

**CONFLICTS OF DIRECTORS INTERESTS WITH THE INTERESTS OF THE
COMPANY IN THE CONTEX OF FINANCIAL AND ECONOMIC CRISIS
(a comparative overview of some EU countries)**

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Abstract

The article presents a **comparative analysis** of the legal regulation of the conflict of interests in some EU member countries.

The financial crisis is to an important extent attributed to failures and weaknesses in corporate governance legislation. The importance of **independent and disinterested board oversight**, is more than obvious. It is essential, but often neglected in large (financial) companies.

Potential weaknesses in **board composition** are apparent and lead to conflict of interest. The issue of the legal regulation of directors **conflict of interest** is becoming more and more important.

In conducting business, members of the Management and Supervisory board, under most of the EU countries companies are subject to a **non-competition obligation and conflict of interest rules**.

In key areas where directors clearly have **conflicts of interest** (i.e. remuneration of directors, and supervision of the company's accounts) decisions in listed companies should be made exclusively by **non-executive or supervisory directors** who are in the majority independent.¹

Generally, **corporate governance codes** (but not companies acts) adopted in EU Member States agree on the need for a significant **proportion of non-executive or supervisory directors** to be independent (the absence of close ties with management, controlling shareholders and the company itself), i.e. free from any material conflict of interest.

Key words: conflicts of interest, non-executive directors, independent directors, disinterested directors, board composition, non-competition obligation, director's duties,

General on Company law in Europe

EU Company law is lagging behind² the developments in the EU and world economy. In discussion on the future of the EU company law it is inevitable to take into account

¹ The EU Commission's position as to the role of non-executive or supervisory directors in its Action Plan1 adopted on 21 May 2003, EUROPEAN COMMISSION, Internal Market Directorate General, Brussels, 5 May 2004, Recommendation on the role of (independent), non-executive or supervisory directors, Consultation document of the Services of the Internal Market Directorate General.

the financial and economic crisis that challenges business environment over the last years. It is obvious that weaknesses and malfunctions in EU company law have attributed crisis.

A number of legal solutions about the functioning of financial markets including those regulating the issues directors' disqualification and of the conflicts of interest arising between shareholders and managers and those between shareholders and creditors, turned out as weak and therefore inappropriate and obsolete.

Harmonization can provide common rules and standards or it can remove obstacles. The choice of legal instrument ranges from directly binding regulations over directives necessitating national implementation.³

Mere recommendations are not sufficient any more in the fields like conflict of interest and directors' disqualification. To be honest, there are some binding regulation (directives) having been implemented to national legislations, especially in the field of financial market regulation, but this does not correspond the emerging needs, caused by crisis circumstances and aiming to overcome them⁴.

Harmonization in the field of **conflict of interest and directors' disqualification** would make cross-border business operations in the EU market more transparent and contribute sufficient safeguards against abuse, and prevent that people engaged in abuse in one Member State may continue to carry on their abuse in another Member State.

General on Conflicts of Interest

Definition of the Conflict of Interest

Conflict of interest is the situation, when a person's impartial and objective performance of duties or decision-making, within the function he/she is performing, is jeopardized because personal business interests are involved, or the family's interests, his emotions, political or national (favorable or unfavorable) disposition or any other related interests with other natural or legal persons.

² The last comprehensive analysis of European Company Law (Action Plan for Modernising Company Law in the EU) was presented 10 years ago, in the year 2002

³ Report of the Reflection Group On the Future of EU Company Law, Brussels, 5 April 2011

⁴ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse); Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC; Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

A conflict of interest therefore exists when personal business interests, or the family's interests, emotions, political or national disposition or any other related interests are involved in managerial decisions. A conflict of interest is an impediment to voting and directors should disclose and explain it⁵. It, in serious cases, if it is not prevented, it negatively affects efficiency and transparency of corporate governance. It is an ethical issue, but not just ethical; it could threaten good practices in corporate governance and cause enormous economic damages.

Rules to Eliminate and Prevent Conflicts of Interest

Generally, directors are subject to a non-competition obligation and directors' disqualification and conflict of interest rules during and even after their employment.

Diverse rules to eliminate and prevent **conflicts of interest** and to strengthen independence, objectivity and effectiveness in particular for listed companies are widely enacted at the EU level not so much in the laws but extensively in corporate governance codes of the EU member countries.

It is for instance recommended (not legally binding stipulated), that in the key areas where Executive Directors clearly have conflicts of interest (i.e. remuneration of Directors, and supervision of the company's accounts), decisions in listed companies should be made exclusively by Non-Executive or Supervisory Directors who are in the majority independent⁶.

EU member's countries' company law in this field is not harmonized; there are separate and very diversified national pieces of legislation in this regard. Legal regulation on conflict of interest at EU level is mainly in the form of recommendations which leave to the member countries to decide either to implement the recommended concepts by legislation or merely in corporate Governance Codes.

Unfortunately the voluntary principle "comply or explain"⁷ in corporate governance codes, has been widely applied rather than legislative implementation in EU member countries, what appears not to be the most appropriate way of regulation, especially not in the times of world economic and financial crisis.

⁵ See in detail: Profile of Independent Non-Executive or Supervisory Directors, Annex II to Recommendation of 2005 on Non-Executive or Supervisory Directors.

⁶ The EU Commission's position as to the role of non-executive or supervisory directors in its Action Plan¹ adopted on 21 May 2003, European Commission, Internal Market Directorate General, Brussels, 5 May 2004, Recommendation on the role of (independent), non-executive or supervisory directors, Consultation document of the Services of the Internal Market Directorate General.

⁷ Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States, accessible on http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf. showed that the informative quality of explanations published by companies departing from the corporate governance code's recommendation is - in the majority of the cases - not satisfactory and that in many Member States there is insufficient monitoring of the application of the codes.

See also: GREEN PAPER: The EU corporate governance framework Brussels, 5.4.2011 COM(2011) 164 final.

A number of **recommendations covering different aspects of conflict** of directors interest were issued by the EU, instead of implementing this concepts to binding by legal framework (like EU directives or EU regulations), such as:

- the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board,
- appropriate regime for the remuneration of directors of listed companies and remuneration policies in the financial services sector,
- statutory auditors' independence, external quality assurance for statutory auditors and audit firms, auditing public interest entities and the limitation of the civil liability of statutory auditors and audit firms.⁸

Harmonized and legally binding regulation of the criteria for the directors' conflict of interests and the directors' disqualification, applicable across the EU, would by no doubt, contribute significantly to transparency in cross-border mobility.

Independent Directors

Independent (disinterested) directors are directors with no influence on their impartial, professional, objective, honest and complete assessment in carrying out his/her duties as directors. Directors are deemed dependent if they have a business relationship or if they are personally or in some other way **closely connected** with the company or its management.

Generally, corporate governance codes (rather than companies acts) adopted in EU Member States agree on the need for a significant proportion (mostly majority) of Non-Executive or Supervisory Directors to be **independent** (the absence of close ties with management, controlling shareholders and the company itself), i.e. free from any material conflict of interest.

Directors should act **independently**, with no influence on their impartial, professional and complete assessment in decision making, while carrying out their duties. Directors are deemed **dependent** if they have a business relationship through which

⁸ 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) (OJ L 52, 25.2.2005, p. 51–63).

Recommendation on the Role of (Independent), Non-Executive or Supervisory Directors, Consultation document of the Services of the Internal Market Directorate General, European Commission, Internal Market Directorate General, Brussels, 5 May 2004.

Commission Recommendation of 6 May 2008 on external quality assurance for statutory auditors and audit firms auditing public interest entities (notified under document number C(2008) 1721).

Commission Recommendation of 16 May 2002 – Statutory Auditors' Independence in the EU: A Set of Fundamental Principles (text with EEA relevance) (notified under document number C(2002) 1873) (OJ L 191, 19.7.2002, p. 22–57).

Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (text with EEA relevance) (2004/913/EC).

Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms (notified under document number C(2008) 2274) (text with EEA relevance) (OJ L 162, 21.6.2008, p. 39–40).

Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector (text with EEA relevance) (OJ L 120, 15.5.2009, p. 22–27).

they are personally or in some other way closely connected with the company or its management.

According to EU Recommendation on the role of non-executive or supervisory directors of listed companies, Non-executive or Supervisory Directors should be independent and free of conflicts⁹. But this is again only recommendation and not binding legal rule. In addition "independence" is differently defined in the various EU Member States. In some Member States this would require independence from the company and any of its stakeholders, including the shareholders, while in other EU Member States independence from shareholders is not required and may even not be deemed desirable¹⁰.

Conflicts of Interest in German AktG and Corporate Code

Competition Clause

Apparently almost the only set of legally binding rules in the field of conflict of interest is related to ban of competition. A member of the Management Board may not, without the **permission of the Supervisory Board**, conduct **any kind of commercial business** or undertake individual transactions in the same type of business as the company; he or she may not, without permission become a director or active manager of any other company or firm.

If a member of the Management Board violates such prohibition, the company may claim damages or require that the member treat such transactions made on behalf of the company (competition clause, §88 AktG).

Granting credit to members of the Management Board

Another legally binding provision of the German company law, refer to credits granted to the Management Board member. Para. 89 of the AktG (Grant of Credit to Members of the Management Board) stipulates that the company may grant **credit to members** of the Management Board only pursuant to a **resolution of the Supervisory Board**.

In addition a controlling company may grant credit to legal representatives, registered authorised officers (Prokuristen) or General Managers of a controlled company only with the **consent** of its Supervisory Board; a controlled company may grant credit to legal representatives, registered authorized officers (Prokuristen) or General Managers of the controlling enterprise only with the consent of the Supervisory Board of the controlling enterprise. The same also apply to credits to the **spouse or a minor child** of a member of the Management Board, or other legal representatives,

⁹ 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/EC), hereinafter referred to as Recommendation of 2005 on non-executive or supervisory directors.

¹⁰ Report of the Reflection Group On the Future of EU Company Law, Brussels, 5 April 2011

registered authorized officers (Prokuristen) or General Managers. There other detailed statutory provisions, referring to the relations in which credit may be granted only with the consent of the Supervisory Board;

In addition, there are several rules on conflicts of interests in the German corporate governance Code, which are non binding recommendation of professional ethics.¹¹ (hereinafter Gcg Code). Gcg Code stipulates that during their employment for the enterprise, members of the Management Board are subject to a comprehensive non-competition obligation.

Prohibition to Demand or Accept Benefits from Third Parties

There are no legal rules in German AktG, regarding benefits from third parties. **Prohibition to demand or accept payments** from third parties is in German law **not a legal** but rather code's professional ethical recommendation.

According to Gcg Code, Members of the Management Board may not, in connection with their work, demand nor accept from third parties payments or other advantages for themselves or for any other person nor grant third parties unlawful advantages.

Members of the Management Board are legally bound to act in the company's best interests. But the provision, that no member of the Management Board may pursue personal interests in his decisions or use business opportunities intended for the enterprise for himself is not legal but ethical (Gcg Code).

Disclosure of Conflicts of Interest

According to Gcg Code (but not GAktG), all members of the Management Board have to disclose conflicts of interest to the Supervisory Board and inform the other members of the Management Board thereof.

Members of the Management Board may take on sideline activities, especially Supervisory Board mandates outside the enterprise, only with the approval of the Supervisory Board (Gcg Code).

But on the other hand, there is the AktG provision, that important transactions require the approval of the Supervisory Board. But it is up to shareholders to decide which are the transactions, subject o approval; they are not listed by the law.

Conflicts of Interest in Austrian AktG and Corporate Governance Code

Prohibition of Competition

Prohibition of Competition is the legal (AAktG) obligation of Austrian directors. According to para. 79. of the Austrian AktG, (Prohibition of Competition) the members of the Management Board are not entitled to carry on a trade or to enter into any

¹¹ German Corporate Governance Code, as amended on June 12, 2006, Government Commission German Corporate Governance Code.

business transactions for their own accounts or the accounts of others (or act as general partner for any other trading company) that fall within the company's scope of business, unless the **Supervisory Board gives its approval** thereto.

In case of violation of this prohibition, the company is entitled to claim damages or instead demand that the member turn over to the company the transactions entered into for his own account and any remuneration earned from transactions made for the account of others or to assign any of his rights to such remuneration.

Disinterested Business Judgment

On the other hand, the concept of disinterested business judgement is defined in the Austrian corporate Governance Code. There is no strict legal rule on prohibition of the conflict of interest.

According to the ACGC, the Management Board makes its decisions without being influenced by its own interests or the interests of controlling shareholders, on the basis of the facts and in compliance with applicable laws.

The Austrian CGC (rather than AAktG) further says that the members of the Management Board must disclose to the Supervisory Board any material personal interests in transactions of the company and group of companies as well as any other conflicts of interest. Furthermore, they must also immediately inform the other members of the Management Board. Disclosure of any material personal interests in transactions of the company is therefore **not legal obligation** of Austrian directors.

Prior Approval of the Transactions between the Company and the Members

All transactions between the company or a group company and the members of the Management Board or any persons or companies with whom the Management Board members have a close relationship must be in line with common business practice.

The transactions and their conditions must be approved in advance by the Supervisory Board with the exception of routine daily business transactions (AAktG and ACGC). Approval by the Supervisory Board or the competent committee is required before a Management Board member may accept a position on the board.

The approval of the Management Board is required for any sideline business undertaken by senior management (ACGC).

Conflict of Interests in French Law and Corporate Governance Recommendations

Prior Consent of the Board of Directors

There are a number of very precise provisions to avoid conflicts of interest in French company law. According to French Law on Commercial Companies (f LCC), prior

consent of the Board of directors is necessary for any agreement entered into, either directly or through an intermediary, between the company and:

- its general manager or one of its assistant general managers,
- one of its directors,
- one of its shareholders holding a fraction of the voting rights greater than 10% or, in the case of a corporate shareholder, the company which controls it.¹²

The same applies to agreements in which the above mentioned persons have an indirect interest. Agreements entered into between the company and another firm are also subject to prior consent if the company's general manager (assistant) or one of its directors is the owner, a liable partner, a manager, a director or a member of that firm's Supervisory Board, or is in any way involved in its management.

The said provisions of f LCC, Article 225-38 are not applicable to agreements relating to current operations entered into under normal terms and conditions (f LCC, Article L225-39).¹³

Agreements Subject to the Prior Consent of the Supervisory Board

Very similar provisions are laid down to avoid conflict of interest in the case of the **two-tier system in France**. Namely, subject to the prior consent of the Supervisory Board are any agreement entered into, either directly or through an intermediary, between the company and:

- a member of the Executive board (Directorate) or of the Supervisory Board,
- one of its shareholders holding a fraction of the voting rights greater than 10% or, in the case of a corporate shareholder, the company which controls it. The same applies to agreements in which a person has an indirect interest.

Agreements entered into between the company and another firm are also subject to prior consent if a member of the company's executive board (Directorate) or Supervisory Board is the owner, an indefinitely liable partner, a manager, a director or a member of that firm's Supervisory Board or, more generally, is in any way involved in its management (f LCC, Article L225-86).¹⁴

The provisions of Article 225-86 are not applicable to agreements relating to current operations entered into under normal terms and conditions. Such agreements are nevertheless made known to the President of the Supervisory Board by the interested party unless they are of no significance to any party, given their objective or their financial implications. A list of such agreements and their objectives is sent to the members of the Supervisory Board and to the auditors by the President (f LCC, Article L225-87).

¹² f LCC, Article L225-38.

¹³ Law No 2001-420 of 15 May 2001 Article 105 and Article 111 (5) Official Gazette of 16 May 2001, Law No 2003-706 of 1 August 2003 Article 123 (I) (1) Official Gazette of 2 August 2003.

¹⁴ Law No 2001-420 of 15 May 2001 111 (2) Official Gazette of 16 May 2001, Law No 2003-706 of 1 August 2003 Article 123 (I) (6) Official Gazette of 2 August 2003.

Prohibition for the Members of the Directorate to Obtain from the Company a Security or Guarantee

It is prohibited, in French company law, for members of the Directorate and non-corporate members to **obtain from the company a security or guarantee** from the company for any obligations they may contract to third parties. Any agreement to do so is void.

This prohibition applies to permanent representatives of corporate members of the Supervisory Board. It likewise applies to the spouses, ascendants and descendants of such persons, or any intermediary. Nevertheless, where the company operates as a banking or financial institution, the prohibition does not apply to ordinary transactions concluded on normal terms and conditions in the course of its business.

Disclosure and Approval as regards Remunerations, Contracts and Loans

According to Article L225-102-1,¹⁵ the annual report (referred to in Article L225-102) gives **details of the total remuneration and benefits** of all kinds paid to each executive during the financial year from the company and controlled companies. These provisions are applicable to companies whose shares are quoted on a regulated stock market, and for companies which are controlled by a company whose shares are quoted on a regulated stock market. The annual report also includes a list of all the posts and functions that each of those executives occupied in any company during the financial year.

Global **information on the remuneration** paid to senior employees must be given to the shareholders before the General Meeting. This must state the total remuneration paid to the 10 highest paid employees in companies with more than 200 employees and the total for the five highest paid employees in smaller companies; the total figure must be certified by the auditors (Article 168).

French Corporate Governance Recommendations

The French Corporate Governance Commission recommends **full disclosure** regarding the amounts and all forms and calculations of direct, indirect, or deferred compensation of individual executives and directors and the ten most highly compensated persons exercising management functions (including stock options in France or abroad, pension plans, and so forth).¹⁶

Contracts in which directors are interested must be **approved by the board**, notified to the auditors and submitted to the General Meeting. They will bind the company

¹⁵ Law No 2001-420 of 15 May 2001 Article 116 (I) Official Gazette of 16 May 2001, Law No 2003-706 of 1 August 2003 Article 138 Official Gazette of 2 August 2003.

¹⁶ 10. Jean-Pierre Hellebuyck's Commission on Corporate Governance, AFG-ASFFI, Recommendations on Corporate Governance, Adopted on 9 June 1998, Amended in 2001.

vis-a-vis third parties even if disapproved by the General Meeting, except in the case of fraud.

AFG¹⁷ notes that the Act of 21 August 2007 on Work, employment and purchasing power (loi TEPA) includes the AFG recommendation that all contracts relating to remunerations, allocations of compensation, payments, or other advantages that may be due to executive directors at the time they cease their employment or change functions, be presented in separate resolutions.¹⁸

Independent Directors

AFG recommends that at least one-third of the board be composed of members free from conflicts of interest; **this is therefore not a legal obligation** for the composition of the French Board. To be qualified as being free from conflicts of interest a Director must not be in a situation of a potential conflict of interest. In particular, therefore, he or she is recommended (this is not a legal obligation) **not to:**

- be a salaried employee or executive director of this company or of any company of the same group, nor have been in such a position at any time during the past five years;
- be a salaried employee or executive director of a significant shareholder of this company or of any company of the same group;
- be a salaried employee or executive director of a significant or frequent commercial, banking, or financial partner of this company or of any company of the same group;
- have been the auditor of the company during the previous five years; nor
- have been a board member of this company for more than 12 years.¹⁹

The French Corporate Governance Commission recommended, that at least one-third of the Board comprise independent directors. These directors should be 'free of any interest' in the company, which means they should have no conflicts of interest.²⁰

In the French Corporate Governance Commission's view, a Director **free of any interest is one without any direct or indirect tie to the company** or companies of the group and therefore may be reputed to participate with objectivity in board discussions. He must neither be now, or ever have been, an employee, nor chairman, nor chief executive of the company or of any company of the group. He must neither be a lead shareholder of the company nor of a company of the group, nor be related in any way to such a shareholder. Finally, he must not in any way whatsoever be related to a significant or regular commercial or financial partner of the group or of any group company.

¹⁷ AFG – Recommendations on corporate governance – 2010.

¹⁸ AFG – Recommendations on corporate governance – 2010.

¹⁹ AFG – French Recommendations on corporate governance – 2010.

²⁰ Jean-Pierre Hellebuyck's Commission on Corporate Governance, AFG-ASFFI, Recommendations on corporate governance, and Adopted on 9 June 1998 and Amended in 2001: Corporate governance commission recommendations define the independent director.

Therefore, a director free of any interest must be without any tie to the company; he or she must neither be an employee, nor chairman, nor chief executive, neither be a lead shareholder or in any way be related to a commercial or financial partner of the company.

All above mentioned rules of the French law, referring to independent directors and directors' free of conflict are rules of professional ethic, so **non binding recommendations**, rather than binding legal rules.

Conflicts of Interest in the UK Companies Act

Legal prohibition to have a Conflict of Interests in UK law

UK is the only of the analyzed countries, that imposes directors legal **prohibition to have a conflict of Interests**.

Directors under UK law are required not to put themselves in a position where there is a conflict between their personal interests and their duties to the company.

A director is an agent of the company. His position is similar to the position of a trustee who is not permitted to allow a conflict between his interests and those of the trust. That is why directors' powers to enter into contracts with the company are extremely limited. The directors are not allowed to put themselves in a position in which their interests and duties will be in conflict.

If they contract with the company, they must make **full disclosure** of all relevant facts referring to the contract to all members of the company, who then approve the contract. According to UK law, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interests at the meeting of directors of the company. In the case of a proposed contract, the declaration has to be made at the meeting of directors.

UK law requires directors of all companies, public and private, to disclose to the Board of Directors any interest, direct or indirect, which they may have, in transactions or arrangements with the company. The Articles cannot provide otherwise. The disclosure is required to be made only to the board and not to the General Meeting.

A director **has the duty to avoid conflicts of interest** (Section 175 the 2006 Companies Act). That means, a director of a company must avoid a situation in which he or she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company; it includes a conflict of interest and a conflict of duties. This applies in particular to the exploitation of any property, information or opportunity. This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

According to UK company law,²¹ directors are required not to put themselves in a position where there is a conflict between their personal interests and their duties to the company.

Companies Act 2006 contains several provisions designed to deal with situations in which a director has a conflict of interest. Provisions regulating directors' conflicts of interest fall into two main categories: requirements for disclosure to members, and requirements for member approval.²²

Requirements for Disclosure to Members in the 2006 Companies Act

According to Section 317, it is the duty of a director of a company (public and private) who is interested (directly or indirectly) in a contract or proposed contract with the company, to declare the nature of his interests.

In the case of a proposed contract, the declaration has to be made at the meeting of directors. That applies to shadow directors as well. The Articles cannot provide otherwise. The disclosure is required to be made only to the Board and not to the General Meeting.

Declaration of interest in an existing transaction or arrangement is also the duty of director of an UK company. Section 182 of the 2006 Companies Act requires a director to declare any interest (direct or indirect) that he or she has in any transaction or arrangement entered into by the company. Where a director of a company is in any way (directly or indirectly) interested in a transaction or arrangement that has been entered into by the company, he or she must declare the nature and extent of the interest to the other directors.

The declaration must be made, like with the proposed transactions, either at a meeting of the directors, or by notice in writing (section 184), or by general notice (section 185). If a declaration of interest proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

This rule does not require a declaration of an interest of which the director is not aware; but a director is treated as being aware of matters of which he ought reasonably to be aware.

Transactions Requiring the Approval of Members in the 2006 CA

There are four types of transaction requiring the approval of members in Companies Act 2006:

²¹ Companies Act 2006, Office of Public Sector Information.

²² Explanatory Notes, referring to the Companies Act 2006 (c.46) which received Royal Assent on 8 November 2006.

- long-term service contracts,
- substantial property transactions,
- loans, quasi-loans and credit transactions, and
- payments for loss of office.

This rule applies to the mentioned transactions entered into by a company and involving either a director of the company or a director of the company's holding company. In the latter case, the transaction must be approved by both, the company and the holding company. Approval is never required of the member of a wholly owned subsidiary. The member approval is an ordinary resolution of the shareholders' meeting, but the company's articles may require a higher majority or even unanimity.

Director's service contract (Section 188, as defined in Section 227) includes contracts of employment with the company, or with a subsidiary of the company. It also includes contracts for services and letters of appointment to the office of director. The contract may relate to services as a director or to any other services that a director undertakes personally to perform for the company or a subsidiary.

Directors' long-term service contracts are contracts under which a director is guaranteed at least two years of employment with the company of which he is a director, or with any subsidiary of that company.

Pursuant to Section 190 the following arrangements have to be approved by a resolution of the members of the company or have to be conditional on such approval being obtained (Substantial property transactions, sections 190 to 196):

- an arrangement under which a director of the company or of its holding company, or a person connected with such a director, acquires or is to acquire from the company (directly or indirectly) a substantial non-cash asset;
- an arrangement under which the company acquires or is to acquire a substantial non-cash asset (directly or indirectly) from such a director or a person so connected.

Members' approval is therefore required if the company buys or sells a non-cash asset, to or from:

- a director of the company or a person connected with a director of the company;
- a director of its holding company or a person connected with a director of its holding company.

Property transactions have to be substantial, namely if the value of the asset exceeds £ 100,000 or 10% of the company's net assets; no approval is required if the value of the asset is less than £ 5,000).

A company may not make a loan to a director of the company or of its holding company, or give a guarantee or provide security in connection with a loan made by any person to such a director, unless the transaction has been approved by a resolution of the members of the company.

If the director is a director of the company's holding company, the transaction must also have been approved by a resolution of the members of the holding company (Section 197 of Companies Act).

A company may not make a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the members of the company. According to the 2006 Companies Act, payment for loss of office means a payment made to a director or past director of a company by way of compensation for loss of office as director of the company.

Pursuant to Section 217, a resolution approving a payment for loss of office to a director must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought.

In addition, requirement of members' approval is needed for payment in connection with transfer of undertaking and payment in connection with share transfer.

Conflicts of Interests in Slovenian Law and Corporate Governance Code

Competition Clause

It is laid down in article 41 of the Slovenian CAct, that members of the Management Board and Supervisory Board of a public limited company and procurators may not participate in any of these roles or be an employee in any other company, or as an entrepreneur pursue an activity, which is or could present **competition to the activity of the first company**. The founding act of a company may provide that these restrictions also apply to shareholders in a public limited company; but it may also set conditions under which these persons may participate in a competing company.

In the case of violation of the ban on competition, the company may claim **compensation**; it may also require the offender to cede to the company any operations concluded for his own account as operations concluded for the account of the company, or require the offender to transfer to it any benefits from operations concluded for his own account, or to cede to the company his right to compensation (Article 42 S CAct).

The amendment to S SAct enacted in 2011 stipulate, that directors are legally obliged to get **approval of the Supervisory Board** when they do business with the company they own more than 10 % and **publicly disclose the business** done with the company, they own less than 10 %. Unfortunately, this amendments do not cover all other transactions, that could be done by directors.

Recommendation on Independent Directors in the Slovenian Corporate Governance Code

According to the Slovenian Corporate Governance Code (S CGC)²³ the word 'independence' means absence of influence on a person's impartial, professional, objective, honest and complete assessment in carrying out his/her duties or in decision making, within the function he/she is performing. Persons are deemed dependent if they have a business relationship, are personally or in some other way closely connected with the company or its management.

Conflict of interest under the S CGC exists when a person's impartial and objective performance of duties or decision-making, within the function he/she is performing, is jeopardized because personal business interests are involved, or the family's interests, his emotions, political or national (favorable or unfavorable) disposition or any other related interests with other natural or legal persons. A conflict of interest is an impediment to voting and the person disclosing it shall be required to explain it.

Recommended Duty of Loyalty and Immediate Disclosure

It is recommended by the S CGC, that the Management Board members **are loyal to their company** in all areas of their activity. In decision-making they must not put their own interests before those of the company or take advantage of the company's business opportunities for personal gain.

It is recommended by the S CGC (but not legally stipulated as binding), that the Management Board members **immediately disclose** the existence of any potential conflict of interest to the Supervisory Board and notify of it to the other Management Board members. Immediate disclosure of the existence of any potential conflict of interest for the Management Board members is therefore not a legal obligation under Slovene law.

It is recommended by the S CGC, that during his term of office, a Management Board member must **observe the competition clause and not perform any gainful activity** in the company's area of activity without the consent of the Supervisory Board; neither may he conclude transactions for his own or for the account of a third-party.

It is also only recommended (rather than being a legal obligation) by the S CGC, that Members of the Management Board may **not demand or accept from third parties any remuneration** in connection with their work, or enjoy other benefits for themselves or for a third party, or provide to third parties illegal benefits. All Transactions and Memberships are Recommended to be Publicly Disclosed

All legal transactions between the company and a Management Board member, as well as transactions between the company and persons or companies related to the member in whom he is personally involved are recommended to be concluded by observing the code of good practices and be publicly disclosed.

²³ 17.The Corporate Governance Code for Joint Stock Companies was jointly phrased and adopted by the Ljubljana Stock Exchange, Inc., Ljubljana, the Association of Supervisory Board Members of Slovenia, and the Managers' Association of Slovenia on 18 March 2004, agreeing on adopting its amendments on 14 December 2005 and 5 February 2007.

It is also only recommended, that a Management Board member should accept memberships in Supervisory Boards or Boards of Directors in companies that are not associated to his company only after having **informed of it to the President** of the Supervisory Board of the company in which he is a Management Board member.

It is also only recommended, that in its annual report, a company should disclose the memberships of Its Management Board members in management or supervisory bodies of non-associated companies,

It is recommended by the sCCG that each Management Board member should thoroughly, accurately and promptly inform the president of all major events and developments of individual transactions in the areas for which he is responsible.

Summary on Conflict of Directors' Interests under UK, German, French, and Slovenian Law

Summary on Duty to avoid Conflict of Directors' Interests

Unlike other analyzed company legislation, under UK law the director **has the duty to avoid conflicts of interest**. This applies in particular to the exploitation of any property, information or opportunity. Directors are required not to put themselves in a position where there is a conflict between their personal interests and their duties to the company.

In other legislations, it is more or less generally said, that the Management Board members are loyal to their company in all areas of their activity. In decision-making they must not put their own interests before those of the company or take advantage of the company's business opportunities for personal gain.

Members of German (Austrian, Slovene) Management Board are legally bound by **the enterprise's best interests**. But it is only the German (Austrian, Slovene) Corporate Governance Code's recommendation (and not legal obligation, like is in UK and France), that all members of the Management Board have to disclose conflicts of interest to the Supervisory Board and inform the other members of the Management Board thereof.

It is only recommended by Codes (but not legally stipulated as binding), that the Management Board members **immediately disclose the existence of any potential conflict of interest** to the Supervisory Board or notify it to the other Management Board members. Immediate disclosure of the existence of any potential conflict of interest for the Management Board members is therefore not a legal obligation under these legislations.

Summary on prohibition of competition and benefits from third parties

There are exact legal rules on prohibition of competition in the **German, Austrian and Slovene** corporate Laws and Codes (but not in French and UK); the rules stipulate that members of the Management Board are subject to a comprehensive non-competition obligation.

It is only German Corporate Code recommendation (and not legal provision), that members of the Management Board may not, in connection with their work, **demand nor accept from third parties any benefits** like payments or other advantages for themselves or for any other person, nor grant third parties unlawful advantages. This is a very strong legal prohibition under UK Law.

It is also only recommended (rather than being a legal obligation) by the Slovenian Code, that Members of the Management Board may not demand or accept from third parties any remuneration in connection with their work, or enjoy other benefits for themselves or for a third party, or provide to third parties illegal benefits.

Summary on Approval of Important transactions

Members of the Management in Germany and Slovenia are not prohibited to take on **competitive and other sideline activities outside the enterprise** (as they are in UK and France) but they need the approval of the Supervisory Board (ActG and Gcg Code).

There are a number of very precise provisions to avoid conflicts of interest in **French** company law. According to French Law, prior consent of the Board of directors is necessary for any agreement entered into between the company and its general manager or one of its assistant general managers, one of its directors, or one of its shareholders holding a fraction of the voting rights greater than 10%.

Agreements entered into between the company and another firm are also subject to prior consent if the company's general manager (assistant) or one of its directors is the owner, a liable partner, a manager, a director or a member of that firm's Supervisory Board is in any way involved in its management.

Very similar provisions are laid down to avoid conflict of interest in the two-tier system. Namely, subject to the prior consent of the Supervisory Board, any agreement entered into, must be between the company and a member of the Executive board (Directorate) or of the Supervisory Board or one of its shareholders holding a fraction of the voting rights greater than 10%.

Important transactions in all countries but UK, require the approval of the Supervisory Board, but the respective transactions are not legally defined in Germany and Slovenia (as they are in Austria and France), but left to shareholders.

Summary on Requirements for Disclosure

In the majority of the analyzed EU countries, **directors must make full disclosure** of all relevant facts referring to the contract on his own behalf in the field of companies object. But only in some legislation it is the legally binding provision rather than code recommendation.

Declaration of interest in existing transaction or arrangement under UK Law requires a director to declare any interest (direct or indirect) that he or she has in any transaction or arrangement entered into by the company.

There are four types of transaction requiring the approval of members in Companies Act 2006: long-term service contracts, substantial property transactions, loans, quasi-loans and credit transactions and payments for loss of office.

According to French law, the annual report gives details of the total remuneration and benefits of all kinds paid to each executive during the financial year from the company and controlled companies. The annual report also includes a list of all the posts and functions that each of those executives occupied in any company during the financial year.

Contracts in which French directors are interested must be approved by the Board, notified to the auditors and submitted to the General Meeting.

According to Slovenian Code all legal transactions between the company and a Management Board member, as well as transactions between the company and persons or companies related to the member in whom he is personally involved are recommended (rather than legally defined as mandatory) to be concluded by observing the code of good practices and be publicly disclosed.

Summary on independent (non executive) directors

There is **no definition and legal regulation of “independence”** in the context of directors, in any of the analyzed laws. Independency of directors is not a legal obligation to be taken into consideration for the composition of corporate boards.

On the other hand there are explanations in different Codes and recommendations (like above mentioned EU Recommendation²⁴) on that. But the respective Recommendation leaves to the member countries to decide whether to implement the recommendation in the company legislation or using the principle explain or comply in the corporate governance codes. Unfortunately the great majority of EU member countries decided for the latter, the consequence of which is poor implementation of the conflict of interest legal remedies in the European corporate legislation.

Conclusions

²⁴ European Commission Recommendation on the role of (independent) non-executive or supervisory directors, 2004

EU member's countries' company law in the field of conflict of interest and directors disqualification, is not harmonized; there are separate and very diversified national pieces of legislation in this regard. Rules on conflict of interest at EU level are mainly recommendations, rather than binding legal rules, which leave to the member countries to decide either to implement the recommended concepts by legislation or merely in corporate Governance Codes.

Unfortunately the voluntary principle "explain or comply" in corporate governance codes, has been widely applied rather than legislative implementation in EU member countries, what appears not to be the most appropriate way of regulation, especially not in the times of world economic and financial crisis.

There are substantial and important differences in legal regulation of Conflict of Directors' interests between comparatively analyzed EU countries. Having in mind, that world economic and financial crisis was to important extent caused by inefficient corporate governance regulation, especially in financial services, substantial harmonization of the EU regulation in the field of directors' disqualification and conflict of interest would be welcome.

The financial crisis has highlighted how important it is for legislator to follow up changing business environment and to react in due time with efficient legal tools. Further harmonization of company law, not in general but in particular fields of company law (like directors' disqualification and conflict of interest) is more than needed²⁵. Due to the financial roots of the economic crisis, this is especially true for financial services companies and listed companies, dealing with broader public in a very sensitive financial field.

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