 2004.

By 2003, Mr Alexis Kyprianou of Vivendi had been asked to make arrangements for the disposal of a number of the group's non-core assets, including the leases of the Ark held by CH3. Mr Kyprianou was assisted in this task by Mr Peter Harrod, who was the financial controller of CH3's then parent company, Centenary Holdings Limited («CHL»), and its subsidiaries. Mr Harrod and Mr Richards are brothers.

Mr Harrod drew Mr Richards' attention to the Ark.

CH3 was not in a position to assign its leases of the Ark to one of Mr Richards' companies because the freehold owner, Dekamobilien Investment GmbH («Deka»), was unwilling to countenance an assignment to an organisation that did not have a triple A rating. The idea arose that Vivendi would transfer, not the leases, but the company that held them, CH3, having first removed various assets from the company. There would be a reverse premium of £15 million to take account of CH3's obligations under its leases.

In 2004 CH3 through a series of transactions was transferred to a company beneficially owned by Mr Richards. Mr

Richards took advantage of the fact that the management issues CH3 in its then parent company was in charge of Mr Richards' brother. It was recognised that CH3's £77.7 million loan to C6 involved CH3 giving financial assistance for the purpose of an acquisition of shares in the company. The issues to which this gave rise were addressed using the whitewash procedure for which sections 155-158 of the Companies Act 1985 then provided. That required CH3's director to make a statutory declaration stating that he had formed the opinion that the loan would not render the company unable to pay its debts and that the company would be able to pay its debts as they fell due during the following year.

Since CH3 was leaving the Vivendi group, it was felt inappropriate for Mr Constant to make the requisite statutory declaration. 22 January 2004 Mr Constant was replaced as CH3's sole director by Mr Bloch, who then made the appropriate declaration. Mr Bloch had known Mr Richards since the mid-1990s.

After the change of the director and transfer of shares CH3 Mr Richards was formally appointed to provide consultancy services to CH3 under an agreement made between P4 Property Consulting Limited («P4 Consulting»), Mr Richards and CH3 on 3 March, 2004. Under clause 5 of the Consultancy Agreement, P4 Consulting was to be entitled to £30,000 a month. £600,000

was, however, to be paid upfront. CH3 shall pay to the Company at the inception of this agreement the amount of: Two Hundred and Forty Thousand Pounds Sterling (£240,000) for the Company to retain the services of the Consultant on a first priority basis, and an amount of Three Hundred and Sixty Thousand Pounds Sterling (£360,000) representing the minimum 12 months term of this Agreement. In addition, CH3 entered into a set of agreements for the provision of advisory services to companies controlled by Richards, and regularly paid their fees.

Finally, it paid dividends of £5.314 million Richards controlled companies on 26 May, 2004, which caused significant damage to the financial condition of CH3. The dividend served to remove from CH3 more than a third of the money that Vivendi had left in the company. The Consultancy Agreement, like the dividend payment, was motivated by a desire to remove money from CH3 before, and regardless of, any future failure of the company. CH3 did not in fact have any profits available for distribution as at 26 May, 2004. On Mr Reid's calculations, CH3 had very substantial net liabilities. Soon CH3 became insolvent.

CH3 went into liquidation in the middle of 2005. The company has proved to be insufficient funds to satisfy creditors' claims. It revealed the need to file a claim on behalf of the CH3 against its directors in connection with the waste of assets. CH3 has

ceded Vivendi SA its claims rights. Vivendi SA has brought the claim pursuant to an assignment from CH3's liquidators. CH3 itself has also been joined as a claimant. The defendants were the sole director (Mr Bloch) and the alleged shadow director (Mr Richards) of the second claimant. The second defendant, Mr Stephen Bloch, is said to have acted in breach of his duties as a director of CH3 in causing the company to make the payments, which totalled more than £10 million. The first defendant, Mr Murray Richards, is said to bear responsibility as well: both as a «shadow director» and for dishonestly assisting Mr Bloch's alleged breaches of duty.

Both before and after CH3 went into liquidation, Mr Bloch became a director of a number of further companies associated with Mr Richards. According to the English law, the relationship between the director and the company he heads are fiduciary (trustee). Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct or the affairs of another<sup>12</sup>. The shadow director has a number of fiduciary duties in relation to the company. To those, in particular, applies a duty to act in good faith and in the best interests of the beneficiary (the *duty of good faith/loyalty*)

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<sup>12</sup> Sales J, F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch), [2012] Ch 613 (the paragraph 225).

and to exercise the due diligence in this case (the *duty of care*), not put himself in a position of conflict, not make an unauthorised profit. Mr Bloch as the *de jure* director owes directors' duties to the company in relation to which he performs those functions. Certainly he carried the whole complex of fiduciary duties to the company, which he had violated.

Mr Richards formally was not a director and could not act on behalf of the company. But Mr Richards' involvement was apparent from even the rather limited documentary evidence that is available. The concept of a shadow director, adopted in common law and at the legislative level<sup>13</sup> has been applied in the case. Mr Bloch was accustomed to act in accordance with directions or instructions from Mr Richards and, hence, that Mr Richards was a shadow director of CH3.

The Court found that Mr Bloch acted in accordance with directions from Mr Richards, consequently Mr Richards was a shadow director. Mr Richards had used his position and influence within the company to encourage company spending far beyond its means at a time when he knew it to be in financial difficulty. The court found that Mr Richards acted dishonestly in seeking to extract as much money from the floundering

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<sup>13</sup> Section 741(2) of the Companies Act 1985, section 251 of the Companies Act 2006, section 22(5) of the Company Directors Disqualification Act 1986 and section 251 of the Insolvency Act 1986.

company as possible before it went into liquidation. Significantly, Mr Richards was found to have violated a fiduciary duty to act in the best interests of both the company and its creditors.

The Companies Act 1980, expressly provided that shadow directors have the same rights and responsibilities as the *de jure* director<sup>14</sup>. The Companies Acts 2006, however, no longer contains such indication. As for the judicial practice, it was different: a number of judges held the view that the shadow and the *de facto* director are equal<sup>15</sup>, others judges were inclined to believe that the indirect influence exerted by a paradigm shadow director who does not directly deal with or claim the right to deal directly with the company's assets will not usually be enough to impose fiduciary duties upon him<sup>16</sup>.

Prior to this case, the Courts had been reluctant to impose fiduciary duties on shadow directors on the basis that a shadow director did not assume responsibility for the company's affairs. The Court in this case found that a shadow director does owe fiduciary duties to the company and its creditors, at least in respect of the directions and instructions given to the directors of the

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<sup>14</sup> Section 63 of the Companies Act 1980.

<sup>15</sup> *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1998], *John v Price Waterhouse* (unreported, 11 April 2001).

<sup>16</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).



company. The Court reasoned that if a shadow director was accustomed to giving directions or instructions to a company's directors, which he intended to be acted upon, it could fairly be said that the shadow director had assumed responsibility for the company's affairs. Having assumed responsibility, it was fair to impose a duty on a shadow director to act in the company's interests, rather than their own, and to act in good faith while giving directions to directors of the company. The Court recognised that a shadow director's role in a company's affairs may be just as important as that of a director's<sup>17</sup>.

This case demonstrates that the Courts are prepared to take a flexible approach in ensuring that those who act dishonestly or recklessly in managing companies are held to account. Just because an individual is not officially a director does not mean he is beyond the jurisdiction of the Court.

Defendants raised the issue of the the limitation of period's application, saying that from the moment the majority of the disputed transactions has been more than six years (this term is applied to this category of cases). But section 21 of the Limitation Act 1980 contains an exception and provides no period of limitation prescribed by this Act shall

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<sup>17</sup> Corporate power behind the throne held to account as a shadow director. Electronic resource. - Access mode: <http://www.burges-salmon.com/en/news-and-insight/legal-updates/corporate-power-behind-the-throne-held-to-account-as-a-shadow-director/>

apply to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use. This provision applies in relation to company directors and anyone who dishonestly assisted him in his breach of duty or illegal acts<sup>18</sup> as well as true trustees<sup>19</sup>.

The Court has applied this provision. It is interesting that the judge has not operated on the notion of 'fraud', specified in the law, but the term 'dishonest conduct', which, within the meaning appears to be somewhat wider.

Both Mr Bloch (as CH3's de jure director) and Mr Richards (as a shadow director) were found guilty of breach of fiduciary duty and dishonest conduct and brought to justice<sup>20</sup>.

Small Business, Enterprise and Employment Act 2015 has specified the status of «shadow directors». According to the amendment to the Article 170 (5) of the

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<sup>18</sup> Williams v Central Bank of Nigeria [2012] EWCA Civ 415, [2013] QB 499.

<sup>19</sup> Gwembe Valley Development Co Ltd v Koshy [2003] EWCA Civ 1048, [2004] 1 BCLC 131.

<sup>20</sup> England and Wales High Court (Chancery Division) Decisions. <http://www.bailii.org/ew/cases/EWHC/Ch/2013/3006.html>

Companies Act 2006, director's general duties are applied to the shadow director of the company in the cases and to the extent that such use is possible.

Ukrainian legislation contains some provisions that implementing rules of the common law concept of the shadow directors and their liability.

According to paragraph 5 of the Article 41 of the Law of Ukraine «On the Restoring Debtor's Solvency or Declaring it Bankrupt», dated from May 14, 1992<sup>21</sup> as amended by the Law «On Amendments to the Law of Ukraine «On Restoring Debtor's Solvency or Declaring it Bankrupt», dated from December 22, 2011<sup>22</sup> the subsidiary liability for the debtor's obligations can be applied to the founders (participants, shareholders) of the debtor, the debtor's head or others in the event of failure debtor's property. The liquidator is entitled to file a claim against third parties who bear a subsidiary liability for the debtor's obligations in connection with bringing to bankruptcy according to the law.

In particular, the subsidiary liability is stipulated by the p. 7 of the Article 77 of the

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<sup>21</sup> Про відновлення платоспроможності боржника або визнання його банкрутом: Закону України від 14.05.1992 р. № 2343-XII // Відомості Верховної Ради України. – 1992. – № 31. – Ст. 440.

<sup>22</sup> Про внесення змін до Закону України «Про відновлення платоспроможності боржника або визнання його банкрутом»: Закон України від 22 грудня 2011 р. № 4212-VI // Відомості Верховної Ради України. – 2012. – № 32-33. – Ст. 413.

Commercial Code of Ukraine, the Article 176 of the Civil Code of Ukraine for the state as a founder of legal entities of public law (state institutions, state enterprises); the Article 553 of the Civil Code of Ukraine for the guarantor under the surety contract; by the paragraph 5 of the p. 1 of the Article 1 of the Law of Ukraine «On State and Private Partnership» dated from July 1, 2010<sup>23</sup> No. 2404-VI for the state partner under the obligations of the company or business entity in accordance with the agreement concluded within the state and private partnership; p. 1 of the Article 119 of the Civil Code of Ukraine, p. 1 of the Article 66 of the Law «On Business Entities» for the members of no-limited company and p. 1 of the Article 133 of the Civil Code of Ukraine, p. 1 of the Article 75 of the Law «On Business Entities» for the commandite's members that are jointly held a subsidiary liability with all of their assets under the obligations of the company, etc. The proportion of these requirements is determined by the difference between the sum of the creditors' claims and the liquidation mass.

According to the paragraph 2 of the Part 5 of the Article 41 of the Law «On Restoring Debtor's Solvency or Declaring it Bankrupt» the subsidiary liability for its

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<sup>23</sup> Про державно-приватне партнерство: Закон України від 01.07.2010 р. № 2404-VI // Відомості Верховної Ради України. – 2010. – № 40. – Ст.524.

obligations can be imposed on the founders (participants, shareholders) of the debtor – legal person or other persons in case of bankruptcy of the debtor caused by the fault of its founders (participants, shareholders) or others who are entitled to give binding instructions to the debtor or otherwise have the opportunity to determine its validity. In these rules the law does not specify the term «other persons» («others»). So the range of «others» who are entitled to give binding instructions to the debtor or otherwise have the opportunity to determine its validity is determined in each case separately.

A number of amendments to the legislation of Ukraine was made according to the Law of Ukraine «On the Amendments to Certain Legislative Acts of Ukraine Concerning the Ultimate Beneficiaries of Legal Entities and Public Persons» dated from October 14, 2014 No. 1701-VII. There was the concept of «the enterprise's ultimate beneficiary» among them, which was then renamed by the legislator in the term of «the ultimate beneficial owner (controller) of a legal entity».

According to the Article 64<sup>1</sup> of the Commercial Code of Ukraine<sup>24</sup> the term of «the enterprise's ultimate beneficiary» was enshrined in the law. An obligation of the enterprises, except state and municipal

<sup>24</sup> Господарський кодекс України від 16 січня 2003 р. № 436 –IV / Відомості Верховної Ради України. – 2003. – № 18. – Ст. 144.

enterprises, to establish the ultimate beneficiary, regularly update and store information about it and give it to the State Registrar in cases and to the extent provided by the Law of Ukraine «On State Registration of Legal Entities and Individuals – entrepreneurs», has been defined. The data that makes it possible to establish the ultimate beneficial owner (controller), is the information about an individual, which includes the last name, name and middle name (if any) of an individual (the individuals), the country of his (their) constant residence and the date of birth.

The term of «ultimate beneficiary» is defined in the law of Ukraine «On the Prevention and Counteraction the Legalization (Laundering) of Illegally Obtained Incomes, Financing Terrorism and the Spread of the Mass Destruction Weapons» dated from October 14, 2014 No. 1702-VII<sup>25</sup>. According to the Article 1 of the Law the ultimate beneficial owner (controller) is an individual, who has the ability to exercise decisive influence over the management or business activities of a legal entity directly or through others irrespective of the formal ownership.

It is carried out, in particular, by:

<sup>25</sup> Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення: Закон України від 14.10.2014 р. № 1702-VII // Відомості Верховної Ради. – 2014. – № 50-51. – Ст. 2057.

- the exercising the possession or use right of all assets or its significant share;
- the right of decisive influence on the formation of the staff, voting results, as well as any transactions that provide the opportunity to determine the conditions of the economic activity;
- the right to provide binding instructions or to carry out the management functions;
- the direct or indirect (through other individual or legal entity) ownership of the share in the legal entity of the 25 percent or more of the share capital or the right to vote in the legal entity by one person independently or together with the related individuals and / or legal entities.

Herewith the ultimate beneficial owner (controller) can not be a person, who has the formal right to 25 percent or more of the share capital or voting rights in the legal entity but is an agent, nominee (nominal holder) or is only an intermediate agent for such a right.

Paragraph 3 of the Article 53.1 of the Civil Code of Russian Federation with amendments stipulated by the Federal Law dated from May 5, 2014 No. 99-FZ «On Amendments to the Section 4 of p. 1 of the Civil Code of Russian Federation and on Becoming Invalid of Certain Provisions of

Legislative Acts of Russian Federation»<sup>26</sup> came into legal force September 1, 2014. They stipulate that the ultimate beneficiaries of the company are responsible for the obligations of the controlled by them enterprises without the preliminary stage of such companies' bankruptcy.

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<sup>26</sup> О внесении изменений в главу 4 части первой Гражданского кодекса Российской Федерации и о признании утратившими силу отдельных положений законодательных актов Российской Федерации: Федеральный закон от 5 мая 2014 № 99-ФЗ. Электронный ресурс. Режим доступа: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_162608/](http://www.consultant.ru/document/cons_doc_LAW_162608/)

The Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Concerning the Liability of the Bank Related Persons» dated from March 2, 2015<sup>27</sup> came into force on March 8, 2015. It was adopted in order to increase the liability of the bank related persons (mainly managers and supervisors of the bank), who make decisions that have consequences for the banks' financial condition, to improve banking supervision and to protect the depositors and creditors' interests. The law amended the Article 52 of the Law of Ukraine «On Banks and Banking Activity», under which the bank related persons are:

- 1) supervisors of the bank;
- 2) persons with a substantial participation in the bank, and those through whom these persons carry out the indirect ownership of the bank qualifying shareholding;
- 3) bank managers, the head of the internal audit, heads and members of the bank committees;
- 4) bank related and affiliated persons, including members of the banking group;
- 5) persons who have qualifying shareholding in the related and affiliated persons of the bank;
- 6) the heads of legal entities and bank managers, who are related and affiliated

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<sup>27</sup> Про внесення змін до деяких законодавчих актів України щодо відповідальності пов'язаних із банком осіб: Закон України від 2 березня 2015 року № 218-VIII // Відомості Верховної Ради. – 2015. – № 17. – Ст. 122.

persons of the bank, the head of the internal audit, the heads and members of the committees of these persons;

7) associated persons of individuals mentioned in paragraphs 1-6;

8) legal entities, where the individuals mentioned in this paragraph are managers or owners of the qualifying shareholding;

9) any person, through whom the transaction in the interests of the persons mentioned in this paragraph is conducted and on whom the persons referred in this paragraph influence during such a transaction through labor, civil and other relations.

Undertaken agreements with the bank related persons may not provide the conditions that are not the current market conditions. Such current market conditions are determined in accordance with the Article 52 of the Law of Ukraine «On Banks and Banking Activity». Concluded by the bank agreements with the bank related persons on terms that are not the current market conditions are invalid from the moment of their conclusion.

According to the paragraphs 5 and 6 of the Article 58 of the Law «On Banks and Banking Activity» the bank related person can be brought to a civil, administrative and criminal liability for violating the law, including regulatory acts of the National Bank of Ukraine, carrying out risk operations that threaten the interests of bank depositors or other creditors, or making the bank to an

insolvency. The bank related person is responsible by his property for the guilty actions or the omission that led to the bank's damages. If the bank related person by his actions or omission made damages to the bank and the other bank related person directly or indirectly received the property gains as a result of these actions or omission, these persons are jointly liable for the caused damage.

The amendments to the legislation concerning the disclosure of the ultimate beneficial owners, bankruptcy law, the implementation of the responsibility of the bank related persons, in my opinion, are aimed at implementing in the future legislation of Ukraine of the concept of liability of shadow directors for damages caused by the joint stock company. Further author's articles will be directed to the research of corporate responsibility of persons, who manage a joint stock company.