Instructions for Completing the Statement of Independence of a Member or Candidate for the Position of Member of the Supervisory Board

General

When completing supervisory board member independence statements in practice, various problems arise in the interpretation of independence criteria referred to in the Corporate Governance Code for Listed Companies (hereinafter: the "Code"). The explanations below were, therefore, drawn up as an instruction to facilitate the filling in of independence statements in accordance with Appendix C3 of the Code.

In **Section 1** of the statement, the member or candidate for the position of member of the supervisory board enters personal information and information on the company in respect of which they are filling in the statement.

In **Section 2**, they mark whether the individual statements or criteria are true or not. These are summarised according to the criteria referred to in Appendix C3 of the Code. In order to avoid incomprehensibility or double negation, the criteria from the Code have been changed to a certain extent. In order to facilitate the determination of whether a statement is true or false in a concrete case, we provide explanations and clarifications of the criteria in accordance with the Code.

a) *I am not performing the function of executive director or management board member of the company or associated company and have not performed such a function over the course of the past five years.*

Criterion a) from Appendix C3 of the Code recommends that non-executive directors or supervisory board members should not be executive directors or management board members of the company or associated company and for them not to have held such a position over the course of the past five years. A "cooling off" period is, therefore, recommended during the time a person discharges the executive and supervisory functions. An immediate transition from the management board to the supervisory board may bring about the situation of a supervisory board member dealing with the consequences of their own decisions. Experience further shows that an immediate transition of a member and especially the chairman of the management board to the ranks of supervisory board member sometimes causes less than optimum relations within the supervisory board or between the supervisory board and management board. This is that much more problematic if the former chairman or member of the management board becomes the chairman of the supervisory board.

The recommendation creates more difficulties in the part where it refers to "executive directors or members of the management board of associated companies". The Code defines the term “associated companies” in Appendix A.17[1]. In a somewhat simplified manner, we could summarise the definition by saying that companies associated with the company, for which the existence of a potential conflict of interest in accordance with the claim in this question is being determined, are usually companies that directly or indirectly (and alone or with related parties) hold equity investments of over 25 % in the company concerned as well as companies, in which the company concerned directly or indirectly holds an investment of over 25 %. Associated companies are therefore "subsidiaries", "sub-subsidiaries" and other hierarchically lower-ranked group companies as well as the "parent company" and the hierarchically higher-ranked group companies. Associated companies further include "sister" companies or companies associated through common leadership. It should be noted that other deviations from the simplified rule are also possible in practice, meaning that it is necessary to verify whether the companies are considered to be part of the same group according to the Companies Act (hereinafter: ZGD-1).

b) ***I am not employed at the company or associated company and have not held such a position over the course of the past three years.***

Criterion b) from Appendix C3 of the Code recommends that non-executive directors or supervisory board members should not be employed at the company or associated company and for them not to have held such a position over the course of the past three years unless the non-executive director or supervisory board member is a higher-ranked company officer and was elected to the board of directors or the supervisory board as part of the workers' representation system that is recognised by law and if they at the same time also provide protection against abusive dismissal and other forms of unfair treatment. The purpose of this recommendation is to ensure the independence of supervisory board members from the management board. The recommendation is formulated in a somewhat complicated manner because it is taken from the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the management board or supervisory board (hereinafter: "Commission Recommendation"). The abovementioned Commission Recommendation is applied in Member States with

[1] Appendix A.17 of the Code: "Related parties: legally independent parties that are related to one other, either in terms of governance, capital or in some other manner, whereby such ties mean that they jointly formulate their business policy and act in concert to attain common business objectives; or in terms of one party being able to direct or significantly influence the other party in decision-making on matters of finance and operations; or in terms of one party's operations or operating result significantly influencing the other party's operations or business results. Related parties are deemed to be especially the persons that are related as close family members; a party or parties, which are deemed to be related parties and which collectively, indirectly or directly participate in another party; by the same party or parties, which are deemed to be related parties, participating in both parties; by forming a group of companies under the act governing companies as members of the management or supervisory bodies or procurators or employees under an employment contract, to which the tariff section of the collective agreement does not apply, with the company, in which they discharge such a function or in which they are employed; and close family members of such a person."

different legal systems. In Slovenia, the Employment Relationship Act in conjunction with the Worker Participation in Management Act provides relevant protection to workers' representatives on the supervisory board. This is why such persons do not have a potential conflict of interest even though they are employed at the company provided they are not "senior management". The term "senior management" is unfortunately not clearly defined in the Code or in Slovenian legislation and theory. Senior management by all means usually includes the management (management board) as well as the so-called expanded management at the company. These are employees who are not legal representatives of the company, but hold managerial powers and may to a certain extent also take decisions independently.

If workers' representatives are not part of senior management, they shall mark TRUE even though they are employed at the company. Shareholders' representatives who are employed at the company shall always mark FALSE.

c) *I do not receive significant additional remuneration from the company or an associated company apart from a fee received as supervisory board member.*

Criterion c) from Appendix C3 of the Code recommends that a supervisory board member should not receive, or have received, significant additional remuneration from the company or an associated company apart from a fee received as supervisory board member. Such additional remuneration covers in particular any participation in a share option or any other performance-related pay scheme; it does not cover the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company (provided that such compensation is not contingent in any way on continued service).

The recommendation is a derivation or expansion of the first part of the definition of the conflict of interest; conflict of interest exists when the impartial and objective performance of tasks or decision-making of a supervisory board or management board member is compromised on account of their personal economic interests.

This recommendation is more relevant in certain other EU countries than it is in Slovenia. It namely treats mainly profit participations, share schemes, and stock options that have not been in use in Slovenia in recent years. The only method of additional remuneration that was extensively used in the past and which is covered by this criterion were profit participations that are now prohibited by law.

When discharging their supervisory function, a supervisory board member must act autonomously, independently, and exclusively to the benefit of the company. Such supervisory independence could be compromised if the member were to receive (in addition to the remuneration for their supervisory function) larger additional remuneration from the

company. Making remuneration dependent on the company's results does indeed seem elegant at first glance, but is not an optimum solution for supervisory boards. One of the main tasks of supervisory boards is to ensure suitability of financial indicators. It is, therefore, not the most appropriate option for the remuneration or reward system to be linked to the supervisory board members' personal economic interest in the contents of financial statements. It is appropriate for management board members to be rewarded in this manner, while the supervisory board must prudently and, as appropriate, critically weigh their eligibility to such rewards, whereby the remuneration of the members according to the same mechanisms may again represent a reason for the conflict of interests.

The question that arises is what such remuneration should be in order to be considered to represent significant additional remuneration. It is certainly remuneration that a member receives for work within the supervisory board, remuneration for memberships in committees, chairing and as an addition to meeting attendance fees and other (travel) expenses. The text of the Code does not mention what "significant" remuneration means, not even by way of example. When determining what significant remuneration means, both the company's point of view and the member's personal point of view must be taken into account.

In line with this criterion, the Code indicates the following as additional remuneration:

- Remuneration in the form of any participation in stock options;
- Remuneration in the form of participation in any performance-related payment schemes.

These two schemes do not comply with the supervisory board member remuneration method recommended under point 12.1 of the Code[2].

The Code excludes certain types of payments from such additional remuneration, i.e.:

- Amounts that a supervisory board member receives as part of the retirement scheme (including deferred compensation) for prior service with the company.

These amounts are not considered to represent additional significant remuneration and do not represent a reason for the conflict of interest only under the condition that such compensation is in no way dependent on the continuation of the performance of the supervisory function. Taking into account that supervisory board members in Slovenia are generally not included in any pension schemes associated with the supervisory board member function, this will probably not represent difficulties in interpretation.

[2] 12.1 Aside from attendance fees, members of the supervisory board are also entitled to remuneration for discharging their function in the amount set by the general meeting. Members of the supervisory board receive strictly cash payments and their remuneration may not be directly dependent on the company's performance as disclosed in the company's financial statements.

If the case involves pension schemes or employment-related remuneration, the supervisory board member shall mark **TRUE** provided they have already marked the same reply under criterion b).

d) ***I am not and do not represent in any way the controlling shareholder(s).***

Criterion d) from Appendix C3 of the Code recommends that supervisory board members should not be or represent controlling shareholders. As regards the meaning of control, this criterion refers to examples in Article 1 of Council Directive 83/349/EEC.

Shareholders appoint the supervisory board and entrust it with supervising the work of the management board. Supervisory board as well as management board members are guided by the principle of action to the benefit of the company, whereas shareholders have their own interests and objectives. The shareholders' strongest interest is certainly the economic one as they invest their own capital in a legal entity and, therefore, expect (the maximum possible) profit. Shareholders may have differing interests or these interests may be of different intensity for individual shareholders. The abovementioned interests may also deviate from the company's interests, which is why it is important for the supervisory board members not to be overly influenced by the shareholders' interests.

This criterion consequently recommends that supervisory board members should not simultaneously be controlling shareholders and neither their representatives because their judgement would in such a case be overly influenced by other interests and not only by the company's interests.

The first explanation is required in regard to the question of what it means to be a representative. Shareholders' representatives can never be all of the supervisory board members, for whom an individual shareholder has voted. In such a case, the representative would be the shareholder's legal representative.

The other question is that of who is considered to be a controlling shareholder. In this regard, the criterion invokes examples from Article 1(1) of Council Directive 83/349/EEC of 13 June 1983[3]. The above directive defines the rules for the consolidation of financial

[3] Point 1(1) of Council Directive 83/349/EEC reads: A Member State shall require any undertaking governed by its national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking):
(a) Has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or
(b) Has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; or
(c) Has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent undertaking must be

statements and has been transposed into the ZGD-1. In simplified terms, we can say that a shareholder is considered to be a controlling shareholder if they hold the majority of voting rights, if they control the company based on an enterprise contract or if it controls the company in practice through other reasons. The concrete judgement in such a case depends on the ties involved in a particular case. It should be noted in this regard that awkward reference when making the judgement means that criteria need to be applied that define the determination of control or the fact that a company is a parent company when it comes to the question of the requirement of consolidated accounts under the financial reporting section of the ZGD-1 (Article 56) and not the criteria from the ZGD-1 section dealing with associated companies[4].

e) ***I do not have, or have not had within the last year, a significant business relationship with the company or an associated company, either directly or as a partner, shareholder, director, or senior employee of a body.***

Criterion e) of Appendix C3 of the Code recommends that supervisory board members should not have, or should not have had within the last year, a significant business relationship with the company or an associated company, either directly or as a partner, shareholder, director, or senior employee of a body having such a relationship. Business relationships include the situation of a significant supplier of goods or services (including financial, legal, advisory, or consulting services), of a significant customer, and of organisations that receive significant contributions from the company or its group.

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a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision; or
(d) Is a shareholder in or member of an undertaking, and:
(aa) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated accounts are drawn up, have been appointed solely as a result of the exercise of its voting rights; or
(bb) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. The Member States may introduce more detailed provisions concerning the form and contents of such agreements. The Member States shall prescribe at least the arrangements referred to in (bb) above.
They may make the application of (aa) above dependent upon the holding's representing 20 % or more of the shareholders' or members' voting rights. However, (aa) above shall not apply where another undertaking has the rights referred to in subparagraphs (a), (b), or (c) above with regard to that subsidiary undertaking.

[4] The second paragraph of Article 56 of the ZGD-1 says:
A company is the parent company of another company if one of the following conditions is fulfilled:
1. it has the majority of the voting rights in the other company;
2. it has the right to appoint or discharge the majority of members of the management or the supervisory board and is, at the same time, a member of the other company;
3. it has the right to exercise control over the other company on the basis of an enterprise contract or on other legal grounds; or
4. it is a member of the other company and, on the basis of an agreement with other members of this company, it controls a majority of the voting rights in this company.

Just as under criterion c), this criterion involves the conflict of interest for reasons of a personal economic interest or other interests, especially the interests of another legal entity and indirectly the personal economic interest. The potential conflict of interests arises from the fact that a supervisory board member who has a significant business relationship with the company either directly or indirectly has at some point supervised the transactions performed with themselves or with the company, in which they hold an important function. In addition to the above, the relationship of the supervisory board member with the management board, which signs contracts with the former in regard to the business cooperation that is important for the member, could be different than it would be otherwise.

The Code lists examples of these business relationships.

- Position of a significant supplier of goods or services, including financial, legal, advisory, or consulting services;
- Position of a significant customer; and
- Position of organisations that receive significant contributions from the company or its group.

The Code does not, however, explain the meaning of the term *significant* business relations. Whether these relationships are significant should again be weighed from two points of view. The first is the company's point of view, which means that we judge whether the said relationships are of significant importance for the company's financial and other operations and thus affect the company's position and performance on the market. The second is the point of view of the supervisory board member. What needs to be ascertained are the importance and weight of such relationships in regard to the personal economic situation of the supervisory board member or the company, in which the member is a shareholder, director, partner, etc., or of another person associated with the former. This second subjective point of view namely directly affects the extent, to which such business relationships can influence the supervisory board member.

The Code limits significant business relationships in terms of time to the current state-of-affairs and the preceding three years.

f) ***I am not, or have not been within the last three years, partner or employee of the present or former external auditor of the company or an associated company.***

Just as criterion f) from Appendix C3 of the Code, this statement recommends that supervisory board members should not be, or have been within the last three years, partner

or employee of the present or former external auditor of the company or an associated company.

The external auditor is proposed to the general meeting by the supervisory board. In accordance with the recommendations of the Code, the supervisory board carries out an interview with the auditor, cautions them as to the special features, and works with them during the audit in line with its powers. The audit must be performed professionally and objectively as well as in accordance with the accounting standards, whereas supervisory board members may not or must not rely solely on the auditor's opinion despite all of the above as they are obliged to make their own judgement as to the annual report. The annual report reviewed by the auditor is confirmed by the supervisory board, whereby such confirmation is considered to mean that it has been adopted.

In view of the above, it is important that the external auditor has no personal relations with supervisory board members. Supervisory board members propose the appointment of the auditor to the general meeting and also critically weigh the auditor's work.

Supervisory board members thus may not be partners or employees of the current or former auditor. The same applies to associated companies. In terms of time, this limitation applies to the current period and the preceding period of the last three years.

g) ***I am not an executive director or management board member in another company in which an executive director or management board member of the company is a supervisory board member. I also do not have other links with executive directors or management board members of the company through involvement in other companies or bodies.***

This statement is also expressly summarised from criterion g) from Appendix C3 of the Code. It recommends that supervisory board members should not be executive directors or management board members of another company in which the executive director or management board member of the company is a supervisory board member and should also not have other links with executive directors or management board members of the company through involvement in other companies or bodies.

Criterion g) thus represents a so-called "interlocking" situation. It is somewhat awkwardly phrased and causes certain difficulties in understanding in practice. The crucial aspect of interlocking is the mutual association between management board and supervisory board members of two companies. A supervisory board member may not simultaneously be a member of a management body of another company, in which the management board member is at the same time a supervisory board member. The above situation of direct

interlocking has been prohibited in Slovenia in indent 3 of Article 273 of the ZGD-1[5]. Indirect interlocking represents a special challenge. It happens in practice that three or more companies feature in a case of interlocking. In such a case, a management board member of company A is simultaneously a supervisory board member of company B. A management board member of company B is simultaneously a supervisory board member of company C and management board member of company C is simultaneously also a supervisory board member of company A.

The law does not prohibit this; however, such a situation undoubtedly meets the criterion of the second part of the statement and represents work in other companies or bodies meaning that supervisory board members have other links with executive directors or management board members of the company. In this and in comparable cases, it is, therefore, necessary to mark FALSE.

h) ***I have not served on the supervisory board for more than three terms (or, alternatively, more than 12 years).***

Criterion h) from Appendix C3 of the Code recommends that supervisory board members should not have served on the supervisory board for more than three terms (or, alternatively, more than 12 years where national law provides for normal terms of a very small length).

Criterion h) limits membership in a concrete supervisory board in terms of time. The wording of this criterion is also summarised from the Commission Recommendation with the correction of the manifest error of the translation of said recommendation that recommends 3 years (the correct translation is 3 terms) or more than 12 years where national law provides for normal terms (what is meant is the duration of the term) of a very small length[6].

In Slovenia, the term of office is laid down in the first paragraph of Article 255 of the ZGD-1: Members of management or supervisory boards shall be appointed for a period of time which is laid down by the articles of association and which may not exceed than six years with the possibility of reappointment. The maximum period of the term of office in Slovenia is thus 6 years. Members who serve on the supervisory board for more than 12 years (irrespective of the timeframe of the term of office) must mark FALSE.

i) ***I am not a close family member of management board members or of persons in the situations referred to under criteria (a) through (h).***

[5](1) A supervisory board member may not be:
…- a member of the management board of another company in which a member of the management board of this company serves as a member of the supervisory board;

[6] See Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (Text with EEA relevance) (2005/162/ES).

Criterion i) relates to the existence of the conflict of interest arising from the inclusion of the interests of the family and its emotions. There are strong emotional ties and common, shared interests between close family members. Both of these, of course, affect the work of a supervisory board member whose interests could come into conflict with those of the company on the one hand and with those of the close family members on the other, and thus potentially with their own personal interests.

Criterion i) thus prescribes that supervisory board members may not be close family members of management board members and extends the applicability of all of the abovementioned dependence criteria to close family members of supervisory board members.

The question that arises is which persons should be considered to be close family members. The Code does not provide a definition of the term close family member, while individual acts provide differing definitions of said term[7]. The contents of the Companies Act contain the term close family member, but not a definition of said term. The term close family member may undoubtedly include family members according to the definition of a family in the Marriage and Family Relations Act: spouses, including common-law partners, and children, including children born out of lawful matrimony, and adoptees whom a person is obliged to maintain under the law and whom they have actually maintained. Because family ties can differ significantly from one family to another, it would be appropriate for an individual supervisory board member to warn of any family ties with management board members or other person referred to under this criterion, and the supervisory board should ascertain whether the nature of the family ties is such that could make such a person a close family member.

In accordance with this criterion, supervisory board members may not be close family members of:

- The members of the management board and executive directors, and the members of the management board and executive directors of related parties;
- Employees at the company or associated company;
- Majority shareholders;
- Partners, shareholders, directors or senior staff, with whom the company, in which such a person holds the function of supervisory board member, has a significant business relationship;
- Partners or employees of the current or former external auditor of the company or associated company.

[7] The Register of Deaths, Births, and Marriages Act thus considers the spouse, children and parents of the deceased to represent close family members, while the Civil Tax Act considers the spouse, children, and adoptees of the owner to represent close family members, etc.

In addition to the cases referred to in the preceding recommendation, a conflict of interest may also arise for a supervisory board member if:

- They are a member of expanded management of an associated company;

- They have taken part in the drafting of the contents of the proposed annual report of the company.

The statement additionally indicates the above situations as a potential conflict of interest, i.e. when a supervisory board member is simultaneously a member of expanded management of an associated company and when they have taken part in the drafting of the contents of the proposed annual report of the company.

The term “expanded management” of an associated company must be interpreted sufficiently broadly. Expanded management undoubtedly includes members of management bodies, but not exclusively them. Point A.21 of the Code defines expanded and core management of a company as expanded and core management as defined in the company's internal acts.

A supervisory board member is also considered to be dependent if they have taken part in the drafting of the contents of the proposed annual report of the company. The supervisory board must verify the compiled annual report and the proposal for the appropriation of distributable profit submitted by the management board. The supervisory board must review the annual report and the bases for it, and draft a written report for the general meeting. A supervisory board member who was to simultaneously take part in the compilation of the company's annual report would thus actually review their own work. It is for this reason that supervisory board members may not take part in the drafting of the contents of the company's annual report. Because supervision of the annual report is one of the principal tasks of the supervisory board, the question arises of whether it is prudent for such a supervisory board member to even keep their function or whether it would be best for them to resign or to be recalled, which is indicated by the practice of Slovenian courts that have in the past also found such situations to be illegal.

Other potential conflicts of interest

None of the recommendations can encompass all of the circumstances that could arise in practice. This is why the last part of the statement is intended for other conflicts of interests that are not comprised in statements a) through i). It first provides a definition of the conflict of interest as defined in the Code:

Conflict of interest exists when impartial and objective performance of tasks or decision-making of a member of the supervisory board or management board is compromised by their personal economic interest, interests of the family, its emotions, political or national sympathy/aversion or any other associated interest with another natural person or legal entity.

The question that arises; therefore, is whether any other fact not indicated in statements a) through h) affects decision-making in accordance with the above definition of the conflict of interest. Every supervisory board member must himself or herself ascertain whether such conflicts of interest exist in their case.