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DIRECTORS' AND OFFICERS' (D&O) LIABILITY INSURANCE: CHALLENGES OF IMPLEMENTATION IN BOSNIA AND HERZEGOVINA

Directors' and officers' liability insurance (D&O insurance) is a form of professional liability insurance and one of the key instruments for safeguarding corporate governance, as it mitigates the financial consequences that may arise for individuals from breaches of the duties of care, loyalty, or trust owed to the company. D&O insurance is not merely protective but structurally embedded in modern corporate governance as a risk-allocation mechanism balancing accountability and entrepreneurial freedom. D&O insurance is relatively new in the legal system of Bosnia and Herzegovina and is still rarely used in practice. However, its importance is growing in parallel with the development of capital markets, corporate transparency, and regulatory requirements. The paper analyses the legal nature and function of D&O insurance, complemented by a comparative overview of solutions in Germany and Austria, with the aim of identifying the opportunities and obstacles for its full implementation in Bosnia and Herzegovina. The paper argues for regulatory and contractual adjustments of D&O insurance to new forms of managerial risk and proposes guidelines for the development of an appropriate legal and institutional framework in Bosnia and Herzegovina. The objective is to highlight existing normative gaps and practical challenges in domestic law and to offer proposals for alignment with European standards in the fields of insurance and corporate governance.

Keywords: D&O insurance, directors' and officers' liability, corporate governance, German D&O insurance, Austrian D&O insurance.

1. INTRODUCTION

One of the central issues of corporate governance and risk management in modern corporate systems is the liability of directors and members of the management board. The complexity of corporate relationships and the growing number of disputes related to breaches of their fiduciary duties have led to a significant increase in the personal exposure of directors and

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board members to the risk of liability claims. Therefore, over time, this institute has become a key instrument for protecting both individuals performing the functions of directors and board members, as well as the companies themselves, in the course of business (Trautman & Altenbaumer-Price, 2012). The institute exists in legal practice in Bosnia and Herzegovina (BiH); however, it is regulated by general tort law and company law provisions.

Even though directors' and officers' liability insurance (D&O insurance) has a long tradition in comparative legal systems and a relatively well-defined normative and contractual framework, its application in BiH remains insufficiently researched and, in practice, is often marked by numerous legal and practical challenges. The complexity arises from issues related to the distinction between insurable and uninsurable risks, the relationship of D&O insurance to the rules governing the liability of board members towards the company and third parties, as well as the compliance of contractual solutions with the applicable regulations in the fields of contract law, company law, and insurance law.

In this paper, we analyze the normative framework of D&O insurance in BiH and identify the key challenges of its application in domestic practice. Based on comparative legal solutions and theoretical assumptions, the paper's aim is to offer proposals for the normative improvement of D&O insurance in BiH. Special focus is placed on issues concerning the legal nature of D&O insurance, the qualitative and quantitative scope of coverage, exclusions of liability, and the impact of the specificities of the domestic corporate and regulatory environment on the effectiveness of this institute. The paper uses the method of normative analysis of applicable regulations, along with the method of analyzing domestic practices, and includes a comparative overview of selected solutions in Germany and Austria, with the aim of indicating possible directions for improving the legal framework and practice of D&O insurance in BiH.

The article is structured into four main sections. In the first section, the authors provide introductory remarks on directors' and officers' (D&O) liability insurance, outlining its conceptual foundations and functional role within corporate governance. The second section offers a comprehensive comparative analysis of D&O insurance in Germany and Austria, highlighting key doctrinal approaches and practical developments. The third section focuses on BiH, examining the existing legal and insurance framework, including an analysis of insurance policies and their implications for traditional company law doctrines, particularly the business judgment rule. Finally, the fourth section presents normative recommendations and concluding observations on how to further develop and strengthen the application of D&O insurance *de lege ferenda*.

2. THE CONCEPT AND LEGAL NATURE OF D&O INSURANCE

In the past, the primary duty of company directors was to achieve maximum profit, often without broader responsibility towards society, shareholders, or other stakeholders. Over time, however, regulatory requirements, state supervision, and the interests of minority shareholders have increased, leading to greater transparency and accountability in corporate governance. At the same time, in certain legal systems, employees have been given greater influence over management, including access to boards of directors. Increased social expectations, together with numerous cases of poor governance, fraud, unethical business practices, and spectacular bankruptcies, have resulted in a rise in litigation against directors and board members. Shareholders, creditors, and employees are increasingly initiating proceedings for damages caused by poor business decisions, while modern media and advanced communications increase the likelihood of uncovering irregularities (Youngman, 1999, pp. 1–3). Most securities class action lawsuits in the US brought by shareholders are settled out of court within the D&O insurance coverage limit. D&O insurance thus serves as an important source of funds for companies for the defense and settlement of lawsuits (Lin *et al.*, 2011).

In performing managerial, representative, and supervisory functions, members of the management and supervisory boards are obliged to prioritize the interests of the company, while duly considering the interests of other stakeholders affected by its operations. United States (US) law has developed rules on the liability and due care of board members, encompassed within the standard of fiduciary duty, which includes three obligations: the duty of loyalty, the duty of care, and the duty to act in good faith. All these rules come into play in the performance of the core tasks of company management, particularly through the application of the business judgment rule, which grants management autonomy in decision-making, including decisions that may involve risk, without fear that a court will determine the liability of board members in relation to such decisions (Trivun, 2019, p. 80).

Notwithstanding the protective scope of this rule, an additional layer of protection has emerged within corporate practice and legal doctrine. To facilitate risk-taking inherent in managerial decision-making and to mitigate the personal liability exposure of directors, D&O insurance has developed as a complementary mechanism. It serves to enhance managerial willingness to engage in value-generating, yet risk-laden, decisions, while preserving the functional objectives of corporate governance. Some scholars argue that D&O insurance is an indicator of robust governance practices, since it enhances managerial efficiency (Hsieh *et al.*, 2025). In its simplest terms, D&O insurance is a form of professional liability insurance directly related to corporate governance, which protects directors and members of management boards from potential claims for damages caused while performing their duties during the period of insurance (Kaltchev, 2006, pp. 351–352). However, moral hazard has been associated with D&O insurance by various scholars (Kim, 2015; Gillan & Panasian, 2015; Zeng, 2014; Lin *et al.*, 2011), whether related to management being disincentivised to act in the best interest of stakeholders or tax avoidance, leading to more lawsuits. On the other hand, in China scholars have established a positive correlation between the effects of D&O insurance and oversight of state-owned enterprises (SOEs). Three SOE-specific mechanisms have been observed: political promotion incentives, reputation-related strategic benefits, and ongoing monitoring by insurers (Wanyan *et al.*, 2025, p. 625).

D&O insurance is not directly regulated under the Law on Insurance of the Federation of BiH (Official Gazette of the Federation of BiH, No. 23/17), however, given its nature, it is classified within the category of liability insurance (which comprises four types within this group), specifically under other liability insurance (Džidić & Ćurković, 2017, p. 229). In fact, this type of insurance represents a form of professional liability insurance (Petrović Tomić, 2008, p. 181). The legal nature of this insurance is, to say the least, complex. The contract is concluded based on the modalities of insurance for the account of another, as well as collective insurance, and this combination of elements certainly has a specific impact on the rights and obligations of the contracting parties, particularly the insured (Radović, 2015, p. 106). The emergence of the COVID-19 pandemic and the associated economic crisis, as well as the war developments in Russia and Ukraine, have further contributed to the expansion and increased relevance of D&O insurance (Maleta & Čarapina, 2022, p. 364).

D&O insurance is one of the most controversial and least understood management tools, yet it plays a very important role in the management of companies (Li *et al.*, 2022, p. 1). When discussing the scope of coverage of this type of insurance, as with other types, a distinction is made between qualitative and quantitative scope of coverage. The qualitative scope of coverage under an insurance contract refers to defining the risks covered by this type of insurance, as well as identifying the circle of third parties entitled to compensation, while the quantitative scope refers to defining the monetary amounts covered, *i.e.,* the insured sums (Lazić, 2022, pp. 68–72). The qualitative scope of D&O insurance coverage can be divided into basic and extended coverage.

Basic coverage (A-side coverage) refers to personal coverage of directors or board members, while extended coverage (B-side coverage and Insuring Agreement C) refers to coverage of the company (Granof & Nicholls, 2014, p. 106). This means that in the case of basic coverage, when the company does not indemnify a director or board member for damages arising from their actions, this type of insurance compensates the director or board member for the losses they have suffered (defense costs, damages), *i.e.*, those they are obliged to pay based on a final judgment or settlement. Thus, A-side coverage protects directors and board members when they must bear defense costs from their personal assets or in the event of losing damages claims. The company may not indemnify these costs for various reasons: it may be insolvent, such payments may be prohibited by law or the company's statutes, or it may simply be the company's decision.

Once companies began to be sued together with directors, another form of coverage emerged (Petrović Tomić, 2008, p. 182). If the company indemnifies the director or board member, we speak of extended coverage, where the company is reimbursed for the damage that it has paid to its director or board member. In other words, the company is reimbursed by the insurer for costs it has paid instead of the director or board member for damage caused in the performance of their duties (Mogel, 2003, p. 14). It should be noted that this coverage does not extend to damages for which only the company itself is liable, that is, where the company is the defendant in a legal dispute. At first glance, such extended coverage might appear to constitute liability insurance for the company; however, this is not the case. Rather, B-side coverage is properly understood as a form of liability insurance protecting directors, as it indemnifies them in situations where the company is unable or unwilling to do so (Petrović Tomić, 2008, p. 182). For the company itself to be covered by insurance, it must conclude a separate contract. We refer to this kind of coverage as C-side coverage (entity coverage), which provides protection to the company itself when it is the defendant in a legal dispute. This type of coverage seeks to reconcile the interests of directors and board members with those of the company in the event of a potential dispute.

D&O insurance is intended to cover costs arising from lawsuits initiated against directors and board members by shareholders or third parties. Coverage will be provided in situations where, in judicial proceedings, it is established that the director or board member did not act in bad faith, i.e., that they acted in good faith (Core, 2000, p. 450). In other words, this type of insurance does not cover actions that fall within the sphere of intent. The insurer assesses the risk of potential disputes by analyzing the likelihood of lawsuits being brought against the company and the expected costs of such proceedings. Based on this assessment of litigation risk, the insurance premium is determined, which includes the estimated risk, increased by the insurer's operating costs and an appropriate profit margin.

Legal systems differ significantly in how they structure directors' liability, the scope of the business judgment rule, and the permissibility and design of insurance coverage. Germany and Austria provide highly instructive models, as both jurisdictions combine a well-developed doctrine of directors' duties with a sophisticated regulatory and market framework for D&O insurance. The following section therefore undertakes a comparative analysis of these two jurisdictions, with a view to identifying key structural features and lessons relevant for other legal systems.

3. COMPARATIVE OVERVIEW – EUROPEAN EXPERIENCES

3.1. Comparative Overview Reasoning

In 2018, a comprehensive comparative study on D&O liability in different legal systems has been conducted by a group of scholars (Deakin *et al*., 2018, p. 4). This comparative overview is based on the insurance law aspect of their research, excluding details on the corporate law framework of each country and liability for damages to third parties. We only analyze liability for damages caused to the company and the shareholders and the insurance law aspects of such liability.

We have chosen to analyze two countries that are also part of the European Union (EU): Austria and Germany, because of their increasing relevance for BiH's corporate and economic environment, particularly considering the country's EU accession process and the growing presence of foreign-owned companies operating within its market. Foreign subsidiaries represent an important segment of the domestic economy. In 2023, the number of foreign affiliates operating in BiH reached 1,187, accounting for approximately 1.4% of the total number of business entities in the country. Despite their relatively small numerical share, these companies have a significant economic impact, employing more than 15% of the workforce and generating almost one fifth of the total value added in BiH (Agency for Statistics of BiH, 2024). Germany represents one of the most important sources of foreign investment, accounting for 11% of all foreign subsidiaries operating in BiH, followed by Austria with 8.9%. German companies are especially active in the manufacturing sector. Austria is also interesting because of the presence of Austrian insurance companies in BiH.

It is established that insurance companies use policy templates from other jurisdictions, such as US-based policies in Spain or German policies in Austria, illustrating the transnational diffusion of D&O insurance practices (Deakin & Koziol, 2018). Since many countries nowadays operate internationally, liability risks exist everywhere. Brussels I Recast (2012), Section 3, Article 11(1) stipulates that an insurer domiciled in a Member State may be sued in the courts of the Member State: (1) where the insurer is domiciled, (2) in the courts of the Member State where the claimant (policyholder, insured, or beneficiary) is domiciled, (3) if the insurer is a co-insurer, in the courts where proceedings are brought against the leading insurer. If an insurer is not domiciled in an EU Member State but operates through a branch, agency, or establishment in a Member State, it is treated as domiciled in that Member State for disputes arising from the activities of that establishment (Brussels I Recast, Article 11).

3.2. D&O Insurance in Austria and Germany – General Remarks

The market for D&O insurance in Germany has become very lucrative. In 2009, 75% of companies, 94% of board members and 66% of senior executives had taken out D&O coverage. The premium amounted to €750 million in 2018 (Thole, 2023, p. 2). The interest in D&O insurance can be explained by the tightening of liability standards for managers through legislation and case law, which has further strengthened the decision-makers' need for insurance protection. One case has led to the adoption of D&O insurance as an essential risk-management instrument in Germany: the German Federal Court of Justice (BGH) decision BGH II ZR 175/95. In this decision, the BGH established a duty of the supervisory board to enforce viable liability claims against management board members, in the interest of the company[1] (Bundesgerichtshof, 1997, p. 1). Contrary to this, there are not many D&O insurance cases before Austrian courts. A notable one was a case before the Austrian Supreme Court in 2015, in which the central question was whether a D&O insurance policy covers defense costs in a civil employment dispute where the employer raised damage claims against a former board member. The damage claim was raised after the insurance contract ended, but criminal proceedings concerning the same alleged misconduct had already been initiated during the policy period (OGH, 2015).

According to a D&O report by Alliance Commercial (2025, p. 3), the most common drivers for D&O liability are mergers and acquisitions, regulatory enforcement actions or consumer or employee litigation, thematically centered around environmental issues, cyber security, and product safety. According to the German Federal Financial Supervisory Authority (BaFin) Sustainable-Finance Strategy, false sustainability disclosures are treated as financial loss (*Vermögensschaden)* that must be covered by a VSH-type D&O policy. This means that in Germany, ESG risks are becoming legally internalized into directors' duties, thereby transforming sustainability from a policy objective into a liability-relevant governance obligation (BaFin 2024, point 4, p. 3). For this reason, insurers have introduced a standard ESG-Liability endorsement and premiums for that layer rose about 12 % in 2025. The market impact is documented in the Allianz Commercial D&O Insights report, which notes a 12 % premium uplift for the ESG endorsement (Allianz Commercial, 2025, pp. 12–13).

Regulation (EU) 2022/2554 on Digital Operational Resilience for the Financial Sector (DORA) obliges boards to supervise information and communication technology (ICT) risk. For directors, DORA means that cybersecurity, ICT risk management, incident response, testing, outsourcing oversight, and digital resilience are now part of their legal oversight responsibilities (European Commission 2022a, recital, p. 45). If the board does not actively supervise ICT risk, that can be framed as a breach of the duty of care. The Austrian Financial Market Authority (FMA) reaffirmed that guidelines and recommendations and other measures passed by resolution and issued by the European Banking Authority (EBA) regarding environmental risk factors must be applied (FMA, 2026). In the backdrop of these developments and the increased risks directors and officers face, the following comparative analysis will consider two elements of comparison: the company law aspect in which focus is given to anchors of liability, particularly the duty of care, and the insurance law aspect in terms of what is covered by D&O insurance.

3.2.1. Company Law Aspects

According to the German Limited Liability Companies Act (German GmbHG) and the German Stock Corporation Act (German AktG), a strict separation of the company's property

[1] In this case, the supervisory board members challenged resolutions refusing to pursue damages claims against the CEO following substantial losses caused by risky transactions with a collapsing shell company, arguing that the supervisory board unlawfully failed to enforce potential liability claims.

from the shareholders' property, exists, meaning that the shareholders are not personally liable for the company's debts toward third parties (Article 1(1) AktG and Article 13(2) GmbHG). The same applies to shareholders in Austria, and in accordance with the Austrian Stock Corporation Act (Austrian AktG) and Austrian Limited Liability Companies Act (Austrian GmbHG). Both jurisdictions have a two-tier corporate governance structure of joint stock companies. Building on this framework of limited liability and structured corporate governance, the focus necessarily shifts to the standard of conduct expected from directors, which operates as the primary counterbalance to the privilege of limited liability. In both German and Austrian law, this standard is expressed through the duty to act with the care of a conscientious and diligent business manager (Identical provision in both AktG: *Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*, see Article 84(1) of the Austrian AktG and Article 93(1) German AktG), thereby establishing an objective benchmark against which managerial decisions are assessed.

A comparative analysis of German and Austrian law reveals a high degree of doctrinal convergence regarding directors' duties, particularly in relation to the duty of care and the business judgment rule (BJR), albeit with some differences in codification and emphasis. Both systems adopt an objective standard of care, requiring directors to act as conscientious and diligent business managers, while simultaneously recognizing that entrepreneurial decision-making inherently involves risk.

Management boards enjoy broad discretion, which was subsequently codified in § 93(1) sentence 2 AktG (Hüffer & Koch, 2026). Article 93(1) AktG establishes not only a fault-based liability regime but also a general behavioral standard (*Verhaltensstandard*) that is concretized through specific duties, including the obligation to ensure lawful conduct (*Legalitätspflicht*), proper corporate organization, and effective compliance structures. As doctrinal analysis highlights, Article 93 AktG performs a dual function by simultaneously defining the standard of fault (*Verschuldensmaßstab*) and prescribing objective behavioral duties guiding managerial conduct (Hüffer & Koch 2026, Article 93 paras. 7&8). This provision introduces three-pronged test shielding directors from liability where decisions (i) qualify as business judgments, (ii) are based on adequate information, and (iii) are made in the best interest of the company. The rule thus protects entrepreneurial discretion and acknowledges that corporate decision-making is inherently characterized by uncertainty, prognostic elements, and risk. However, the scope of this protection is limited by the legality duty, which represents the core of the duty of care. Unlawful conduct falls outside the protective scope of the business judgment rule[2] (BGH, 2012).

Austrian law follows a closely aligned approach but distinguishes itself by the explicit statutory incorporation of the BJR into both the Austrian AktG (Article 84(1a)) and Austrian GmbHG (Article 25(1a)) through the 2015 reform (Karollus & Riedler, 2018). Austrian doctrine further refines the standard by emphasizing good faith, informed decision-making, and the absence of conflicts of interest, while jurisprudence clarifies that only gross misjudgments or manifestly unreasonable decisions trigger liability (Karollus, 2016). Shareholders generally cannot claim damages individually if their losses merely reflect a reduction in share value, since compensation paid to the corporation indirectly benefits them. Because of this, D&O insurance is obtained and enforced by the corporation itself (Wagner & Klein, 2018).

[2] Any action that violates statutory law, such as engaging in fraudulent transactions or facilitating breaches like Embezzlement (article 266 Criminal law statute), falls outside the scope of permissible discretion. Consequently, such conduct cannot be justified as a business decision, and corporate officers may incur personal liability.

3.2.2. The Insurance Law Aspect

The German Insurance Contract Act 2008 (German VVG) as well as the Insurance Contract Act of Austria (Austrian VVG) do not have special provisions on D&O insurance; therefore general legal rules regarding insurance contracts and certain types of insurance contracts apply. D&O insurance is not mandatory for companies, however, there are countries such as the Netherlands that provide D&O coverage as part of the risk management of large multinational (listed) corporations (Wuisman & Wolf, 2018, p. 363). Since directors owe their duties to the company as a separate legal entity, not directly to shareholders, claims for breaches of duty are usually brought by the company itself (Gilead, 2018, p. 239). Consequently, the costs of D&O are borne by the company.

D&O insurance in Germany covers claims against directors and officers from external sources (*Außenhaftung*), and claims from within the company (*Innenhaftung*), but most claims are made by the company itself against its directors and officers. This percentage is as high as 80% in Germany (Ludwichowska-Redo & Thiede, 2018, p. 811). One similarity in both jurisdictions is that insurance companies are very reluctant to release payments without a court ruling on damages claims, even where the facts establishing liability are clear (Welser & Siegwart, 2013, p. 332).

In a statutory reform introduced by Germany in 2009, D&O insurance policies covering members of the management board include a mandatory deductible (*Selbstbehalt*). According to Article 93(2) German AktG, the deductible must amount to at least 10% of the damage, up to a maximum of 1.5 times the director's fixed annual remuneration. By contrast, Austrian law does not have a similar provision in the Austrian AktG and therefore does not require a deductible in D&O insurance policies. As a result, companies are free to decide whether to include a deductible in the policy, and in practice deductibles appear to be relatively uncommon in Austria (Karollus & Riedler, 2018, p. 67).

Authors such as Doralt & Doralt (2010, p. 565) claim that provisions on deductibles are necessary to uphold the preventive function of liability for damages. Others, however, (Spann, 2018, p. 851) claim that this attempt by the German legislature to avoid moral hazard failed since directors acquire separate policy coverage for deductibles (*Selbstbehaltspolice*). In Germany, D&O policies cover defense costs, damages payable to the corporation or third parties, and certain legal expenses related to liability claims, but they exclude intentional misconduct, deliberate breaches of duty, certain insolvency-related violations, fines and criminal penalties (Wagner & Klein, 2018, p. 201). It is to be assumed that similar provisions are part of the general conditions for D&O insurance in Austria, since the Austrian Association of Insurers does not provide a template for them and foreign general conditions (based in German law) are used without significant adaptation for Austria (Karollus & Riedler, 2018, p. 67). In any case, parties are free to design their own insurance contract.

4. CHALLENGES OF D&O INSURANCE IN BIH

4.1. The Company Law Aspect

The Company Laws[3] in BiH stipulate that companies are organized in four main legal forms: general partnership, limited partnership, joint-stock company, and limited liability

[3] The laws are: Law on Companies of the Federation of the BiH (*Official Gazette of the Federation of BiH*, Nos. 81/2015 and 75/2021); Law on Companies of the Republic of Srpska (*Official Gazette of the Republic of*

company. The company obtains legal personhood by incorporation and similarly to Germany and Austria, is liable for its obligations with all its assets. Therefore, there is a strict separation between the assets of the company and its owners and members. The members of the management board, the president and members of the supervisory board, legal representatives, and authorized signatories are persons with special duties towards the company (Hasanović & Muftić, 2025, p. 60). As such, they must perform their tasks with the due care and diligence of a prudent businessperson (Grbo, 2016, p. 412). In all three jurisdictions,[4] the duty of care is formulated around the standard of a "prudent (conscientious) businessperson", combined with the requirement that decisions be taken in the best interest of the company.[5]

Under this framework, a personal interest is broadly defined to include situations where a director, or a related person, is a party to a transaction with the company, has a financial relationship with a contracting party, or is subject to control or influence that may affect impartial decision-making. Family members and closely connected persons are explicitly included within the scope of related parties, thereby expanding the reach of the rule and preventing circumvention. In such cases, the law imposes a duty of full disclosure and requires prior approval by the competent corporate body, ensuring procedural safeguards and informed decision-making (Company Law FBiH/RS/BD, Art. 34/34/53).

Complementing these disclosure obligations, the laws impose a strict duty to avoid conflicts of interest, prohibiting directors and related persons from using company assets, exploiting non-public information, abusing their position, or appropriating business opportunities belonging to the company. This duty applies irrespective of whether the company itself could exploit the opportunity, thereby emphasizing the objective nature of fiduciary responsibility. A breach of these duties gives rise to corporate claims, allowing the company to seek damages or the transfer of benefits obtained through the violation, which reinforces the principle that directors are primarily accountable to the company itself. Additionally, the legal framework incorporates rules on business secrecy, requiring the protection of sensitive corporate information, and imposes a prohibition on competition, restricting directors and certain shareholders from engaging in competing activities without prior authorization. Violations of these obligations similarly trigger liability, including damages, disgorgement of profits, or transfer of business opportunities to the company.

It is also important to note that, similarly to Germany and Austria, the BiH legislators emphasize that persons who perform their duties with the care of a prudent businessperson, and in the reasonable belief that they are acting in the best interest of the company, will not be liable to the company for damage resulting from their business judgment. However, this does not include instances in which the shareholder or director acted in bad faith, specifically where he or she abused the company for unlawful or fraudulent purposes or disposed of the company's assets as if they were their own (Company Law of the FBiH/RS/BD, art. 5/15/7).

Srpska, Nos. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, 17/2023 and 45/2025); Law on Enterprises of the Brčko District of BiH – Consolidated Text (*Official Gazette of the Brčko District of BiH*, Nos. 49/11 and 01-02-815/20).

4 Federation of the BiH, Republika Srpska and Brčko Distrikt.

5 Articles 32-41 Law on Companies of the FBiH; Articles 31-39 Law on Companies of the RS; Articles 27-30 & 53 of the Law on Enterprises of the BD.

4.2. The Insurance Law Aspect

4.2.1. Regulatory and Legal Framework Challenges

Although D&O insurance represents a developed and widely used institution in comparative law, neither insurance legislation nor regulations governing company law contain specific provisions regulating this form of liability insurance for members of corporate management bodies. Courts apply general rules on liability insurance.

Despite the absence of explicit legal regulation, D&O insurance is increasingly used in practice, particularly in larger companies, the banking sector, and companies with international ownership structures. A-side coverage protects directors and officers personally when they are sued and the company cannot indemnify them, *i.e.* where the company has initiated insolvency or bankruptcy proceedings. B-side coverage reimburses the company for amounts it has paid to indemnify its directors and officers. C-side coverage is the part of D&O insurance that covers the company's own liability when it is a defendant in a legal proceeding.

In this paper, we analyze D&O insurance in the narrower sense (basic coverage, A-side) and the broader sense (extended coverage, B-side). These objectives include protecting directors from personal liability, as well as protecting the company from both indirect and direct liability (Griffith, 2006, p. 1168).

4.2.2. Key Legal Issues Arising from Market Practice and Policy Wording

In the absence of specific statutory regulation, key elements of D&O insurance in BiH are primarily shaped through insurers' policy wording and market practice. When handling inquiries for D&O insurance, the standard practice is to use the reinsurer's (RE) terms and conditions during the quotation and underwriting process, i.e. the terms of the reinsurer from whom coverage for the specific risk is obtained.

The reason for this approach is that companies do not have their own developed D&O policy wording, nor sufficient experience in independently underwriting and managing this type of risk. As a rule, the entire amount, *i.e.* 100% of the risk, is ceded to reinsurance, whereby the reinsurer fully assumes the technical risk. Considering that there are no general conditions for domestic insurance companies, in this paper we analyzed the Polaris[6] D&O insurance policy.[7] The analysis focused on key contractual elements, including the identification of insured persons, the scope of coverage, the determination of the insured event, and policy exclusions, with a view to identifying potential legal uncertainties and inconsistencies in the absence of specific regulation.

The analysis of the Polaris D&O policy wording demonstrates that, in the absence of specific statutory regulation, key elements of coverage are determined almost entirely through contractual provisions. The policy provides indemnity for losses arising from claims based on wrongful acts committed by the insured, while the notion of "loss" includes not only damages awarded by courts, but also defense costs, settlements, and interest. Furthermore, the policy distinguishes between different layers of coverage, notably A-side (covering the personal liability of directors) and B-side (reimbursement of the company). The analysis further confirms

6 Polaris is a specialized underwriting agency (MGA) that assesses and structures risks on behalf of insurers but does not carry the insurance risk itself.

7 Polaris Executive Star, Directors' & Officers' Liability Policy Wording.

that coverage is based on the claims-made principle, as explicitly stated in the insurance offer. Under this model, coverage is triggered the moment a claim is made, rather than when the underlying wrongful act occurred.

Issues may arise in relation to retroactive coverage, extended reporting periods, and the temporal limits of the insurer's liability, all of which depend entirely on contractual wording rather than statutory rules. The policy includes several standard exclusions, such as those relating to fraud, unlawful personal profit, prior claims, and other specific risks. Notably, the exclusion for dishonest or fraudulent conduct applies only after it has been established by a final, non-appealable decision, meaning that the insurer remains obliged to advance defense costs until such determination is made.

The insurance offer introduces a wide range of additional exclusions (*e.g.* money laundering, insolvency, professional services, sanctions), which may significantly limit the effective scope of coverage in practice and create a discrepancy between the insured's expectations and the actual level of protection. The policy wording is characterized by a high degree of complexity and detailed definitions of key concepts such as "claim", "wrongful act", and "loss". Given that D&O insurance covers the liability of directors and members of management boards of companies, it is necessary to clearly define the circle of persons falling within this category. The insured is a director or a member of the management board of a company, regardless of the manner of their appointment.

The identification of insured persons represents one of the key legal issues in the absence of specific regulation of D&O insurance in BiH. The Polaris policy wording adopts a broad definition of insured persons, encompassing not only directors and officers, but also employees, procurators, spouses, and even legal representatives or heirs in certain circumstances. Overall, the broad and flexible definition of insured persons, while beneficial from a risk management perspective, contributes to legal uncertainty in BiH due to the absence of clear statutory guidance.

4.2.3. Insufficiently Developed Case Law

The application of D&O insurance in BiH is still at an early stage of development, which is reflected in the limited number of concluded policies, as well as in the extremely small number of court disputes in this field. According to available practical insights, the number of D&O insurance policies issued is relatively low, which consequently contributes to the absence of relevant case law.

In such circumstances, legal issues related to the application of D&O insurance are mostly resolved through corporate and contractual practice, without significant reliance on court or arbitral practice within the domestic legal system. The reasons for this situation can be found in the limited insurance market, as well as in the fact that only a relatively small number of insurers in BiH offer D&O products.

The practice of D&O insurance in BiH remains insufficiently developed, both in terms of market presence and in terms of judicial treatment of disputed issues, which indicates the need for further development of this area of insurance law, both through practice and through potential normative intervention.

The authors conducted a limited study by directly contacting insurance companies operating in the Federation of BiH. The insurers were asked to provide information on the number of D&O insurance policies issued in the period from 2020 to 2025. Based on the responses received, it can be concluded that only a relatively small number of insurers are engaged in offering this type of insurance, while the number of policies issued in the observed period is extremely low, generally remaining within single-digit figures per company. The low number of concluded policies directly contributes to the absence of case law in this field, thereby further slowing the development of legal standards and the interpretation of this form of insurance.

4.2.4. The Question of Regulatory Oversight

According to the Law on Insurance of the Federation of BiH (Official Gazette of the Federation of BiH, No. 23/17), in the Federation of BiH, insurance activities are supervised by the Insurance Supervision Agency of the Federation of BiH, which is responsible for ensuring the legality and stability of the insurance market. Among its competencies is the approval of general insurance conditions used by insurance companies. However, these conditions are primarily drafted by insurers themselves, which places the regulator in a supervisory rather than a proactive role in shaping insurance products (Insurance Supervision Agency of the Federation of BiH, 2026). In practice, D&O policy terms are often developed internally by insurers or provided through international underwriting agencies (MGAs), frequently drawing from established market practices such as those of the London insurance market or Lloyd's. As a result, policy conditions can vary significantly between providers. The absence of standardized local D&O insurance conditions in BiH presents a specific challenge for policyholders. In practice, such coverage is often provided through MGAs and reinsurance arrangements, relying on policy wordings developed in foreign markets (*e.g.* the London market or Lloyd's-based structures).

As a result, these policy conditions may not always be fully aligned with the domestic legal and regulatory framework, which can affect the clarity and predictability of coverage. This raises concerns regarding transparency and the extent to which insured persons, particularly company directors and managers, are adequately protected in a local context.

Furthermore, given the international dimension of D&O insurance, which often involves foreign insurers, reinsurers, and cross-border risk placement, the question arises as to how effectively local regulatory authorities can oversee such arrangements. While the regulatory framework ensures a level of formal control, it may not fully address the substantive complexities of these products.

5. CONCLUSION

D&O insurance in BiH primarily functions as a contractual institution adopted from comparative law, with its application based on general rules of contract law and insurance law. It is a voluntary type of insurance that has developed through practice, without explicit normative grounding in the applicable regulations.

The absence of a clear regulatory framework inevitably leads to legal uncertainty, particularly regarding the scope of coverage, the relationships between contracting parties, and the limits of the insured's liability. Such a situation creates room for inconsistent practice and varying interpretations, both by insurers and in potential disputes.

It can be concluded that the existing legal framework does not fully meet the needs of modern corporate governance, which indicates the need for future normative intervention, whether within the reform of company law or through the improvement of insurance legislation.

When it comes to company law, it could be considered that the focus should shift from whom the duties are owed, to what behavior is expected from directors (Barrett, 2024, p. 41). Legislators should also learn from failed policy experiments in German law, in which the mandatory deductible failed. To avoid moral hazard, companies should find mechanisms to hold directors accountable through regular monitoring and supervision. Even though D&O insurance is an important tool for safeguarding companies against bad business decisions of their managers, it can also be a tool of abuse. Its implementation should therefore be carefully regulated to prevent abuse of the corporate form and, consequently, abuse of the law. The first step in the right direction for BiH would be to create a D&O policy in line with domestic company law and tort law standards, tailor-made to small and medium-sized enterprises that operate in BiH.

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