

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

Guidance on the avoidance and management of conflicts of interest under the Financial Regulation

(2021/C 121/01)

DISCLAIMER: 'On the basis of applicable EU law, this document provides technical guidance for staff and bodies involved in implementing, monitoring and controlling the EU Budget on how to interpret and apply the EU rules in order to facilitate implementation and to encourage good practice(s). The examples provided in the document merely aim at illustrating the specific concepts presented in each chapter. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.'

TABLE OF CONTENTS

	<i>Page</i>
1. Regulatory references	3
2. Introduction and purpose of the guidance note	3
3. The concept and obligations regarding avoidance of conflicts of interest	4
3.1 Main differences between the previous and the current Financial Regulation with regard to conflicts of interest	4
3.2 The new provisions on conflicts of interest in the FR 2018	6
3.2.1 Definition of conflict of interest	7
3.2.2 Who is concerned	7
3.2.3 ‘Situations which may objectively be perceived as a conflict of interest’	10
3.2.4 Obligations in case of conflict of interest	12
4. Specific elements for direct/indirect management	15
4.1 Conflicts of interest in award procedures	16
4.2 Further references in the FR 2018 to conflicts of interest	17
4.3 Ethical issues in non-financial contexts	18
5. Specific elements for shared management	22
5.1 Who does what in the context of shared management?	23
5.2 Rules on conflicts of interest under the Procurement Directives	25
5.3 Specific elements for shared management financial instruments	29
6. Possible measures to avoid and manage conflicts of interest	30
6.1 Awareness raising	31
6.2 Policies, rules and procedures	31
6.3 Declarations of interest, asset disclosure and exclusive functions	33
6.4 Other measures	35
Annex I – Other illustrative examples of conflicts of interest	39
Annex II – EU legal provisions on conflicts of interest in the area of shared management	39

1. REGULATORY REFERENCES

Legislative act	Articles
Regulation (EU, Euratom) No 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union and repealing Regulation (EU, Euratom) No 966/2012 ⁽¹⁾ Financial Regulation (<i>hereinafter</i> 'FR 2018')	Articles 2, 26, 33, 36, 61, 62, 63, 69, 70, 71, 73, 76, 77, 78, 89, 136, 137, 141, 150, 154, 155, 167, 205, 209, 216, 225, 237 and Annex I points 20.6, 28.2 and 29.1
Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 ⁽²⁾ Financial Regulation (<i>hereinafter</i> 'FR 2012')	Articles 32, 57 and 59
Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ⁽³⁾ ⁽⁴⁾ Public Procurement Directive (<i>hereinafter</i> 'PP Directive')	Articles 2, 24, 41, 57, 58 and 83

⁽¹⁾ OJ L 193, 30.7.2018, p. 1.

⁽²⁾ OJ L 298, 26.10.2012, p. 248.

⁽³⁾ OJ L 94, 28.3.2014, p. 65.

⁽⁴⁾ To ensure the guidance note is clear and easy to understand, the references to the Procurement Directive 2014/24/EU should also be understood as references to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC as the concept of conflicts of interest is similarly defined in all three Directives.

2. INTRODUCTION AND PURPOSE OF THE GUIDANCE NOTE

The FR 2018, which entered into force on 2 August 2018, has strengthened the measures to protect the EU financial interests. A key example is the strengthening of the rules on conflicts of interest, which, in addition to direct and indirect management, are now explicitly extended to Member States' authorities (regardless of the Member States' internal governance arrangements) and any person implementing any of the EU funds under shared management.

Situations involving conflicts of interest can happen at any time. It is of paramount importance to either prevent them or manage them appropriately when they occur. That requirement is crucial for upholding the transparency, reputation and impartiality of the public sector and the credibility of the rule of law principles as a fundamental value of the EU. This is essential for maintaining public confidence in the integrity and impartiality of public bodies and officials as well as in the decision-making processes that serve the general interests. Conversely, if conflicts of interest are not prevented or properly managed when they arise, they can negatively affect the decision-making process in public bodies, give rise to unsound use of public money and cause reputational damage. They can also lead to a loss of faith in the public sector's ability to operate impartially and in the general interests of society.

Conflicts of interest must be prevented and addressed and the principles governing the EU budget ⁽¹⁾ must be duly observed. Having in place detailed policies and rules on avoiding and managing conflicts of interest is an essential part of good governance.

Given the fundamental importance of rules on conflicts of interest, the infringement of EU law in this respect is a matter of serious concern and will normally result in some form of redress, financial or other, e.g. disciplinary ⁽²⁾.

⁽¹⁾ Title II FR 2018.

⁽²⁾ See also Chapter 3.2.4 and Chapter 5.1.

The purpose of this guidance note is to:

- (1) promote a uniform interpretation and application of the rules on avoidance of conflicts of interest ⁽³⁾ for financial actors ⁽⁴⁾ and staff of the EU institutions involved in implementing, monitoring and controlling the EU budget under direct/indirect/shared management;
- (2) raise awareness among Member States' authorities, holders of public office (including members of government) and any other person involved in implementing the EU budget under shared management ⁽⁵⁾ about the applicable provisions set out in the FR 2018 and the PP Directive with regard to the avoidance of conflicts of interest; and
- (3) raise awareness among external partners ⁽⁶⁾ (including their staff and any entity with whom the external partner has a contractual relation for budget implementation) involved in implementing the EU budget under indirect management about the applicable provisions set out in the FR 2018 with regard to the avoidance of conflicts of interest.

Chapters 1 to 3 of this guidance note are relevant to all management modes, whereas Chapters 4 and 5 present specific elements that are relevant to direct/indirect management and shared management, respectively. Chapter 6 provides a non-exhaustive list of suggestions and recommendations for measures that could be put in place to avoid and manage conflict of interest situations. These suggestions and recommendations aim at providing EU institutions and Member States' authorities with guidance and tools to assist them in the avoidance of conflicts of interest.

3. THE CONCEPT AND OBLIGATIONS REGARDING AVOIDANCE OF CONFLICTS OF INTEREST

3.1. Main differences between the previous and the current Financial Regulation with regard to conflicts of interest

FR 2012	FR 2018
<p>Article 57 Conflict of interests</p> <p>'1. Financial actors and other persons involved in budget implementation and management, including acts preparatory thereto, audit or control shall not take any action which may bring their own interests into conflict with those of the Union.</p> <p>Where such a risk exists, the person in question shall refrain from such action and shall refer the matter to the authorising officer by delegation who shall confirm in writing whether a conflict of interests exists. The person in question shall also inform his or her hierarchical superior. Where a conflict of</p>	<p>Article 61 (our underline) Conflict of interests</p> <p>'1. Financial actors within the meaning of Chapter 4 of this Title and other persons, <u>including national authorities at any level</u>, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, shall not take any action which may bring their own interests into conflict with those of the Union. <u>They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests.</u></p>

⁽³⁾ Excluding ethical issues in non-financial contexts, which are covered by EU legislation and Commission documents not directly related to the implementation of the EU budget.

⁽⁴⁾ Financial actors (within the meaning of Chapter 4 – Articles 73, 76, 77 and 89 – of Title IV of FR 2018) are the authorising officers (each EU institution performs the duties of authorising officer and delegates – and further sub-delegates – its duties of authorising officer to staff at an appropriate level), the accounting officers (appointed by each EU institution from officials subject to the Staff Regulations) and the imprest administrators (appointed by decision by the accounting officer of the EU institution, on the basis of a duly substantiated proposal from the authorising officer responsible).

⁽⁵⁾ Examples of EU funds under shared management by Member States are: (i) the European Regional Development Fund (ERDF); (ii) the European Social Fund (ESF); (iii) the Cohesion Fund (CF); (iv) the European Maritime and Fisheries Fund (EMFF); (v) the Asylum and Migration Fund (AMIF); (vi) the Internal Security Fund (ISF); (vii) the Border Management and Visa Instrument (BMVI); (viii) the European Agricultural Fund for Rural Development (EAFRD); (ix) the European Agricultural Guarantee Fund (EAGF); (x) the Fund for European Aid to the Most Deprived (FEAD); (xi) the European Globalisation Adjustment Fund (EGF); and (xii) the European Union Solidarity Fund (EUSF).

⁽⁶⁾ A non-exhaustive list of external partners is available in Chapter 4.

interests is found to exist, the person in question shall cease all activities in the matter. The authorising officer by delegation shall personally take any further appropriate action.

2. For the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 setting out what is likely to constitute a conflict of interests together with the procedure to be followed in such cases.’

Article 32 of Rules of Application of the FR 2012 ⁽¹⁾

Acts likely to constitute a conflict of interests and procedure (Article 57 of the Financial Regulation)

‘1. Acts likely to be affected by a conflict of interests within the meaning of Article 57(2) of the Financial Regulation may, inter alia, take one of the following forms without prejudice to their qualification as illegal activities under point (d) of Article 106(1) of the Financial Regulation:

- (a) granting oneself or others unjustified direct or indirect advantages;
- (b) refusing to grant a beneficiary the rights or advantages to which that beneficiary is entitled;
- (c) committing undue or wrongful acts or failing to carry out acts that are mandatory.

Other acts likely to be affected by a conflict of interests are those which may impair the impartial and objective performance of a person’s duties such as, inter alia, the participation in an evaluation committee for a public procurement or grant procedure when the person may, directly or indirectly, benefit financially from the outcome of these procedures.

2. A conflict of interest shall be presumed to exist if an applicant, candidate or tenderer is a member of staff covered by the Staff Regulations, unless his participation in the procedure has been authorised in advance by his superior.

3. In the event of a conflict of interests, the authorising officer by delegation shall take appropriate measures to avoid any undue influence of the person concerned on the process or procedure in question.’

2. Where there is a risk of a conflict of interests involving a member of staff of a national authority, the person in question shall refer the matter to his or her hierarchical superior.

Where such a risk exists for staff covered by the Staff Regulations, the person in question shall refer the matter to the relevant authorising officer by delegation. The relevant hierarchical superior or the authorising officer by delegation shall confirm in writing whether a conflict of interests is found to exist. Where a conflict of interests is found to exist, the appointing authority or the relevant national authority shall ensure that the person in question ceases all activity in the matter. The relevant authorising officer by delegation or the relevant national authority shall ensure that any further appropriate action is taken in accordance with the applicable law.

3. For the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest.’

⁽¹⁾ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

The FR 2018 has explicitly extended the scope of the provisions on conflicts of interest to all management modes ⁽⁷⁾ and to all actors, including national authorities at all levels, involved in the EU budget implementation, including carrying out preparatory acts and audits, as well as exercising control.

The following are the main changes brought about by the FR 2018 regarding conflicts of interest.

- Broader scope: explicitly applicable to shared management (in addition to direct and indirect management) and to national/regional authorities at any level, including members of government.
- Reworded definition of conflict of interest: now covering ‘any other direct or indirect personal interest’, which is broader than ‘any other shared interest with a recipient’ in Article 57 FR 2012.
- More situations covered: it explicitly requires not only that situations involving conflict of interest be prevented but also these situations be addressed, including those which ‘may objectively be perceived’ as a conflict of interest’. This provision strengthens the preventive function for conflict of interest situations.

Shared management

Prior to the FR 2018, the rules on conflicts of interest as set out in Article 57 FR 2012 were not directly applicable in the Member States when implementing the EU budget in shared management. Considering in particular that the specific measures to be adopted, as referred to in Article 57 FR 2012, merely focused on the duties of the authorising officer by delegation, such provision applied only to staff of the EU institutions and EU bodies.

However, Article 59(1) FR 2012 provided that ‘The Commission and the Member States shall respect the principles of sound financial management, transparency and non-discrimination ⁽⁸⁾ ⁽⁹⁾[...] when they manage Union funds’ and ‘the Commission and the Member States shall fulfil their respective control and audit obligations.’ In accordance with Article 59(4) FR 2012, bodies designated by Member States to manage and control EU funds in shared management were already obliged to set up and ensure the operation of an effective and efficient internal control system.

Furthermore, Article 32(1) FR 2012 provided that the budget must be implemented in compliance with effective and efficient internal control (for all management modes) and in line with the relevant sector-specific rules. Article 32(3)(c) FR 2012 required these internal control systems to be capable of avoiding conflict of interest from arising in all methods of budget implementation.

Therefore, the avoidance of conflict of interest was one of the shared management principles enshrined in Article 59(1) FR 2012. Thus, even before the FR 2018 entered into force, under the FR 2012 Member States were obliged, when implementing the EU budget in shared management, to take the necessary measures to avoid conflicts of interest; for example, this obligation has been clearly set out in the accreditation criteria for the Paying Agencies under the Common Agricultural Policy (CAP) ⁽¹⁰⁾.

⁽⁷⁾ The methods used for implementing the EU budget are set out in Article 62 FR 2018 (direct/indirect/shared management).

⁽⁸⁾ Judgment of the Court of Justice of 12 March 2015, *eVigilo Ltd.*, C-538/13, ECLI:EU:C:2015:166, paragraphs 35, 42 and 43, on public procurement. The Court of Justice established that an award decision taken in a situation of conflict of interest violates the principles of equal treatment and transparency; it concluded that EU law does not preclude that a national court may rule an adjudication unlawful, solely on the basis of a bias in the award procedure, which the complainant does not have to prove, but which the adjudicating authority must examine. A conflict of interest entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer. Such a conflict of interest is thus liable to constitute an infringement of the principles of equal treatment and transparency. Moreover, contracting authorities’ obligation to treat economic operators equally and non-discriminately and to act in a transparent way means that they are assigned an active role in the application of those principles of public procurement. The contracting authority is therefore required to determine whether any conflicts of interest exist and to take appropriate measures in order to prevent and detect conflicts of interest and remedy them.

⁽⁹⁾ In another case (Judgment of the Court of First Instance of 17 March 2005, *AFCO Management Consultants and others v Commission*, T-160/03, ECLI:EU:T:2005:107, paragraph 74) concerning procurement by the Commission, the requirement of avoidance of conflicts of interest was also based on the principle of sound financial management.

⁽¹⁰⁾ Annex I of the Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ L 255, 28.8.2014, p. 18), in particular point 1(B)(v).

3.2. The new provisions on conflicts of interest in the FR 2018

One important legal provision ⁽¹⁾ for the avoidance of conflicts of interest is Article 61 FR 2018, which contains revised rules on conflicts of interest. As of 2 August 2018, it applies to all funds stemming from the EU budget and to all management modes.

Article 61 FR 2018 is directly applicable in the Member States to the extent that they are involved in implementing the EU budget. Consequently, their obligation to prevent and address conflicts of interest, as set out in this Article, does not depend on national implementing measures being adopted. However, Article 61 FR 2018 does not comprehensively regulate conflicts of interest and the way these should be dealt with as it makes reference to taking appropriate measures to prevent and address situations of conflict of interest. In addition, national authorities remain competent for adopting supplementary and possibly even more detailed and/or stricter national rules as evident from the reference to 'any further appropriate action to be taken in accordance with the applicable law' in paragraph 2 of Article 61 FR 2018.

In the context above, the application of such national rules would no longer be exclusively a national matter and could be included in the scope of checks, controls and audits carried out by the Commission services as well as by the European Court of Auditors, in line with paragraph 2 of Article 61 FR 2018. While Member States remain competent to apply their own supplementary and/or more detailed national rules (even if Article 61 FR 2018 is directly applicable), they should consider aligning or supplementing any more lenient or incomplete national rules in order to improve the legal certainty of the applicable rules where the EU budget is concerned.

Examples of rules on ethics and conflicts of interest at Member State level:

- (1) In one Member State it is prohibited for persons occupying managerial positions in government administration (e.g. minister, secretary of state, head of central office) to hold more than 10 % of shares in private companies.
- (2) In a second Member State, the Head of State, ministers and members of Parliament may not accept gifts, hold shares in private or public companies or hold government contracts.
- (3) In a third Member State, anyone holding a public sector position must not carry out any trading activities if they own over 10 % of a company's shares.
- (4) In a fourth Member State, ministers and members of Parliament must not be part of supervisory or managerial bodies of private companies and if they own shares in a private company of 0,5 % or more, they must transfer their consequential management rights to another person for the duration of their mandate.
- (5) In a fifth Member State, officials who have financial responsibilities and whose hierarchical level or the nature of their duties so warrants must, within two months of their appointment, take all steps to ensure that their financial assets are managed, during the duration of their duties, under conditions which exclude any right of scrutiny on their part.

3.2.1. Definition of conflict of interest

Pursuant to Article 61 FR 2018, a conflict of interest exists where the 'impartial and objective exercise of the functions of a financial actor or other person' involved in budget implementation 'is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest.'

A conflict of interest can arise even if the person does not actually benefit from the situation, as it is sufficient that circumstances compromise the exercise of their functions in an objective and impartial manner. However, such circumstances must have a certain identifiable and individual link with (or impact on) concrete aspects of the conduct, behaviour or relationships of the person.

⁽¹⁾ Alongside the EU Procurement Directives, staff regulations, and numerous sector-specific rules.

A mere link with beliefs, views, opinions or preferences of the person does not usually or automatically constitute a personal interest (but each case may be different from the other). However, persons involved in budget implementation should exercise their rights of expression, opinion and political and civic participation by considering and managing the risks that may arise for their impartiality in the exercise of functions and for the image and reputation of the institutions or authorities where they work ⁽¹²⁾.

Moreover, a conflict of interest would not usually exist where the person is only concerned as a member of the general public or of a broad class of persons, unless the person (or the related person, e.g. a family member) is in a specific and different situation compared to other members of the general public or of a broad class of persons.

Similarly, the concept of conflict of interest would not usually cover situations where the EU budget implementation tasks by the person concerned are related to decisions (1) that are of a general nature and based on objective criteria that apply to a whole sector of the economy or a very wide group of potential beneficiaries; and (2) that would therefore neither be compromised by emotional life, political or national affinity and economic interest, nor by the fact that the person concerned or a member of their family is among the beneficiaries.

National affinity, political affinity, emotional life or others as listed in Article 61(3) FR 2018 are factors that could compromise the impartiality and objectivity of a person involved in budget implementation. In practical terms, to avoid such compromise persons involved in budget implementation should refrain from involvement, influences or pressures that may affect their impartiality and objectivity (or the perception of their impartiality or objectivity) in their professional performance. This could in particular result from friendships or enmities, family relationships, party affiliations, associations or religious beliefs. Persons involved in budget implementation should base their performance and professional judgment only on legal and objective criteria and on sufficient and appropriate evidence ⁽¹³⁾.

The inclusion of a reference to 'any other direct or indirect personal interest' is broader than the wording of the FR 2012, which referred to 'any other shared interest with a recipient'. An indirect interest goes beyond the direct connection between the person in question and the beneficiary of EU funds.

Direct and indirect interest can also include gifts or hospitality, non-economic interests, or result from involvement with non-governmental or political organisations (even if non remunerated), competing duties of loyalty between one entity the person owes a duty to and another person or entity the person owes a duty to.

Example of a personal interest:

A head of a managing authority/paying agency:

- (1) might have a direct personal (family) interest in allocating EU funds to a project of the company of their spouse/partner (and therefore would need to declare a conflict of interest and abstain from being involved in decision-making related to that project, so that the situation can be managed);
- (2) might have an indirect personal (family) interest, in allocating EU Funds to a company that promised to create a new factory for which the company of the spouse/partner will most likely be the most significant sub-contractor (and therefore would require them to abstain from decisions related to the award procedure) or owns the land that the company will have to buy to build the factory.

⁽¹²⁾ See also, for example, Articles 12, 12b, 15 and 17a of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community.

⁽¹³⁾ See also, for example, Articles 12, 12b, 15 and 17a of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community and Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds (OJ L 74, 14.3.2014, p. 1).

The relationships constituting family membership may vary between countries and need to be analysed within the legal and cultural context (depending, for instance, on the degree of kinship). However, the text and the purpose of Article 61 FR 2018 as set out in Chapter 2, namely to protect the integrity and impartiality of decision-making related to the implementation of the EU budget and the public's trust therein, form the basis for some general guidance.

- First, it should be noted that Article 61(3) FR 2018 refers to 'family' and 'emotional life' separately. An emotional bond between family members is therefore not required for a person's impartiality to be compromised by reasons involving family.
- Second, Article 61(3) FR 2018 does not stipulate conflict of interest as an automatic consequence of a family relationship, but the concerned person's impartiality needs to be compromised (in exceptional cases, this may not be the case).
- Third, from the purpose of Article 61 FR 2018 to protect the integrity of budget implementation and the public's trust, it may be derived that the notion of family should cover relationships between the person concerned and a party involved that would typically raise reasonable suspicions about a potential undue family-related influence on the exercise of official functions.

Against this background, Article 61 FR 2018 should refer, at least, to immediate family. The concept of immediate family goes significantly beyond that of the nuclear family, but its precise contours are neither universally recognised nor defined in EU legislation, except in specific policy areas, notably migration. The Commission services take the view that, in the context of Article 61 FR 2018 and based on its purpose, 'immediate family' should comprise, at least, the following relationships, including if formed through adoption: The spouse (including a partner with whom the individual has a (non-) registered non-marital partnership), children and parents, (great-)grandparents and (great-)grandchildren, (half-) brothers and sisters (including from blended families), uncles and aunts, nieces and nephews, first-degree cousins, parents-in-law, children-in-law, siblings-in-law, stepparents and stepchildren.

The existence of one of these family relationships between the person concerned and a party involved should, at least, be considered as a situation objectively perceived as a conflict of interest (see Chapter 3.2.3), save in exceptional, objectively plausible circumstances.

Apart from the concept of 'immediate family', the wider concept of 'extended family' may still lead to a conflict of interest, notably pursuant to rules and regulations or social perception in the country concerned or taking into account further circumstances such as emotional or economic ties.

- Last, public trust in a sound implementation of the EU budget – as protected by Article 61 FR 2018 – is, in principle, indivisible. Citizens in country A must be able to trust the integrity of budget implementation in country B. Therefore, there is only very limited room for variations from one country to another in the application of standards derived from Article 61 FR 2018.

Similarly, a personal friendship (or god-parents/god-children relationships), which may imply a closer proximity than with immediate family could lead to a situation where the person concerned, by having a particular relation with that friend, would compromise their impartiality and objectivity.

Anyone permanently living in the concerned person's household is at least in a situation that could objectively be perceived as a conflict of interest ⁽¹⁴⁾, unless such a conclusion is refuted by an objectively plausible counterargument.

Example of rules on ethics and conflicts of interest at Member State level:

In one Member State, members of Parliament, members of Government or local executives are forbidden to employ as a parliamentary assistant or member of their cabinet a person from their 'first family circle' (spouse, children and parents). For the employment of a person from the 'second family circle' (brothers, sisters, brothers-in-law, sisters-in-law, nephews or nieces, ex-spouse, etc.), the law obliges the employment to be declared.

⁽¹⁴⁾ See Chapter 3.2.3.

3.2.2. *Who is concerned*

The Commission is responsible for implementing the EU budget, in cooperation with Member States, in line with the financial rules for establishing and implementing it, while observing the principle of sound financial management (Article 317 TFEU ⁽¹⁵⁾ and Article 63(1) FR).

Financial actors as well as other persons (at EU or national level), including national authorities are concerned by Article 61 FR 2018, as long as they are involved in implementing, at any level, the EU budget under direct, indirect and shared management (including preparatory acts, audits or controls). This means that Article 61 FR 2018 applies to anyone and to any entity under Member States jurisdictions ⁽¹⁶⁾ involved in implementing the EU budget ⁽¹⁷⁾.

Article 61 FR 2018 concerns: (i) financial actors ⁽¹⁸⁾ (within the meaning of Chapter 4 – Articles 73, 76, 77 and 89 – of Title IV of FR 2018) which are the authorising officers (each EU institution performs the duties of authorising officer and delegates – and further sub-delegates – its duties of authorising officer to staff at an appropriate level), the accounting officers (appointed by each EU institution from officials subject to the Staff Regulations ⁽¹⁹⁾) and the imprest administrators (appointed by decision by the accounting officer of the EU institution, on the basis of a duly substantiated proposal from the authorising officer responsible); and (ii) staff (including members of opening and evaluation committees and the external experts selected to assist them ⁽²⁰⁾) involved in implementing the EU budget.

The external partners entrusted with the (indirect) management of EU funds listed in Article 62(1)(c) FR 2018, including any entity with whom the external partner has a contractual relation for budget implementation (e.g. financial intermediaries) also fall within the scope of Article 61 FR 2018 as well as their staff and members, as long as they are under Member States jurisdictions and involved in implementing the EU budget (see further details and recommendations in Chapter 4).

As far as executive agencies referred to in Article 69 FR 2018 are concerned, Article 61 FR 2018 is directly applicable to them.

As regards decentralised agencies referred to in Article 70 FR 2018, the rules on conflicts of interest are set out in Article 42 of the Framework Financial Regulation ⁽²¹⁾. For public-private partnership bodies referred to in Article 71 FR 2018, the rules on conflicts of interest are set out in Article 27 of the Model Financial Regulation ⁽²²⁾. Both these Articles mirror the provisions of Article 61 FR 2018, explicitly mention members of their respective management boards or governing

⁽¹⁵⁾ Treaty on the Functioning of the European Union.

⁽¹⁶⁾ Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.

⁽¹⁷⁾ Article 61 FR 2018 would not generally apply to candidates, tenderers, applicants, beneficiaries (including final recipients in the context of shared management financial instruments) and contractors and should not be used when referring to them unless they are in a specific and different situation. In this respect, there may be cases where Article 61 FR 2018 applies and a conclusion can only be reached by taking into consideration the legal framework under which the above candidates, tenderers, applicants, beneficiaries and contractors exercise their role or functions. For instance, for the purposes of the Common Provisions Regulation ('CPR'), a beneficiary can be the body granting the aid (in the context of State aid where the aid per undertaking is less than EUR 200 000). A similar situation occurs in the context of financial instruments operations, where the beneficiary is the body that implements the financial instrument or the fund of funds (as appropriate) or when the managing authority is a beneficiary of technical assistance under a programme. In the referred cases, these bodies implement the EU budget and they are covered by the provisions of Article 61 FR 2018. A similar situation occurs where an authority outsources some of its tasks in budget implementation to an external company. In that case, the external company is involved in budget implementation and is therefore covered by the provisions of Article 61 FR 2018. For additional information, please refer to the last paragraph of Chapter 3.2.4, to Chapter 4.1 for direct/indirect management, to Chapter 5.2 for shared management and to the end of Chapter 6.4 which includes additional measures concerning beneficiaries and contractors.

⁽¹⁸⁾ <https://myintracomm.ec.europa.eu/budgweb/en/man/finactor/Pages/finactor.aspx>

⁽¹⁹⁾ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community.

⁽²⁰⁾ Article 150(5) FR 2018.

⁽²¹⁾ Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 122, 10.5.2019, p. 1).

⁽²²⁾ Commission Delegated Regulation (EU) 2019/887 of 13 March 2019 on the model financial regulation for public-private partnership bodies referred to in Article 71 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 142, 29.5.2019, p. 16).

boards and, in addition have been incorporated in the financial rules of all decentralised agencies and public-private partnership bodies concerned. To the extent that these entities implement the EU budget under indirect management, Article 61 FR 2018 applies.

In the case of shared management, it is the responsibility of national authorities to establish internal control systems with responsibilities/tasks being clearly assigned as this is relevant to determining a person's 'involvement in budget implementation' in each particular case.

However, it should be noted that, pursuant to Article 61(1) FR 2018, the 'involvement' encompasses preparatory acts, and any step of the process of planning, deciding on, managing, auditing and controlling the use of EU funds. Therefore, this concept includes anyone that might influence the decision-making process including national, regional and local authorities, staff or members of these authorities and government members, to the extent that they deal with any of the abovementioned steps in implementing the EU budget.

Hence, Article 61 FR 2018 applies to any step (to be) taken by anyone who is responsible for, and/or who has the ability to steer and/or influence, the decision-making process linked to the implementation of the EU budget. However, their involvement has to be reasonably significant: the person has to be entitled to exercise a certain degree of discretion or control over the implementation of the budget (i.e. the power to act or to give instructions to those who act; a role to advise or to provide opinions to those who act).

Example of a person working for a managing authority/Commission service but not involved in implementing the EU budget and therefore falling outside the scope of Article 61 FR 2018:

A staff member working for the Communication department that is only responsible for publishing calls for proposals in a website but does not intervene in its preparation is not involved in budget implementation (even if working for a managing authority/Commission service).

In addition to the level of proximity to the decision-making process, other important aspects need to be considered, such as the nature and importance of the responsibilities exercised (including whether they are political, administrative, legislative or executive), the existing functional or hierarchical links, the nature of the decision-making process and its transparency and openness to public scrutiny. All these aspects also have an influence on the objective perception of conflicts of interest (see Chapter 3.2.4).

Examples of persons at any level involved in implementing the EU budget including preparatory acts, and therefore falling within the scope of Article 61 FR 2018:

- (1) A member of government or a Commissioner who has the direct or indirect power to instruct or influence an authority or service that manages EU funds (this is relevant in case there is a risk that the position leads to concrete situations, which could amount to, or be perceived as amounting to, a conflict of interest).
- (2) A head of a national or regional authority/Commission service/EU body, office or agency that manages EU funds who has the power to instruct a person responsible for assessing applications for EU funds (same as above).
- (3) A staff member of a national or regional authority/Commission service/EU body, office or agency that manages EU funds who is responsible for managing procurement contracts or grants (same as above).
- (4) A staff member of a paying agency/certifying authority/audit authority/Commission service (or a person/entity to whom an activity has been outsourced) responsible for auditing the implementation of EU funds.

Composition of advisory groups in relation to budget implementation

Private interests can influence public budget implementation through advisory groups established by public authorities. An advisory or expert group refers to any committee, board, panel, task force, or similar group, or any subcommittee or other subgroup thereof that provides EU institutions and national authorities with advice, expertise, or recommendations on budget implementation. They usually consist of representatives from public authorities, the private sector, and/or civil society organisations, and may be established by EU institutions and national authorities.

There can be a risk to the integrity of budget implementation if, for example, private interests strongly steer or influence the work of advisory groups. When, for example, corporate executives or interest representatives advise governments as members of an advisory group, they act as part of the decision-making process with direct influence on decision-makers while still having their own private interests. In this respect, while the expertise of advisory groups is indeed important for the quality of the decision-making process, it is equally important that such groups have a balanced composition representing the different relevant areas of expertise and interest required for the specific tasks and/or decision of the body concerned.

For the application of Article 61 FR 2018 to members of such advisory groups, it is important to distinguish between sectoral or societal interests that they officially represent in the advisory group on one hand and the member's personal interests (e.g. because a project submitted to the advisory group is run by the member's spouse/partner) on the other hand. In the latter case, the member is obliged to disclose the situation and must be excluded from deliberations on that project.

3.2.3. *'Situations which may objectively be perceived as a conflict of interest'*

Any activity or interest, which could interfere with the impartial and objective exercise of the functions of a financial actor or other person, and thus affect public trust in the sound financial management of the EU budget, is a situation which may be perceived as a conflict of interest.

A perceived conflict of interest may notably occur when a person, regardless of their intentions, may reasonably see him or herself or be seen as having competing personal and public interests as these risk undermining the person's ability to fulfil their tasks and responsibilities in an impartial and objective manner (e.g. a risk or possibility of favouritism or hostility for reasons of family interest and national or political affinity may objectively be perceived as a conflict of interest). A perceived conflict of interest covers objective circumstances affecting trust and confidence in a person's or entity's independence and impartiality, even if the conflict of interest does not materialise ⁽²³⁾ or even if the person does not actually benefit from the situation. In this context, it is of utmost importance to safeguard both the effective observance of the rules on avoidance of conflicts of interest and avoid any doubts that a reasonable, informed, objective and good-faith person may have about the conformity of the behaviour of a person involved in budget implementation.

The inclusion of the wording 'situations which may objectively be perceived as a conflict of interest' in Article 61 FR 2018 ensures partly alignment with the definition of conflict of interest set out in the PP Directive. However, as compared to the PP Directive, Article 61 FR 2018 contains the term 'objectively': this was added to the FR 2018 to underline the importance of basing the risk of perceived conflicts of interest on objective and reasonable considerations. This notably includes verifiable factual indications that there are links ⁽²⁴⁾ between the functions and the interest at stake, for instance, a power to act or give instructions, a link via a third person, a continuing link with previous positions, a link with future positions or a hierarchical and/or functional link.

⁽²³⁾ E.g. a staff member effectively uses their power to favour/deliberately benefit an economic entity owned by an immediate family member.

⁽²⁴⁾ Judgment of the Court of Justice of 12 March 2015, *eVigilo Ltd.*, C-538/13, ECLI:EU:C:2015:166, paragraph 45: 'Evidence such as the claims in the main proceedings relating to the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.'

The interest has to be sufficiently significant to be perceived as being able to 'compromise' the 'impartial and objective exercise of the functions'. As a rule, it could be argued that the higher the responsibility and the accountability or the greater the interest or the closer the involvement in budget implementation, the higher the probability of a perceived conflict of interest.

In this regard, Article 61 FR 2018 does not set a precise quantitative threshold for the interests that could create a conflict of interest, nor does it seem possible to establish one. A 10 % share in a company may not seem large, but it (or indeed an even smaller percentage share) could still be the largest single holding in the company concerned, it could be accompanied by the right to veto important decisions of the company or represent a sizeable asset given the size of the company. A thorough examination of each case will be necessary in such situations.

Examples of when a person who works for a managing authority/paying agency (or a national contracting authority) or for a Commission service, and is in charge of evaluating applications for EU funding, could come to be in a situation that may constitute or be objectively perceived as a conflict of interest:

- (1) The person (or their partner) simultaneously carries out consultancy work, for either a consultancy or a third party providing services to the consultancy, on submitting applications for EU funding.
- (2) The person (or an immediate family member of the person) directly or indirectly owns a company applying for EU funding.
- (3) The person has a personal friendship with the managers/owners of a company applying for EU funding.
- (4) The person is a candidate (as a member of a political party) for public office and their political party has a business relationship vis-à-vis a specific applicant for EU funding.
- (5) Prior to leaving their position in the public service, a person negotiates their future employment in a company applying for EU funding ⁽²⁵⁾ (or affiliated or partner company, or another company with overlapping ownership compared to the one applying for EU Funding).
- (6) The person recently worked in a management position in a company applying for EU funding, and was in charge of the particular sector of the company that is now requesting the funding.
- (7) If the person lives in a municipality that is applying for infrastructure funding, this should not necessarily and objectively be perceived as giving rise to a conflict of interest. The larger the group to which the person belongs that would benefit from a measure – in this case, the people of the municipality concerned – the more diluted the risk of conflict of interest generally becomes. However, a case-by-case assessment remains necessary if, for example, the person were to benefit from the funding measure in a particular way, e.g. from public infrastructure increasing the real estate value of their neighbourhood, the perception of a conflict of interest could exist/arise.

3.2.4. *Obligations in case of conflict of interest*

The rules on conflict of interest should be implemented in a comprehensively preventive manner, as they aim to prevent, in the first place, a person from being in a situation where they would use their power in a manner influenced by their interest. If it appears that the impartial judgement of someone involved in implementing the EU budget can be hampered by personal interests, either by favouring a certain choice, or by being overly critical or hostile in order to avoid the perception of favouritism, this situation should be promptly dealt with before it could result in any wrongful act.

Whenever there is a situation that may be objectively perceived as a conflict of interest, it must be examined and resolved in such a way that it could no longer be objectively perceived as such. In this context, and without prejudice to any stricter national rules, financial actors and other persons involved in implementing the EU budget must:

— refrain from taking any action which may bring their own personal interests into conflict with those of the EU;

⁽²⁵⁾ OECD 'Managing Conflict of Interest in the Public Sector', OECD Guidelines and Country Experiences (2003), p. 25, <http://www.oecd.org/corruption/ethics/48994419.pdf>

Example:

Refrain from taking any action that concerns their personal interests. A person must not decide upon allocation of public funds to, evaluate, monitor, control or audit a project in which they (or their personal friends or immediate family) are to be or have been involved.

- take appropriate measures to prevent conflicts of interest from arising in the tasks under their responsibility.

Example:

The person concerned must abstain from decisions influencing the allocation of funds to their own entities (or of their immediate family). It must be ensured that there is no influence on decision-making⁽²⁶⁾ linked with budget implementation. As an example, agricultural land (in cases where the land is eligible) automatically entitles (as there is no selection procedure) a beneficiary to receive direct payments under the European Agricultural Guarantee Fund. In such a situation, the person concerned should not be involved in the decision-making process determining the eligibility of a particular plot of land.

- take appropriate measures to address any situations which may objectively be perceived as a conflict of interest.

Example:

The person concerned could take measures that ensure that they are no longer involved in any step of budget implementation or no longer have any economic interest or other personal interest within the meaning of Article 61 FR 2018 in relation to an entity applying for EU funding. Thus, the person could sever all relations with the entity; or the person concerned should abstain from being involved in any decision regarding the allocation of EU funding to the entity concerned (including by resigning if punctual abstention could not sufficiently address the situation); or the entity could withdraw the application for EU funding.

The steps below must be taken where there is a risk of a conflict of interest involving a person involved in implementing the EU budget.

- The person must report it to their hierarchical superior (or to the relevant authorising officer by delegation) (or in the case of politically exposed persons, a good practice is for the person to disclose relevant personal interests in a public declaration of interests).
- The relevant hierarchical superior (or the relevant authorising officer by delegation) must confirm in writing whether a conflict of interest exists (and the person concerned is obliged to refrain from creating any *fait accompli* while their superior's decision is pending). The hierarchical superior must exercise judgement and carefully consider whether someone who is aware of the relevant facts would be likely to think that the organisation's integrity is at risk from an unresolved conflict of interest. The hierarchical superior should evaluate the need to replace the person who has declared a possible conflict of interest. Before that, and without prejudice to applicable law, the authority or the hierarchical superior should discuss the situation with the person concerned to better assess the risk of biased execution of their duties.
- When it is established that a conflict of interest has arisen, the relevant national authority (or the appointing authority) must ensure that the staff member concerned ceases all relevant activities related to budget implementation, including any preparatory acts.

⁽²⁶⁾ Including verification, authorisation, payment and accounting of claims or payment requests.

Article 61 FR 2018 also requires the national authority (or the relevant authorising officer by delegation) to ensure that any further appropriate action is also taken in accordance with the applicable law (see Chapters 3.2 and 6.2). This is important not only to address the issue but also to allow for business continuity. In this respect, it may be the case that the authority (or the relevant authorising officer by delegation) needs the advice or intervention of other competent bodies, in accordance with applicable law.

Finally, on one hand, in the presence of an unresolved objectively perceived conflict of interest or if the conflict of interest materialises, e.g. a staff member effectively uses their power to favour/deliberately benefit an economic entity owned by an immediate family member, such situations should lead to the examination of its impact on EU budget implementation⁽²⁷⁾ also with a view to determine adequate remedies (e.g. cancelling and re-evaluating award procedures, cancelling contracts/agreements, suspending payments, making financial corrections and recovering funds). In addition, such situations could generally qualify as a wrongful act under administrative, civil service law or criminal law and should be penalised as such. On the other hand, attempts by candidates, tenderers or applicants, to unduly influence an award procedure or obtain confidential information should be treated, at least, as grave professional misconduct and should lead to exclusion from participating in award procedures (as it is the case for direct/indirect management under Articles 136(1)(c)(iv) and (v) – see Chapter 4).

4. SPECIFIC ELEMENTS FOR DIRECT/INDIRECT MANAGEMENT

As set out in Article 36(3)(c) FR 2018 on internal control of budget implementation for all management modes (including direct/indirect management), internal control systems must be capable of avoiding conflicts of interest.

In direct management, in accordance with Article 62(1)(a) FR 2018, the Commission (and therefore Commission staff) executes the budget directly through its services.

In indirect management, in accordance with Article 62(1)(c) FR 2018⁽²⁸⁾, the Commission entrusts budget implementation to external partners. Examples of such external partners are international organisations under the umbrella of the United Nations, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, EU bodies⁽²⁹⁾, private law bodies with a public service mission, public law bodies including Member State organisations, and third countries⁽³⁰⁾ or the bodies they designate.

However, even if the external partners are responsible for setting up and maintaining an effective and efficient internal control system, the Commission remains ultimately responsible and accountable for implementing the EU budget. For this reason, the Commission should include the obligations related to avoidance on conflicts of interest, stemming from Article 61 FR 2018, in the agreements (either new or amended) signed with the external partners. This is even more important where the external partner is not under Member States jurisdictions⁽³¹⁾ (see Chapter 3.2.2). The external partners should also include these obligations in their own agreements with any other entity (e.g. implementing entities such as financial intermediaries) with whom they have a contractual relation for budget implementation. The external partners remain however competent for adopting supplementary and possibly even more detailed and/or stricter rules but, as a minimum, they must adhere to the obligations of Article 61 FR 2018.

⁽²⁷⁾ For staff of the EU institutions see also Article 93 FR 2018.

⁽²⁸⁾ See also Articles 156, 157 and 158 FR 2018.

⁽²⁹⁾ To be noted that Executive agencies (Article 69 FR 2018) apply the FR provisions directly.

For decentralised agencies (Article 70 FR 2018), the rules on conflicts of interest are established in Article 42 of Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 FR 2018.

For public-private partnership bodies (Article 71 FR 2018), the rules on conflicts of interest are established in Article 27 of Commission Delegated Regulation (EU) 2019/887 of 13 March 2019 on the model financial regulation for public-private partnership bodies referred to in Article 71 FR 2018.

⁽³⁰⁾ This guidance note is also of relevance, for example, to indirect management with the beneficiary country (IMBC) for candidate countries, whereby EU funds are implemented under indirect management by partner/beneficiary countries; to other forms of indirect management by partner/beneficiary countries under the European Neighbourhood Instrument (ENI) (e.g. programme estimates; Egypt or Tunisia) and to National Authorising Officers (NAOs) and similar functions in the partner countries entailing a responsibility for managing EU funds.

⁽³¹⁾ Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.

The Commission is also tasked with supervising these partners so they fulfil their duties ⁽³²⁾. This is obligatory and relevant to the extent that, under indirect management, the Commission must ensure that the external partners provide for a level of protection of the EU's financial interests equivalent to that provided under direct management ⁽³³⁾.

While direct management allows for continuous prevention, detection and handling of conflicts of interest at all stages from design through the implementation phase to audits and evaluations, the Commission's involvement in the prevention, detection and handling of conflicts of interest in cases of indirect management is also based on the *ex ante* assessment of the external partner's procedures.

The steps involved in such an assessment are set out in Article 154(4) FR 2018 and are further detailed in the Commission decision ⁽³⁴⁾ establishing new terms of reference for the pillar assessment methodology to be used under the FR 2018. In particular, this methodology includes the assessment of the procedures in place for the avoidance of conflicts of interest in the pillar of internal control systems, as well as, when applicable, in the pillar of grants, procurement and financial instruments. Only after a positive assessment, would the entity be eligible to be entrusted with budget implementation tasks.

Therefore, in dealing with conflicts of interest in indirect management, a focus should be put on preventing conflicts of interest when budget implementation tasks are entrusted to an external partner, and on detection and handling of conflicts of interest by those involved in carrying out checks or auditing the external partner (and any entity with whom the external partner has a contractual relation for budget implementation) during and after the implementation phase.

The basic acts (sectoral legislation) of different policies, funds or programmes may also contain further rules on conflicts of interest, notably the obligation to avoid conflicts of interest. Considering the Commission's commitment to (and requirement of) transparency, it is important to provide participants ⁽³⁵⁾, beneficiaries ⁽³⁶⁾, external partners, etc., with clear information about their obligations regarding conflicts of interest and to include provisions or cross-references to legal provisions on those obligations (and the consequences of their violation) in (i) procurement documents; (ii) work programmes; (iii) calls for proposals; (iv) procurement contracts, (v) grant agreements; (vi) contribution agreements and (vii) financing agreements.

4.1. Conflicts of interest in award procedures

The public procurement rules that EU institutions have to comply with are set out in the FR 2018 ⁽³⁷⁾. Article 2(3) FR 2018 defines an award procedure as a procurement procedure, a grant award procedure, a contest for prizes, or a procedure for selecting experts or persons or entities implementing the budget in indirect management.

The Commission (Directorate-General for Budget) 'Central Financial Service's Vade-mecum on public procurement' ⁽³⁸⁾ and 'Vade-mecum on grants' ⁽³⁹⁾ are documents for internal use intended to provide EU institutions and agencies with practical assistance in preparing and implementing these procedures and to provide guidance ⁽⁴⁰⁾ on dealing with conflicts of interest in award procedures.

⁽³²⁾ Article 154(5) FR 2018.

⁽³³⁾ Article 154(3) FR 2018.

⁽³⁴⁾ Commission Decision of 17 April 2019 on establishing new terms of reference for the pillar assessment methodology to be used under Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ C 191, 6.6.2019, p. 2).

⁽³⁵⁾ A participant is defined in Article 2(47) FR 2018 as 'a candidate or tenderer in a procurement procedure, an applicant in a grant award procedure, an expert in a procedure for selection of experts, an applicant in a contest for prizes or a person or entity participating in a procedure for implementing Union funds pursuant to point (c) of the first subparagraph of Article 62(1)'; i.e. indirect management.

⁽³⁶⁾ A beneficiary is defined in Article 2(5) FR 2018 as 'a natural person or an entity with or without legal personality with whom a grant agreement has been signed'.

⁽³⁷⁾ Member States' public procurement rules are defined in the procurement directives.

⁽³⁸⁾ <https://myintracomm.ec.europa.eu/budgweb/EN/imp/procurement/Documents/vademecum-public-procurement-en.pdf>

⁽³⁹⁾ <https://myintracomm.ec.europa.eu/budgweb/EN/imp/grants/Documents/grants-vademecum-en-combined.pdf>

⁽⁴⁰⁾ See also BUDGWEB for model contracts and grant agreements and declarations of absence of conflicts of interest and confidentiality: <https://myintracomm.ec.europa.eu/budgweb/EN/Pages/index.aspx>

Further information can also be found in the 'Procurement and Grants for European Union external actions – A Practical Guide (PRAG)' ⁽⁴¹⁾. This practical guide provides contracting authorities, on the one hand, and tenderers, candidates, applicants and contractors, on the other hand, with practical assistance in preparing and implementing procurement and grant contracts in the field of external actions. This practical guide does not apply to awards procedures for which the Commission acts as contracting authority on its own account (these are covered by the Vade-mecums on public procurement and on grants referred to above). The references included in Section 2.5.4 of this practical guide in relation to conflicts of interest are, in substance, similar to the four cases presented below.

In the specific context of award procedures, four situations must be distinguished: (i) conflicts of interest under Article 61 FR 2018; (ii) attempts to unduly influence an award procedure or obtain confidential information (which should be treated as grave professional misconduct); (iii) the involvement in the preparation of documents used in the award procedure; and (iv) professional conflicting interests ⁽⁴²⁾. Cases involving these four situations are presented in more detail below so to make clear in which cases there is a conflict of interest covered by the provisions of Article 61 FR 2018.

1. Conflicts of interest under Article 61 FR 2018

In the context of award procedures, the EU (and its staff) acts as a contracting authority or as a provider of EU support in the form of grants, prizes, financial instruments and budgetary guarantees.

The concept of conflict of interest is linked to the principles of sound financial management, transparency and equal treatment ⁽⁴³⁾. Where legal instruments provide for an obligation of sound financial management, transparency and equal treatment, this includes the diligent handling of conflicts of interest, in particular to ensure a level playing field.

For example, in line with the principles of transparency and equal treatment, members of an evaluation committee ⁽⁴⁴⁾ have to be able to impartially and objectively assess the proposals. Therefore, they are obligated to take any action required under Article 61 FR 2018.

The concept of conflict of interest refers to situations where persons involved in budget implementation are in one of the situations referred to in Article 61 FR 2018, i.e. where the person's ability to impartially and objectively exercise their role is 'compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest'. In this respect, the obligations explained in Chapter 3 apply ⁽⁴⁵⁾.

In the context of award procedures, Article 61 FR 2018 applies to the authorising officers ⁽⁴⁶⁾ and to those involved or in charge of the award procedure as well as to those involved in the preparation, opening and evaluation phases. The concept of 'conflict of interest' as defined in Article 61 FR 2018 does not apply to participants (i.e. candidates/tenderers/applicants) and should not be used when referring to them.

Furthermore, the FR 2018 further strengthens the rules on conflicts of interest with the following provisions:

— members of opening and evaluation committees (and the external experts selected to assist them) must comply with the provisions of Article 61 FR 2018 (Articles 150(5), 225(4), 237(2), Annex I points 28.2 and 29.1 FR 2018),

⁽⁴¹⁾ <https://ec.europa.eu/europeaid/prag/> (This practical guide does not apply to civil protection and humanitarian aid operations carried out by the Directorate-General for Humanitarian Aid and Civil Protection (DG ECHO)).

⁽⁴²⁾ See recital 104 FR 2018.

⁽⁴³⁾ Judgment of the Court of Justice of 12 March 2015, *eVigilo Ltd.*, C-538/13, ECLI:EU:C:2015:166, paragraph 35, on public procurement. The Court of Justice established that an award decision taken in a situation of conflict of interest violates the principles of equal treatment and transparency. Judgment of the Court of First Instance of 17 March 2005, *AFCon Management Consultants and others v Commission*, T-160/03, ECLI:EU:T:2005:107, paragraph 74, concerning procurement by the Commission, the requirement of avoidance of conflicts of interest was additionally based on the principle of sound financial management.

⁽⁴⁴⁾ Judgment of the Court of First Instance of 17 March 2005, *AFCon Management Consultants and others v Commission*, T-160/03, ECLI:EU:T:2005:107: the Commission failed to investigate apparent conflict of interest between a tenderer and a member of the committee for the evaluation of the tenders.

⁽⁴⁵⁾ See also point 5 of the Guidelines on Commission participation in private law bodies annexed to Decision C(2004)2958.

⁽⁴⁶⁾ Including by delegation and sub-delegation.

- the selection of persons or entities to be entrusted with implementing the EU budget under indirect management should not give rise to conflicts of interest (Article 154(1) FR 2018),
- for financial instruments that the Commission directly implement, the selection of managers of dedicated investment vehicles, financial intermediaries and recipients should not give rise to conflicts of interest (Article 216(3) FR 2018).

2. Grave professional misconduct

There are specific situations involving participants that qualify as cases of ‘grave professional misconduct’ and not as conflicts of interest under Article 61 FR 2108:

- where the participant enters into an agreement with other persons or entities ⁽⁴⁷⁾ with the aim of distorting competition,
- where the participant attempts to unduly influence the decision-making process of the contracting authority during a procurement procedure, for example by denigrating another participant or by misrepresenting the expertise and resources available to the participant,
- where the participant tries to obtain confidential information that may give them undue advantages in the procedure.

These cases are listed in Article 136(1)(c) FR 2018 and are a basis for excluding the participant from award procedures if ‘it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the person or entity belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence’. As set out in Article 136(2) FR 2018, such exclusion may also happen in the absence of a final judgment or a final administrative decision on the basis of a preliminary classification in law having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 143 FR 2018.

3. Involvement in the preparation of documents used in the award procedure

There may be cases where the contracting authority/provider of EU support contracted, for example, outside expertise to help prepare documents to be used in an award procedure (e.g. drafting the tender specifications of a subsequent procurement procedure) and where the service provider themselves decide to take part in the same award procedure as a participant.

In accordance with Article 137(1) FR 2018, the participant is obliged to declare its involvement in the preparation of documents used the award procedure (or any other of the situations referred to in Articles 136(1) and 141(1) FR 2018) and, where applicable, declare whether it has taken any remedial measures referred to in Articles 136(6)(a) and 136(7) FR 2018.

The contracting authority/provider of EU support is responsible for ensuring the participants involved in preparing the documents and other participants are treated equally. The participant involved in preparing the documents must be rejected from the subsequent procedure if their participation entails a breach of the principle of equality of treatment, including distortion of competition, that cannot be remedied otherwise (Article 141(1)(c) FR 2018 ⁽⁴⁸⁾). In this respect, the

⁽⁴⁷⁾ E.g.: another person or entity could be: (1) another participant; or (2) a service provider (previously involved in the preparation of documents to be used in the award procedure), where the participant contracts this service provider to help in preparing their tender/application with the aim of distorting competition (it is notoriously difficult to draft grant/tender specifications which are sufficiently precise that they will be understood by all applicants in the same way. A consultant who has helped a contracting authority to draft them should not then offer (or be contracted) consultancy to a participant on how exactly to draft their corresponding tender/application).

⁽⁴⁸⁾ In addition to the rejection resulting from the involvement in the preparation of documents used in the award procedure it is also highlighted that there are other circumstances that may lead to the rejection of a participant such as the one set out in Article 141(1)(b) FR 2018 when a participant has misrepresented the information required as a condition for participating in the procedure or has failed to supply that information. The following is a case where the authorising officer rejected a participant from an award procedure for failing to supply information (judgment of the General Court of 9 April 2019, *Sopra Steria v European Parliament*, T-182/15, ECLI:EU:T:2019:228): the General Court dismissed Sopra Sterias's application – It was irrelevant that conflict did not materialise, Sopra Steria breached tender rules requiring it to inform the European Parliament without delay of any potential conflict of interest; the European Parliament must reject a bidder who fails to supply information required as a condition for participation: the situation was that the European Parliament put out to tender several lots for different IT services. One of these lots was for evaluation of other lots, so it was obviously incompatible for one consortium to bid for that lot as well as for others. During the procedure, there was a merger between two companies in consortia bidding for such incompatible lots, which led to a cancellation for non-compliance with the incompatibility rule. The Court upheld the European Parliament's cancellation decision.

contracting authority could, for example, provide information for the evaluation committee members concerning the services providers who were involved in preparing the documents to be used in the award procedure.

The burden of proof is on the contracting authority/provider of EU support. It is therefore up to the contracting authority/provider of EU support to prove the distortion of competition or to prove that it has taken all possible measures to avoid the rejection from the award procedure of the participant concerned ⁽⁴⁹⁾. Such rejection is subject to a contradictory procedure ⁽⁵⁰⁾, so the participant must be given the opportunity to prove that their prior involvement did not distort competition.

In practice, it is recommended to avoid rejection by putting in place measures to avoid distortion of competition. In particular, the information given to the service provider for the preparation of documents to be used in an award procedure should also be communicated to the other participants in the second procedure. Besides, the time limit for receipt of tenders/applications of the second procedure should be long enough to ensure that all participants are well informed.

4. Professional conflicting interests (for procurement only)

Economic operators ⁽⁵¹⁾ participating in procurement procedures should not have conflicts of interest that may negatively affect the performance of the contract (Article 167(1)(c) and Annex I point 20.6 FR 2018).

This is usually referred to as a professional conflicting interest and should be treated at the selection stage in order to prevent cases where, for example, an economic operator is awarded a contract to evaluate a project in which they have participated or to audit accounts which they have previously certified as, in these cases, the economic operator has already been involved in the precise subject matter of the tender. These situations often arise in evaluation or audit framework contracts, where the contractor can have a professional conflicting interest for a specific contract.

A case-by-case assessment is required to confirm that the situation of conflict of interest may negatively affect the performance of the specific contract in question. If the economic operator is in such a situation, the corresponding tender is rejected. The assessment should include a contradictory procedure with the concerned operator and should be based on objective criteria and factual elements that confirm, taking into consideration the nature of the tasks to be performed, the professional conflicting interest and, simultaneously, prevent an unjustified limitation of the number of economic operators that can participate in procurement procedures, in order to also abide by the principles of non-discrimination, equal treatment and transparency.

⁽⁴⁹⁾ Judgment of the General Court of 12 February 2019, *Vakakis v Commission*, T-292/15, ECLI:EU:T:2019:84, regarding participation in drafting terms of reference (the contracting authority did not investigate it and in the absence of an investigation, the uncertainty meant that the award procedure was challenged). The case concerned a dispute over damages. The winning company in a tender had employed someone who had been involved in the preparation of tender specifications. The loser claimed damages on the grounds that the winner would have been excluded for that reason, if only the adjudicating authority had done sufficient research. The Court held that the outcome of such research was hypothetical, and anyway need not have resulted in rejection, if other precautions were taken. Paragraph 45: '[...] According to the 'Practical Guide to contract procedures for European Union external actions', a tenderer in a situation of a conflict of interests must be excluded from the tendering procedure unless proof is supplied that that fact does not constitute unfair competition.[...].'

⁽⁵⁰⁾ Judgment of the Court of Justice of 3 March 2005, *Fabricom SA v Belgium*, C-21/03 and C-34/03, ECLI:EU:C:2005:127, paragraph 36, stating the non-conformity with Community law of a provision of national law 'whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.'

⁽⁵¹⁾ For the purpose of the procurement procedures under the FR 2018, an economic operator is defined in Article 2(24) FR 2018 as 'any natural or legal person, including a public entity, or a group of such persons, who offers to supply products, execute works or provide services or supply immovable property'.

In the specific case of the selection of the independent external audit bodies or experts that carry out the external audit of the annual financial statements of European political parties and European political foundations, Article 233 FR 2018 sets out that the term of the contract is limited to 5 years, with a maximum of two terms. After two consecutive terms, there is a presumption that there are conflicting interests that may negatively affect the performance of the audit.

The professional conflicting interest is different from the involvement in the preparation of documents used in the award procedures as described under point 3 of this Chapter 4.1.

4.2. Further references in the FR 2018 to conflicts of interest

The concept of conflicts of interest is further referred to in the FR 2018 to encompass the following situations:

- if the accounting officer of the Commission is also the accounting officer of an executive agency (Article 69(3) FR 2018) or if two or more EU institutions or bodies have the same accounting officer (Article 78(2) FR 2018), specific arrangements are required to avoid any conflict of interest,
- the implementing entities or counterparts involved in implementing financial instruments and budgetary guarantees must prevent conflicts of interest with their other activities (Article 209(2)(e) FR 2018),
- where the implementation of an action or work programme requires the beneficiary to award public contracts, they must avoid any conflict of interest (Article 205(1) FR 2018),
- EU institutions and bodies may exceptionally accept corporate sponsorship as in-kind support for an event or an activity for promotional or corporate social responsibility purposes, provided that it does not generate any conflicts of interest (Article 26(2)(c) FR 2018).

The first two examples are close in substance to the concept of professional conflicting interests described in Point 4 of Chapter 4.1.

4.3. Ethical issues in non-financial contexts

This document covers primarily financial management issues related to conflicts of interest and regulated in the FR 2018. In this context, staff involved in implementing the EU budget being confronted with a situation of conflict of interest as defined in the FR 2018 should follow the procedures described in Chapter 3.2.4. Nevertheless, it is considered valuable to provide, in the current chapter, a short description and compilation of relevant documents covering ethical issues in non-financial contexts at Commission level.

Rules on conflicts of interest applicable to Commission staff (even when there is no involvement in budget implementation) are regulated through what is broadly known as 'rules on ethics' (professional ethics or deontology). The framework is set by the Regulation of the European Parliament and the Council on the Staff Regulations of Officials of the EU and the Conditions of Employment of Other Servants⁽⁵²⁾. In the Commission⁽⁵³⁾, the Directorate-General for Human Resources and Security is responsible for staff ethics at central corporate level, which includes cabinet staff.

In addition, each Commission service has an obligation to advise staff members in relation to ethics and to put in place internal measures for preventing and managing conflicts of interest.

Preventive and mitigating measures are an important aspect of regulating conflicts of interest within the Commission. The obligations for staff include, amongst others, declaring:

- any situation in which a staff member is asked to deal with a matter in which, directly or indirectly, they have any personal interest such as to impair their independence, and in particular, family and financial interests,

⁽⁵²⁾ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community.

⁽⁵³⁾ Equivalent procedures are in place in all other EU Institutions, Agencies and Bodies.

Example:

The person concerned should declare any situation where they are asked to deal with a matter in which, they have a family and/or financial interests (such as the companies owned by their immediate family).

- any situation of conflict of interest upon recruitment or upon return from leave on personal grounds,
- the professional activity of spouses (including a partner with whom the individual has a registered non-marital partnership) and possibly of other immediate family members,
- offers of gifts or hospitality,
- decoration or honour,
- paid or unpaid outside activities and assignments, for which, as a general rule, authorisation needs to be asked and obtained in advance.

A staff member may also be asked, among other things, to: (i) desist from acting in certain circumstances; (ii) refrain from outside activities during active service or leave on personal grounds; and (iii) refrain, for a limited period of time, from professional contacts with former colleagues or from representing opposing parties after leaving the service. In addition, a staff member must refrain from any unauthorised disclosure of confidential information.

The rules and restrictions mentioned above serve the purpose of preventing conflicts of interest from arising, e.g. from the outside activities of the staff member or professional activities of their spouse (including a partner with whom the individual has a registered non-marital partnership). The reference documents and sources of information presented below provide more detail in relation to rules on conflicts of interest affecting staff ⁽⁵⁴⁾, even when they are not involved in implementing the EU budget.

- Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ⁽⁵⁵⁾, notably Articles 11 and 16,
- Commission Decision of 29 June 2018 on outside activities and assignments and on occupational activities after leaving the Service ⁽⁵⁶⁾,
- Communication from Vice-President Šefčovič to the Commission on Guidelines on Gifts and Hospitality for staff members SEC(2012) 167 final ⁽⁵⁷⁾,
- European Commission Ethics Guide (Ref. Ares(2019)4833796 – 24/07/2019) ⁽⁵⁸⁾,
- Practical Guide to Staff Ethics and conduct ⁽⁵⁹⁾,
- Commission Decision of 17 October 2000 amending its Rules of Procedure: Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public ⁽⁶⁰⁾,
- Ethics and staff conduct webpage ⁽⁶¹⁾,

⁽⁵⁴⁾ For Members of the Commission see: Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission (OJ C 65, 21.2.2018, p. 7). The European Union Treaties provide that the independence of Members of the European Commission must be beyond doubt, and that Commissioners must behave with integrity and discretion throughout and after the end of their term of office. The Treaty on the Functioning of the European Union develops these principles further. Member States may not try to influence European Commissioners. Commissioners may not engage in other occupations during their term of office and must continue to behave with integrity and discretion after their mandate. The obligation of professional secrecy, which binds all staff of the European institutions, also applies to Commissioners.

⁽⁵⁵⁾ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01962R0031-20200101>

⁽⁵⁶⁾ https://myintracomm.ec.europa.eu/staff/Documents/talent-management/staff/C_2018_4048_F1_COMMISSION_DECLARATION_EN_V9_P1_954331.pdf

⁽⁵⁷⁾ https://ec.europa.eu/info/sites/info/files/communication-to-the-commission-guidelines-on-gifts-and-hospitality_2012_en.pdf

⁽⁵⁸⁾ <https://webgate.ec.testa.eu/Ares/document/show.do?documentId=080166e5c60c438b>

⁽⁵⁹⁾ <https://myintracomm.ec.europa.eu/staff/Documents/staff-conduct/practical-guide-to-staff-ethics-and-conduct.pdf>

⁽⁶⁰⁾ https://ec.europa.eu/info/files/code-good-administrative-behaviour-0_en

⁽⁶¹⁾ <https://myintracomm.ec.europa.eu/staff/EN/staff-conduct/Pages/index.aspx>

- Guidelines on the prevention and management of conflicts of interest in EU decentralised agencies of 10 December 2013, which notably covers members of management boards and experts ⁽⁶²⁾,
- Guidelines on whistleblowing ⁽⁶³⁾ ⁽⁶⁴⁾.

The handling of cases where a conflict of interest cannot be adequately mitigated depends on the applicable legal framework and procedure. Different remedies will be available to the EU institutions. They exist in the FR 2018, in the Staff Regulations, in sectoral legislation, or in the binding agreements into which the Commission, other persons/entities involved in implementing the EU budget, contractors and beneficiaries have entered.

The European Anti-Fraud Office (OLAF) or the Investigation and Disciplinary Office of the Commission (IDOC) may be called upon to investigate whenever circumstances present (i) a suspicion of fraud, corruption or other illegal activities; (ii) breaches of financial rules (such as those on public procurement); (iii) favouritism affecting the financial interests of the EU; or (iv) serious professional misconduct.

Example ⁽⁶⁵⁾:

‘The Appointing Authority decided to remove from post an official who privately negotiated important terms of a contract with an external company, without any authorisation from his hierarchy. Both the Disciplinary Board and the Appointing Authority considered that this behaviour seriously damaged the image of the institution and reflected adversely upon his position. Moreover, the official openly recommended the company of his partner as a subcontractor to the Commission, which resulted in that company effectively acting as a subcontractor, without the knowledge of the hierarchy. The official furthermore participated in the management of the contract binding the company of his partner to the contractor of the Commission. All this constituted a serious conflict of interest. The Appointing Authority concluded that the official seriously breached Articles 11, first paragraph, 12 and 21 of the Staff Regulations, as well as Article 57 and 79 of the Financial Regulation ⁽⁶⁶⁾’.

5. SPECIFIC ELEMENTS FOR SHARED MANAGEMENT

In addition to the rules set out in the FR 2018, the rules for managing and controlling shared management funds are supplemented in sectoral legislation.

For details about the rules on financial corrections and on the set up of management and control systems for shared management funds, please refer to the relevant provisions of (i) the FR 2018; (ii) other sectoral legislation for shared management funds notably, with regard to European Structural and Investment Funds, to the Common Provisions Regulation (‘CPR’) ⁽⁶⁷⁾; and (iii) the ‘Guidance for the Commission and Member States on a common methodology for the assessment of management and control systems in the Member States – EGESIF 14-0010-final 18/12/2014 ⁽⁶⁸⁾’. In

⁽⁶²⁾ https://europa.eu/european-union/sites/europaeu/files/docs/body/2013-12-10_guidelines_on_conflict_of_interests_en.pdf

⁽⁶³⁾ <https://myintracomm.ec.europa.eu/staff/en/staff-conduct/individual-obligations/Pages/whistleblowing.aspx>

⁽⁶⁴⁾ <https://myintracomm.ec.europa.eu/staff/Documents/staff-conduct/whistleblowing-guidelines-en.pdf>

⁽⁶⁵⁾ Source: Activity Report of the Investigation and Disciplinary Office of the Commission (IDOC) 2019.

⁽⁶⁶⁾ The references to Articles 72 and 79 FR 2012 have their correspondence in Articles 61 and 100 FR 2018.

⁽⁶⁷⁾ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

⁽⁶⁸⁾ https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2014/guidance-for-the-commission-and-member-states-on-a-common-methodology-for-the-assessment-of-management-and-control-systems-in-the-member-states

addition, for detailed rules on the management and control system for the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), please refer also to the Horizontal Regulation ⁽⁶⁹⁾ and in particular the accreditation criteria for paying agencies ⁽⁷⁰⁾.

5.1. Who does what in the context of shared management?

The overall responsibility and accountability for implementing the EU budget lies with the Commission. However, approximately 75 % of the EU budget is implemented by Member States in shared management in accordance with the rules of the FR 2018, the applicable sectoral EU legislation and national rules. Therefore, close cooperation between the national authorities and the Commission is needed to ensure that the EU budget is used in line with the principles of sound financial management and that the EU's financial interests are well protected by an adequate accountability model.

Shared management means that Member States (and, depending on their organisation, also their regions), taking into account their institutional and legal framework, are responsible for implementing programmes, aid schemes and actions funded under shared management. This role also includes defining the scope of support of the funds and the design of specific instruments for support and allocating funds to beneficiaries (e.g. companies, farmers, municipalities, etc.) and audits and controls on the implementation of programmes.

In shared management, the Commission is responsible for proposing the legislative provisions at EU level, adopting the programmes, carrying out certain advisory functions, and exercising supervision over the implementation of the programmes, including monitoring and auditing, without, however, intervening directly at the operational level; i.e. under shared management rules the Commission, in principle, is not a party to the contractual relation between the national or regional authority and the beneficiaries/recipients of the funds. Moreover, the Commission also facilitates the EU-wide dissemination and exchange of knowledge, good practices and information regarding the support provided by the EU funds under shared management.

In accordance with Articles 36(1) and 63(1) FR 2018, the Commission and the Member States must adhere to the principle of sound financial management as defined in Article 33 FR 2018.

In this context, it is for Member States and their authorities to act by means of the following steps.

- Setting up and ensuring the effective functioning of internal control systems. These control systems must comply with the requirements of the FR (in particular Articles 36 and 63 FR 2018), sectoral legislation and national rules, including those on (i) having adequate procedures for organising such internal control systems; (ii) selecting operations; (iii) having appropriate measures in place to prevent, detect and properly mitigate and address conflicts of interest; and (iv) carrying out the necessary administrative and on-the-spot management verifications or checks, and audits. Member States should check their existing systems to ensure that the aspects as regards conflicts of interest in the FR 2018 are well covered.
- Establishing measures to avoid conflicts of interest. Effective prevention of conflicts of interest is important to safeguard the EU's financial interests in the implementation of the EU budget, under the applicable EU rules. Staff members should act without regard for personal interests in order to safeguard the integrity of the decision-making process.
- Establishing whether a conflict of interest exists in a given case and, if so, applying mitigating measures. To this end, a Member State has to assess whether or not a conflict of interest exists, for example, when its authorities evaluate an application for funding or check the eligibility of expenditure.

⁽⁶⁹⁾ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ L 347, 20.12.2013, p. 549).

⁽⁷⁰⁾ Annex 1 to the Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ L 255, 28.8.2014, p. 18), in particular point 1(B)(v).

- Reporting on cases of conflict of interest using appropriate reporting tools, in particular the Irregularity Management System (IMS) for reporting detected irregularities to the Commission.
- Correcting irregularities in cases of non-compliance (either individual or systemic ⁽⁷¹⁾) with the rules on avoidance of conflicts of interest as laid down in Article 59(2)(b) FR 2012 and Article 63(2)(c) FR 2018. Non-compliance with conflict of interest rules may result in Member States imposing financial corrections and recovering funds ⁽⁷²⁾ as laid down in sector-specific rules and/or other forms of redress.

Example:

In one notable case, an entity which had been used to implement cooperation programmes had to be wound up altogether, because some members of the entity board also directed technical assistance offices which were likely to, and did, get consultancy work from it. This was criticised by the Court of Auditors in its special report No 1/96. One of the offices concerned launched a case for defamation against the Court of Auditors, which it lost. In its judgement on that particular case the Court of Justice stated that ‘the conflict of interest constitutes, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith’ (our underline) ⁽⁷³⁾ ⁽⁷⁴⁾.

As explained in Chapter 3.2.3, the existence of an objectively perceived conflict of interest is to be assessed regardless of the intention of the person concerned. The Commission considers that an unresolved objectively perceived conflict of interest constitutes an irregularity. Such irregularities must be prevented, but if not, they should be detected and corrected by the competent national authorities ⁽⁷⁵⁾. More targeted corrective measures and sanctions/penalties might be imposed, by Member State authorities, on beneficiaries/final recipients based on national legislation and on the agreements and contracts concluded with them.

Similarly to the situation described in Chapter 5.2, for financial corrections in case of non-compliance with the applicable rules on public procurement ⁽⁷⁶⁾, there is no need to demonstrate any effective impact of the objectively perceived conflict of interest or that the objectively perceived conflict of interest has been deliberately used to benefit a certain person/entity (these would be relevant only for establishing a fraudulent irregularity).

When a conflict of interest is detected, the Member States authorities should consider possible implications on other operations or contracts for the concerned operation/stakeholders and act appropriately to prevent further situations of conflict of interest.

⁽⁷¹⁾ See also as information points: (1) Judgment of the Court of Justice of 27 October 2005, *Greece v Commission*, C-387/03, ECLI:EU:C:2005:646; and (2) Judgment of the General Court of 25 February 2015, *Poland v Commission*, T-257/13, ECLI:EU:T:2015:111, in the field of the CAP.

⁽⁷²⁾ For the CAP, see in particular Articles 54-56 of Regulation (EU) No 1306/2013 of 17 December 2013.

⁽⁷³⁾ Judgment of the Court of First Instance of 15 June 1999, *Ismeri Europa Srl v Court of Auditors*, ECLI:EU:T:1999:124, T-277/97 and appeal, paragraph 123. In the same case (paragraph 146), the conflict of interest with regard to the award of public contracts already compromises the sound management of EU funds and equal access for all to such contracts. Thus, it is not necessary for it to also cause quantifiable material injury as well.

⁽⁷⁴⁾ Judgment of the General Court of 20 March 2013, *Nexans France v Joint Undertaking Fusion for Energy*, T-415/10, ECLI:EU:T:2013:141, paragraph 114. The fact that a tenderer, even though he has no intention of doing so, is capable of influencing the conditions of a call for tenders in a manner favourable to himself constitutes a situation of a conflicts of interest.

⁽⁷⁵⁾ Article 63(2) FR 2018: ‘2. When executing tasks relating to budget implementation, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, namely by [...] (c) preventing, detecting and correcting irregularities and fraud; [...] They shall also recover funds unduly paid and bring legal proceedings where necessary in that regard. Member States shall impose effective, dissuasive and proportionate penalties on recipients where provided for in sector-specific rules or in specific provisions in national law.’

⁽⁷⁶⁾ See type of irregularity No 21 of the annex to the Commission Decision C(2019) 3452 final of 14.5.2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement.

- Ensuring the audit, in accordance with internationally accepted audit standards, of the use of the funds by national independent audit bodies, in addition to the controls carried out by national authorities responsible for the management of EU funds (or under their responsibility). The audit opinions of these bodies form the basis of the overall assurance on the use of EU funds. The Commission's reliance on national audit opinions does not however prevent it from carrying out further audits on the use of EU funds and does not affect the Commission's duty to monitor, as part of its risk assessment, the control systems established in the Member States.

The Commission is responsible for:

- providing advice and guidance for, and monitoring, the conformity of national internal control systems with EU requirements,
- auditing Member States' internal control systems to assess whether they are appropriate and effective in preventing and managing, among other things, situations of conflict of interest (on a risk basis, taking account of the results of verifications, audits and controls carried out by national authorities or other EU audit bodies and communicated to the Commission and any other information available) and to make recommendations to improve those systems,
- auditing expenditure declared to the Commission by the Member States to verify compliance with relevant eligibility rules,
- applying appropriate measures to protect the EU budget, such as the interruption of payment deadlines, suspension of payments and financial corrections in cases of non-compliance (either individual or systemic) with the rules on avoidance of conflicts of interest as laid down in Article 59(6)(b) and (c) FR 2012 or Article 63(8)(b)(c) FR 2018, together with recommendations for Member States on appropriate corrective measures to take, including the strengthening of their internal control systems ⁽⁷⁷⁾.

Article 63(8)(b) FR 2018 ⁽⁷⁸⁾ obliges the Commission to exclude expenditure from EU financing because of a breach of applicable law. This can result from controls and audits at any level of the control systems in the Member State, from controls and audits carried out by the Commission, from audits by the European Court of Auditors or from investigations by the European Anti-Fraud Office (OLAF) and their purpose is to restore a situation where the expenditure co-financed is in line with the applicable law. As explained above, Member States are primarily responsible for correcting irregularities. The Commission may exclude expenditure from EU financing where the Member State has failed to take the required actions, where there are serious deficiencies in the effective functioning of the management and control system, or where all or part of the EU financing to an operation is irregular. The Commission has the power to apply extrapolated or flat-rate corrections where it is not possible to quantify precisely the amount of irregular expenditure ⁽⁷⁹⁾.

In conclusion, for shared management funds, it is first for national authorities/bodies managing and controlling EU funds to prevent, detect, report and correct conflicts of interest situations. The measures taken by these authorities/bodies in this respect remain subject to audits by the national independent audit bodies, monitoring and audits by the Commission as well as audits by the European Court of Auditors and to investigations by OLAF in the exercise of its competences.

5.2. Rules on conflicts of interest under the Procurement Directives

Article 61 FR 2018 covers all management modes and all types of spending under the EU budget.

⁽⁷⁷⁾ COM(2014) 38 final, Report from the Commission to the Council and the European Parliament, EU Anti-corruption report, p. 26. <https://eur-lex.europa.eu/procedure/EN/1041639>

⁽⁷⁸⁾ Article 63(8)(b) FR 2018: '8. In order to ensure that Union funds are used in accordance with the applicable rules, the Commission shall: [...] b) exclude from Union financing expenditure for which disbursements have been made in breach of applicable law';

⁽⁷⁹⁾ Several findings related to conflict of interest have been identified in the past in the framework of Commission audits and OLAF investigations, both at system level and at the level of individual operations. In the case of findings related to the system established in the Member State to prevent, detect and mitigate the conflicts of interest, system recommendations have been issued and flat rate corrections have been applied due to the system deficiencies found, covering also issues related to conflicts of interest. In the case of individual projects being affected by conflicts of interest with a financial risk, the findings resulted in 100 % financial corrections of the expenditure affected by the conflict of interest.

Public procurement rules set out in the Procurement Directives⁽⁸⁰⁾ are relevant in shared management, in particular for a beneficiary in a Member State that is a contracting authority⁽⁸¹⁾ and awards contracts for implementing a project funded by the EU budget.

Procurement rules take the form of national law, notably the Member States' transposition of the Procurement Directives, or they may be derived directly from general principles enshrined in EU law.

It should be noted that the scope of the Procurement Directives is limited, in particular by minimum thresholds as regards the procurement value net of VAT. Besides, given the transposition deadline of 18 April 2016, the 2014 Procurement Directives are applicable as from that date at the latest or earlier if transposed before that date in national legislation.

Under Article 2 of the previous Procurement Directive⁽⁸²⁾, the requirement to avoid conflicts of interest was derived from the principles of equal treatment and transparency, enshrined in that provision⁽⁸³⁾. Indeed, going beyond the directives, the Court of Justice stated that, even where the directives do not contain any provisions specifically governing any litigious issue⁽⁸⁴⁾ or where the case at hand falls outside the scope of the directives⁽⁸⁵⁾⁽⁸⁶⁾, contracting authorities in the Member States are bound to comply with the fundamental rules of the Treaty in general, and with the principle of equal treatment in particular. As a result, the principle of transparency also applies in this context, to ensure that compliance with the principle of equal treatment can be scrutinised⁽⁸⁷⁾.

If the principles of equal treatment and transparency, on which the requirement to avoid conflicts of interest was based, are thus generally applied in the field of public procurement, then the avoidance of conflicts of interest must be considered equally applicable in this field.

In the new PP Directive⁽⁸⁸⁾, Article 24 obliges Member States to ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising from procurement procedures and lays down a definition for the concept of a conflict of interest, as follows:

Article 24 Directive 2014/24/EU:

'Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.'

⁽⁸⁰⁾ Directives 2014/23/EU, 2014/24/EU and 2014/25/EU. In so far as the Directives do not apply, the procurement rules fall within the scope of the Treaty and also under national public procurement law.

⁽⁸¹⁾ For EU institutions' public procurement rules are defined in the FR 2018.

⁽⁸²⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽⁸³⁾ Judgment of the Court of Justice of 12 March 2015, *eVigilo Ltd.*, C-538/13, ECLI:EU:C:2015:166, paragraph 35.

⁽⁸⁴⁾ Judgment of the Court of Justice of 18 June 2002, *Hospital Ingenieure Krankenhaus-Planungs- GmbH (HI) / Stadt Wien*, C-92/00, ECLI:EU:C:2002:379, paragraph 47.

⁽⁸⁵⁾ Judgment of the Court of Justice of 7 December 2000, *Telaustria Verlags GmbH and Telefonadress GmbH / Telekom Austria AG*, C-324/98, ECLI:EU:C:2000:669, paragraph 60.

⁽⁸⁶⁾ Judgment of the Court of Justice of 23 January 2003, *Makedoniko Metro and Mikhaniki AE / Elliniko Dimosio*, C-57/01, ECLI:EU:C:2003:47, paragraph 69. See also the judgments cited in Footnotes No 16 and 17 and Section 1.1 of Commission Interpretative Communication 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2).

⁽⁸⁷⁾ Judgment of the Court of Justice of 7 December 2000, *Telaustria Verlags GmbH and Telefonadress GmbH / Telekom Austria AG*, C-324/98, ECLI:EU:C:2000:669, paragraphs 61 to 63.

⁽⁸⁸⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

Pursuant to this provision, contracting authorities are obligated to take appropriate measures and put in place systems capable of detecting, preventing and redressing conflicts of interest in the area of public procurement ⁽⁸⁹⁾. This is valid for all stages of a procurement procedure (preparation of tender, selection of tenderers/candidates and award of contract as well as post-tendering phase).

The wording of the PP Directive is not prescriptive in relation to the measures and mechanisms to achieve these objectives. It is up to the Member States to identify the most appropriate solutions, as allowed by the national jurisdictions. In any case, Member States must make information and guidance available to contracting authorities and to economic operators as set out in Article 83(4) PP Directive.

In line with the purpose of Article 24 PP Directive – namely to protect fair competition and equal treatment among tenderers – Article 57(4)(e) PP Directive allows (though does not oblige) Member States to provide for a ground for exclusion of a tenderer where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other, less intrusive measures.

A type of case that has traditionally been categorised as a conflict of interest is characterised by the tenderer's involvement in preparing a call for tenders. These cases are now regulated separately in Article 41 PP Directive, requiring the contracting authority to take appropriate measures to avoid any distortion of competition. Under Article 57(4)(f) PP Directive, Member States may provide for the tenderer to be excluded where the situation cannot be effectively remedied by other, less intrusive measures (such as sharing relevant information with all tenderers and the fixing of adequate time limits for the receipt of tenders). Prior to any such exclusion, tenderers must be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition ⁽⁹⁰⁾ ⁽⁹¹⁾.

Article 58(1)(c) PP Directive defines the framework for selection criteria, among which the tenderer's technical and professional ability. Article 58(4) PP Directive elaborates on this type of criteria: a contracting authority may assume that an economic operator does not possess the required professional abilities if the contracting authority has established that the economic operator has conflicting interests that may negatively affect the performance of the contract. The logic behind this provision applies equally to cases that do not fall within the scope of the PP Directive in the sense that (within the confines of national law) the contracting authority has the option (but is not obliged under the PP Directive) to exclude a tenderer from the being awarded the contract if that tenderer is subject to a conflict of interest.

National authorities had to take the measures necessary to ensure that, by the deadline for transposition (18 April 2016), all arrangements are in place in order to be compliant with the PP Directive. By April 2017 and every 3 years after, Member States are required to submit a report to the Commission on the most common sources of misapplication or legal

⁽⁸⁹⁾ Judgment of the Court of Justice of 10 July 2001, *Ismeri Europa v Court of Auditors*, C-315/99 P, ECLI:EU:C:2001:391, paragraph 47: '[...] the concept of "confusion of interests" defined by the Court of First Instance as being "the fact that a person who helps to evaluate and select bids for a public contract has this contract awarded to him" is pertinent, relevant and indicative of a serious malfunction of the institution or body concerned.'

⁽⁹⁰⁾ Judgment of the Court of Justice of 3 March 2005, *Fabricom SA v Belgium*, C-21/03 and C-34/03, ECLI:EU:C:2005:127, paragraph 36, stating the non-conformity with Community law of a provision of national law 'whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.'

⁽⁹¹⁾ Judgment of the General Court (Second Chamber) of 13 October 2015, *Intrasoft International SA v European Commission*, T-403/12, ECLI:EU:T:2015:774, paragraph 76: 'The awarding authorities are under no absolute obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no actual risk of practices liable to distort competition between tenderers. On the other hand, the exclusion of a tenderer where there is a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency (judgment in *Nexans France v Joint Undertaking Fusion for Energy*, cited in paragraph 75 above, ECLI:EU:T:2013:141, paragraphs 116 and 117).'

uncertainty as well as on prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities as set out in Article 83(3) PP Directive. Similar provisions have been inserted in the specific procurement directives concerning concessions ⁽⁹²⁾ and utilities ⁽⁹³⁾.

Examples of when conflicts of interest arose in public procurement procedures:

- (1) In a public procurement procedure carried out within a project concerning actions to promote business growth, a conflict of interest was identified as the CEO of the sole bidding company was employed by the contracting authority with the task of preparing the tender technical specifications, at the time the tender procedure was carried out. As a result, all expenditure related to the public procurement was irregular (ineligible for co-financing).
- (2) In a public procurement procedure carried out within a project for renewing technology in an environmentally friendly manner, the shareholder of the winner company was also the manager of the consultant that advised the contracting authority on the technical documentation. The contracting authority chose a different consultant, not linked to the winner, for preparing the public procurement procedure. The public procurement consultancy limited its work to the legal part of the call and used for the technical specifications of the call for tenders the technical documentation prepared by the first consultancy. The contracting authority did not take appropriate measures to avoid any distortion of competition. As a result, the expenditure related to the public procurement was irregular (ineligible for co-financing).
- (3) In a public procurement procedure, three independent offers needed to be presented according to national rules, yet the beneficiary (contracting authority) chose the offer of a bidder whose owner was also the exclusive owner of the beneficiary (in this case however the conditions for an in house award have not been fulfilled). In this case, the managing authority made no adequate verification of a situation of lack of independence between the beneficiary and its contractors. Although the offer was the lowest received, all expenditure related to this public procurement contract was concluded as being irregular and consequently ineligible for co-financing.

Infringement of rules on public procurement may result in financial corrections or other forms of redress. The Commission adopted guidelines, in 2013 ⁽⁹⁴⁾ and in 2019 ⁽⁹⁵⁾, for determining financial corrections to be made to expenditure financed by the EU for non-compliance with the applicable rules on public procurement.

Similarly to the 2013 guidelines, the 2019 guidelines set out flat-rate financial corrections for cases related to conflicts of interest, 'whenever an undisclosed or inadequately mitigated conflict of interest has been identified, according to Article 24 of the Directive 2014/24/EU (or Article 35 of Directive 2014/23/EU or Article 42 of Directive 2014/25/EU), and the tenderer concerned was successful in securing the contract(s) in question,' ⁽⁹⁶⁾ The conflict of interest may already occur at the stage of the project preparation, as far as the project preparation had an influence on the tender documentation/tender procedure. There is no need for a complainant to demonstrate that the conflict of interest has materialised ⁽⁹⁷⁾.

⁽⁹²⁾ Articles 35, 38(7)(d) and 45(3) and (4) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

⁽⁹³⁾ Articles 42, 59, 80(1) and 99(3) and (4) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁽⁹⁴⁾ Commission Decision C(2013) 9527 final of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.

⁽⁹⁵⁾ Commission Decision C(2019) 3452 final of 14.5.2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement.

⁽⁹⁶⁾ The conflict of interest involving other than a winning tenderer is also considered a breach of the Procurement Directives provisions, however the Commission guidelines do not set out a financial correction for such breach as only the winning tender would be eligible for co-financing by the EU budget.

⁽⁹⁷⁾ Judgment of the Court of Justice of 12 March 2015, *eVigilo Ltd.*, C-538/13, ECLI:EU:C:2015:166, paragraph 31-47.

With regard to the condition of undisclosed and inadequately mitigated conflict of interest, this refers to (i) an obligation of the person concerned for prior disclosure of any perceived conflict of interest; and (ii) implementation of mitigating measures to address such situations by the contracting authority. These measures should in the first place be directed at the person concerned on the side of the contracting authority (i.e. this person ceases all activities related to the tender in question, for example, the member of the evaluation committee is removed from the panel). If such measures are not sufficient to mitigate the conflict of interest (for example, the person concerned has been involved in the stages of the procurement procedure that already took place and cannot be changed/repeated), further measures should be taken by the contracting authority as regards the tenderer concerned (such as exclusion of the tenderer from the tender, a possibility also mentioned in Article 57(4)(e) of PP Directive).

There is no need to demonstrate any effective impact of the conflict of interest (also due to the notion of perception in the definition of the conflict of interest) on the concrete decision-making process. In particular, there is no need for evidence that the conflict of interest has been deliberately used to benefit the winning tenderer (these would be relevant only for establishing a fraudulent irregularity).

Example:

Person X is one of five members of a tender evaluation committee. During the period of evaluation of tenders and decision-making on the award, X has been employed by the winning tenderer, company Y, in a position responsible for tasks related to the subject matter of the tender, an employment which X, however, does not disclose in violation of their procedural obligation.

Irrespective of the concrete and material influence of the person X on the award decision and its concrete circumstances (decision-making mode of the evaluation committee in accordance with objective award criteria, six bidders participating in the tender, etc.), the situation presents a conflict of interest. A financial correction applies in accordance with the Commission's guidelines on financial corrections in public procurement if both conditions mentioned in these guidelines are fulfilled, i.e. (1) the conflict of interest has not been disclosed and/or adequately mitigated (either on the side of the person X or on the side of the company Y); and (2) this conflict of interest concerned the winning company.

For further information on avoiding conflict of interest in the context of procurement, please refer to the following documents: (i) PP Directives; (ii) 'Identifying conflicts of interest in public procurement procedures for structural actions. A practical guide for managers (2013)' ⁽⁹⁸⁾; (iii) 'Public procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds. February 2018' ⁽⁹⁹⁾; and (iv) 'DG REGIO – Preventing fraud and corruption in the European Structural and Investment Funds – taking stock of practices in the EU Member States Study on the implementation of Article 125(4)(c) CPR in the Member States' ⁽¹⁰⁰⁾.

5.3. Specific elements for shared management financial instruments

Where EU funds are implemented through financial instruments, preventive and mitigating measures need to be taken at every stage of implementation of the financial instrument operation, from selecting bodies to implement financial instruments ⁽¹⁰¹⁾ to selecting final recipients. Article 38(5) CPR sets out that the selection of these bodies must be based on open, transparent, proportionate and non-discriminatory procedures, avoiding conflict of interest.

⁽⁹⁸⁾ This guidance document elaborated by a group of Member States' experts coordinated by OLAF under the auspices of the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF): https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/2013_11_12-Final-guide-on-conflict-of-interests-EN.pdf

⁽⁹⁹⁾ https://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf

⁽¹⁰⁰⁾ https://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/implement_article125_fraud_en.pdf

⁽¹⁰¹⁾ For detailed information concerning the selection of bodies implementing financial instruments see the Commission Notice – Guidance for Member States on the selection of bodies implementing financial instruments (OJ C 276, 29.7.2016, p. 1).

Article 7(2) of Commission Delegated Regulation (EU) No 480/2014 ⁽¹⁰²⁾ lays down that the selection of bodies must be transparent and justified on objective grounds and not give rise to conflicts of interest. It also lays down that in cases where the body implementing the financial instrument allocates its own financial resources to the financial instrument or shares the risk, measures to mitigate possible conflicts of interest are necessary.

Moreover, Article 6(1)(a) of Commission Delegated Regulation (EU) No 480/2014 lays down that the selection of final recipients must be transparent and justified on objective grounds and must not give rise to a conflict of interest.

6. POSSIBLE MEASURES TO AVOID AND MANAGE CONFLICTS OF INTEREST

When dealing with conflicts of interest, the focus should be placed on prevention as it is much more difficult to detect and correct such situations. It is worth bearing in mind that conflicts of interest can arise at any stage of EU budget implementation. As a result, any measure to prevent and address them should consider the earlier stages of implementation to maximise prevention over correction. Furthermore, measures to prevent and address conflicts of interest should be effective, proportionate, transparent and regularly updated (taking into consideration any legal, policy or institutional development).

This chapter provides a non-exhaustive list of suggestions and recommendations for measures that could be put in place to avoid and manage conflict of interest situations. These suggestions and recommendations aim at providing EU institutions and Member States' authorities with guidance and tools to assist them in the avoidance of conflicts of interest.

For additional explanations and examples, please refer to the extensive work undertaken by the OECD (Organisation for Economic Co-operation and Development) and SIGMA (Support for Improvement in Governance and Management ⁽¹⁰³⁾) on conflicts of interest ⁽¹⁰⁴⁾ and to the regulatory framework for EU institutions referred to in Chapter 4.

⁽¹⁰²⁾ Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 138, 13.5.2014, p. 5).

⁽¹⁰³⁾ SIGMA is a joint initiative of the OECD and the EU, principally financed by the EU.

⁽¹⁰⁴⁾ OECD (1) 'Managing Conflict of Interest in the Public Sector' (2005), <https://www.oecd.org/gov/ethics/49107986.pdf>

(2) OECD 'Managing Conflict of Interest in the Public Sector', OECD Guidelines and Country Experiences (2003), p. 24, <http://www.oecd.org/corruption/ethics/48994419.pdf>

(3) OECD 'Guidelines for managing conflict of interest in the public service – report on Implementation' (2007).

(4) Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, OECD/LEGAL/0316, <https://legalinstruments.oecd.org/public/doc/130/130.en.pdf>

(5) SIGMA (Support for Improvement in Governance and Management) – a joint initiative of the OECD and the EU, principally financed by the EU – paper 36 – GOV/SIGMA(2006)1/REV1, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=gov/sigma\(2006\)1/REV1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=gov/sigma(2006)1/REV1)

(6) OECD (2017), Recommendation on Public Integrity, <http://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf>

(7) OECD (2014), Survey on managing conflict of interest in the executive branch and whistle-blower protection, <https://www.oecd.org/governance/ethics/2014-survey-managing-conflict-of-interest.pdf>

(8) OECD (2010), Post Public Employment – Good Practices for Preventing Conflict of Interest, <https://www.oecd-ilibrary.org/docserver/9789264056701-en.pdf?expires=1578648145&id=id&accname=oid031827&checksum=A96A1-D7335AAB93369841CEF00EA4789>

(9) OECD (2009), Revolving doors, accountability and transparency: Emerging regulatory concerns and policy solutions in the financial crisis, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2009\)2&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2009)2&docLanguage=En)

(10) OECD (2005), Guidelines for managing conflict of interest in the public service, Policy brief, https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/cy%20activity%20Interface2006/143_2006_if_oecd%20Policy%20Brief.pdf

(11) OECD (2019), Fraud and corruption in European Structural and Investment Funds. A spotlight on common schemes and preventive actions, <https://www.oecd.org/gov/ethics/prevention-fraud-corruption-european-funds.pdf>

6.1. Awareness raising

The accountability model for managers is an approach to public management in which managers are held accountable for results by assigning them responsibility, accompanied by delegated authority for decision-making and the autonomy and resources necessary to achieve the expected results. In practice, senior managers should have the authority and autonomy to be accountable for the results of the organisation or entity that they supervise.

In the context above, prevention of conflicts of interest is closely linked to awareness of those involved; if a conflict of interest is anticipated, it can be avoided. Raising awareness about conflicts of interest is therefore highly recommended. In addition, the existence of a strong management culture ('tone at/from the top') that supports integrity is of utmost importance as senior public officials/staff members can create a culture of integrity where everyone has ownership and responsibility for their actions and where conflicts of interest are not tolerated. Similarly, it is also important to encourage a culture in which staff members can seek guidance and advice without fear of reprisal.

EU institutions and national authorities should provide continuous, comprehensive and compulsory training on ethics and integrity and on how to identify, manage and monitor conflicts of interest. This includes examples of conflicts of interest and the provision of advice in case an official has doubts about policies or procedures in place. The appointment of an ethics officer within an entity involved in EU budget implementation could also be part of the measures in place. Such officer would be responsible for providing any person who so requests with advice relevant to compliance with ethical principles. While being bound by professional secrecy, the ethics officer could play a fundamental role in the dissemination of a culture of integrity based on dialogue and trust.

6.2. Policies, rules and procedures

Taking account of the number, size and complexity of programmes and available staff members, it is important to ensure that the principle of separation of functions (or segregation of tasks/duties) is adequately implemented in practice (between and within each body involved in management and/or control of EU funds), as this is an important requirement for establishing the management and control systems as set out in Article 36(3)(a) FR 2018.

Each body should have: (i) written arrangements as regards the exercise of the different functions and of the decision-making process; (ii) a clear division of functions and clear job descriptions for staff; (iii) an adequate number of sufficiently qualified human resources at the different levels and for the different functions.

The principle of separation of functions is relevant to the extent that there is lower likelihood of conflicts of interest if functions are adequately separated, i.e., an adequate separation of functions minimises the risk of conflicts of interest. The absence of procedures that ensure that functions are adequately separated is a deficiency in the management and control systems.

Examples with relation to the principle of separation of functions:

- (1) A staff member who was responsible for the appraisal of an application for EU funding is later tasked with auditing its implementation. In carrying out the audit, the staff member may believe that their support for the selection of the project should be borne out by a positive report on its implementation. Even if there are a large variety of reasons why a selected project could derail, the absence of a clear separation of functions may lead to a situation of conflict of interest.
- (2) The audit authority implements some technical assistance operations. When such operations are included in the sample to be audited by the audit authority, the audit of such operations should be carried out by a different independent auditor to ensure functions are adequately separated. Similar situations could occur, for example, at the level of a managing authority of a given programme in which the same managing authority is also beneficiary of the funds. In those cases, the tasks of the managing authority should be transferred to a different service (even if within the same organisation) and arrangements for the evaluation of the grant application, approval of the grant decision and management verifications must ensure separation of functions.

(3) The economic department within a regional ministry sends a voting member to a selection committee:

Scenario 1: The environmental department of a regional ministry applies for a project, the selection of which is to be decided by the economic department of the same ministry. Assessment: (i) no conflict of interest – if no hierarchical relations exist between the economic and environmental departments; and if the economic department has not been involved in preparing the project undertaken by the environmental department; and there is clear separation of functions.

Scenario 2: The economic department applies for a project. Assessment: conflict of interest.

The implementation of a code of ethics and/or conduct ⁽¹⁰⁵⁾ or any other policies and procedures at work, including rules governing the management of conflicts of interest in the organisation ⁽¹⁰⁶⁾, are also of key importance. All of these are helpful tools to raise awareness and establish the rules and obligations for avoiding and managing conflicts of interest. Policies and procedures should be unambiguous and cover issues such as:

- conflicts of interest – explanations, requirements and procedures for declaring them, contradictory procedures leading to possible sanctions,
- gifts and hospitality policy ⁽¹⁰⁷⁾ – explanation and responsibilities of staff on compliance,
- confidential information – explanation and responsibilities of staff,
- requirements for reporting suspected fraud, including protection of whistle-blowers (as mentioned under Article 142(2)(a) FR 2018). Whistle-blowing policies and rules should include elements such as what to report, how to report, to whom to report, where to find support, the protection of personal data, the protection measures for whistle-blowers, how their reporting will be investigated and communicated and the consequences for people who retaliate against whistle-blowers ⁽¹⁰⁸⁾.

Legislation, policies and formal procedures to regulate conflicts of interest, to mitigate the risk of conflicts of interest and to tackle cases that do arise are tools that must be in place (see also Chapter 3.2). In a constantly evolving environment, the policy and procedures must remain effective and relevant in dealing with conflicts of interest by updating them if and when necessary. Staff members must declare adherence to the established rules, policies and procedures.

⁽¹⁰⁵⁾ From a study for the European Parliament Budgetary Control Committee ('CONT'), 'Codes of Conduct and Conflicts of Interest at any governance level of the management of EU Funds': According to the OECD, there is a definitional differentiation between codes of conduct and codes of ethics. A code of conduct serves as an instrument of a rules-based compliance approach. It describes as specifically and unambiguously as possible what kind of behaviour is expected and establishes strict monitoring and sanctioning procedures to enforce the code. A code of ethics is rooted in the values-based management approach. It focuses on general values rather than on specific guidelines, putting more trust in the employee's capacities for moral reasoning. A code of ethics seeks to support and coach on the application of these values in daily real-life situations (Bertók, J. & Maesschalck, J. (2009). *Public Sector Ethics: an infrastructure*. In: OECD (Eds.): *No longer business as usual – Fighting Bribery and Corruption*. Paris. p. 34). However, the choice for a respective version depends on several factors, including the existing jurisdiction's legal framework and the organisation's ethics culture in management and leadership. Therefore, in most cases, a hybrid form is desired, providing a general ethics scope and clear behavioural instructions (*Ibid.* p. 35).

https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282017%29572715

⁽¹⁰⁶⁾ For example, 'The European Code of Good Administrative Behaviour' adopted by the Commission, 13 September 2000 which sets out the principles that guide the administrative conduct of the Commission services, including integrity and avoidance of conflicts of interests,

https://ec.europa.eu/info/files/code-good-administrative-behaviour-0_en

⁽¹⁰⁷⁾ OECD 'Managing Conflict of Interest in the Public Sector' provides examples of checklists for gifts and other benefits (<https://www.oecd.org/gov/ethics/49107986.pdf>). See also the regulatory framework for EU institutions in Chapter 4.3 of this document, the EU Staff Regulations and EU ethical standards.

⁽¹⁰⁸⁾ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. OECD (2014), Survey on managing conflict of interest in the executive branch and whistle-blower protection, <https://www.oecd.org/governance/ethics/2014-survey-managing-conflict-of-interest.pdf>

The actual legal instruments to regulate conflicts of interest could differ from one country to the other. For example, there may be (i) specific legislation addressing the issue of conflicts of interest in managing EU funds; (ii) 'horizontal' legislation addressing the issue of conflicts of interest in general terms for the entire public sector; and (iii) legal instruments or any other instrument suitable for putting in place such rules and ensuring that they are enforced.

6.3. Declarations of interest, asset disclosure and exclusive functions

Declarations of interest

Transparency is key to preventing conflicts of interest at any stage of the EU budget implementation. EU institutions and national authorities at any level should develop measures within their internal control systems to ensure transparency and accountability.

A declaration of absence of conflicts of interest and, if applicable, a declaration of both current and past interests are useful tools to help detect and manage conflict of interest situations.

Past interests are relevant as long as the person continues to have obligations/liabilities stemming from past positions/employment (during a specific period for 'cooling off' and abstention from exercise of duties which may interfere with duties of past employment). Declarations of past interests could be limited for example to 5 years or as long as the person continues to have liabilities/obligations related to those past positions/employment situations.

The declaration should be requested from the person concerned as soon as possible (and should be updated as soon as a change in the interest situation occurs). It could include, for example, interests relevant to the management of contracts, to decision-making and to helping prepare or give policy advice. Such declarations should contain:

- a clear reference to the tasks concerned and to the subject matter,
- the signatory's full name, date of birth, position in the organisation and detailed functions,
- the date of signature.

The declaration should enable the signatory to officially declare:

- whether they have interests they perceive to be or may be perceived to be in conflict with the implementation of the EU budget and/or whether they are in a conflict of interest linked to the implementation of the EU budget,
- whether there are circumstances (including interests) that might place them in a conflict of interest in the near future, and
- that they will immediately report any possible conflict of interest in the event of any circumstance that might lead to such a conclusion.

An explanatory note could be attached to the declaration to give signatories clear guidance on the following aspects.

- The organisation's policy, including the purpose of the declaration and that it can be subject to verification to make sure it is correct.
- The legal requirements, including clarification of certain issues deriving from the definition. As an example, it should clarify which relationships constitute family membership (see Chapter 3.2.1).
- The code of conduct, policies and procedures governing the management of conflicts of interest in the organisation.
- The procedure for abstention and removal in cases where a possible conflict of interest is identified. Where a staff member discloses a possible conflict of interest or where a third party reports a possible conflict of interest, the staff member concerned should be obliged to refrain from dealing with the relevant file until their superior or the competent authority has ruled on whether a conflict of interest exists (this may also include in past cases).
- The procedure to follow in the event of a change in the situation, especially when and how to declare any conflict of interest that arises and to whom.
- The consequences of not disclosing a conflict of interest, often known as 'breach of trust' procedures. The person or body empowered to implement them has to have sufficient authority and accountability.

When a conflict of interest situation arises after the initial declaration was submitted, it does not necessarily mean that the initial declaration was false. It is possible that none of the circumstances that caused the conflict were present or known when the declaration was submitted. Consequently, there should be an obligation to:

- declare the existing situation as soon as the person concerned becomes aware of the circumstances that may influence the impartial and objective execution of their duties,
- refrain from action and refer the case to their hierarchical superior (or to the relevant authorising officer by delegation).

It is important that organisations establish clear and objective criteria to assess declarations of interest and apply them consistently. As part of effective verifications to identify possible false declarations, all declarations should be duly registered, saved by the authority and be subject to checks (according to an appropriate methodology), in accordance with applicable law, against other sources of information to identify, for instance, links between those involved in the selection of projects and potential beneficiaries.

EU and national rules are applicable as far as sanctions and legal remedies are concerned for infringements by officials, beneficiaries and contractors. When detecting a false declaration, the authority should proceed, subject to the legal framework in force, with appropriate investigative (including examination of its impact in EU budget implementation) and corrective measures. The latter could include imposing disciplinary and criminal sanctions on the official who submitted the false declaration, cancelling and re-evaluating award procedures, cancelling contracts/agreements, suspending payments, making financial corrections and recovering funds. Undeclared conflicts of interest do not necessarily constitute criminal offences. However, conflicts of interest, if not identified and managed properly, can ultimately reach this point, depending on the applicable legal framework.

Asset disclosure and exclusive functions

Asset disclosure and policies for exclusive functions and/or cumulative jobs for holders of public office or officials in sensitive/higher risk posts can help prevent and detect conflicts of interest. The following measures could be included.

- Declaration of personal income.
- Declaration of family income and assets ⁽¹⁰⁹⁾.
- Declaration of personal assets.
- Public disclosure of the person's previous employment details, duties, roles and number of years in public and private entities.
- Public disclosure (or in a register accessible only to persons who can show a legitimate interest in obtaining this personal data) of declarations of income and assets ⁽¹¹⁰⁾.
- Restrictions on the ownership of or on the exercise of rights flowing from property titles of private companies.
- Divestment, either by selling business interests or investments, or by establishing (in combination with other measures), a blind trust to ensure that the beneficiary has no knowledge of its assets and no right to intervene in the management of its assets.
- Declaration of gifts, including restrictions and control of gifts and other forms of benefits such as hospitality according to pre-defined policies and procedures.
- Removal and routine withdrawal of staff members from public duty when participating in a meeting or making a decision that would place them in a position of conflict.
- Security and control of access to internal information.
- Regular and effective rotation of staff in sensitive positions (with regard to preparation of calls, evaluation and verification of submissions, authorisation, payment and accounting, including in the area of public procurement); use of depersonalised functional mailboxes for 'helpdesks'.

⁽¹⁰⁹⁾ To ensure proportionality, the declaration of family income and assets could be linked to those cases where, at least 3 years before assuming office, the person concerned transferred their assets to family members.

⁽¹¹⁰⁾ Owned directly or indirectly (beneficial ownership).

- Restrictions (and/or transparency/registration/supervision requirements) on secondary employment, concurrent appointments (e.g. with a non-governmental organisation, political organisation, or government-owned company), post-employment business, spouse employment (or of a partner with whom the individual has a (non-) registered non-marital partnership) and even other immediate family members employment.
- Appropriate legal provisions to deal with conflicting interests related to new professional activities after leaving the civil service, i.e. the fact that a civil servant who has recently left the service would enter into new employment or private business relations in a field linked to their previous functions or, conversely, that a person with a recent business background in a certain field would be recruited to a related public function. The above could also include restrictions, for a limited period of time, from professional contacts with former colleagues or from representing opposing parties after leaving the service. Situations like these can pose a significant risk to trust in public administration. Consequently, there should be specific rules and procedures to manage such situations, which could include declarations on ethical behaviour or acceptance of scrutiny for a certain number of years.

6.4. Other measures

It is particularly important to detect conflict of interest situations as early as possible. If, for example, a conflict of interest is identified before EU funding is awarded, the selection procedure should be suspended pending further investigation.

Checking information provided by company register databases, databases of EU and national bodies for checking work contracts between natural persons and legal persons, public registers⁽¹¹⁾, employees' files and any other relevant information available to EU institutions and national authorities could be valuable tools to prevent conflict of interest situations. The above could require the advice or intervention of other competent bodies, in accordance with applicable law. Risk scoring tools (such as ARACHNE mentioned further below) could be also used. Data must be treated taking into account the data protection rules.

Establishing specific risk indicators may help alert to the risk of conflicts of interest. Risk indicators are elements unusual by nature or different from normal activity and that may alert to the need of further examination. Conflicts of interest can take any number of forms and can emerge and affect decisions at any point in time – from setting strategic goals to evaluating a project or the discharge report. Any list of indicators cannot therefore be exhaustive.

Risk indicators should make staff and managers more vigilant and prompt them to take the necessary action. However, risk indicators do not mean that a conflict of interest situation has occurred or may occur, but that the situation needs to be checked and monitored with due diligence.

The following risk indicators could be considered:

- absence of a declaration of conflict of interest, where mandatory or requested,
- staff member of the contracting authority, just before joining it, worked for a firm that may bid in a tender to be prepared by the staff member,
- staff member of the contracting authority has immediate family working for a firm that may bid in a tender,
- amendment to the terms and conditions of the contract signed between the beneficiary and the contractor,
- relationships/acquaintance between the beneficiary and staff of the authority involved in budget implementation or between the final beneficiary and contractors,
- beneficiary and procured subcontractor share office space/premises/address, or similarity in company names indicates economic interdependence,
- evaluation committee members do not have the necessary technical expertise to evaluate the submitted bids and are steered by one individual,

⁽¹¹⁾ Including of beneficial ownership.

- member of the expert committee who assesses projects is highly ranked in one of the entities presenting a project for funding,
- subjective elements are overrepresented in the criteria system or in the evaluation of a tender,
- specifications are very similar to the winning bidder's product or services, especially if the specifications include a set of very specific requirements that very few bidders could meet,
- estimated/maximum amount of the contract is not disclosed in the publicly available procurement documents (only registered internally), but the bid is very close to that internally established amount (for example, 1-2 % difference);
- beneficiary created immediately prior to the application for the grant;
- few applicants or fewer applicants than expected for a call for proposals/tenders;
- the same enterprise repeatedly wins successive contracts;
- poor execution of contract does not result in application of penalties or in the exclusion of the contractor/service provider from being awarded further contracts.

However, this list is not exhaustive. The relevant services and authorities should add to it.

As part of the fight against fraud ⁽¹¹²⁾ (and irregularities), the Commission developed a number of data mining and risk scoring tools, for the expenditure side of the budget, known as 'DAISY' and 'ARACHNE'.

DAISY is an analytical tool for the Commission departments responsible for research that processes risk profiles and red flags to focus audit capabilities and other control resources on the most risk-prone projects.

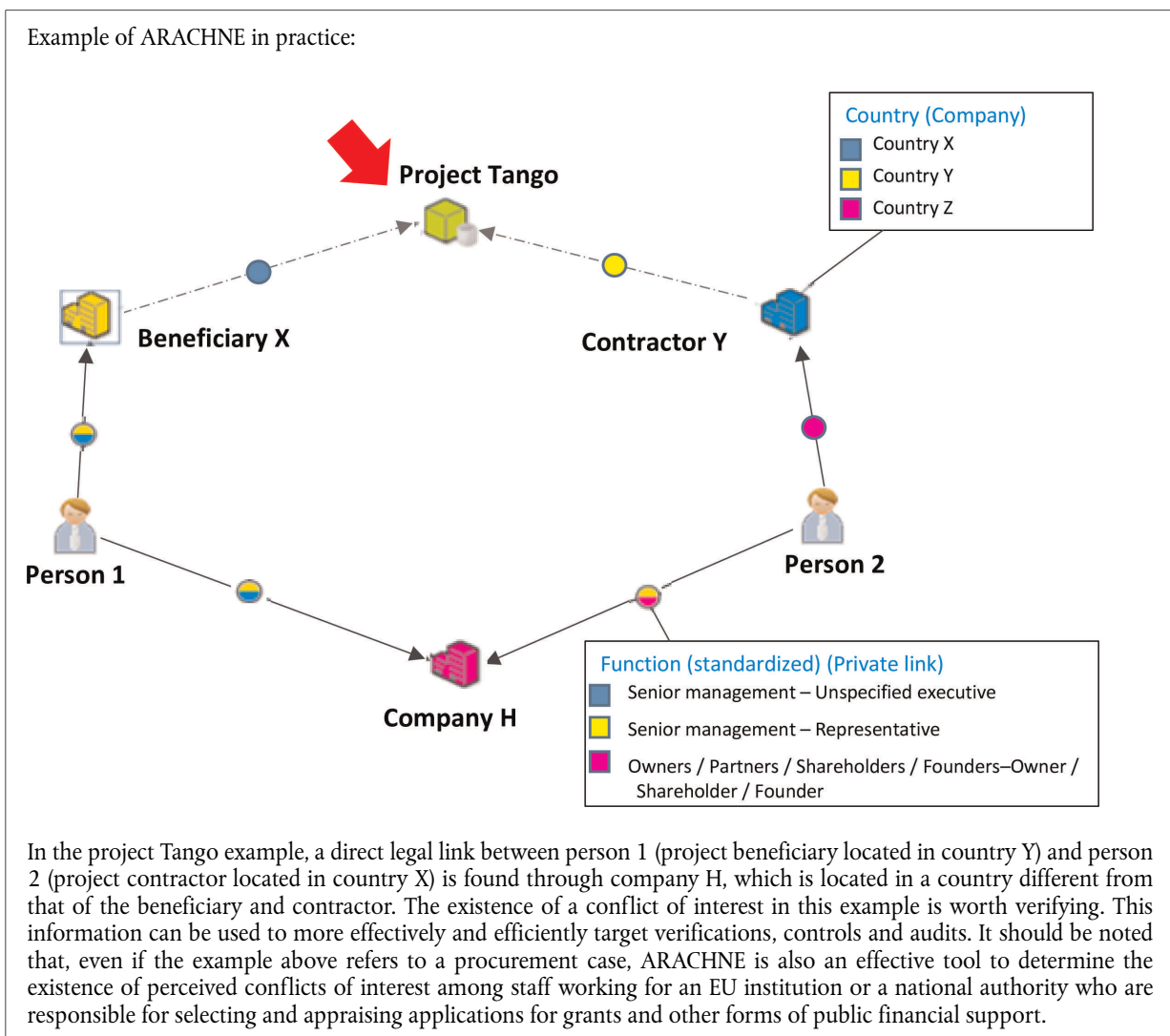
ARACHNE ⁽¹¹³⁾, which is offered to Member State authorities, is a specific data mining/risk-scoring tool that establishes, on the basis of data provided by managing authorities, a comprehensive database of projects. It enriches this data with publicly available information in order to identify, based on a set of risk indicators, the projects, beneficiaries, contracts and contractors that might be susceptible to risks of fraud, conflicts of interest and irregularities. ARACHNE identifies more than one hundred risk indicators, which are grouped into seven risk categories such as procurement, contract management, eligibility, performance, concentration, reputational and fraud alerts.

Once in place and once part of the management and control systems, ARACHNE is a tool that can increase the interoperability of available data and with it the efficiency of project selection, management verifications, controls and audits. ARACHNE can help identify and safeguard against conflict of interest situations. It displays legal links between companies and persons, and is capable of identifying risks of conflict of interest.

⁽¹¹²⁾ For further information, see the 'Guidance for Member States on Fraud Risk Assessment and Effective and Proportionate Anti-Fraud Measures', EGESIF_14-0021-00: https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_fraud_risk_assessment.pdf

⁽¹¹³⁾ <https://ec.europa.eu/social/main.jsp?catId=325&intPageId=3587&langId=en> and <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7883&type=2&furtherPubs=yes>

Example of ARACHNE in practice:



In the project Tango example, a direct legal link between person 1 (project beneficiary located in country Y) and person 2 (project contractor located in country X) is found through company H, which is located in a country different from that of the beneficiary and contractor. The existence of a conflict of interest in this example is worth verifying. This information can be used to more effectively and efficiently target verifications, controls and audits. It should be noted that, even if the example above refers to a procurement case, ARACHNE is also an effective tool to determine the existence of perceived conflicts of interest among staff working for an EU institution or a national authority who are responsible for selecting and appraising applications for grants and other forms of public financial support.

There is no one-size-fits-all policy for managing the issue of conflicts of interest that could be applied with the same effectiveness to all countries and EU institutions. In order to be effective, such policies should always take into account the political, administrative and legal context in each country as well as the special characteristics, current trends and risks associated with different cultural and regional environments.

In addition to the abovementioned measures, there are additional risk factors, realities and aspects that should be taken into account when policies and procedures are drafted in order to strengthen and/or restore trust in the public sector:

- to ensure that the risks associated with conflicts of interest are successfully addressed, any action should be part of a wider governance culture of enhanced transparency, integrity, impartiality and accountability,
- sound policies and procedures for managing a conflict of interest situation should be closely linked to the anti-fraud obligations of countries and EU institutions and therefore has to become a management and political priority,
- any committees responsible for managing conflicts of interest should comply with detailed rules and checks to enforce transparency, accountability and credibility.

Another aspect of preventing conflicts of interest concerns beneficiaries and contractors. In line with applicable law and within its limits, a high level of protection can be promoted through provisions in the specifications of the relevant call and in the terms and conditions of the contract or funding agreement. Provisions preventing conflicts of interest may refer in particular to:

- the selection of the beneficiary or the contractor (which may include a limitation on the duration of their contract ⁽¹¹⁴⁾),
- the beneficiary's/contractor's role, or that of persons or entities with a link to the beneficiary or contractor (including beneficial owners), in the preparation of the call,
- the implementation of the project by the beneficiary or the contractor ⁽¹¹⁵⁾,
- the selection of subcontractors or partner entities (especially in case of grants with partners/consortium members from different Member States or third countries).

By way of example, the following obligations should be imposed on beneficiaries and contractors: (i) refrain from any activity giving rise to conflicts of interest; and (ii) pass on these and other relevant obligations to any natural person with the power to represent it or take decisions on its behalf, to their staff and to third parties involved in the performance/implementation of the agreement/contract, including subcontractors.

Beneficiaries and contractors must also ensure that the persons referred to above are not placed in a situation which could give rise to conflicts of interest and must notify immediately of any situation that could constitute a conflict of interest or a professional conflicting interest during the implementation of the contract/agreement. Beneficiaries and contractors must take immediate action to rectify the situation and the contracting authority should: (i) verify that the action is appropriate; (ii) require the beneficiary/contractor to take further action within a specified deadline; and/or (iii) decide not to award a specific contract (in the case of framework contracts) to the contractor. The authorising officer or the relevant authority should exercise judgement and carefully consider the nature and intensity of the remedies for the specific case being dealt with.

⁽¹¹⁴⁾ As is the case, for example, for the selection of independent external audit bodies or experts that carry out the external audit report on the annual financial statements of European political parties and European political foundations, for which the term of the contract is limited to 5 years, with a maximum two terms in accordance with Article 233 FR 2018.

⁽¹¹⁵⁾ As is the case for direct management – in accordance with Annex I 20.6 FR 2018, 'a contracting authority may conclude that an economic operator does not possess the required professional capacity to perform the contract to an appropriate quality standard where the contracting authority has established that the economic operator has conflicting interests which may negatively affect its performance.'

ANNEX I

Other illustrative examples of conflicts of interest*Example No 1*

D is a director in a managing authority (or paying agency or Commission service) and responsible for the final approval of project awards, after rigorous and transparent assessment by a panel composed of external experts, appointed by D. In line with the recommendation of the panel, D awards a project to a beneficiary where D's spouse/partner is a senior manager. Even if there is no indication of influence having been exerted by D over the panel's evaluation, D bears responsibility for controlling the award process and hence is required to disclose the conflict of interest and to let D's superior decide on whether D is to be excluded from that particular procedure.

Example No 2

A staff member used to work in the advisory department of a Commission service/paying agency/managing authority and gave advice to the promoters of Project A on their project. Later the staff member is transferred to the selection department and tasked with evaluating the application submitted for Project A. When carrying out the evaluation, the staff member might be influenced by the fact of evaluating his/ her own advice and the wish to show that their advice was correct, especially in front of hierarchy. In this context, it should be considered that project selection is a particularly sensitive task in budget implementation. Unless the advice provided to the project promoter was insignificant (e.g. information on forms to be filled in and deadlines to be met), the staff member's prior involvement hampers their impartiality and creates a perception of conflict of interest ⁽¹⁾.

Example No 3

C is chairperson of the evaluation committee in a call for proposals to award grants. One of the applicants is company X, in which C's spouse/partner holds a senior management position. The fact that the C's spouse/partner holds a senior position with one of the applicants creates the perception of a conflict of interest because the chairperson might have a personal interest in the economic well-being of their spouse's/partner's company or at least in supporting their spouse's/partner's professional activity. In any case, this situation makes it highly unlikely for the chairperson to evaluate the proposals impartially and so he must abstain.

Example No 4

A member of the supervisory board of the paying agency was also member of the board of a beneficiary of the Fund. This was considered a situation of conflict of interest because they might have a personal interest to favour this particular beneficiary. The paying agency addressed the situation by requesting the resignation of the member from the supervisory board and assessed the existence and extent of the financial risks for the Fund for the operation at stake. The paying agency could have also addressed the situation by agreeing to an arrangement with the member of the Supervisory Board, which guarantees that they refrain from any involvement in files that concern that beneficiary.

⁽¹⁾ In its Annual Report on the Activities Funded by the Sixth, Seventh, Eighth and Ninth European Development Funds in the financial year 2005 (OJ C 263, 31.10.2006, p. 205), the ECA states that 'to avoid a conflict of interest, the same entity cannot be responsible for the preparation of project proposals with beneficiaries and the selection of projects and contracts' (see Observation 47, on page 228).

ANNEX II

EU legal provisions on conflicts of interest in the area of shared management ⁽¹⁾

(1) Regulation (EU) No 1303/2013 laying down common provisions for the European Structural and Investment Funds ('CPR'). In four articles, namely Article 5(3)(d), Article 34(3)(b), Article 38(5) and 39a(8), referring to the obligation to avoid conflicts of interest as follows:

Article 5 (3), PRINCIPLES OF UNION SUPPORT FOR THE ESI FUNDS, 'Partnership and multi-level governance'

'The Commission shall be empowered to adopt a delegated act in accordance with Article 149 to provide for a European code of conduct on partnership [...] The code of conduct, while fully respecting the principles of subsidiarity and proportionality, shall lay down the following elements:

(d) the main objectives and good practices in cases where the managing authority involves the relevant partners in the preparation of calls for proposals and *in particular good practices for avoiding potential conflicts of interest* in cases where there is a possibility of relevant partners also being potential beneficiaries, and for the involvement of the relevant partners in the preparation of progress reports and in relation to monitoring and evaluation of programmes in accordance with the relevant provisions of this Regulation and the Fund-specific rules;

CHAPTER II – Community-led local development, 'Local action groups'

Article 34(3)(b)

'3. The tasks of local action groups shall include the following: [...] (b) drawing up a non-discriminatory and transparent selection procedure which avoids conflicts of interests, ensures that at least 50 % of the votes in selection decisions are cast by partners which are not public authorities, and allows selection by written procedure;'

Implementation of financial instruments

Article 38 (5)

'5. The bodies referred to in points (a), (b) and (c) of the first subparagraph of paragraph 4 of this Article may, when implementing funds of funds further entrust part of the implementation to financial intermediaries provided that such bodies ensure under their responsibility that the financial intermediaries satisfy the criteria laid down in Articles 33(1) and 209(2) of the Financial Regulation. Financial intermediaries shall be selected on the basis of open, transparent, proportionate and non-discriminatory procedures, avoiding conflict of interests.'

Article 39a

'8. The bodies referred to in paragraph 5 of this Article, when implementing funds of funds may further entrust part of the implementation to financial intermediaries provided that such bodies ensure under their responsibility that the financial intermediaries satisfy the criteria laid down in Articles 33(1) and 209(2) of the Financial Regulation. Financial intermediaries shall be selected on the basis of open, transparent, proportionate and non-discriminatory procedures, avoiding conflict of interests.'

⁽¹⁾ Even if the legal bases referred to in this annex are applicable for the period 14-20, the expenditure under this period is eligible for a contribution from the European Structural and Investment Funds if it has been incurred by a beneficiary and paid between 1 January 2014 and 31 December 2023. In addition, expenditure is eligible for a contribution from the EAFRD if the relevant aid is actually paid by the paying agency between 1 January 2014 and 31 December 2023. In other words, projects/operations for the period 14-20 can be implemented by the end of 2023.

(2) Commission Delegated Regulation (EU) No 240/2014 ^(?) is based on Article 5(3) CPR and defines a code of conduct for implementation partnerships for the ESI Funds. It refers to conflicts of interest in the following provisions:

Article 11, Rules of procedure of the monitoring committee

‘When formulating the rules of procedure, monitoring committees shall take into account the following elements:

(f) the provisions on conflict of interest for partners involved in monitoring, evaluation and calls for proposals’;

Article 12, Obligations relating to data protection, confidentiality and conflict of interest

‘Member States shall ensure that partners involved in the preparation of calls of proposals, progress reports and in monitoring and evaluation of programmes are aware of their obligations related to data protection, confidentiality and conflict of interest.’

Article 13, Involvement of relevant partners in the preparation of calls for proposals

‘Managing authorities shall take appropriate measures to avoid potential conflict of interest where involving relevant partners in the preparation of calls for proposals or in their assessment.’

(3) Commission Delegated Regulation (EU) No 480/2014 supplements the Common Provisions Regulation and refers to the avoidance of conflict of interest in rules with regard to the bodies implementing financial instruments and to independent experts tasked with quality reviews for major projects: ^(?)

Article 6, Specific rules on the role, liabilities and responsibility of bodies implementing financial instruments (*Third subparagraph of Article 38(4) of Regulation (EU) No 1303/2013*)

‘1. The bodies implementing financial instruments shall perform their obligations in accordance with applicable law and act with the degree of professional care, efficiency, transparency and diligence expected from a professional body experienced in implementing financial instruments. They shall ensure that:

(a) final recipients receiving support from financial instruments are selected with due account taken of the nature of the financial instrument and the potential economic viability of investment projects to be financed. The selection shall be transparent and justified on objective grounds and shall not give rise to a conflict of interest; [...]

Article 7, Criteria for the selection of bodies implementing financial instruments (*Third subparagraph of Article 38(4) of Regulation (EU) No 1303/2013*)

2. When selecting a body referred to in paragraph 1, the managing authority shall take due account of the nature of the financial instrument to be implemented, the body’s experience with the implementation of similar financial instruments, the expertise and experience of proposed team members, and the body’s operational and financial capacity. The selection shall be transparent and justified on objective grounds and shall not give rise to a conflict of interest.

(f) in cases where the body implementing the financial instrument allocates its own financial resources to the financial instrument or shares the risk, proposed measures to align interests and to mitigate possible conflicts of interest.

^(?) Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds (OJ L 74, 14.3.2014, p. 1).

^(?) Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 138, 13.5.2014, p. 5).

Article 22, Requirements for independent experts carrying out the quality review

(Fourth paragraph of Article 101 of Regulation (EU) No 1303/2013)

'1. The quality review of major projects referred to in the third paragraph of Article 101 of Regulation (EU) No 1303/2013, shall be carried out by independent experts that have: (a) [...] (e) [...];

(f) no conflict of interest at any level in relation to the major project; [...]'

(4) Commission Delegated Regulation (EU) No 639/2014 ⁽⁴⁾ establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy

Article 38 Requirements applicable to the national or regional certification schemes

'Public or private certification authorities shall fulfil the following conditions:

[...] they shall be impartial and free from any conflict of interest as regards the exercise of the certification tasks.'

(5) Regulation (EU) No 1305/2013 ⁽⁵⁾ on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) also includes provisions on avoiding conflicts of interest as follows:

Article 15 'Advisory services, farm management and farm relief services'

'3. The authorities or bodies selected to provide advice shall have appropriate resources in the form of regularly trained and qualified staff and advisory experience and reliability with respect to the fields in which they advise. The providers under this measure shall be chosen through a selection procedure open to both public and private bodies. That selection procedure shall be objective and shall exclude candidates with conflicts of interest.'

TITLE IV – European Innovation Partnership ('EIP') FOR AGRICULTURAL PRODUCTIVITY AND SUSTAINABILITY

Article 56 – Operational groups

1. EIP operational groups shall form part of the EIP for agricultural productivity and sustainability. They shall be set up by interested actors such as farmers, researchers, advisors and businesses involved in the agriculture and food sector, who are relevant for achieving the objectives of the EIP.

2. EIP operational groups shall establish internal procedures that ensure that their operation and decision-making is transparent and that situations of conflict of interest are avoided.

(6) Commission Delegated Regulation (EU) No 907/2014 ⁽⁶⁾ specifically mentions conflicts of interest in the accreditation criteria for the CAP paying agencies as follows:

⁽⁴⁾ Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation (OJ L 181, 20.6.2014, p. 1).

⁽⁵⁾ Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 (OJ L 347, 20.12.2013, p. 487).

⁽⁶⁾ Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ L 255, 28.8.2014, p. 18).

‘ANNEX 1, 1(B)(v)

(v) Appropriate measures are taken to avoid a conflict of interests where a person occupying a position of responsibility or a sensitive position with regard to the verification, authorisation, payment and accounting of claims or payment request also fulfils other functions outside the paying agency’.

(7) The Fund for European Aid to the Most Deprived (‘FEAD’) Regulation ⁽⁷⁾ includes the following provisions:

Article 2 — Definitions

‘The following definitions apply:

(2) “most deprived persons” means natural persons, whether individuals, families, households or groups composed of such persons, whose need for assistance has been established according to the objective criteria set by the national competent authorities in consultation with relevant stakeholders, while avoiding conflicts of interest, or defined by the partner organisations and which are approved by those national competent authorities and which may include elements that allow the targeting of the most deprived persons in certain geographical areas;’

Article 13 — Implementation reports and indicators

‘1. From 2015 to 2023, the Member States shall submit to the Commission, by 30 June of each year, an annual implementation report for the operational programme implemented in the previous financial year.

2. [...] The Member States shall consult the relevant stakeholders, while avoiding conflicts of interest, on the implementation reports of OP I. A summary of the comments of those relevant stakeholders shall be annexed to the report.’

Article 14 — Review meetings ⁽⁸⁾

‘1. The Commission and the Member States shall meet every year from 2014 to 2023, unless otherwise agreed, to review the progress made in implementing the operational programme, [...]’

2. The review meeting shall be chaired by the Commission. The relevant stakeholders shall be invited to participate in review meetings of OP I except for the parts of that meeting when their participation would lead to conflicts of interest or breach of confidentiality related to audit matters.’

Article 32 — Functions of the managing authority

‘1. The managing authority shall be responsible for managing the operational programme in accordance with the principle of sound financial management.

2. As regards the management of the operational programme, the managing authority shall:

(b) draw up and, after consultation of the relevant stakeholders, while avoiding conflicts of interests, for OP I, or after approval the monitoring committee referred to in Article 11 for OP II, submit to the Commission annual and final implementation reports referred to in Article 13;’

(8) The Regulation on general provisions for the Asylum and Migration Fund (‘AMIF’) and Internal Security Fund (‘ISF’) ⁽⁹⁾ refers to conflicts of interest in its Recital No 12:

‘(12) Member States should establish, in a manner consistent with the principle of proportionality and the need to minimise administrative burden, a partnership with the authorities and bodies concerned to develop and implement their national programmes throughout the entire multiannual period. Member States should ensure that there is no conflict of interest among the partners at the different stages of the programming cycle.’

⁽⁷⁾ Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived (OJ L 72, 12.3.2014, p. 1).

⁽⁸⁾ See ‘DG AGRI Guidance Note of 26.2.2014 on Anti-fraud Measures as foreseen in the context of Accreditation Criteria’.

⁽⁹⁾ Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (OJ L 150, 20.5.2014, p. 112).