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Law**Business****Research**

Overview Mark Greene, Andrew Pitts and George Stephanakis <i>Cravath, Swaine & Moore LLP</i>	3
Austria Peter Feyl and Ursula Rath <i>Schönherr Rechtsanwälte GmbH</i>	7
Belgium Sandrine Hirsch and Vanessa Marquette <i>Simont Braun</i>	13
Canada Alexandre Ciocilteu and Samara Sekouti <i>Lapointe Rosenstein</i>	20
Cyprus Stavros Pavlou, Lia Iordanou and Mikhail Diptan <i>Patrikios Pavlou & Co</i>	27
Denmark Søren Fogh and Michael Steen Jensen <i>Gorrissen Federspiel Kierkegaard</i>	31
Estonia Gerli Kilusk <i>Lepik & Luhaäär LAWIN</i>	35
Finland Klaus Ilmonen <i>Hannes Snellman Attorneys at Law Ltd</i>	39
France Youssef Djehane and Arnaud Duhamel <i>Gide Loyrette Nouel</i>	44
Germany Reinhold Ernst and Cecilia Di Cio <i>Hengeler Mueller</i>	49
Greece George Bersis and Rita Katsoula <i>Potamitis Verkis</i>	58
Ireland Orlaith O'Brien and Edel Conway <i>McEvoy Partners</i>	63
Israel Ashok J Chandrasekhar <i>Goldfarb, Levy, Eran, Meiri, Tzafrir & Co</i>	67
Italy Riccardo G Cajola <i>Cajola & Associati</i>	72
Japan Masatsura Kadota and Eriko Matsuno <i>Nagashima Ohno & Tsunematsu</i>	78
Luxembourg Philippe Hoss <i>Elvinger, Hoss & Prussen</i>	83
Macedonia Dragan Dameski and Elena Miceva <i>Debarliev, Dameski & Kelesoska Attorneys at Law</i>	88
Malta Simon Tortell and Katya Azzopardi <i>GVTH Advocates</i>	92
Nigeria Yinka Edu and Oghor Ogboi <i>Udo Udoma & Belo-Osagie</i>	96
Philippines Simeon Ken R Ferrer and Carmela L Sacasas <i>SyCip Salazar Hernandez & Gatmaitan</i>	101
Poland Tomasz Ludwik Krawczyk and Mateusz Rogoziński <i>Drzewiecki, Tomaszek & Partners</i>	107
Romania Septimiu Stoica and Miruna Poenaru <i>Salans</i>	112
Serbia Martina Jović and Predrag Milovanović <i>Milovanović & Associates Law Office</i>	119
Slovenia Boštjan Špec <i>Jadek & Pensa</i>	123
South Africa Ezra Davids and Paul Schroder <i>Bowman Gilfillan Inc</i>	128
Sweden Richard Folke and Lina Williamsson <i>DLA Nordic</i>	136
Switzerland Patrick Schleiffer and Jacques Iffland <i>Lenz & Staehelin</i>	141
Trinidad and Tobago William David Clarke, Luana Boyack and Donna-Marie Johnson <i>JD Sellier + Co</i>	146
Turkey Noyan Turunç <i>Turunç</i>	151
Ukraine Elena Zaytseva <i>Integrites</i>	157
United Kingdom Peter Brien and Michael Roy <i>Slaughter and May</i>	162
United States Mark Greene, Andrew Pitts and George Stephanakis <i>Cravath, Swaine & Moore LLP</i>	169
Uruguay Diego Rodríguez <i>Ferrere</i>	177

Ukraine

Elena Zaytseva

Integrites

Statutes and regulations

- 1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The securities market in Ukraine is regulated by a number of laws and subordinate acts. These include the Civil Code of Ukraine, the Commercial Code of Ukraine, the Laws of Ukraine on Securities and Stock Market, the Law of Ukraine on State Regulation on the Securities Market, on National Depository System and Peculiarities of Electronic Turnover of Securities in Ukraine, on Accounting and Financial Statements in Ukraine, the Regulation on the Procedure for Securities Offerings Registration during Joint Stock Companies establishment and others. On 29 April 2009 the new Law on Joint Stock Companies enters into force, introducing new demands to the form of joint stock companies' shares and related issues.

The Securities and Stock Market State Commission (the Commission) is the main institution regulating the securities market in Ukraine. Thus, one of the obligations of the Commission is to establish the demands for securities offerings, including foreign issuers (considering the demands of legislation on currency) that issue securities in the territory of Ukraine. The Commission also defines the order of securities issue registration and information flow on securities issuing.

Public offerings

- 2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

The list of necessary documents in connection with a public offering of securities is defined by the Securities and Stock Market State Commission, and given in the Regulations on the Order of the Securities Offerings (No. 942 from 26 April 2007) and includes:

- balance sheet and financial statements;
- reference on the agreement on keeping the register of shareholders, or on the agreement on services of securities emission (depending on the type of securities). If the issuer keeps the register itself, it is obliged to present a copy of the licence for professional activities on the securities market – depository activity;
- reference on the presence or the absence of the state's part in the share capital of the company;
- copy of the certificate of state registration;
- data and copies of the certificates of the previous issuance of shares;
- an application for the issue of securities and a prospectus for their issue, which must include data on the issuer, including:
 - its name, place of residence (if applicable), telephone numbers, date of the state registration, registration authority, share capital, etc;

- data on issuer's officials, including data on average wages of the executive authority members for the last quarter;
 - list of licences;
 - data on the participation in holding companies, associations, etc;
 - information on branches and representative offices;
 - data on daughter companies and companies in which more than 10 per cent of the share capital belongs to the issuer;
 - list of business activities of the issuer;
 - possible risk factors in the issuer's activities;
 - prospect of the issuer's activities;
 - balance sheet and financial standing for the accounting period;
 - data on securities placement – overall principal value, plan for the involvement, type of securities, etc;
 - amount of shares in ownership of the members of the executive authority and a list of persons whose part in the share capital exceeds 5 per cent;
 - information about the registrar or depository (depending on the types of securities);
 - data on the persons responsible for the issuance;
 - data on the money obligations of the issuer;
 - data on the organisers of trade in the issuer's securities;
 - data on the persons responsible for the audit of the issuer;
 - data on any bankruptcy procedure or sanction of the issuer or its predecessor (during the previous three years); and
- a copy of the payment document, confirming the payment of the appropriate state fee;
 - the decision of the general meeting of shareholders on public issuance of shares; and
 - copies of the notification on the general meeting of shareholders (published in local mass media) as well as the reference on personal notifications of all the shareholders about the corresponding general meeting.

All the submitted documents are to be duly signed, stamped and notarised if required by the current Ukrainian legislation. The Regulations do not distinguish between primary and secondary offerings. However, the Law of Ukraine on Securities and the Stock Market divides the Ukrainian stock market into a primary category (legal relationship, related to securities issuance) and a secondary category (legal relationship, related to securities turnover).

These requirements refer to public offerings of securities. Primary issuance of shares during the establishment of a company is controlled by the Regulations on the Order of Securities Offerings Registration during the Establishment of Joint-Stock Companies of the Securities and Stock Market State Commission (No. 1027, 19 October 2006). Such issuance can be only closed (private) and the decision about such offering is taken by a meeting of the company's founders.

- 3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

The Law on Securities and the Stock Market determines that public offering of securities in Ukraine implies publication in the mass media or any other declaration on securities offering, addressed to indefinite persons. The law outlines the procedure for such offerings and the information that must be included in such documents:

- the decision (taken by the issuer's authorised body) on public offering of securities; this decision is formalised by the minutes (protocol) of the issuer;
- in the case of refusal of securities owner to use its preferential right to purchase shares (if this is defined in the condition of the given public offering of securities), its written consent, confirming the refusal;
- an application and all other necessary documents (defined by the Securities and Stock Market State Commission) for the registration of the securities offerings and prospectus for their offering;
- registration of the offering by the Securities and Stock Market State Commission; and the involved underwriter (if necessary); assignment of an international identity number to the securities;
- signing an agreement on services of securities offering with the depository or with the registrar on keeping the register of the securities owners (unless the register is maintained by the issuer itself according to the legislation of Ukraine);
- issuance of the certificates for the securities (if the securities are issued in documentary form) and disclosure of information, contained in the prospectus of the securities offering;
- open (public) offering of the securities;
- affirmation of the results of the offering by the authorised body of the issuer;
- affirmation of the changes to the company's charter (on the changes to the share capital due to the offering) and registration of the charter with the appropriate state authorities;
- filing a report on the results of the public offering of the securities and its registration by the Securities and Stock Market State Commission; and
- getting a certificate on the registration of securities offering and disclosing the information from the report on the results of public offering of the securities.

The process takes a minimum of seven months, and usually approximately one year.

It should be mentioned that trade in securities is one of the types of professional activities on the securities market (the Law of Ukraine on State Regulation on the Securities Market). Trade in securities covers signing of agreements on securities (including commission agreements and agency) on one's own behalf or on behalf of other persons, by order and at the expense of other persons (brokerage) and on one's own behalf at one's own expense with the aim of resale (dealer activities). According to the Law of Ukraine on Securities and the Stock Market, professional activities on the securities market can be carried out only under a licence, granted by the Securities and Stock Market State Commission. If the party to the transaction is a non-resident, it cannot satisfy to the licensing demands of the professional activities on the securities market (defined by the decision of the Securities and Stock Market State Commission) and is obliged to involve other persons for such transactions.

The Law of Ukraine on Securities and the Stock Market also defines the following restrictions on the public offering of securities:

- public offering of securities cannot be made earlier than 10 days after the publication of the prospectus;

- the issuer must stop public offering of securities no later than in one year from the beginning of the offering;
- during public offering of securities, shares cannot be sold at lower than their nominal value;
- no persons can have priority rights to buy securities in public offerings (except in cases defined by the legislation);
- the quantity of the offered securities cannot exceed the quantity defined in the prospectus; and
- before the registration and publication of information on changes to the prospectus of securities emission, the issuer does not have the right to carry out public offering of securities.

The Law of Ukraine on Protection of Economic Competition defines certain restrictions connected to the purchase of shares in case of concentration (acquisition of direct or indirect control over one or several market participants). Thus, the seller cannot offer shares to such a purchaser (unless the purchaser obtains a corresponding permit for the concentration).

- 4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Restrictions of turnover or sale of securities in Ukraine can be determined exclusively by the legislation of Ukraine. The Law of Ukraine on Securities and the Stock Market defines the concept of insider information with the special regime of disclosure. Thus, insider information is defined as any unpublished data on the issuer, his securities or deals on his securities, in case such data can significantly influence the cost of securities. Information on the evaluation of securities value as well as the financial state of the issuer (in case such information is received from the open sources, not prohibited by the legislation) is not considered to be insider information. The Securities and Stock Market State Commission defines which information can be defined as insider information.

Insiders (persons who possess insider information) cannot:

- use insider information for the personal benefit or benefit of related persons, before such information is published;
- transfer such information to other persons (except professional labour of official duties); or
- give recommendations related to the purchases or selling of securities, related to insider information (before such information is published).

As for issuance of research reports, in general, information in Ukraine is considered confidential or not confidential according to the Law of Ukraine on Information, the Law of Ukraine on Scientific and Technical Information, Resolution No. 611 of the Cabinet of Ministers of Ukraine, the Law of Ukraine on Information That Cannot Be Considered Confidential adopted on 9 August 1993, and also according to the Civil Code and the Commercial Code of Ukraine.

The required information disclosure connected with the public offering of securities is defined by the Securities and Stock Market State Commission and cannot contradict the demands of the confidential information disclosure. The Regulations of the Commission on this issue (No. 1591, 19 December 2006) determines that the information can be published only in Ukrainian. If the date of publishing is defined according to the Regulations, the disclosure cannot be done before that date.

According to the typical contract on underwriting (approved by Decision No.1336 (from 18 November 2008) of the Securities and Stock Market State Commission), the information included in such a contract is considered confidential. The parties to such contract agree not to disclose, publish or by any way transfer such information to

other persons except in the cases of preliminary written agreement between the parties and the cases defined by the legislation.

- 5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

The Law of Ukraine on Securities and the Stock Market divides the Ukrainian stock market on primary (legal relationship, related to securities issuance) and secondary (legal relationship, related to securities turnover) and does not include special conditions for the secondary offerings of securities. However, due to the fact that securities market is not very developed in Ukraine, there are not many legal norms, referring to primary and secondary offerings, as well as legal interpretation of these terms.

It should be considered that the most part of the primary emission and almost all secondary trade in securities in Ukraine are carried out on over-the-counter securities market (off-exchange). The seller of securities falls under the general rules of the Ukrainian legislation on liabilities. Thus, the seller should possess corresponding legal status, property rights for the securities and, since carrying out the professional activities on the securities market, possess a corresponding licence from the Securities and Stock Market State Commission.

- 6 What is the typical settlement process for sales of securities in a public offering?

In the case of public offering of securities, the settlement process is carried out according to the procedure for such offerings defined in the Law on Securities and the Stock Market (see question 3). The differences in settlement depend on the form of the securities (documentary or non-documentary).

The duly registered brokers can conclude the agreement on security purchase at the stock market. Such agreements are drafted according to the typical form on the basis of personal records of the parties, done during the trade, and the record of the specialist, given at the request of the parties. The responsibility for the preparation of the agreement and informing on the disputes on the conditions of the agreement lies with the broker-seller. After signing, the agreement is registered in the settlement department of the stock exchange.

It should be noted that according to the Law of Ukraine on Prevention and Counteraction of Legalisation (Laundering) of Proceeds from Crime, after the detection of such financial transaction as payment for securities (paid in cash and more than 80,000 hryvnas), the subject of primary financial monitoring is obliged to register this operation in the register of financial operations (with the characteristic of obligatory financial monitoring of the type 'purchase of securities for cash') and to inform the State Committee for Financial Monitoring of Ukraine about the transaction within three working days from the registration.

Private placings

- 7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The Law on Securities and the Stock Market determines certain demands for the private placing of securities, including:

- the issuer must stop the private placing of securities in the term defined by the decision about their private placing, but not later than in two months after the beginning of the placement;
- during the private placing of securities, shares cannot be sold at a price lower than their nominal value;
- preferences for the purchase of securities are prohibited (except in cases defined by the legislation); and

- the actual quantity of placed securities is stated in the report on the results of the private placing of securities, which is approved by the authorised body of the issuer and rendered to the Securities and Stock Market State Commission.

- 8 What information must be made available to potential investors in connection with a private placing of securities?

The main data that must be made available to potential investors regarding the private placing of securities includes:

- financial and business condition of the issuer;
- the results of the issuer's activities during the period defined by the legislation of Ukraine;
- information on any activities that can have an influence on financial and business conditions of the issuer and bring on considerable changes to the securities price; and
- information on the shareholders with 10 per cent or more of the share capital.

The data must be revealed in good time and completely.

- 9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

The information required for private placing of securities is not so considerable as for public offering of securities (though it includes the name and place of residence of the issuer, size of its share capital, managing authorities, officials and founders; securities of the issuer (type, form of issuance, form, quantity) and their listing; information on rating agency; annual financial statements and audit report. At the request of an authorised person of the Securities and Stock Market State Commission, an issuer (closed joint-stock company) is obliged to render additional information on its financial and commercial activities.

However, according to the Regulations on Revealing of Information by Issuers of Securities of the Securities and Stock Market State Commission (Decision No. 1591, 5 December 2007), closed joint-stock companies, subject of the procedure of sanctions, do not reveal the information on the rating agency.

Legislative acts of Ukraine contain no special provisions aimed at enhancing the liquidity of securities sold in a private placing.

Offshore offerings

- 10 What specific domestic rules (if any) apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Ukrainian issuers can offer securities outside Ukraine only with the permission of the Securities and Stock Market State Commission (except external state bonds of Ukraine). Such permission is granted to the issuer with the following demands:

- registration of securities offerings;
- admittance of the securities to the stock market trade of at least one Ukrainian stock market; and
- correspondence of the amount of securities offered outside Ukraine to the demands determined by the Securities and Stock Market State Commission.

Update and trends

The current securities market in Ukraine is subject to certain risk factors, many of which are not mediated by hedging procedures, common in international practice. Some types of securities envisaged by the legislation do not have sufficient explanation and particularisation, foreseen by the international standards of financial instruments classification. For instance, there is no substantial legal base for certain types of derivatives and some other types of securities (warrants, depository receipts, etc). Accordingly, development of legislative acts, regulating new financial instruments on the market is essential.

Further development of the Ukrainian financial market also

requires establishing favourable conditions for investing into foreign securities; regulations on public offerings of securities, warranted by the issuers' property; and improvement of the legislation on mortgage securities market, etc. Some experts state that there is a necessity to adopt a law on rating system for securities, establishing obligatory rating for certain types of securities and qualifying requirements for persons providing corresponding services on the market. Currently, the major aim is establishing in Ukraine a full-fledged system of securities and financial instruments, which would correspond to the international standards and the EU guidelines in the sphere of financial markets.

Particular financings

- 11** What special considerations apply to offerings of exchangeable or convertible securities, warrants or depository shares or rights offerings?

Due to the early stage of development of the securities market in Ukraine, there are not many provisions on exchangeable or convertible securities. The Law of Ukraine on Securities and the Stock Market mentions convertible securities only twice, determining the possibility of preference shares to be exchanged into simple shares or other type of preference shares. The possibility to exchange such securities can be stated in the conditions of the securities offerings.

Underwriting arrangements

- 12** What types of underwriting arrangements are commonly used?

According to the Ukrainian current legislation, underwriting arrangements are defined in an agreement (underwriting agreement) that is signed between a trader (underwriter) and an issuer on distribution of securities by the order, in the name of and at the expense of the issuer for remuneration. In addition to general requirements of the agreements, underwriting agreements must include arrangements on the special rights and obligations of a trader (determine regional markets for the trade; define (subject to the agreement with the issuer) the securities' price in case of changes to the distribution conditions; in case of public offering – guarantee the sale of all or a part of the securities and to redeem unsold securities at the fixed price; sign an agreement of cooperation with the purpose of organising the public offering; render a report on the securities distribution after the end of distribution, etc). The issuer, in turn, must render to the trader all the necessary documents for the distribution of securities; inform the trader on the changes of distribution conditions, and can define the terms for the receipt from the trader the documents, report and other information on securities distribution.

The arrangements on underwriting can include or exclude the obligation of the trader to redeem unsold securities. Such agreements may also include the arrangements regarding the amount and procedure for the trader's service payment. In Ukraine, banks and securities traders usually prefer to conclude underwriting agreements without the obligation to redeem unsold securities. In this case, the unsold part of the securities is returned to the issuer.

- 13** What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Ukrainian legislation does not provide special regulation on the issue of indemnity, force majeure clauses, etc, for an underwriting agreement.

Success fees for underwriters in Ukraine usually depend on the amount of sold securities. According to the general rule of the Law on Securities and the Stock Market, the amount of the securities, distributed in the public offering, cannot exceed the quantity of securities, defined in the prospectus of securities offerings.

- 14** What additional regulations apply to underwriting arrangements?

See question 12.

Ongoing reporting obligations

- 15** In which instances does an issuer of securities become subject to ongoing reporting obligations?

As the central authority on the securities market in Ukraine is the Securities and Stock Market State Commission, the reports (on the quantity of actually distributed securities), approved by the authorised body of the issuer, are rendered to the Commission.

Regular information on the issuer (annual and quarterly reporting on the results of the financial and commercial activities of the issuer) is also to be rendered to the Securities and Stock Market State Commission.

- 16** What information is a reporting company required to make available to the public?

The issuers are obliged to reveal the information on their financial and commercial status and activities; on any activities that may influence their financial and commercial status and bring about substantial change in the price for their securities; and on the owners of significant holdings of shares (10 per cent or more). The list of information included in the issuers' regular and special reports to the Securities and Stock Market State Commission is determined by the Law of Ukraine on Securities and the Stock Market.

A special internet source was created by the Securities and Stock Market State Commission to make this information available to the public (<http://smida.gov.ua/>). In addition to the above-stated data, the information published on the site includes general data on issuance of shares, violations of the issuers, news from the market participants, etc.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

On 14 January 2003, the Securities and Stock Market State Commission approved the Concept of Prevention of Manipulations on the Securities Market, on Unfair trade Practices and Violation of Ethic Rules of the Professional Activities on the Stock Market. The main rules prohibiting manipulative practices in Ukraine are based on the worldwide principles and standards of stock market development and envisage activities aimed at:

- ensuring equal possibilities of the access to the information on the participants of stock market;
- gradual concentration of secondary turnover of securities on the organised market with the purpose of the adequate market pricing of securities;
- monitoring the agreements on the securities market;
- establishing norms and standards of commercial activities and commission activities on unorganised securities market;
- separating professional activities on the securities market from criminal schemes and prevention of money laundering schemes; and
- regulation of issuance and turnover of derivative securities.

Price stabilisation

18 What (if any) measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Among the measures, taken by the issuer of the securities, aimed at securities' price stabilisation is buy-out of the securities by the issuer and upon the agreement with the issuer, the securities dealer can undertake an obligation to buy-out undigested securities. Other measures of stabilisation of securities on the market are: conversion, consolidation or split (usually can be done by the specialist in corporate management).

On the other hand, securities' registration or data on securities' issue, published by the Securities and Stock Market State Commission, cannot be regarded as a guaranty of securities value.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

The bases of liabilities for securities transactions are defined by the Laws of Ukraine on Securities and Stock Market, on National Depository System and Peculiarities of Electronic Turnover of Securities in Ukraine, on Accounting and Financial Statements in Ukraine, on State Regulation of Securities Market in Ukraine and corresponding provisions of the Criminal Code of Ukraine, and the Administrative Code of Ukraine.

For instance, the applicant is responsible for the data authenticity, stated in the documents rendered to the Securities and Stock Market State Commission. Persons, responsible for violations on stock market, incur a liability under the current legislation of Ukraine.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Any person has the right to protect its civil rights in the case of violations, disclaiming or contesting. Any person can apply to court for the protection of personal non-property or property right and interest. To defend rights in a business-related dispute, a foreign or Ukrainian legal entity, an individual entrepreneur or natural person may apply to an appropriate Ukrainian court, or to an appropriate arbitration tribunal or institution within or outside Ukraine (depending on the type of violation and conditions of the relevant agreements).

Moreover, there is the decision of the Securities and Stock Market State Commission on Protection of securities' owners during the depository registration (No. 64, 11 February 2003).

The Law of Ukraine No. 801-VI (from 25 December 2008) has introduced certain changes into the Criminal Code of Ukraine, the Code of Ukraine of Administrative Offences and the Law of Ukraine on State Regulation on the Securities Market related to the sanctions on the securities market. For instance, the list of offences, subject to financial sanctions levied by the Securities and Stock Market State Commission, was expanded. The Law entered into force on 14 January 2009.

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