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Identifying conflicts of interests in the Agricultural Sector

A practical guide for funds managers

*drafted by a group of Member States' experts coordinated by OLAF's Unit D2- Fraud
Prevention, Reporting and Analysis*

DISCLAIMER:

This is a working document drafted by a group of Member States' experts with support from the European Anti-Fraud Office (OLAF). It is intended to facilitate the implementation of support in the area of agriculture and to encourage good practice. It is not legally binding on the Member States but provides general guidelines with recommendations and reflects best practice.

These general guidelines are without prejudice to national legislation and may be interpreted and/or adapted taking into account the national legal framework.

They are also is without prejudice to the interpretation of the Court of Justice of the European Union or decisions of the Commission.

Executive summary

This guide was prepared under a collaborative working procedure involving experts from the Member States and OLAF in close collaboration with the Directorate-General for Agriculture and Rural Development of the European Commission in charge of the Common Agricultural Policy (CAP).

The legislative provisions for 2014-2020 require Member States to develop anti-fraud measures in relation to the management of EU funds. The avoidance of conflicts of interest situations is part of the requirements of the EU Regulations in the area of Common Agricultural Policy (CAP). Potential conflicts of interest in the field of agricultural funds were identified as a subject of interest to Member States.

In 2013, under the same collaborative working procedure a practical guide on identifying conflicts of interest in the use of the European Structural Investment Funds focusing on public procurement procedures was elaborated. The COCOLAF Fraud Prevention and Detection experts group at its meeting of 13 November 2014 decided to adapt the above mentioned guidelines to the Agriculture sector.

A working group of experts from twelve different Member States was established. The working group concluded that there was need to prepare guidelines for the agriculture sector in particular regarding the selection phase and in private procurement of the actions funded by the agricultural EU funds in the sense that beneficiaries who are not bound by rules on public procurement put projects out to tender. Reference could be made to the existing Guide already prepared for structural actions, to the different sections of the guide where applicable.

The guide contains recommendations for managers and officials working in the management of EU agricultural funds. It is not binding on Member States but aims to provide a common approach to handling conflicts of interests for the Paying Agencies and contracting authorities, without prejudice to national legislation.

This guide is intended to serve as a useful and practical tool for public officers, focusing on the main points raised at the workshop:

1. Define a conflict of interest
2. Extend the scope of the document so that it can also be applied to 'private procurement' which in this context means the 'three-offer-rule - simplified procedure' and 'authorisation phase/selection procedure' for agricultural funds

3. Identify high-risk areas in which COI are most common in managing agricultural funds and take account of the fact that most projects are relatively small and may not fall under the EU Public Procurement Directives
4. Safeguard transparency/impartiality: the importance of establishing declarations of absence of conflict of interest as well as procedures and tools for implementing the proper use of declarations
5. Provide guidance on minimum rules to be applied by MS and share best practices
6. A list of red flags to help identify situations in which there could be a conflict of interest

The guide gives examples of real cases intended to help explain what a 'conflict of interest situation' is and to raise awareness among staff.

Contents

- INTRODUCTION..... 7
- 1.LEGAL FRAMEWORK 9
 - 1.1. Definitions of Conflict of Interest (COI) at EU level 9
 - 1.1.1 Financial Regulation..... 9
 - 1.1.2 Directive on public procurement.....12
 - 1.1.3 Definitions of Financial Actor and Economic Operator12
 - 1.2 EU Legal provisions in the CAP.....13
 - 1.3 National definitions16
 - 1.4 Case law17
 - 1.4.1 Case C-387/03 - Market Measures.....18
 - 1.4.2 Case T-257/13 - Rural Development – Investment Measures19
- 2. CONFLICTS OF INTEREST AND AGRICULTURE..... 20
 - 2.1 EAGF - Case study23
 - 2.1.1 Case No 123
 - 2.2 EAFRD - case studies.....24
 - 2.2.1 Case No 2 – Authorisation of claims and projects (selection procedures)24
 - 2.2.2 Case No 3 – COI in meat processing investment24
 - 2.2.3 Case No 4 – COI in rural development investment.....26
 - 2.3. LEADER27
 - 2.3.1 Case No 5 - COI in LEADER27
- 3 RED FLAGS 27
 - 3.1 What are red flags and how are they used?27
 - 3.2. Red flags in EAGF and EAFRD – IACS and - non-IACS measures28
 - 3.2.1 Red flags in EAGF – IACS28
 - 3.2.2 Red flags in EAGF – Non – IACS29
 - 3.2.3 Red flags in EAFRD-Non-IACS30
 - 3.2.4 Red flags in EAFRD – area related - investments32
 - 3.2.5 Red Flags in Leader34
 - 3.2.6 Other possible red flags34
- 4. PREVENTION THROUGH TRANSPARENCY AND OTHER MEASURES - BEST PRACTICES..... 36
 - 4.1 Declarations relating to COIs39

4.2 Best practices.....	41
5. MANAGING A CONFLICT OF INTEREST – BEST PRACTICES	44
5.1 Managing a declaration (declared COI - mitigating risks)	44
5.2 Checking the declarations	47
5.3 Preventive, corrective and repressive measures, failure to disclose, false declarations	48
5.3.1 Failure to disclose a Conflict of Interests	48
5.3.2 False declarations.....	50
ANNEX 1.....	52
ANNEX 2	55
ANNEX 3	57
ANNEX 4.....	61
ANNEX 5.....	68
APPENDIX I.....	77

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Austria	Austrian Ministry for Agriculture, Forestry, Environment and Water Management
Bulgaria	Commission for prevention and ascertainment of conflict of interest
Cyprus	The Anti-Fraud Service, Cyprus Agricultural Payments Organisation (CAPO)
Czech Republic	Ministry of Finance
Germany	Hessian Ministry of Environment, Climate Protection, Agriculture and Consumer Protection
Estonia	Agricultural Register and Information Board
Greece	Managing Authority, Administrative Sector for Community Resources and Infrastructure, Hellenic Ministry of Rural Development and Food
Spain	Internal Audit Service, Spanish guarantee agricultural fund (FEGA)
Malta	Internal Audit and Investigations Department (Cabinet Office)
Romania	AFCOS Romania
Slovenia	Agency for Agricultural Markets and Rural Development (AAMRD)
United Kingdom	UK Co-ordinating Body (UKCB) for Agriculture

The document was endorsed by the COCOLAF Fraud Prevention Group on 10 November 2015.

INTRODUCTION

The existing guidelines for dealing with conflicts of interest in the field of structural actions¹ are focussed on public procurement. This guide for agriculture is intended to complement the structural funds guide with due regard to the special characteristics of the agricultural sector and in particular to situations that are not, or not entirely, covered by the legal framework for public procurement.

As a matter of fact, public procurement rules do not directly apply to most actions funded under EU agricultural funds, although principles similar to those governing public procurement must be followed. According to the general principles of public procurement, any use of public funding should:

- Follow sound financial management, using budgetary resources efficiently and effectively;
- Be transparent and controllable;
- Respect the principles of equal treatment and proportionality;
- Give room to, and make effective use of, broad competition between economic operators;
- Avoid conflicts of interest distorting the competition.

Implementing the EU agricultural measures often entails grants or private procurement in the sense that beneficiaries who are not bound by rules on public procurement put projects out to tender. In such cases, beneficiaries are generally held to account by the three-offer-rule, so as to ascertain effective competition and economically sound execution of projects. According to the Commission guidance note of 26.02.2014 on Anti-fraud Measures as foreseen in the context of Accreditation Criteria many problems in rural development actions are rooted in fraudulent activities manipulating private procurement and artificially creating conditions for funding.

Conflicts of interest have become a recurrent concern, especially in the selection phase and in private procurement of the actions funded by the agricultural EU funds, because they can cause serious harm to the public budget and to the reputation of the EU and the country concerned.

¹ See Document OLAF.D.2 Ares (2015) 183254 of 16 January 2015: "Identifying conflicts of interests in public procurement procedures for structural actions – a practical guide for managers" – Appendix I.

Against this background, the Advisory Committee for Coordination of Fraud Prevention (COCOLAF) decided on 13 November 2014 to call on a group of experts to draft a practical guide to managing conflicts of interest, for managers dealing with the management of measures funded by the EU agricultural funds.

Accordingly, this guide has been drafted under the new collaborative working procedure involving experts from Member States, OLAF and operational Commission departments. The objective is to exchange good practice and draft practical documentation that Member States and the Commission can use for administrative tools, guidance and support to boost anti-fraud measures/strategies.

In cooperation with the Member States, OLAF held a workshop bringing together thirteen experts from thirteen different Member States with practical experience in managing such situations. Based on their knowledge, they drew up a list of the main points on which there was a need to exchange good practice.

The Directorate General for Agriculture and Rural Development was also associated to the process. OLAF's Fraud Prevention Unit (OLAF/D2) coordinated the work.

The guide is aimed at managers and staff in (a) the paying agencies and (b) other national authorities acting as managing and contracting authorities for selection and procurement procedures. It covers all operations funded by the European Agricultural Guarantee Fund (EAGF) or the European Agricultural Fund for Rural Development (EAFRD) and all types of procurement, irrespective of the amount involved. It provides information on existing rules on conflicts of interest, taking into account the legal framework at Union and at national level as well as related administrative guidance. It further aims to identify solutions on the most pressing issues, as evidenced by practical cases of conflicts of interest in the implementation of agriculture funds. It includes relevant provisions of the Financial Regulation, provisions in the CAP area, legislation applicable in the EU Member States, case law, case studies and best practices for avoiding and managing situations of conflict of interest.

In cooperation with experts from the Member States the working group has identified a core set of issues which are addressed in the practical guide. In day-to-day management, the level of requirements and scope of verification must take into account the need to find a balance between

- The need for verification;
- The value of the procurement or grant;
- Whether procurement is subject to public procurement regulations or not;

- Simplification and reduction of administrative burden for beneficiaries.

This practical guide is the result of a fruitful exchange between the experts. It is available to all Member States and relevant stakeholders e.g. through the Fraud Prevention platform and fora and to Commission departments via OLAF's website.

1.LEGAL FRAMEWORK

1.1. Definitions of Conflict of Interest (COI) at EU level

Conflicts of interest in decision-making with regard to the allocation of public funds and public procurement, particularly at the local level, form a recurrent pattern in many Member States.

In the field of shared management - including agricultural funds² - the budget is implemented by the Member States and the framework for the implementation is set out in the Financial Regulation. Consequently, EU funded programmes need to be implemented by Member States in accordance with the budgetary principles of the Financial Regulation.

1.1.1 Financial Regulation

The relevant EU legislation for situations of CoI is to be found in the Financial Regulation (FR)³ and its Rules of Application (RAP)⁴, which entered into force on 1 January 2013, in particular Article 57 FR and Article 32 RAP:

Article 57 of the Financial Regulation (FR) defines COI⁵ in the context of spending and managing the EU budget:

² Annex 1 includes basic information on the functioning of agriculture funds for non-experts.

³ 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, OJ L 298, 26.10.2012, p. 1.

⁴ 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.

⁵ The Organisation for Economic Cooperation and Development (OECD) proposed the following definition :
'A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.'

OECD has also identified three types of COI:

An actual COI is a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

An apparent COI can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case.

'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.

(...)

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'.

Article 32 of rules of application (RAP)⁶

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 of their qualification as illegal activities under Article 141:

(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.

A potential COI arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

See 'Managing Conflict of Interest in the Public Service', OECD GUIDELINES AND COUNTRY EXPERIENCES, p.24-25, <http://www.oecd.org/corruption/ethics/48994419.pdf>

⁶ Commission Delegated Regulation (EU) N0 1268/2012, OJ L 362, 31.12.2012, p.1

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.'*

Regarding the abovementioned definition there are some clear indicators that refer to possible COI.

- Involvement of persons:

The financial actors (or other persons involved in the implementation and management of the budget) shall not take any action which may bring their own interests into conflict with those of the Union. This is the case, for instance, if the action affects persons with whom the financial actor has a close relationship (close family ties, permanent business association etc.).

- Conflicting (personal and EU) interests:

Persons shall not take any action which may bring their own interests into conflict with those of the Union (for example by dealing on behalf of the Union with a company in which they hold a significant financial interest).

- Compromising activities:

Activities which could interfere with the impartial and objective exercise of the functions of a financial actor or other person, e.g. consultancy work for a company affected by the way the budget is implemented.

- Reasons of conflict of interest could include the following:
 - involving family,
 - emotional life,
 - political or national affinity,
 - economic interest or
 - any other shared interest with a recipient

Member States must observe the principle of sound financial management when implementing the EU budget. There is a close regulatory link between the principles to be observed by Member States, Article 53 (2) FR and the principle of the avoidance of COI, Art 57 FR. Avoidance of COI is a guiding principle for Member States in the field of shared management which includes the agricultural sector.

1.1.2 Directive on public procurement

A definition of COI to be transposed by the Member States can be found in Directive 2014/24/EU⁷ 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.'*

1.1.3 Definitions of Financial Actor and Economic Operator

Both of the abovementioned EU legal instruments (FR and Directive 2014/24/EU) define the persons who may be involved in the definition of conflict of interest by the notions of **financial actors** (FR) and **economic operators** (Directive 2014/24/EU).

For the purpose of this guidance, these notions could be considered and understood as synonyms. The notions financial actor and economic operator cover all persons who are participating in implementing and managing EU funds. It also means that private beneficiaries, partners, contractors and sub-contractors financed by EU funds could act in favour their own interests but against EU financial interests resulting in a conflict of interest against the EU financial interest⁸.

⁷ 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.

⁸ For the definition of the economic operator, see as well Article 2(37) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European

1.2 EU Legal provisions in the CAP

Besides Article 57 FR, which applies in all shared management funds, **the obligation to avoid COI** situations is specifically mentioned in the following regulations, as far as payments in the framework CAP for the programming period 2014-2020 are concerned:

Commission Delegated Regulation (EU) No 907/2014⁹ specifically mentions COI in the accreditation criteria as follows:

'ANNEX I, 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*.¹⁰

- **Commission Delegated Regulation (EU) No 639/2014¹¹** 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:

Regional Development Fund, the European Commission 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 Commission 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 and as well as Article 2 of Commission Regulation (EC) No 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Council Regulation (EEC) No 595/91, OJ L 355, 15.12.2006.

⁹ 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.

See 'DG AGRI Guidance Note of 24.02.2014 on Anti-fraud Measures as foreseen in the context of Accreditation Criteria

¹⁰ See 'DG AGRI Guidance Note of 24.02.2014 on Anti-fraud Measures as foreseen in the context of Accreditation Criteria

¹¹ 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.

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

Regulation (EU) No 1303/2013¹² laying down common provisions for the ESI funds and applicable to the European Agricultural Fund for Rural Development in three articles, namely Article 5 (3), Article 34(3) and Article 38 (5), referring to good practices for avoiding potential 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)

*'3. The tasks of local action groups shall include the following: ... (b) drawing up a non-discriminatory and transparent selection procedure and objective criteria for the selection of operations, **which avoid conflicts of interest**, ensure that at least 50 % of the votes in selection decisions are cast by partners which are not public authorities, and allow selection by written procedure;'*

Implementation of financial instruments

Article 38 (5)

¹² See footnote 7.

*'5. The bodies referred to in points (a) and (b) of the first subparagraph of paragraph 4, when implementing funds of funds may further entrust part of the implementation to financial intermediaries provided that such entities ensure under their responsibility that the financial intermediaries satisfy the criteria laid down in Article 140(1),(2) and (4) of the Financial Regulation. Financial intermediaries shall be selected on the basis of open, transparent, proportionate and non-discriminatory procedures, **avoiding conflicts of interest.**'*

Regulation (EU) No 1305/2013¹³ on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) also includes provisions on avoiding COI 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 beneficiaries under this measure shall be chosen through calls for tenders. The selection procedure shall be governed by public procurement law and shall be open to both public and private bodies. It 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.**'*

¹³ 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.

1.3 National definitions

The notion of COI is not harmonised across the EU. Some Member States (such as Romania) give a definition directly in its criminal law while others (e.g. **Greece, Slovenia and the United Kingdom**) address COI in their administrative and criminal codes indirectly (e.g. abuse of official duties, favouritism, abuse of insider information, and for Slovenia even fraud to the detriment of the EU).

Some Member States do not have references to COI in their criminal law, but this does not mean that they do not address this issue.

For example, in **Austria** there is no definition of COI in the area of public management, but there are regulations concerning bias (or recusal, 'Befangenheit') (§ 47 BDG 1979¹⁴ and § 7 AVG¹⁵).

The **United Kingdom** does not have specific criminal legislation regarding COI to directly make it an offence. However, the generic offence of 'misconduct in public office', covers more than just conflict of interests and could be referred to if the conflict resulted in an investigation into alleged corrupt behaviour.¹⁶ Cyprus and Malta address the issue of COI at Paying Agency level. With regard to agricultural funds, the Cyprus Agricultural Payments Organisation's (CAPO) has an independent Anti-Fraud Service which is responsible, among its other more specialised functions, for all the antifraud policy in the agricultural domain¹⁷.

In **Germany** for example such defaults regarding the COI in the field of public administration could be found in section 20 of the administration procedure act¹⁸ regarding to "persons excluded" (ausgeschlossene Personen) and in section 21 of the same law concerning "fear of prejudice" (Besorgnis der Befangenheit).

In **Slovenia**, COI is defined in the Code of Conduct of Civil Servants, Civil Servants Act (CCCA), and Public Procurement Act.

¹⁴ Section 47 of the Austrian Federal Civil Servants Act, Bundesgesetz vom 27. Juni 1979 über das Dienstrecht der Beamten (Beamten-Dienstrechtsgesetz 1979 – BDG 1979), Bundesgesetzblatt Nr. 333/1979, as amended.

¹⁵ Section 7 of the Austrian General Administrative Procedure Act, Allgemeines Verwaltungsverfahrensgesetz 1991 (AVG), Bundesgesetzblatt Nr. 51/1991, as amended.

¹⁶ Misconduct in public office is an offence at common law. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

¹⁷ Article 14(2) of Law 64(I)/2003.

¹⁸ Administration Procedure Act in the wording last promulgated on January 23rd 2003 (Federal Law Gazette I p. 102), amended by Article 3 of the act on July 25th 2013 (Federal Law Gazette I p. 2749)

In **Greece** a Law¹⁹ codifies a definition of COI and 'private interest' with regard to public procurement, a number of preventive and corrective measures, as well as penalties applicable to the parties involved in public procurement procedures.

Annex 3 summarises the situation in different Member States.

1.4 Case law

The Union Courts have provided a number of elements to clarify the interpretation of COI:

- The concept of COI is objective in nature. In order to characterise it, it is appropriate to disregard the intentions of those concerned, in particular whether or not they acted in good faith.²⁰
- A COI constitutes, objectively and in itself, a serious irregularity.²¹ A COI as regards the award of public contracts already compromises the sound management of EU funds and equal access for all to such contracts, without there being any need for it to cause quantifiable material injury as well.²²
- COI in the sense 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.²³
- By contrast, a person or enterprise that has carried out research, studies or development in connection with public works, supplies or services cannot be excluded from tendering for those works, supplies or services, unless they have been given the opportunity to prove that, in the circumstances of the case, the experience which they have acquired was not capable of distorting competition.²⁴

¹⁹ Law No. 4281/2014 – Articles 45, 46: Article 45 of Law No. 4281/2014.

²⁰ Judgment of the General Court of 20.3.2013 in Case T-415/10, NEXANS FRANCE v JOINT UNDERTAKING FUSION FOR ENERGY, para 115; see also Judgment of the ECJ of 10.7.2001 in Case C-315/99, P Ismeri Europa v Court of Auditors, paras 44 to 48.

²¹ Judgment of the Court of First Instance of 15.6.1999 in Case T-277/97, Ismeri Europa Srl v Court of Auditors, para 123.

²² Ibid, para 146.

²³ Judgment of the ECJ of 10.7.2001 in Case C-315/99, P Ismeri Europa v Court of Auditors, para 47.

²⁴ Judgment by the ECJ of 3.3.2005 in Joined Cases C-21/03 and C-34/03, FABRICOM SA v BELGIUM, para 36.

- After the discovery of a COI in a tendering procedure the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. This obligation derives in particular from the principles of sound administration and equal treatment.²⁵ By analogy, the same applies to Member States acting in shared management, where they are bound by the principles of sound financial management, transparency and non-discrimination, pursuant to Article 59(1) FR.

With regard to COI in the field of the Common Agricultural Policy, there is no case law at EU level that interprets the concept. However, the courts have confirmed the Commissions' approach in the field of COI in cases C-387/03²⁶ and T-257/13²⁷. Both cases could serve as case studies.

Cases T-73/08 (concerning financing of a social project by the Daphné II Programme 2004-2006) and T-160/03 (concerning tender procedure within the TACIS programme for the supply of technical assistance services, entitled 'Agricultural Extension Services in South Russia') also help to understand the concept of COI in the field of EU funds (see also Annex 4).

1.4.1 Case C-387/03 - Market Measures

EAGF (Agriculture) Specific Conflict of Interest – Aid to beneficiaries of the wine sector was based on laboratory results conducted by the wine laboratories belonging to beneficiaries

Conflict of Interest between Beneficiaries and Certified Laboratories leading to seemingly artificial uniformity of the alcoholic strength increase in a particular region.

Red flag: Suspicion of artificially uniform prices / targets of deliverables of the measure (here: statistically non acceptable, uniform increase in alcoholic strength to the upper limit of 2% for wineries in a particular region).

²⁵ Judgment by the Court of First Instance of 17.3.2005 in Case T-160/03, AFCON Management Consultants and others v Commission, para 75.

²⁶ Judgment of the ECJ of 27.10.2005 in Case C-387/03, Greece v Commission.

²⁷ Judgment of the General Court of 25.2.2015 in Case T-257/13, Poland v Commission.

Preventive Measure: Certification of labs that are not connected in any way with the beneficiaries.

Detective – Corrective Measures

Statistical evaluation of results (levels of alcoholic strength) that may lead to the conclusion of statistically non acceptable uniformity of alcoholic strengths

Examination of shareholder registers and charters to establish any relation between the laboratories and the beneficiaries.

Repressive Measures

Recovery of undue payments made to beneficiaries/ penalties/ exclusion from the measure.

1.4.2 Case T-257/13 - Rural Development – Investment Measures

EAFRD (Agriculture) Specific Conflict of Interest – Relation between early retirement scheme beneficiaries and young farmer (transferees) beneficiaries, as young farmer's knowledge and professional skills can be testified to by their relatives (early retirement scheme beneficiaries) by signing a relevant declaration. In this case, due to the manifest conflict of interest and insufficient evidence provided on the validity of the eligibility conditions, the risk of error is significant.

Measure-Specific Conflict of Interest: Conflict of Interest potentially resulting in the distortion of eligibility conditions, arising from the relation of beneficiaries of interdependent measures such as between the Measure of 'Early retirement scheme' (M 113 of RDP 2007-2013) and the Measure of 'Young farmers' (M 112 of RDP 2007-2013)

Red flag 1: Insufficient documentation to ensure the validity of eligibility.

Red flag 2: Interdependency between measures – Particularly between the measures M 113 (early retirement) and M 112 (Young Farmers) where the beneficiaries are in many cases related.

Preventive Measure: The beneficiary should provide sufficient and robust documentation prior to approval of eligibility in order to reduce the likelihood of approval of beneficiaries by artificially creating funding / eligibility conditions.

Preventive / Detective Measure: Carrying out cross-checks on measures that are interdependent can help to establish a COI arising between beneficiaries. It should be noted that cross-checks also serve as a preventive measure deterring beneficiaries from falsifying their funding / eligibility conditions, given that the beneficiaries are informed of their use and the consequences (repressive measures) in case of breach.

Corrective/ Repressive Measure: If it is established that beneficiaries have artificially created eligibility conditions, subsequent actions should typically include (according to the legal provisions of the regulations) reductions and penalties in case of payment claims, recovery of amounts unduly paid and imposition of penalties when a payment has already been made, and exclusion of the relevant beneficiaries from the measure for a predefined period.

2. CONFLICTS OF INTEREST AND AGRICULTURE

The paying agencies (departments or bodies of the Member States) are responsible for the management and control of expenditure of both agricultural funds EAGF and EAFRD.

Each paying agency has ultimate responsibility for anti-fraud policies, activities and operations. These can be supported by national rules, legislation and policies issued centrally or regionally. However, each paying agency is responsible for implementing, managing and updating policy and is accountable for the execution of the effective measures for addressing COI.

The same financial management and control rules apply to both EAGF and EAFRD. The main functions according to Regulation (EU) No 907/2014 can be described as follows:

- 1) Authorisation of applications and control of payments (including administration controls, on the spot checks, ex post controls). For certain area-related measures Member States should set up and operate an integrated administration and control system (IACS). The main elements of such an integrated system are a computerized database, an identification system for agricultural parcels, aid applications or payment claims and a system for the identification and recording of payment entitlements.

2) Payment of the authorised amount to beneficiaries.

Accounting of all executed payments in the paying agencies in separate accounts for EAGF and EAFRD expenditure.

Scope

The list of areas which should be covered by COI policy is not exhaustive but could include the following:

- addressing fraud as well as risks and issues relating to bribery and corruption;
- rules to which all employees must adhere, including sections on COI, in particular:
 - a clear, understandable and universal definition of COI;
 - declaration and registration of any potential COI;
 - disciplinary consequences of failing to declare COI;
- guidance, instructions and procedures on gifts or hospitality;
- standards of behaviour expected of public servants especially with regard to financial matters.

As mentioned in the introduction, the existing guidelines for dealing with conflicts of interest in the field of structural actions²⁸ are focussed on public procurement. This guide for agriculture is intended to complement the structural funds guide for situations not covered by public procurement only. The examples below are therefore limited to private procurement (the three offers rule) or other cases when public procurement rules are not applicable.

Conflict of interests in the area of agricultural funds may take place at any of the following stages:

- evaluating the application;
- selecting it as suitable for financial aid;
- signing the contract;
- evaluating the implementation of the contract;
- evaluating of payment application

²⁸ See Document OLAF.D.2 Ares (2015) 183254 of 16 January 2015: "Identifying conflicts of interests in public procurement procedures for structural actions – a practical guide for managers".

To evaluate the risk of different measures in Rural Development, the following parameters should be considered:

Risk increases in direct proportion to the size and percentage of the subsidy and the scope of the operation. Risks are also higher in smaller Member States, because it is more likely that there could be a relationship between the key stakeholders concerned (between beneficiaries, and between beneficiaries and officials).

In the field of agriculture the problem of revolving doors occurs when officials leave the public sector to work for the private sector, or when consultants are working for associations operating in the same field. Civil servants working in authorising departments could be employed at the same time as consultants in a project which is incompatible. Another risk concerning the three-offers-rule is how to make sure that real offers are delivered and that the best offer is chosen objectively. The risk that related persons or institutions present offers remains.

For example, the Certifying Body for the Paying Agency **in Austria** considers that while the inherent risk in IACS-measures is rather low, the risk in EAFRD- and EAGF-Non-IACS is higher due to close relationships between the experts working in these sectors. Cases of close relationships are a widespread problem within agriculture and rural development and awareness of this problem needs to be raised. In some EAGF-Non-IACS-Measures in Austria there are few companies receiving EU financial support, and public officials and beneficiaries have often known each other for years. The paying agency (PA) seeks to prevent possible COI by separation of duties, 4-eyes-control and enhanced supervision.

Malta reported that as the smallest Member State, it encounters greater risks of COI. Employees are often related to beneficiaries or are even themselves part-time farmers applying for EU Agricultural funds. In this context it is therefore important to prevent COI by ethical guidance, separation of duties, rotation of duties and effective supervision.

According to the Certifying Body **of Hesse in Germany**, clear organizational standards are necessary to prevent potential conflicts of interests due to relationships between the staff of paying agencies and funding applicants. A clear dividing line between consulting and authorisation tasks can be as helpful as the centralisation of official duties.

Romania reported that potential COI in the agricultural sector may arise when:

- suppliers of goods or services have shareholders in common with the beneficiary;

- service providers (i.e. consultancy and design, site supervision, technical verification, monitoring) have kinship relations with the shareholders or managers of the beneficiary company;
- civil servants or employees of the central or local public administration are employed as service providers in the project.

Cyprus recommends:

- raising awareness among staff about COI and the importance of signing of declaration on absence of COI;
- identifying high-risk areas;
- learning lessons from best practice in other Member States in the field of accounting and payments
- signing of declarations by senior management
- homogenous procedures
- extension of obligations to all external partners and contractors

While establishing COI policies certain issues of conflict shall be taken into account:

- difficulties in validating the truthfulness of COI declarations
- striking the balance between public interests and employee privacy while carrying out cross checks and validation procedures.

2.1 EAGF - Case study

2.1.1 Case No 1

A senior official works for a delegated body responsible for the processing of claims, including validation and authorisation of the area-related measures of EAGF and EARFD. The official is a part-time farmer who submits a request for subsidies to the office in which he is working. All staff are aware of this situation and, of course, the senior official is not allowed to deal with his own request.

What is the problem?

While the senior official may not have been involved in his own request, he may have had some influence on the checks performed by his colleagues. Even if he did not exert any influence directly, the mere fact that the claimant is a senior colleague of the officials processing the claim may – consciously or unconsciously – influence the decisions made by these officials. Therefore, the way the office dealt with the situation still had the

potential to compromise the credibility of the validation and authorisation process, as well as the integrity of the responsible authorities.

What would be a possible solution?

The paying agency should specify that applications from officials should not be processed in the department in which the applicant works. In addition, all cases, or a sample of them, should be additionally checked by a supervision authority.

2.2 EAFRD - case studies

2.2.1 Case No 2 – Authorisation of claims and projects (selection procedures)

In Austria there are specialised associations (e.g. for education) acting as beneficiaries and situated within the regional chambers of agriculture or the Austrian Economic Chamber. Within these chambers there are close relationships between the experts or the chairman acting for the association and the officials working in the chamber and approving the projects or granting the subsidies (although it was never the same person).

Risks in the selection procedures

Close relationships between the experts or the chairman acting for the association and the officials selecting the projects could pose a risk to objectivity. Similar risks may occur as a result of other instances of close relationships between civil servants and beneficiaries which could influence the selection, especially where officials are employed in the project or in associations acting as beneficiaries or their representatives.

2.2.2 Case No 3 – COI in meat processing investment

Beneficiary A applies for financial support under the EAFRD investment in a processing agricultural products measure. The project consists of building and equipping a meat processing plant. The administrator signs contracts for the construction works and equipment supply and the contracts are implemented.

During the implementation of the contract, the beneficiary agrees to set up a pledge on the equipment towards a company where the administrator is an associate due to financial shortcomings and disputes with the contractor in charge of the construction work. The company supplies raw material for the meat processing plant.

What is the problem?

The pledge on equipment was agreed between the beneficiary's administrator and the company disregarding the interest of the beneficiary, despite the fact that the raw material value supplied was much lower than the value of the pledged assets.

The administrator agreed to execute the pledge before the surety agreement was even signed, in his personal interest to take over the assets. He disregarded the interest of his employer (beneficiary A) to continue the activity and prejudiced both the beneficiary company and the creditors.

The administrator took over the assets fraudulently, leaving the beneficiary insolvent and with no means of continuing the activity. The creditors (suppliers and Paying Agency) were unable to recover their loss from the beneficiary company, and had to resort to a penal court case against the administrator.

Red flags:

- a pledge or mortgage is set on the assets financed within the project, in favour of a related company, for a commercial debt;
- a low level of cash flow indicating that the pledge would have to be executed without the necessary income to service the debts.

What would be a possible solution?

Require beneficiaries to ask for the Paying Agency's agreement before pledging the financed assets as collateral.

Pay special attention to the creditor to whom the financed assets are to be pledged, the value of the debt and whether or not this might be a red flag for financial problems and / or for fraudulent intentions of the administrators of the beneficiary.

Obtain a preferential order for the Paying Agencies as a creditor in case financial support needs to be recovered.

2.2.3 Case No 4 – COI in rural development investment

Three companies (A, B and C) each submit separate applications for 'diversification of the rural economy' support in order to have €100,000 of EU funding each - for eligible investment at a total value of €200,000. Applicant A applied for funding to construct a handicraft workshop, B for the construction of an organic food kitchen and C for the construction of a shop-café. The investments were all located in the plot belonging to applicant B.

What is the problem?

One building with three different functions was constructed for the three separate projects. The private (three offers) procurement for all three projects had the same participants, the same winner and the same subcontractor (B - one applicant out of three), which carried out all the construction works. The same person represented all of the applicants. Full payment by beneficiaries was a precondition for submitting the payment claim. However no real payment was made. Small instalments were paid to give the impression that the full investment was paid but these were later paid back. This also helped to cover inflating the cost of investments and repaying each share of the project. All related applicants and actual constructor B (who was also one of the three applicants) were implementing and managing EU funds and orchestrated the conflict of interest situation.

What would be a possible solution?

There should be an obligation to disclose possible COI.

When more than one project located in the same place is represented by the same person, there should be further checks in order to mitigate the risk of COI and irregularities or fraud.

There should be an obligation to carry out private procurement using public calls for tender in order to guarantee the same transparency as in public procurement.

2.3. LEADER

2.3.1 Case No 5 - COI in LEADER

A Local Action Group, of which Mr D was a member, applied for funds to the Managing Authority to conduct a study on agricultural land management. Mr D's daughter was employed at the Managing Authority, in the section dealing with tasks related to LEADER. The Managing Authority approved the Local Action Group's project. The owner of the project was a public-law institution in partnership with a contractor. The co-founder of the contractor was Mr F, who was also employed at the Managing Authority, in the section dealing with tasks related to the LEADER measure. If the payment claim had met the prescribed conditions, the final recipient of funds would have been the public-law institution and the contractor.

What is the problem?

There is a COI between the Managing Authority, the Local Action Group and the contractor because they are involved in both implementing and managing the EU budget. The public-law institution did not publish a formal invitation to tender, although, in accordance with the regulations on public procurement, and due to the value of the subject of the contract, a formal publication was required. The contractor was chosen without procurement procedures, thereby preventing other possible tenderers from applying. There were conflicting private interests at the level of the contractor, the Local Action Group and the Managing Authority.

What would be a possible solution?

Rules should be clearly defined so that situations of COI may be identified quickly. Declaration of absence or disclosure of COI prior to submitting and processing of applications is essential to guarantee impartial proceedings.

3 RED FLAGS

3.1 What are red flags and how are they used?

A red flag indicates the risk of possible fraud or corruption. It is an element or a set of elements that are unusual by nature or vary from normal activity. It is a signal that something is out of the ordinary and needs to be examined further.

The presence of red flags should make staff and managers more vigilant and prompt them to take the necessary action to confirm or deny a risk of conflict of interests. It is extremely important to react to them.

The existence of a red flag does not mean that a situation of conflict of interests has occurred or may occur, but that the situation needs to be checked and monitored with due diligence.

3.2. Red flags in EAGF and EAFRD – IACS and - non-IACS measures

This section treats typical cases of suspected fraud concerning conflicts of interests in different areas and gives examples of what happens in practice.

Some of these red flags may appear commonplace and they can apply to many situations, including conflicts of interests. The following red flags are warning signals indicating that first level checks should be carried out to waive doubts or confirm the likelihood of occurrence of a fraud or irregularity.

3.2.1 Red flags in EAGF – IACS

Example: A farmer submits a funding request to the office in which his son works as a senior official. The senior official is not directly involved in processing this request, but could influence the checks performed by his colleagues.

Risks linked to a conflict of interests

The way the authority dealt with the situation risked compromising the credibility of the authorisation and validation process, as well as the integrity of the responsible authorities.

Red flags:

- An employee of the authorisation and validation authority has relatives who present requests for subsidies.

Preventive measures: Ensure that authorisation, validation and audit instructions clearly specify how to deal with this kind of situations. The employee should be removed from a situation that could significantly influence or compromise his or her integrity.

3.2.2 Red flags in EAGF – Non – IACS

Example: A beneficiary claims financial aid from the EAGF for a Vineyard reconversion support measure. The financial support rate is no more than 75% of the incurred costs. There are no procurement rules to be followed, but the beneficiary must prove the incurred costs with supporting documents. The Paying Agency checks the plantation on-the-spot along with the documents.

The beneficiary cancelled the first invoice for the works after receiving the payment from the Paying Agency, and did not register a new invoice in his accounts. The explanation given was that the contractor had cancelled the invoice to avoid incurring undue fiscal obligations, but that a new invoice would soon be re-issued as soon as payment was completed. Fiscal authorities found that both the first and the cancellation invoices were registered in the contractor's accounts, and that only the difference between the two of them was paid to the contractor (10 % of the total amount declared).

When checking the beneficiary's books it transpired that the amounts received as financial aid were transferred to his business partners and to his son. The procurement documents provided by the beneficiary and the contractor were false. The owner was unable to provide evidence that the plantation works were executed by the contractor and paid to him, because they were done using cheap local "black market" services.

Risks linked to a conflict of interests

- Plantation owner profits from the difference between the amount actually paid and the maximum amount eligible for financial support at the taxpayers' expense
- Genuine registered firms are denied the opportunity to compete in a fair tender process
- Loss in taxes due to use of undeclared work
-

Red flags:

- A foreign contractor was selected for local plantation works even though the cost was higher than using local contractors
- Common shareholders between beneficiary and contractors
- Contractor's usual activity was not in line with the works contracted
- The contractor had only three employees
- Invoice was cancelled immediately after receiving the financial support
- The financial support received was transferred almost immediately and almost entirely to owner and related parties

- Suspicious loan contracts, no transparent cash flow from and to the partners in beneficiary's registers

Preventive measures:

Avoid mixing the financial support set up for area based measures. Either use a fixed amount/ha based on solid market research or impose procedure rules for all cost related eligible expenditures

3.2.3 Red flags in EAFRD-Non-IACS

Conflict of interest and authorisation/selection phase in agriculture - focus on Authorisation of claims and projects (selection procedures) in Rural Development other measures

The issue of conflicts of interest must be raised right from the submission of the request for subsidies to finalisation of the project and even during the audit phase. Each specific measure should be detailed with the obligations to be fulfilled.

The responsible authority should take the necessary measures to prevent conflicts of interest right from initiation to project closure.

Example: Civil servants are employed in a project as consultants. Specialised associations (e.g. for education) within the regional chambers of agriculture or the Austrian Economic Chamber. Within these chambers a close relationship exists between the experts or chairman acting for the association and the officials working in the chamber and approving the projects or granting the subsidies (although it was never the same person).

Close relationship between the experts or chairman acting for the association and the officials working in the chamber and selecting the projects could affect objectivity.

Risks linked to a conflict of interests in the authorisation/selection of projects and claims:

- Authorisation of non-eligible project
- Inflating the costs/double funding

- Reputational risk for the public services
- The higher the percentage of the subsidy, the higher the risk
- In small Member States there are only a few experts, who know each other. Cases of close relationships are a widespread problem within rural development and awareness of this problem needs to be raised
- Consultants coming from the public sector and changing to the private sector or working for associations
- Validate the process to ensure that best offer is chosen

Red flags:

- High volume of the measure as a whole and per beneficiary.
- High percentage rate of support (>50% up to 100% subsidy).
- Few experts in the field, who know each other, close relationships between the key actors.
- Experts from the public sector changing to the private sector. Check the names!
- Civil servants working in authorising departments are employed in a project. Check the names!
- The same location of three separate projects and one person representing all of them.
- Three different tenders are won by the same contractor.
- Supplier is replaced after private procurement

Preventive measures:

- Ensure code of ethics is in place, including instructions for staff as appropriate
- Review manual for red flags
- Validate the process to ensure that best offer is chosen
- Update the risk registers with the most current information available
- Transparency measures to handle conflicts of interest
- Conflicts of interests are defined in the working procedures of the paying agency. Each official must inform his/her superior in writing about existing relationships and the superior decides if a CoI is present
- In the 2014-20 Programming Period the problem of close relationships has been solved by passing the approval of educational measures from the chamber to the regional government where persons not involved in the project select or approve the projects or grant the subsidies

- Implementation of selection criteria in the new Programming Period 2014-2020

Recommendations:

- Horizontal risk assessment and risk analysis for all specific aid systems
- Identify the areas at risk of COI in the authorisation/selection phase per measure
- Use a declaration of absence of COI or of disclosure of COI
- Install an obligation of the official to notify the superior if COI occurs
- Document the procedures if (possible) COI occurs
- Document all steps of controls and checks, enhanced supervision
- To prove that the best offer has been selected, make the process transparent; publish a national data base of reference prices and maximum prices
- Invite experts from other Member States to avoid close relationships between experts. To enhance transparency name the experts involved in the project, disclose the process
- Time ban for consultants changing from the public to the private sector
- Lower the percentage rate of subsidies (no 100% support rate)
- Include sanctions in the code of ethics or working procedures
- Establish constant monitoring of compliance with the rules on COI by the Internal Audit Department of the PA

3.2.4 Red flags in EAFRD – area related - investments

The 'red flags' in public procurements which are included under point 4 of the guidelines under Appendix I are relevant to the agriculture sector and in particular in area of investments.

Example: EAFRD – area related - investments - COI in rural tourism investment – Private Procurement

A beneficiary applies for EAFRD funding to construct a tourism facility in a rural area. The beneficiary claims that he used an open tender according to public procurement rules, although he only needed to comply with a simplified procedure, which consists of requesting three offers. The procurement notice is published in a local newspaper and

three local companies confirm that they received a copy of the tender specifications. Only one potential bidder sends an offer, and the contract is awarded to that bidder. Further tenders are organized for equipment and furniture, and again, only one bid is received. It turned out that the winning bid had been previously arranged, as the other companies were not interested in the contract and had been asked to request the tender specifications as a formality. One of the members of the evaluation committee was in a situation of conflict of interest and had given a false declaration during the procurement procedure.

Risks linked to a conflict of interests

Real costs are inflated by a rigged tender procedure.

Genuine registered firms are denied the opportunity to compete in a fair tender process.

Red Flags

- The same companies request the tender specifications in all procurement procedures but fail to send offers
- The companies requesting the tender specifications do not have the capacity to provide the services as they work in a different domain
- Undeclared subcontractors were present on the construction work site (interviews carried out on-the-spot)
- Contracts between the potential bidders were concluded after the procurement contract had been awarded to one of them
- A procurement notice is published in a local newspaper although the value of the contract is relatively high compared to the capacity of local companies in related fields

Preventive, corrective and repressive measures:

Enforce the rule that at least three offers must be received even if an open procedure is applied.

Check the real activity and capacity of (potential) bidders at the procurement verification stage.

Identify the subcontractors of the successful bidder as well as any transactions between bidders and between bidders and beneficiaries.

3.2.5 Red Flags in Leader

See case mentioned under point 3.4.1

Risks linked to a conflict of interests

- Absence of declaration of conflict of interest. Evaluation of projects outsourced by the Paying Agency
- Final beneficiary created immediately prior to the application for the subsidy (this would be a clear attempt at fraudulently gaining subsidy and the claim should be disallowed without question)
- Management of the final beneficiary with little or no experience in the specific field of implementation
- Final beneficiary whose organisation, human resources and/or assets are inadequate for implementing the project

3.2.6 Other possible red flags

Cluster 1: Red flags indicating potential links between contractor and beneficiary:

- Employee of the contracting authority worked for a firm which may bid, just before joining the contracting authority
- Employee of the contracting authority has relatives who work for a firm which may bid
- Personal relationships with all or some of the major actors
- No specific guidelines on segregation of functions. Consortium of public bodies without an adequate organisation for implementing and/or supervising the implementation of the project

Cluster 2: Anomalies concerning project's ownership.

- The same location of three separate projects and one person representing all of them
- More than one separate project is located in the same place
- The same person represents all the applicants

- The same people submit for all projects
- A group of 'independent' projects have the same winner
- Same address of headquarter and other premises
- Same telephone numbers
- Common shareholders, administrators or supervision bodies (as censors)
- Existing work relations between natural persons and legal persons
- No references from previous projects that have been undertaken

Cluster 3: Anomalies concerning selection criteria

- Subjective elements are over-represented in the criteria system (subjectivity should not be part of the criteria in any case)
- The 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
- Unusual selection criteria

Cluster 4: anomalies during project implementation by the contracting authority

- unusual acceptance of non-compliance with contractual requirements during the execution of the contract
- no quality and quantity checks performed from the beneficiary
- contradiction in rigorous selection criteria before contracting and a low level of requirements after the signature of the contract
- Preferential treatment of the successful bidder:
 - easy acceptance of essential contract modifications at the request of the contractor
 - unusual/unbalanced contractual provisions compared to the usual practices on the market regarding terms of delivery or reception, low or no guarantees and quality requirements, extremely good payment conditions offered (eg. 100% in advance or similar)
 - financial penalties not applied even where application was justified by the infringement of contractual provisions
 - Poor contract execution does not result in application of strict penalties or stop the company from being awarded further contracts
- The full investment is paid by small instalments within a very short time period

Cluster 5: anomalies during project implementation by the beneficiary

- Replacement of supplier after process of private procurement
- Unsuccessful bidders in the procedure became at a later stage a subcontractor/ supplier (possibly due to a previous agreement with the successful bidder)
- Loans received / given by the beneficiary from/to the (sub)contractor or natural persons linked to the (sub)contractor
- Loan agreements are made without guarantees and with no credit institutions;
- Multiple money transactions explained as 'loan'
- Unexpected transactions / relations of the beneficiary with the contractor or the unsuccessful bidders (paid or received amounts having no apparent contractual justification)
- Partners are involved without public competition

4. PREVENTION THROUGH TRANSPARENCY AND OTHER MEASURES - BEST PRACTICES

Transparency literally means "*the quality or state of being transparent*", while transparent is to be "*easily seen through, recognized, or detected*". Transparency in the implementation of funds ensures greater accountability and contributes to preventing risks of potential conflict of interest. It enables fair treatment of all parties involved in public or private procurement procedures as well as during the selection or authorisation phase of projects or grants and safeguards the integrity of the public system. One should also not forget that transparent grant and contract awarding practices are a proved safeguard against corruption and favouritism²⁹.

Transparency also protects participants in public procurement and equivalent procedures and enables them to collect information that may be relevant to reporting potential abuse. Transparency requires clear internal processes designed to counteract abuse and increase accountability, increase the legitimacy of management decisions, give guidance on how to cope with risks, and encourage employees to participate in the process of building a more transparent organisation. Transparency ensures higher standards of

²⁹ See as well the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, (2006/C 179/02), OJ C 179/2, 1.8.2006.

ethical behaviour, better decision-making, higher income/economic growth, public confidence, greater participation (in decision-making and in monitoring the work of institutions) and political stability.

The spending of EU funds is tied to the preparation of projects and their implementation in a country and sector-specific context (the largest proportion on the investment field is carried out mainly by local authorities). Lack of transparency over conflicts of interest is more common at the local authority level, where there are well established relationships between the key players.

Conflicts of interest carry a substantial risk of corruption³⁰, but cannot be equated to corruption itself. Criminological prohibitive policy on conflicts of interest, requires:

- **an appropriate legal basis** in order to enable the prevention and elimination of conflicts between public and private interests; and
- **proper implementation of these legal bases**, to avoid any institutional risk of corruption or any other illegal or unethical behaviour in organisations and institutions

It is essential that the legal basis provides for **appropriate sanctions** in case the duty to avoid conflicts of interest is breached, in particular penalties for failing to declare conflicts of interest and to withdraw from handling the file in question.

The legal basis should also provide for **mandatory forms for the officials**, in which new recruits should declare their previous employment, activities, functions and interests, to enable an employer to identify potential conflicts of interest at the workplace.

The effective implementation of a transparency policy helps to prevent conflicts of interest leading to corrupt, illegal or unethical behaviour.

If private interests are seen to influence public functions, authorities should expect a loss of credibility and trust. Private interests are most likely to affect tenders and procurement, when subjective criteria can influence the outcome for personal gain.

While conflicts of interest can bring personal benefits (the acquisition of business or employment, financial benefits etc.), there are negative consequences for the economy due to the distortion of fair competition. If it appears that a decision to award a contract

³⁰OECD Guidelines 'Managing Conflict of Interest in the Public Service'

or to employ a candidate has been pre-determined by a public official, trust in state institutions and their procedures is eroded.

While fully respecting the principle of transparency, the existence of conflicts of interest does not lead to such consequences.

Example: Spain underlines the importance of transparency, in particular regarding Conflict of Interests (CoI) in public procurement procedures. When transparency is applied to the agricultural sector the approach can be different depending on the subject matter:

The data of agricultural aid scheme beneficiaries should be public according to the regulations: each Paying Agency should give on-line access to the data of legal entities or individuals, country and region, aid scheme, amount received, etc. Spain provides a link to the Spanish Central Paying Agency's (FEGA) website on Beneficiary Consultation (Annex 5).

The management of Rural Development (RD) projects involves a number of actors, which may not be easily identified. For the purpose of transparency, and mainly in RD projects, there are a number of measures to be considered and, if appropriate, put in place:

Declarations relating to COI: broader scope.

- If this type of declaration is used, new topics may be covered. Where feasible under applicable data protection law, beneficiaries may authorise an on-line search of sensitive information such as financial assets, companies' partnerships, etc. The purpose would be to identify any possible conflicts involving third-parties
- A declaration could additionally require concerned individuals or legal entities to state any existing legal records relating to previous public procurement procedures

Special measures relating to transparency:

- In certain situations there may be crosschecks of data-bases managed by public institutions (social security, commercial registry, etc.)
- Member State administrations should set an example with effective transparency tools, for example Spain's Central Government Transparency website (see annex 6)

Conclusions: An effectively implemented transparency policy ensures that all actors involved in public procurement procedures in the agricultural sector (government, Rural Development project companies, contractors, etc.) act in a fair and legal way with no suspicion of conflict of interest.

4.1 Declarations relating to COIs

A declaration of **absence** of conflict of interests is an essential tool to prevent and manage situations of conflicts of interests. The completion of such a declaration should be mandatory. This obligation should be met without delay to safeguard the procedure and the person concerned. People are — theoretically — more inclined to declare a conflict of interests if they are aware of the obligations entailed by signing a declaration of absence of conflict of interests.

A declaration of conflict of interests on a merely voluntary basis is not sufficient to demonstrate intentionality at a later stage in the event of fraudulent conduct, where the suspect failed to submit a declaration.

The declaration should:

- make clear reference to the project concerned and to the subject of the declaration
- state the signatory's full name, date of birth, position in the organisation, and function in case of a public or private procurement procedure
- either be signed by hand with all names of the declarer written by hand or be digitally signed in accordance with the national rules and procedures
- include the date of signature

The declaration should enable the signatory to officially declare:

- whether to his/her knowledge he/she is in an apparent/potential/actual conflict of interests linked to the request of subsidies or project referred to
- whether there are circumstances that might place him/her in an apparent/potential/actual conflict of interests in the near future; and
- that he/she commits to declaring immediately any potential conflict of interests in the event of any circumstance that might lead to such a conclusion

The declaration should warn about the disciplinary/administrative/criminal sanctions for making a false declaration.

It should also include an undertaking of confidentiality, if the person is likely to be dealing with commercially confidential data from a tenderer/bidder in the course of the procurement procedure.

An explanatory note should be attached to the declaration to give signatories clear and firm guidance on:

- The organisation's policy, including the purpose of the declaration
- The legal requirements of any regulations, including clarifications of certain issues deriving from the definition: family, emotional life etc. (for example, the relationships constituting family membership may vary between Member States and this needs to be set out within the cultural context (2nd or 3rd degree for example)
- The code of conduct governing management of conflicts of interests in the organisation
- The consequences of non-disclosure of a conflict of interests
- The procedure to follow in the event of a change in the situation and especially when, how and to whom to declare any conflict of interests that arises

The note should give some examples of conflict of interest situations.

Examples:

In Bulgaria,³¹ the CIPAA defines different types of declarations including a declaration of incompatibility, a declaration of private interest (to be submitted within 30 days after an election/appointment), a declaration of occurrence of a change in relevant circumstances referred to in previous declarations, and a declaration of a private interest on a particular occasion.

In Cyprus, A written internal Procedure of Declaration regarding the Impartial Execution of Duties is in place. In a public procurement process, a declaration of COI has to be signed both by the public official responsible for the preparation and conclusion of a competition and by the members of the evaluation committee. Declarations relating to COI are used, inter alia, by employees who deal with the verification or authorisation of claims or payment requests, by employees dealing with public procurement procedures, in the process of internal auditing, and by controllers responsible for checking transactions according to Title V, Chapter III, Regulation (EU) N0 1306/2013.

³¹ See example at 'Attachment 1'

Annex 3 contains information relating to COI in different Member States and examples of declarations used by some Member States which might need to be amended to meet national requirements in other Member States.³² Points 2.4 and 3 of the guidelines on "Identifying conflicts of interests in public procurement procedures for structural actions – a practical guide for managers" which is part of Appendix I of the present document are applicable mutatis mutandis.

4.2 Best practices

for developing a code of conduct in case of receiving presents. Within the broad concept of conflict of interest we not only consider the situation where there is a real conflict between a public official's interests as a private citizen and his/her duty as a public official, but also those situations where there is an apparent conflict of interest or a potential conflict of interest.

Annual declaration of absence of conflict of interests (CoI): For example in the Slovenian paying agency once a year each employee has to sign the declaration of absence of conflict of interests, which lists all relevant rules or laws and regulations from the field of conflict of interests and from the field of data confidentiality. This declaration has to be signed also by those public servants that work on public procurement procedures. In this declaration the employee signs that he is familiar with the laws, regulations and procedures of this field and that within his work there is no conflict of interests. In this declaration the employee also signs that he will inform his superiors, if there is any actual, apparent or potential conflict of interests or change of circumstances. These signed declarations are held in the employment record.

In Estonia the internal audit service of the Paying Agency constantly monitors compliance with the rules of conflict of interests and raises staff awareness about the importance of avoiding conflicts of interest. It is also responsible

The relevance of Public Procurement principles for Private Procurement:

In Estonia a provision was added to the Structural Assistance Act 2014-2020, which enacted that if the beneficiary or partner does not have to follow to the Public Procurement Act and the service, property or construction cost is estimated at 5,000

³² The information presented in this practical guide does is without prejudice to national law and should be regarded as guidelines and best practices.

EUR, excluding VAT equal to or greater than, it must follow the general principles of the public procurement, set in the Public Procurement Act § 3.

The general principles of public procurement are:

- 1) the contracting authority must use financial resources economically and for their intended purpose and achieve the purpose of the public procurement at a reasonable price by ensuring best value for money by comparing various tenders in the event of competition;
- 2) the contracting authority must ensure that public procurement is transparent and reviewed;
- 3) all persons must be treated equally and without discrimination by the contracting authority and the contracting authority must make certain that all restrictions and criteria established for the persons are proportional, relevant and justified in relation to the purpose of the public procurement;
- 4) the contracting authority must ensure effective use of the existing competition in public procurement, whereby the participation of a public legal person or a private legal person using public funds in the public procurement must not distort competition due to its use of public funds;
- 5) the contracting authority must avoid a conflict of interests distorting the competition;
- 6) if possible, the contracting authority will prefer green solutions.

Using e-procurement environment: not only for public, but also for private (3 offer rule) procurements in order to provide workspace for contracting authorities for organising public and private (3 offer rule) procurements and for tenderers for participating in procurements that increases equal treatment, non-discrimination and transparency and effective use of competition.

This option was tested by Estonian Environmental Investment Centre and gave very good results because the risk of inflated private offers dropped significantly.

Staff training: In the Austrian paying agency a regular staff training concerning conflict of interests is in force on all operational levels.

In the Czech paying agency new employees have to pass an adaptation programme during the first three months in post. They have to study the relevant internal rules of

procedures and a safety training that includes aspects of conflict of interests. Finally they have to pass an e-learning test which is necessary for access to the information system.

On the national level there are different kinds of rules for public officials on how to deal with situations where a conflict of interests may occur. In Germany for example, such rules could be found in the Administrative Procedure Act. Furthermore every paying agency has to develop a written anti-fraud-strategy that also includes measures to prevent conflict of interests through measures like staff training.

In the United Kingdom, guidance has been issued to support the implementation of the policy on the conflict of interests. Paying agencies review their guidance annually and update or amend it, if appropriate. It is re-issued to all staff on the intranet at the start of the financial year or other relevant milestones. There is standing guidance on the electronic recording systems that all employees are required to read before they are allowed to make their declarations. Case studies which discuss various scenarios that can arise due to non-registration of an interest area are made available in order to raise awareness. New staff are given welcome and inductions packs which include sections on conduct and discipline. Staff are required to read the conduct and security sections of the staff handbook when they join the paying agency.

Preventive, corrective and repressive measures/ conclusions:

In addition to all other measures suggested as best practices, there are additional risk factors, realities and dimensions that should be addressed and taken into account when policies and procedures are drafted in the agricultural sector, in order to enhance and/ or restore further trust in public management:

- In order to ensure that the risks associated with 'conflicts of interest' are successfully addressed, any action should be part of a wider governance and culture of enhanced transparency, integrity and honesty³³
- Sound policy and regulation for the management of the occurrence of a 'conflict of interest' situation should be closely linked to the antifraud obligations of Member States and thus become a management and political priority

³³ Overarching guidelines on preventing and managing conflict of interest at the ETF, 2013 - 1891, Version 03/06/2013

- There can be no single policy for managing the issue of 'conflict of interests' that could be applied with the same effectiveness to all Member States. In order to be effective, such policies should always take into account the realities, particularities, current trends and risks specific to different cultural and regional environments
- Any committees responsible for the management of 'conflict of interests' should adhere to detailed transparency, accountability and credibility rules and checks³⁴
- Appropriate legal provisions are needed in order to deal with 'conflict of interests' arising from the 'revolving doors', a process which is '... also significant within EU Institutions...'³⁵ as well as at national level
- Regular and effective rotation of staff in sensitive positions (sensitive positions with regard to the verification, authorisation, payment and accounting of claims or payment requests)
- It should be clarified that a situation of conflict of interests falls under Article 1(2) of Regulation (EC, Euratom) No 2988/95.

5. MANAGING A CONFLICT OF INTEREST – BEST PRACTICES

5.1 Managing a declaration (declared COI - mitigating risks)

When a situation of conflict of interests arises it does not necessarily mean that the initial declaration was false. It is possible that none of the circumstances which caused the conflict were present at the time when the declaration was submitted. Therefore one possible way for a public official to prevent conflicts of interest is to:

- Declare the situation immediately on becoming aware of the circumstances which may influence the impartial execution of his duties
- Refrain from action and refer the case to his superior for appointing a substitute

The supervising authority should evaluate the need to replace the public official who has declared a possible conflict of interests. Before replacing the public official, it is recommended that the authority discusses the situation with the public official in order to

³⁴ Regulating Conflicts of Interest for Holders of Public Office in the European Union: A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions, C. Demmke/M. Bovens/T. Henökl/K. van Lierop, T. Moilanen/G. Pikker/A. Salminen, A study carried out for the European Commission, Bureau of European Policy Advisers (BEPA), European Institute of Public Administration in co-operation with the Utrecht School of Governance, the University of Helsinki and the University of Vaasa

³⁵ "Measuring conflicts of interest : a revolving door indicator", Elise S. Brezis, Joël Cariolle, http://www.ferdi.fr/sites/www.ferdi.fr/files/publication/fichiers/wp122_brezis_cariolle_web.pdf

better assess the risk of potential biased execution of duties. Subject to national law, the authority may require the advice of other competent bodies.

In Romania, in case of a conflict of interest, the employee must not participate in the decision-making process and should immediately inform his or her superior in writing³⁶. The superior would then decide that another qualified employee should undertake the tasks. If a conflict of interests is noticed during a verification, evaluation or approval procedure the concerned persons must immediately cease participation and notify.³⁷When submitting an offer within a procurement procedure, a bidder is obliged to declare that he is not in a situation of conflict of interests. If such a situation of conflict of interest occurs during the procurement process, the bidder is obliged to notify, immediately, in writing, the contracting authority and to take measures to eliminate the respective situation.

At the Paying Agency **in Austria**, a COI is defined in a working procedure for rural development (including definitions of existing and possible COI, immaterial COI, incompatibility, for example). If a possible COI occurs, it has to be declared to enhance transparency and mitigate risks. Every official has to inform his/her superior using this form. The superior decides whether a COI exists. If this is the case and no other official is available to take over, enhanced controls and evaluation by the superior have to be made. The procedure is documented in writing. In the new programme period 2014-20 the problem of close relationships between public officials and associations as beneficiaries have been solved by passing the approval of educational measures from the chamber to the regional government where persons not involved in the project select or approve the projects or grant the subsidies.

To enhance the objectivity of the selection phase, the implementation of selection criteria has been incorporated in the new programme period 2014-20.

In Malta, any Agriculture and Rural Payments Agency (ARPA) or Delegated Service (DS) employee involved in the verification, authorisation, payment and accounting of claims who has any direct interest in, or a relationship with, any individual or organisation that submits an application for EU funds, must inform his/her immediate Head of Unit as well as the Head of the Paying Agency (PA).

The Head of Unit and/or employees who have declared a conflict of interest consult with the Head PA to decide as to what action can be taken to remove or reduce the risks arising from conflict of interest issues within their department. This meeting must be held

³⁷ Romanian Government Ordinance nr. 66/2011 (concerning irregularities linked to EU funds)

within 10 working days of the employee having made his/her declaration and before the employee has in any way processed or worked upon any applications or payments relating to the scheme.

Where possible, the employee's superior should seek an alternate employee to perform the duties related to that particular applicant/beneficiary. The person who has the conflict of interest should immediately refrain from discussing or influencing the transaction and/or scheme in which he/she has an interest.

Where it is not possible to find an alternate employee, the Head of the Paying Agency should be informed in writing. The Paying Agency Head's written approval must be obtained before the employee can perform any work on the application in question. The Head of the PA must inform the ARPA's Unit C3 – Controls and ARPA's Unit B – Internal Audit Service of each approval provided so that they will take each situation into consideration when conducting their risk analyses

In Malta, for the LEADER programme, in cases where the Decision Committee members have a conflict of interests, these cannot sit on the selection board assessing that particular call. The Decision Committee has to appoint other independent members as replacements. Once the selection process is concluded, the Decision Committee will publish the preliminary result. The Decision Committee will also need to set up an autonomous & independent appeals board.

Any appeals presented must be lodged with the Chairperson of the appeals board. No members from the evaluation committee or decision committee can be nominated to sit on this board. The outcome of the appeals process is final and cannot be altered by the Decision Committee. The Managing Authority has the right to undertake checks on the process to verify the results and ensure a fair and transparent process. In case of irregularities identified by the Managing Authority, the Local Action Group (LAG) will be requested to revise the process accordingly.

In Malta, if for political considerations a conflict of interest arises, administrators concerned shall, at their own initiative or at the request of the Competent Authority, withdraw or be withdrawn from those areas of their duties giving rise to the conflict of interest, or stop participating in political activities.

5.2 Checking the declarations

Checking the declarations against other sources of information is an effective control in order to identify possible false declarations:

Red flags could appear relating to a possible COI by checking information provided by:

- Database of Register of Commerce or other similar bodies
- Common shareholders or supervision bodies (as censors)
- Address of headquarters and other premises
- Telephone numbers
- For foreign and 'off-shore' companies agreements for changing information could be signed between different authorities

Database of national bodies

- checking for any work contracts between natural persons and legal persons

Successful bidder's registers, accounts or other documents available:

- Information can be found to identify unsuccessful bidders in the procedure that become subcontractors / suppliers due to a previous agreement with the successful bidder

Beneficiary's registers, accounts or other documents available:

- The beneficiary's evidence and documents could point out unexpected transactions/ relations with the contractor or the unsuccessful bidders (paid or received amounts which have no apparent contractual justification)

Comparison of Contracting Authority's actions with other similar procurement procedures/contracts

- Identification of possible preferential treatment: unusual selection criteria, unusual contractual provisions regarding terms of delivery or reception or unusual modification of these, lower guarantees and quality requirements, easy acceptance of essential contract modifications at the request of the contractor, unusual acceptance of lack of compliance with contractual requirements, non-application of financial penalties where application would be justified, contradiction in rigorous selection criteria and the requirements after the signature of the contract

Interview of persons involved (employees, subcontractors or others) during on-the-spot checks

- Information about all subcontractors or suppliers to identify possible unsuccessful bidders in the procedure that subsequently become a subcontractor/supplier;
- Information about quality and quantity checks from the beneficiary, on time delivery requirements and other requirements so as to identify a possible lack of interest/favourable treatment from the beneficiary regarding the compliance with the contractual obligations of the contractor.

5.3 Preventive, corrective and repressive measures, failure to disclose, false declarations

5.3.1 Failure to disclose a Conflict of Interests

Failure to disclose a conflict of interests usually is possible at any of the following two stages:

- **First stage** – at the time **when an applicant submits his application for financial aid to the relevant administration** (for instance paying agency), or at the moment before the public official has carried out any duties related to an application .Relevant national law which sets earlier dates for submission of such declarations by public officials should be taken into account as well, insofar as in this case the irregularity may take place at an earlier moment, specified by the national law
- **Second stage** – at the time **when the public official is about to exercise his duties in relation to an application which may lead to a conflict of interests** as defined by the Article 57 of Regulation 966/2012 or by national law

The authority should take appropriate measures to inform at an early stage both its employees and applicants about:

- the need to disclose facts which may affect the unbiased execution of duties by public officials
- the facts which must be disclosed
- the deadline for submission of such declarations
- where to submit them

It is recommended that the authority holds regular staff meetings to identify possible situations which may lead to conflict of interests and to explain the need to reveal those circumstances which may affect the impartial performance of their duties.

All declarations should be duly registered and saved by the authority. They should be subject to checks in order to establish compliance with the deadlines for submission. Subject to the national law in force the authority should either impose relevant measures/sanctions upon officials who fail to observe the deadline or promptly inform the appropriate body empowered to do so. The consequences may differ depending on the national law:

- Disciplinary sanctions
- Administrative sanctions
- Refusal to conclude a contract with an applicant who has failed to submit a declaration

In Bulgaria, a set of regulations imposes various corrective and repressive measures related to preventing and sanctioning conflict of interest in the agricultural sector. Each legal instrument setting the rules for receiving financial aid by the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development:

- Renders inadmissible all applications where the applicant is a connected person (in the meaning of CIPAA) to any public official who works at the Managing Authority or the Paying Agency and who has dealt with the application
- Requires the evaluation committee members to sign and submit declarations for absence of private interests and connections in the meaning of LPACI
- Provides for cancelation of the contract, stopping any payments and claiming back the money already paid to an applicant who has submitted a false declaration

All public officials are required by the law to submit:

- An initial declaration on private interests, in the meaning of LPACI, upon taking their office, and to disclose any further amendments to it
- A declaration for specific private interests, in the meaning of LPACI, upon assuming that fulfilment of their official duties may render them in a state of conflict of interest. In this case they must refrain from execution of duties

In addition, Article 10 of the Administrative Proceedings Codes gives any public official the right to refrain from execution of duties if there are circumstances which may infringe their impartiality.

Example in Bulgaria

Both public officials and applicants may be subject to corrective and repressive measures for infringements of EU and national legislation related to conflict of interests. Their main purpose is to minimize the financial loss to European funds in cases where potential or existing conflicts of interest have been detected and to impose sanctions upon the individuals whose actions have led to such a conflict of interests.

The authorities should take into account the definitions of conflict of interest, if any, given in their respective national law and the one given at Article 57 of **Financial Regulation (EU, Euratom) No 966/2012**.

In Romania, a CoI is a criminal offence which may be punished by 1 to 5 years imprisonment and exclusion from the right to occupy a public position. At an administrative level, natural or legal persons that are participating directly in the evaluation or verification process of the applications are not allowed to be applicants and are not allowed to provide consultancy services to an applicant. If this principle is violated, the applicant shall be excluded from the selection procedure and the contract or funding decision could be cancelled.

In Malta, if a COI occurs, the respective employee must refrain from any further engagement in the transaction if there is a COI. Another officer should be designated by the Head of Unit. If another officer cannot be designated, the Control Unit and Internal Audit Service (IAS) will be informed in order to take into account the specific transactions. When a false declaration is detected, the employee will be subject to immediate disciplinary measures in line with the Public Service Management Code (PSMC) and/or his personal contract.

5.3.2 False declarations

False declarations are among the most frequent irregularities and may be a useful indicator for detecting potential fraudulent behaviour. Obviously it could take place at the time of disclosure of required information when, in order to evade the law, the respective individual – public official or applicant – states incorrectly some circumstances.

One way to prevent false declarations would be to remind both employees and applicants what the possible negative effects of such violation would be. In addition, the authority should introduce a system allowing for regular checking and crosschecking of the

declarations with other sources of information – public registers, employees' dossiers, media, etc.

Upon detecting a false declaration the authority should proceed, subject to the national law in force, with:

- Imposing disciplinary sanctions upon the public official who has submitted the false declaration
- Cancellation of the contract with the applicant
- Not allowing pending payments on the contract
- Claiming refund of sums already paid to the applicant
- Informing the appropriate national institutions empowered to establish conflict of interest, as it is possible that by falsely declaring some facts the public official may have tried to conceal his private interests in the matter
- Transmitting the case to the prosecutor's office to begin criminal proceedings

Proposed preventive measures: Paying Agency or other competent authority should issue guidance to cover how to "deal" with anyone who fails to disclose a conflict of interests or makes a false declaration.

Case officers are specifically trained to deal with such cases and are supported by experienced colleagues to ensure all cases are effectively investigated and concluded.

ANNEX 1

CONFLICT OF INTERESTS IN THE FIELD OF CAP – JUDGMENT OF THE COURT OF JUSTICE OF EUROPEAN UNION

A list of the judgments of the Court of Justice of the European Union regarding COI in the field of Common Agricultural Policy :

1) Case C-387/03

Greece/Commission (EU:C:2005:646)

Case C-387/03 tackles the question of exclusion from EU financing of costs concerning the vine market because relevant analyses were carried out by oenological laboratories belonging to the aid recipients. The Commission checks revealed uniformity of results of alcoholic strengths which would suggest that referred enrichment, for which the aid was attributed to, had not occurred.

The Greek Government did not show that measures had been taken to ensure that such laboratories, despite belonging to controlled vine cellars, had organized their activities in such **a manner as to avoid any conflict of interest**. That fact was combined with the similarity of results which were contrary to the teachings of science and experience, and allowed to assume that declared alcoholic strengths did not correspond to reality.

2) Case T-257/13

Poland/Commission (EU:T:2015:111)

From case T-257/13 we learn that the Commission could legitimately consider the sole acceptance of declarations made by the farming transferees` relatives in order to demonstrate the acquisition of sufficient knowledge and professional skills of the farming transferee (which was requested by relevant legislation as a condition for acquiring the aid) could create a risk for the EU funds **as a result of conflict of interest**.

Although the Commission did not consider that the declarations made by the farming transferees` relatives should be rejected as evidence, it stressed that it could not be regarded as sufficient evidence in itself. It is conceivable that these relatives were themselves farmers wishing to avail of an addition to the retirement pension and were therefore, as such, potential beneficiaries of the benefits generated by the system of early retirement support. They could thus be encouraged to make false statements.

3) Case T-73/08

Berliner Institut für Vergleichende Sozialforschung / Commission (EU:T:2013:433)

Case T-73/08, Berliner Institut für Vergleichende Sozialforschung / Commission concerns financing a project for prevention and fight against violence against children, youngsters and women and for protection the victims and risk groups by the Daphné II Programme 2004-2006.

Since the condition for attribution of EU funds to the beneficiary was to unconditionally avoid any conflict of interest in the execution of the co-financed project and to notify the Commission should any conflict of interest would emerge, the Court confirmed the Commission's reasoning.

The Court noticed that there was a conflict of interests in attributing the contract by the beneficiary taking into account the connections between the beneficiary and contractor in the organizational, geographical, personal and economic sense. One of the crucial proofs was the fact that the person who signed the contested contractor was at the same time an employee of the beneficiary who paid the invoice and applied for cost reimbursement . (Case T-73/08, Berliner Institut für Vergleichende Sozialforschung / Commission, paragraph 129).

4) Case T-160/03

AFCOn Management Consultants and Others /Commission (EU:T:2005:107)

In case T-160/03, concerning tender procedure within the Tacis programme for the supply of technical assistance services, entitled 'Agricultural Extension Services in South Russia', the Court declared, that after identifying a conflict of interests between a member of the evaluation committee (in this case Mr A) and one of the tenderers (in this case GFA), the Commission should act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. This obligation is derived from the principles of sound administration and equal treatment. The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers.

The Commission did not investigate the links between Mr A and GFA in order to satisfy itself that GFA did not seek to influence the evaluation committee's proceedings. In fact the Commission confirmed that there was no evidence suggesting that GFA sought to influence the proceedings, using one of its employees sitting on the evaluation committee as an intermediary. The commission none the less stated that it had taken no measures

of inquiry in order to ascertain whether GFA and Mr A had collaborated during the tendering procedure.

The Court furthermore states that since it had failed to investigate whether there was any collusion between GFA and Mr A, the Commission in fact had no grounds for ruling out, with any reasonable degree of certainty, the possibility that GFA had sought to influence the tendering procedure. Rather, a number of objective and consistent factors should have led the Commission to take particular care and to consider the possibility that there was collusion between GFA and Mr A. Those factors indicate that the conflict of interests could have arisen not merely as the result of a combination of circumstances but as the result of a fraudulent intention.

Accordingly the Court concludes that the seriousness of the situation gave reasonable grounds for suspecting that there might be collusion between Mr A and GFA.

ANNEX 2

Basic information on CAP

The Common Agricultural Policy (CAP) established in 1962 with the objective of providing affordable food for EU citizens and a fair standard of living for farmers has been reformed several times. In order to achieve the objectives of the CAP's most recent reform, adopted in December 2013, the various measures falling under the CAP, including rural development, are financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). The EAGF and EAFRD ('Funds') are implemented in shared management between the Member States and the Union.

The EAGF is managed on an annual basis in line with the principle of annularity set out in Article 310 of the Treaty on the functioning of the European Union and in chapter 2 of the Financial Regulation no. 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union. Aid measures and schemes are regulated for at EU level and specify EU-wide rules.

The EAFRD is managed on the basis of national or regional multiannual programmes where measures can be tailored at national and regional level in order to meet specific objectives.

The same financial management and control rules apply to both EAGF and EAFRD. Accounts are declared by the paying agencies and cleared (financial clearance) by the Commission on an annual basis.

The paying agencies (departments or bodies of the Member States) are responsible for the management and control of expenditure of both Funds. The main functions according to Regulation (EU) No 907/2014 can be described as follows:

- 1) Authorisation of applications and control of payments (including administration controls, on the spot checks, ex post controls). For certain area-related measures Member States should set up and operate an integrated administration and control system (IACS). The main elements of such an integrated system are a computerised database, an identification system for agricultural parcels, aid applications or payment claims and a system for the identification and recording of payment entitlements.
- 2) Execution of payments of the authorised amount to beneficiaries.

- 3) Accounting of all executed payments in the paying agency in separate accounts for EAGF and EAFRD expenditure.

The inherent risk in IACS-measures is considered as low while the risk in EAFRD - and EAGF-non-IACS is higher due to close relationships between the experts working in these sectors. Cases of close relationship are a widespread problem within agriculture and rural development and awareness about this problem needs to be raised.

In some EAGF-Non-IACS Measures e.g in Austria there are few companies receiving EU financial support and public officials and beneficiaries have known each other for years.

ANNEX 3

Definition of COI and national legislation

In Austria there is no definition of the word „COI“ in the area of public management. But there are regulations concerning bias (or recusal, „Befangenheit“) (§ 47 BDG 1979 and § 7 AVG). Furthermore there are legal provisions on incomparability of functions.

We do not have declarations of absence of COI, because of the obligation to refrain from executing administrative actions because of bias.

Regarding consequences of COI we refer to the regulations concerning bias and the legal provisions on incompatibility (plus BVG, § 78 StPO 1975).

In Bulgaria the Conflict of Interest Prevention and Ascertainment Act (CIPAA) establishes the rules for the prevention and ascertainment of COI, tackling the issue at national level. The CIPAA, inter alia, provides a definition of a COI.³⁸ In its scope the CIPAA extends to all persons holding legislative, judicial or executive powers.

In Cyprus Anti-fraud measures are not managed centrally but separately by each public authority. With regard to agricultural funds, the Cyprus Agricultural Payments has an independent Anti-Fraud Service which is responsible, among its other more specialised functions, for antifraud policy in the agricultural domain.

CAPO was established through the Law concerning the functioning of the Cyprus Agricultural Payments Organisation, No. 64(I)/2003. Articles 32(4) and 47 of the Law provides for the avoidance of any COI regarding 'persons holding a responsible or sensitive position with regard to the verification, authorisation and payment to beneficiaries of funds from the EAGGF Guarantee section (Art. 32(4))'. Article 47 (1)

³⁸ *'Conflict of interest arises when a public office holder has a private interest, which may affect the impartial and objective execution of the official powers or duties thereof. The private interest is defined as interest, which results in a financial or non-financial benefit to a public office holder, or to any persons having close links therewith, including any obligation assumed.'*

'Benefit means any income in money or in property, including acquisition of participating interests or shares, as well as granting, transferring or renouncing rights, receiving a privilege or honours, acquiring goods or services gratuitously or at prices below the market prices, assistance, vote, support or influence, advantage, obtaining or receiving a promise to obtain a job, a position, a gift, a reward or a promise to avoid a loss, liability, sanction or another adverse event.'

stipulates the obligation for any employee of CAPO to notify the occurrence of a COI to his/her superior. The superior has the discretion to exempt an officer.

EU Law (Comm. Delegated Reg. (EU) No. 907/2014, Annex I – Accreditation Criteria, Article 1; Reg. (EU) No. 1305/2013 on EAFRD, Article 15).

In Estonia the presentation identifies a COI in public bidding processes in which "manufactured" offers result in "inflated" prices.

Tenderers shall not be related to the contracting body (procurer). The situation could be improved by establishing rules that (a) tenderers shall not be related to each other and (b) procurer and any of the contractors or sub-contractors shall not be related.

As an example of Best Practice in EE, the Structural Assistance Act 2014-2020 regulates that even if a beneficiary or partner does not fall under the Public Procurement Act, they must adhere to the general principles of public procurement as set out in § 3.

In Greece national legislation deals with the issue of COI on various levels:

- The Code of Administrative Procedure (Law No. 2690/1999) applies to the public sector, local authorities as well as other public entities. A COI is defined in Article 7 of the Law. The same article establishes an internal reporting and control mechanism that is triggered by the officials themselves or by supervising bodies. The exemption of an officer may be ordered ex officio by the superior governing authority
- Declaration and audit of assets of officers involved in public procurement procedures: under Law No. 3213/2003 presidents and members of committees involved in public procurement procedures must file a declaration of assets including their spouses and children. This rule, however, only applies for public supply and public service contracts exceeding €150,000
- Appointment of committees involved in public procurement procedures per Ministerial Decision No. 21508/2011: The Ministerial Decision establishes a procedure of drawing lots in order to appoint members of the committees involved in all stages of public procurement process. The permanent rotation of officers participating in committees shall ensure the impartiality of the public procurement procedures and enhance transparency

- Law No. 4281/2014 – Articles 45, 46: Article 45 of Law No. 4281/2014 codifies a definition of COI and 'private interest' with regard to public procurement, a number of preventive and corrective measures, as well as penalties applicable to the parties involved in public procurement procedures³⁹

In Malta,⁴⁰ the problem of COI is tackled at Paying Agency level. All staff working at the Malta Paying Agency (ARPA, in charge of EU funds) or any other delegated service must comply with the Public Service Management Code (PSMC), national laws and EU regulation. The PSMC defines a COI.⁴¹ It puts the onus on the officers to disclose any potential or actual COI that may arise, to his/her Head of Unit, within a week of their becoming aware of it.

In Romania, COI is regulated in both administrative and penal law⁴². Any definition of COI in administrative laws⁴³ is guided by the principles of impartiality, integrity, decision transparency and supremacy of the public interest.

In Slovenia, COIs are defined in the Code of Conduct of Civil Servants, Civil Servants Act, and Public Procurement Act. Indirectly, the SI Criminal Code addresses COI (e.g. abuse of official duties, abuse of insider information, fraud to the detriment of the European Communities).

- Code of Conduct for Civil Servants (CCCA): The CCCA is applicable to all civil servants and covers all areas of a civil servants work (incl. public procurement). According to the CCCA, a civil servant has to avoid COI and must not abuse his position for private interest. It provides a definition of COI and private interest, explains how public funding shall be executed, determines personal responsibility of civil servants, and guarantees the protection of information which is linked to other relevant jobs

³⁹ Article 45, *Conflict of interest covers all situations in which parties involved in public procurement procedures and execution of public contracts as well as their relatives up to fourth degree, have directly or indirectly "private interest", namely financial or personal interest linked to the outcome of the tendering procedure. Private interests are personal, family, financial, political or other common interests with the candidates and tenderers, as well as conflicting professional interests (such as participation of a member of the contracting authority in the management of an economic agent/potential bidder, past employment of officers in tenderers etc.).*

⁴⁰ See example at 'Attachment 1 '

⁴¹ Definition of COI in the PSMC: 'A situation in which public officers have private or personal interests sufficient to influence or appear to influence the objective exercise of their official duties.'

⁴² In penal law, art. 301 of the Romanian Penal Code defines a COI as 'the deed of the civil servant who, in carrying out his work responsibilities, fulfilled an act or took part to taking a decision by which was obtained, directly or indirectly, a patrimony benefit, for himself, for his husband, for a relative or for family up to 2nd degree inclusively for another person with whom he was in commercial or work relations in the last 5 years of from whom she/he benefited or benefits from advantages of any kind.'

⁴³ A COI is defined as 'being any situation in which a person who is carrying out a public position has an interest of patrimony nature, which might influence the fulfilment with objectivity of the attributions which fall to him/her responsibility according to the normative acts which regulate his/her activity'.

- Upon signature of an employment contract, the Regulations of CCCA become part of the contract. A breach of CCCA results in sanctions such as disciplinary measures
- Civil Servants Act (CSA): The CSA prohibits any activity that may influence the impartiality and objectivity of civil servants or any abuse of information. COI is defined as well as the civil servants' obligations. A Director verifies the performed tasks in order to ensure no COI did arise
- Public Procurement Act (PPA): The PPA defines COI for the purposes of public procurement procedures. Any violation of the PPA constitutes an offence punishable by a fine up to 2000 EUR

ANNEX 4

Declarations relating to COI

Bulgaria:⁴⁴ The CIPAA defines different types of declarations including a declaration of incompatibility, a declaration of private interest (to be submitted within 30 days after an election/appointment), a declaration of change in relevant circumstances referred to in previous declarations, and a declaration of a private interest on a particular occasion. Certain restrictions and prohibitions apply to office holders in order to prevent a COI.⁴⁵

Cyprus: See Articles 47 of Law No. 64(I)/2003.⁴⁶

Anti-fraud measures in are not managed centrally but separately by each public authority. With regard to agricultural funds, the Cyprus Agricultural Payments Organisation's (CAPO) anti-fraud section is, as an independent entity, charged with the identification and sanctioning of COI (based on Article 14(2) of Law 64(I)/2003) has an independent Anti-Fraud Service which is responsible, among its other more specialised functions, for all the antifraud policy in the agricultural domain.

CAPO was established by through the Law No. 64(I)/2003 concerning the functioning of the Cyprus Agricultural Payments Organisation. Articles 32(4) and 47 of the Law shall ensure provide for the avoidance of any COI regarding 'persons holding a responsible or sensitive position with regard to the verification, authorisation and payment to beneficiaries of funds from the EAGGF Guarantee section.

(Art. 32(4))'. Article 47 (1) stipulates the obligation for any employee of CAPO to notify the occurrence of a COI to his/her superior. The superior has the discretion to exempt an officer.

EU Law (Comm. Delegated Reg. (EU) No. 907/2014, Annex I – Accreditation Criteria, article 1; Reg. (EU) No. 1305/2013 on EAFRD, Article 15).

⁴⁴see example at 'Attachment 2 and 3'

⁴⁵ Sample declarations have been submitted.

⁴⁶ Article 47

(1) In case it is found that either an employee of CAPO, or a relative of his/hers up to the fourth degree, is associated financially with an applicant who submits an application for payment for which the employee is responsible, then the employee shall be required to notify this fact without delay, to his/her hierarchically superior person. It lies with the discretion of the hierarchically superior person whether he will decide the exception or not, of that officer and to replace him.

(2) An employee who fails to declare his relation in accordance with subsection (1), shall render himself liable to disciplinary action in accordance with the provisions of the applicable disciplinary code.

Declarations relating to COI:

Declarations relating to COI are used, inter alia, by employees who deal with the verification or authorisation of claims or payment requests, by employees dealing with public procurement procedures, in the process of internal auditing, and by ex-post controllers of scrutiny.

Procedures in place:

(1) A written internal Procedure of Declaration regarding the Impartial Execution of Duties is in place. (2) In the public procurement process, a declaration of COI has to be signed both by the public official responsible for the preparation and conclusion of a competition and by the members of the Evaluation Committee.

Issues for further examination: A need for clarification was addressed with regard to

- Raising awareness among staff about COI and the signing of declaration on COI
- Identification of high-risk areas in which COI are most common.
- Other Member state's approaches and best practice concerning accounting and execution of payments
- Signing of declarations by top and upper management

In addition, a 'Guidance for good conduct and ethics of public officials' is in place.

The Anti-fraud service collects its information for checking the declarations through different means:

- Circulation of a questionnaire to all CAPO departments
- Summarising information gathered through declarations
- Internal training

Examples: (1) A written internal Procedure of Declaration regarding the Impartial Execution of Duties is in place. It includes a screening of the applicants/tenderers as well as the signing of a declaration on the absence of a COI. (2) In a public procurement process, a declaration of COI has to be signed both by the public official responsible for the preparation and conclusion of a competition and by the members of the valuation committee.

Declarations relating to COI are used, inter alia, by employees who deal with the verification or authorisation of claims or payment requests, by employees dealing with public procurement procedures, in the process of internal auditing, and by controllers responsible for checking transactions according to Title V, Chapter III, Reg.1306/2013.

Issues for further examination: A need for clarification was addressed with regard to

- Raising awareness among staff about COI and the signing of declaration on COI
- Identification of high-risk areas in which COI are most common.
- Other Member state's approaches and best practice concerning accounting and execution of payments
- Signing of declarations by senior management
- Homogeneity of procedure
- Extension of obligations uniformly to all external partners and contractors

While establishing COI policies certain issues of conflict shall be taken into account:

- Difficulties in validating the truthfulness of COI declarations
- Striking the balance between public interests and the employees privacy while carrying out validation procedures and cross checks

Greece: Law No. 4281/2014 – Articles 45, 46 establishes a system for the detection and prevention of COI. Staff members involved in public procurement procedures must declare any potential conflict of interest arising in relation to the procurement.

At the start of the tendering procedure, candidates or tenderers are required to submit a declaration on COI. In case a COI is identified, the contracting authority informs the 'Hellenic Single Public Procurement Authority' which is mandated to take all necessary measures such as the exemption of an involved party. In addition, the Hellenic Procurement Authority aims to ensure equal treatment of all candidates and tenderers. All measures taken by the contracting authority are recorded in a separate report kept on the contract's file.

The contracting authority ensures that every procurement contract includes an integrity clause. In case of a violation by the contractor, he will be declared fortified.

Malta:⁴⁷ A declaration on COI must be signed by all staff members of the Paying Agency and other delegated services upon engagement, change of responsibilities, internal promotion and at the beginning of every financial year. The declarations are to be reviewed and signed by the employees' head of unit prior to being forwarded to the Head of the PA.

⁴⁷ See example at 'Attachment 2 and 3

Romania: Regarding EU agricultural funds (under the former SPARD pre-accession programme, EARDF) financing contracts concluded by a beneficiary with the Paying Agency (PA) include the responsibility to refrain from any behaviour 'which would avoid the conflict of interests, defined according to the legislation in force'.

Beneficiaries are obliged to immediately inform the PA on any situation which gives rise to a COI.

Within procurement procedures organised by the beneficiary of EU funds the members of an offer's evaluation commission are obliged to sign statements of confidentiality and impartiality declaring the absence of any COI.

In Romania, according the Article 13 (1) of the Government Ordinance nr 41/2014 (concerning organization of EAFRD Paying Agency), when signing the individual labour contract, the employee of the Agency will sign an engagement that he obliges himself not to provide any consultancy services and not to occupy functions that could determine the occurrence of situations of conflict of interests, during his activity within the Agency.

Art. 14. - (1) provides that in case of conflict of interest the employee is obliged to retain himself from evaluating the claim, taking the decision or participate in the decision making process and to inform immediately, in writing, the superior to which he is directly subordinated.

According the Government Ordinance nr. 66/2011 (concerning irregularities linked to EU fund

Government Ordinance nr 41/2014 (*concerning organization of EAFRD Paying Agency*)

Definition COI for officials: Art. 13 (4) - In respect of the present Ordinance by conflict of interest is understood the situation in which a person which is an employee of the Agency has a personal patrimonial interest, that could influence the objective fulfilment of the attributions according to his position.

Art. 13 (5) - The Agency employee is considered to be in a conflict of interest, if he is in one of the following situations, without being limited to these:

- a) He is asked to evaluate claims, take decisions or participate in taking decisions regarding natural or legal persons with which he has patrimonial relations or they are first degree relatives;

- b) Is participating in the same commission with natural persons that are his spouse or first grade relatives;
- c) The patrimonial interest of his spouse or his first grade relatives could influence the decisions take in respect of his position.

The Government Ordinance nr. 66/2011 (*concerning irregularities linked to EU funds*):

Definition incompatibility 1 for officials: Art 10 (1) – Natural or legal persons that are participating directly in the evaluation or verification process of the applications are not allowed to be applicants and are not allowed provide consultancy to an applicant.

Definition incompatibility 2 for officials: Art. 11 (1) The following persons are not entitled to be involved in the process of verification/ evaluation/ approval of grant applications or programs in a selection procedure:

- a) Those who hold social parts, shares of subscribed capital of one of the applicants or who are members of the board of directors/ management or supervisory body of one of the applicants
- b) Husband/wife, relative or close to second kinship with people who hold social parts, interest parts, shares of subscribed capital of one of the applicants or who are members of the board of directors/ management or supervisory body of one of the applicants
- c) Those which are found to have an interest that can affect their impartiality during the process of verification/ evaluation/ approval of grant applications

(2) The provisions of paragraph (1) shall apply also to persons involved in the process of verification/ approval/ payment of requests for refund/ payment presented by beneficiaries

Definition incompatibility 3 for officials: Art. 13 (1) Beneficiaries individuals/ legal persons of private law are not entitled to hire individuals or legal persons who have been involved in the process of verification/ evaluation of grant applications in the selection procedure for a period of 12 months from the signing of the financing contract.

Definition COI for beneficiaries: Art. 14. - (1) During the procurement process the beneficiaries, natural or legal persons are obliged to take all the necessary measures to avoid the occurrence of a conflict of interest, particularly when there are connections between the shareholders of the beneficiaries and the bidders, between the members of

the evaluation committee and the bidders or that the successful bidder owns the majority of the shares of two bidders for the same type of procurement.

Government Ordinance 34/2006 (*concerning public procurement*)

Art. 68. - The natural or legal persons that participate directly to the verification /evaluation of the bidders and offers are not allowed to be a participant, bidder, associated bidder or subcontractor, under the sanction of exclusion from the procurement procedure.

Art. 69. - The following persons are not allowed to be involved in the verification/evaluation process of the bids/offers:

- a) Persons that own shares in the capital of the candidates/bidders or subcontractors or persons that are part of the administration committee/ the management or supervision body of one of the candidates/bidders or subcontractors
- b) Spouse or relatives or close to kinship, up to fourth degree, with persons that are part of the administration committee, the management or supervision body of one of the candidates/bidders or subcontractors
- c) Those who are found to have an interest that can affect their impartiality during the process of verification/ evaluation/ approval of grant applications
- d) Persons that according to the position that they occupy within the Contracting Authority are in a situation of the conflict of interest as this is defined by the Law 161/2003 (defined in the same manner as the Ordinance 41/2014 mentioned above)

Penal Code: Art. 301- Conflict of interest: The deed of the civil servant who, in carrying out his work responsibilities, fulfilled an act or took part to taking a decision by which was obtained, directly or indirectly, a patrimonial benefit, for himself, for his husband, for a relative or for family up to second degree inclusively or for another person with whom he was in commercial or work relations in the last 5 years or from whom he/she benefited or benefits from advantages of any kind'.

Art. 12. (1), the persons directly involved in the procedure of verification/ evaluation/ approval of grant applications or programs in a selection procedure, as well those involved in the process of verification/ approval/ payment of requests for refund/ payment submitted by beneficiaries are required to submit a declaration on their honour that proves that they are not in any of the situations referred to in article 10 and 11.

Art.15. - (1) When submitting the offer within a procurement procedure, the bidder is obliged to give a declaration according to which it is not in a situation of conflict as this is defined by art 14. (see definitions)

Government Decision nr. 925/2006 (concerning public procurement)

Art. 75 (1) -The evaluation committee and the external experts sign a declaration of impartiality and confidentiality according to which they oblige themselves to comply with article 74 and confirm that they are not in a situation that involves a conflict of interest.

(2) The declaration at alinea (1) is signed before taking over the specific tasks, in the evaluation process and contains the identification data as mentioned in Art 2. alin. (32).

Slovenia: SI Paying Agency (acting as the contracting authority) does not have a special declaration of COI in public procurement procedures.

In general, a declaration of absence of COI must be signed by each civil servant (including those who work on public procurement procedures) once a year.

The declaration lists all relevant national legislation regarding COI. It imposes the duty to notify superior servants of any COI. The declarations are held in the employment record.

United Kingdom: see 'Attachment 4' and 'Attachment 5' for examples of COI declaration.

ANNEX 5

CONFLICT OF INTERESTS- AGRICULTURAL SECTOR: TRANSPARENCY

In Spain, e.g.: a “National transparency Gate” (See example below).

SPANISH CENTRAL PAYING AGENCY (FEGA) BENEFICIARY CONSULTATION



FEGA
Fondo Español de Garantía Agraria

Beneficiary Consultation for CAP Subsidies

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PUBLICATION OF THE BENEFICIARIES OF CAP AID

The new CAP for the 2015-2020 period has introduced a new regulation on the transparency of information on the beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), contained in:

- Articles 111 to 114 of Regulation (EU) no. 1306/2013 of the European Parliament and the Council of 17 December 2013 on the financing, management, and monitoring of the common agricultural policy.
- Articles 57 to 62 of Commission Implementing Regulation (EU) no. 908/2014 of 6 August 2014, laying down rules for the application of Regulation (EU) no. 1306/2013, which develops it.

In compliance with the aforementioned regulations on transparency, the information published for each beneficiary is as follows:

- The full names of natural persons;
- The trade name in the case of corporate persons or the full name of the association if the beneficiary is an association without legal personality;
- The municipality in which the beneficiary lives or is registered;
- The amounts of the payments corresponding to each of the measures financed by EAGF and EAFRD funds received during the financial year.

ectos/consulta_de_beneficiarios_de_ayudas_de_la_pac/index.jsp

The nature and the description of the measures financed by either of the two Funds. A detailed

Attachment 1

Example of Declarations provided by Malta



DECLARATION FORM - 2015

I, the undersigned, staff member of the Agriculture and Rural Payments Agency do hereby declare:

TICK AS APPLICABLE

A1		that I am not a direct beneficiary from the monetary benefit derived from EU fund measures;
A2		that I am not related by consanguinity or affinity to any potential beneficiary to the first degree inclusive;
B1		that I am a direct beneficiary from the monetary benefit derived from EU funded measures; (TABLE below refers)
B2		that I am related by consanguinity or affinity to any potential beneficiary to the first degree inclusive; (TABLE below refers)

TABLE (to be filled in relation with B1 and B2)

<i>I.D. No of Beneficiary</i>	<i>Name of Beneficiary</i>	<i>Details of Scheme</i>

I declare that I am not involved in the processing of the above mentioned.

My role does not give rise to a conflict of interest in terms of paragraph 41 of Section K of the Code of Ethics for Employees in the Public Sector. I understand that such conflict of interest may arise from activities as listed in sub-paragraphs (a) to (d) of Section 7.3.2.4 of the Public Service Management Code.

I am aware that the whole proceedings of the Agriculture and Rural Payments Agency are of a confidential nature and may not, whether still pending or terminated be disclosed directly or indirectly to any person. Information may only be provided through normal official sources.

This declaration is valid for a period of 1 calendar year.

Name in Block Letters: _____

I.D. Number: _____ **Grade:** _____

Date: _____ **Signature:** _____

Attachment 2

Example of Declarations provided by Bulgaria

A. DECLARATION OF PRIVATE INTERESTS

The _____ undersigned

.....

(forename, patronymic and surname)

in my capacity as public office holder:

.....

.....

(state institution and office held)

DO HEREBY DECLARE that:

1. At the date of my election / appointment to the office:

I participate in the following commercial corporations

(state business name of commercial corporation and person's participating interest or shareholding):

.....

.....

.....

.....

I carry on business as a sole trader in the following fields

(state business name and objects):

.....

.....

.....

.....

I am a managing director or member of a management or supervisory body of the following not-for-profit legal entities, commercial corporations or co-operatives:

.....

.....

.....

.....

2. Twelve months prior to the date of my election / appointment to the office:

I participated in the following commercial corporations

(state business name of commercial corporation):

.....
.....
.....
.....

I carried on business as a sole trader in the following fields

(state business name and objects):

.....
.....
.....
.....

I was managing director or member of a management or supervisory body of the following not-for-profit legal entities, commercial corporations or co-operatives:

.....
.....
.....
.....

3. I have assumed the following obligations to credit or financial institutions, as well as to other persons, to a value exceeding BGN 5,000

(state amount and type of obligation assumed and creditor):

.....
.....
.....
.....

4. I have concluded contracts with the following persons who or which carry out an activity in areas related to the decisions made within the range of my official powers or duties.

.....
.....
.....
.....

5. I have a private interest in the activity of the persons having close links with me within the meaning given by Item 1 of § 1 of the Supplementary Provision of the Conflict of Interest

Prevention and Disclosure Act,

.....
.....
.....
.....

Date:

Declarant:

Attachment 3

B. DECLARATION OF A PRIVATE INTEREST ON A PARTICULAR OCCASION

The undersigned
.....,

in my capacity as public office holder:
.....

DECLARE that:

I have a private interest on the following particular occasion:
.....
.....
.....

I am aware that I bear responsibility under Article 313 of the Penal Code for declaring incorrect information.

Date:

Declarant:

Attachment 4

Examples of Declarations provided by United Kingdom

A. CONFLICT OF INTEREST DECLARATION

Introduction

Members of the Partnership should be aware of the rationale for having a policy on possible conflict of interest. It is essential to ensure that no member of the Partnership can influence decisions in any way that may be to his or her advantage. Additionally, it is necessary to reassure the public that all decision making is fair and above board. Finally, it acts as a protection to the member against any possible allegation that he or she may have used their position to their own advantage.

Degree of Interest

It must be recognised that there are various degrees of interest that a member may have in a project. The action to be taken should reflect this.

1. Close Personal Interest

Where a member stands to gain financially from an application or is a Director or a Committee member of the organisation putting forward the project, he or she should be considered to have a personal interest. In such circumstances the member should declare their interest and withdraw from the room while discussion on the project is ongoing.

2. Indirect Personal Interest

Where a member has an indirect personal interest in a project, for example if a relative (immediate family) is associated with the project, the interest should be declared. The member should then take no further part in any discussion or vote on this issue. In certain circumstances it may be appropriate to withdraw from the room, depending on the nature of the relationship with the project.

3. Direct Personal Interest

Where a member has a private or personal interest which is clear and substantial, then he/she must take no further part in the proceedings and withdraw from the meeting whilst the matter is being considered.

If a member does regard his/her private or personal interest as being clear and substantial then one should always disclose the nature of that interest to the Secretary of the meeting who will record the reason for his/her withdrawal.

A member, or a company or body with which the member is personally connected, may have professional, business or other interests that may be substantial and closely related to the work of the Partnership, or sub-committees thereof.

It is not prudent to seek, or accept, membership of any sub-committees if one's involvement could give rise to a perceived or real conflict of interest.

A member of the Partnership may acquire information that has not as yet been made public and/or is confidential. It is a betrayal of trust to breach such confidences. One must not use confidential information for the personal advantage of oneself or anyone known to one or to the disadvantage or discredit of the Partnership or anyone else.

Partnership members may from time to time be offered hospitality or tokens of goodwill; for example, working lunches may be a proper way of doing business provided that no extravagance is involved. Likewise, it is reasonable for a member to represent the Partnership at a social function organised by outside persons or bodies. Members are advised to err on the side of caution in such matters. Members will be personally responsible for all decisions connected with the acceptance or offer of gifts or hospitality and for avoiding the risk of damage to public confidence in the Partnership.

Areas of Uncertainty

In circumstances where a member is unsure whether they have what could be perceived as an interest, the degree of their interest, or whether they should withdraw, they should seek the advice of the Chairperson before the meeting begins. The Chairperson shall have the discretion to rule on these issues. Where the Chairperson feels that he or she

requires guidance or if the potential conflict affects the Chairperson, then the advice of the relevant department should be sought.

DECLARATION

I have read and fully understood the details contained within the Statement of Conflict of Interest. I agree to comply with the recommendation and condition as detailed in the document and to abide by those principles and procedures as directed by my role as a member of

Name (in block capitals)

Signature

Date

Attachment 5

B. OPERATING RULES

Conflict of Interest & Register of Interest

1.39 Members of the Assessment Panel and Administration Unit who have an interest in any project being considered for funding must declare their interests. In such cases they must absent themselves from the assessment procedure and discussion of the project.

1.40 The paying agency has provided a Conflict of Interest (COI) Declaration and a Register of Interests Declaration. However local authority COI declarations may be used, if these comply with the paying agency's requirements. These must be completed for all those involved in the delivery of the programme and retained for inspection.

1.41 Members of sub committees, panels (including independent members), advisory groups or persons otherwise associated with the Partnership (e.g. Member of

staff) who have an interest in any application presented to the Partnership for consideration etc must declare their interests by completing the COI Declaration. They must absent themselves from the selection process and any meeting at which any discussions on the application are taking place.

1.42 For the purposes implementing these of rules, the following arrangements will apply:

- i. members, staff etc associated with the Partnership must *not* receive any papers pertaining to the application following the completion of a Conflict of Interest declaration.
- ii. it is recommended that Conflict of Interest remains as a standing item on the organisation's agenda/minutes;
- iii. a Register of Interest form must be completed by each member of the Partnership and these completed forms should be retained for inspection by the paying agency. Any revisions must also be notified to the Administration Unit within 1 month of that revision. There is a requirement to conduct an annual review of these appendices and to formally record this review. This information should be retained and available for inspection by the paying agency;
- iv. the register of Interest will form part of any monitoring and verification carried out by the paying agency; and
- v. decisions to award financial assistance in which members or persons otherwise associated with the Partnership have an interest of any kind must be notified to the local action group immediately. The notification must highlight to the local action group that members have an interest in the proposed project. If there is any doubt about conflict of interest the local action group should be consulted before assessment. If clarification is required, the paying agency should be consulted before assessment.

APPENDIX I

Guidelines for structural funds

1- Definitions

The notion of conflict of interests is not harmonized across the European Union. Some Member States (like Romania) give definitions in their criminal law while others (e.g. France and the United Kingdom) do not. But this does not mean that they have no criminal incrimination to tackle this issue. For example, the United Kingdom has legislation to deal with this, but it takes the form of an offence called "misuse of public office", which can cover more than just conflict of interests and could be enforced if the conflict resulted in corrupt behaviour.

The Organisation for Economic Cooperation and Development (OECD) proposed a definition⁴⁸ :

'A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.'

The European Union law defines the concept for the purposes of implementing the general budget of the EU.

The definition applies to all types of public procurement financed with EU funds for structural actions and cohesion policy, irrespective of the amount involved.

Article 57(2) of the Financial Regulation applicable to the general budget of the European Union (Regulation No 966/2012) gives a definition of conflicts of interest for the purposes of spending and managing the EU's budget. It states:

⁴⁸ See 'Managing Conflict of Interest in the Public Service', OECD GUIDELINES AND COUNTRY EXPERIENCES, p.24-25, <http://www.oecd.org/corruption/ethics/48994419.pdf>. OECD has also identified three types of conflict of interests :

An **actual** conflict of interests involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of his/her official duties and responsibilities.

An **apparent** conflict of interests can be said to exist where it appears that a public official's private interests could improperly influence the performance of his/her duties but this is not in fact the case.

A **potential** conflict of interests arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

'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.

(...)

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'.

Conflicts of interests and corruption are not the same thing. Corruption usually requires an agreement between at least two partners and a bribe/payment/advantage of some kind. A conflict of interests arises where a person may have the opportunity to put private interests before his or her professional duties.

A conflict of interests in public procurement procedure which is not properly addressed has an impact on the regularity of the procedures. It leads to the breach of the principles of transparency, equal treatment and/or non-discrimination that a public contract has to respect as laid down in article 102 of the Financial Regulation⁴⁹.

Examples

The spouse of a contracting authority's desk officer in charge of monitoring a tendering procedure works for one of the bidders.

A person owns shares in a company. This company takes part in a tendering procedure in which this person is appointed as a member of the evaluation committee.

The head of a contracting authority has spent a week's holiday with the CEO of a firm which bids in a tendering procedure launched by the contracting authority.

An officer in a contracting authority and the CEO of one of the tendering firms have responsibilities in the same political party.

⁴⁹ See especially CJEU T-277/97, 15 June 1999, and C-315/99, 10 July 2001, Ismeri Europa Srl, T-160/03, 17 March 2005, AFCon Management Consultants, Mc Mullin, O'Grady.

The managing authorities should supervise the beneficiaries' running of procurement procedures to ensure that it is smooth and fair. (Note: all references to managing authority in the document shall be understood as a reference to managing authority or any intermediate body to whom managing authority has delegated its tasks). Beneficiaries must ensure transparency and fair treatment for all tenderers. The managing authorities should react quickly and carry out relevant checks if they discover anomalies. This does not imply that there is a conflict of interests but only that the situation needs to be clarified and appropriate measures taken.

2- Declarations relating to conflicts of interests

2.1 Basic elements of a comprehensive framework for managing conflicts of interests in public procurement for structural funds

Conflict of interests' situations can lead economic operators to lose confidence in public procurement for structural actions and discourage honest operators from bidding.

Therefore managing authorities are recommended to put in place a policy related to conflicts of interests to mitigate the risks and to tackle possible cases.

Such a policy should address prevention, detection, management and sanctions of conflict of interests. It should be established within each body functioning as a part of the management and control system of an Operational Programme and should be recommended to beneficiaries conducting procurement procedures, regardless of their legal form.

The policy shall take into account the legal provisions of the Member State concerned and also guidelines and best practices referred to in this document.

The Managing Authorities are recommended to ensure that a conflict of interests policy is established in Operational Programmes under their responsibility, in particular taking into account the obligations stipulated in Article 114 (4) (c) of [new General Regulation] ⁵⁰

⁵⁰ *As regards the financial management and control of the operational programme, the managing authority shall: (...) put in place effective and proportionate anti-fraud measures taking into account the risks identified. Separate guidance on the global implementation of this article is provided by the Commission.*

A policy document regarding conflict of interests in procurement procedures should address a number of issues. It should

- cover the whole procurement process and the management of the subsequent contracts.
- meet the requirements of the national procurement regulations and the EU Public Procurement directives.
- include a specific chapter dedicated to declarations of absence of conflict of interest.
- include reference to gifts and hospitality, which can also be deemed to be inducements. This can be during, before or after any procurement process and during the management of any subsequent contract or procurement.
- ensure that the body maintains records of any conflicts which have arisen, to provide evidence of how they were dealt with and with what appropriate action. The policy of maintaining records will allow future conflicts to have a reference point.
- include reference to the sanctions resulting from undeclared conflicts of interests. Sanctions must be appropriate and a deterrent to breaching the rules.
- include an Annex giving some common examples of such conflicts.
- address the situations when staff leaves a public sector organisation, in particular a post in Government or Local Government (so-called "revolving door" situations): it is an obligation not to reveal confidential information staff have learned as a result of their job. They must not benefit from any subsequent conflicts of interests which may occur after they leave employment.

The policy document related to conflicts of interest must be one of the basic documents which all staff receives, either at their induction when they join the organisation, when they take up a post involving procurement of services, goods or works in that organisation, or a post involving management of such contracts or framework contracts.

Example in the United Kingdom

There is a general code of conduct for Civil Servants, echoed in the Devolved Administrations with similar codes for their officials.

This code requires a standard of behaviour which includes the sort of conduct expected by officials dealing with procurement. It applies to all aspects of a civil servants work – much of which always involves dealing with the public, money or areas where it is essential to treat everyone fairly.

All Government Departments advise all their employees of this code, although no-one actually signs an undertaking to abide with the terms of the code. However, it is considered to be part of the contractual relationship between employer and employee.

The main ethical requirements of honesty, integrity and impartiality easily apply to procurement, but it is understandable that specific declarations or undertakings are required of individuals directly involved in procurement activities.

2.2. Policy regarding declarations of absence of conflict of interests

Managing authorities should require contracting authorities to put in place a procedure for declarations of absence of conflict of interests, as part of their public procurement procedures. They should give contracting authorities guidance on the declaration procedure.

This guidance should clearly cover certain points.

1. Who is responsible for filing and signing the declaration?

Any person involved in one or other stage of public procurement procedures (preparation, elaboration, implementation or closure) should sign a declaration and give it to the person in charge of the procurement procedure.

The obligation should apply at least to the following people:

- the head of the contracting authority and anyone to whom he/she delegates his/her duties,
- members of the management board,
- staff contributing to preparing/drafting the tender documents,
- members of the evaluation committee,

- experts performing any task connected with preparing the tender documents and/or evaluating the bids.

2. What circumstances may be considered an actual, potential or apparent conflict of interests?

The description of the circumstances should be based on the definition given in Article 57 of the Financial Regulation, but also take into account the national legislation in force. If there have been previous cases or specific difficulties linked to cultural national aspects further clarification should be provided supported by examples.

3. At what stage of the procurement procedure should the declaration be filed?

Filing a declaration of absence of conflict of interests should be considered at each stage of the procurement procedure (preparation, evaluation, monitoring and closure).

The manager responsible for procurement should be responsible for asking each person who becomes involved in a procurement procedure to file a declaration of absence of conflict of interests, and for collecting the declarations.

The manager should ensure that the person is well aware of the need to declare any change in the situation without delay. The declaration may be drafted from scratch or using a template at any time when it becomes relevant.

4. How do you check a declaration of absence of conflict of interests?

The policy should set out rules for checking staff declarations of absence of conflict of interests (e.g. employment history, family status) and external experts' declarations of absence of conflict of interests.

It should include some guidelines on the person responsible for carrying out the checks, the method to be used and the timing.

Contracting authorities should be given guidelines on circumstances where conflicts of interests are not clear-cut (e.g. an employment history in partner companies to the tenderer).

5. How do you monitor the declaration of absence of conflict of interests?

The institution should draft procedures for storing and monitoring declarations of absence of conflict of interests, such as a special register or a management information system tool for each public procurement procedure. A person not involved directly with procurement should be designated to monitor the declarations procedure and ensure up to date records are maintained.

6. What sanctions apply if someone fails to disclose any situation of conflict of interests?

The policy should refer to the sanctions in the relevant national legislation — administrative and/or criminal in the case of non-disclosure of a conflict of interests or of a false declaration. A clear distinction should be made between cases involving staff and those involving external experts or partners.

Staff behaviour should be ruled by a code of ethics. The code should include a definition of conflict of interests and the relevant sanctions. Disciplinary measures should be provided for. They may range from a written note to warnings or fines, and even demotion or dismissal. In each case, they must comply with the national legislation.

Internal guidelines should cover cases of misconduct by external experts and set out the action to be taken and the sanctions to be applied. Contracts signed with such experts should include clauses providing for sanctions for misconduct. The sanctions may range from early termination of the contract to exclusion from participating in procurement procedures for a number of years (e.g. five to ten).

7. What action must be taken if a risk of conflict of interests is identified or a conflict of interests is declared/detected before or during the procedure?

Subject to the relevant national law, relevant measures to safeguard the public procurement procedure should be taken. The following steps should be considered, depending on the existence or not of a declaration of absence of conflict of interests, the nature of the conflict of interests and the stage of the procedure:

- where appropriate discussing the elements of facts with the person concerned to clarify the situation
- excluding the person concerned from the public procurement procedure, whether he/she is a staff member or an external expert,
- change in division of duties and responsibilities among the staff
- cancelling the procurement procedure.

Excluding an employee/expert from proceedings should be considered not only if there is an actual conflict of interests but in any case that gives grounds for doubts about his/her impartiality.

In very exceptional cases, it might not be possible to exclude an official or an expert because of a lack of resources or specialised experts in certain fields. In that case, the contracting authority should ensure that its decision is fully transparent, set precise limits to the employee/expert's input and ensure that the final decision is based on transparent and fair evidence.

The policy should also require staff to notify the relevant authorities if a conflict of interests occurs.

All action taken in response to conflict of interests situations in a given public procurement procedure should be documented.

Example in the Slovak Republic

The declaration by members of the selection commission in the procurement process — regulated by the Public Procurement Act (§ 40).

A member of the commission cannot be a person who is or in the year prior to his/her appointment as a member of the commission is or has been:

- a) a tenderer as a natural person;
- b) a statutory body of a tenderer that is a legal entity, or a member of the statutory body, or a member of the supervisory body or other body of that tenderer;
- c) a partner of the legal entity or a member thereof who is a tenderer or a silent partner of the tenderer;
- d) an employee of the tenderer, or an employee of an entrepreneurs' interest grouping of which the tenderer is a member;

e) an employee of the Office for Public Procurement, except for contracts awarded exclusively for the needs of that Office.

A commission member must not be

a) the person close to persons referred to in letters a) to d), and

b) the person against whom may have been doubts about his/her impartiality in relation to the tenderer or candidate, especially if the person was involved in the preparation of documents in a given procurement on the part of the candidate or tenderer, or which may be favored or harmed in relation with the result of the award.

Having taken note of the list of tenderers, the member of the commission must submit a declaration on his/her honour to the contracting authority or contracting entity in which he/she confirms that no circumstances, pursuant to this Act, preventing him/her from being a member of the commission have occurred, or shall inform the contracting authority or contracting entity that circumstances, pursuant to this Act, preventing him from being a member of the commission have occurred.

A member of the commission must notify the contracting authority or contracting entity, without unnecessary delay, of the fact that circumstances preventing him/her from being a member of the commission have occurred, should such circumstances occur during the public procurement procedure.

2.3 Declarations of absence of conflicts of interests

It is highly recommended that people be asked to sign a declaration of **absence** of conflict of interests as soon as they take part in the procedure. This is an obligation to be met without delay to safeguard the procedure and the person him/herself. People are — theoretically — more inclined to declare a conflict of interests if they are aware of the obligations entailed by signing a declaration of absence of conflict of interests.

A declaration of conflict of interests would, by nature, be voluntary, which might be very uncertain. It would be more difficult to demonstrate intentionality at a later stage in the event of fraudulent conduct.

Therefore the following paragraphs concern only the declaration of absence of conflict of interests.

The declaration of absence of conflict of interests should contain the definition of a conflict of interests set out in the Financial Regulation and all the requirements of any code of conduct or ethics applicable to the process and related to conflict of interests.

The declaration should give:

- (a) a clear reference to the procurement procedure concerned;
- (b) the signatory's full name, date of birth, position in the organisation, and function in the public procurement procedure;
- (c) the date of signature.

The declaration should enable the signatory to declare officially:

- whether to his/her knowledge he/she is in an apparent/potential/actual conflict of interests linked to the procurement procedure referred to;
- whether there are circumstances that might place him/her in an apparent/potential/actual conflict of interests in the near future; and
- that he/she commits to declaring immediately any potential conflict of interests in the event of any circumstance that might lead to such a conclusion.

The declaration should include a reference to the disciplinary/administrative/criminal sanctions for making a false declaration.

It may also include an undertaking of confidentiality, if the person is likely to be dealing with commercially confidential data from a tenderer/bidder in the course of the procurement procedure.

An explanatory note should be attached to the declaration to give signatories clear and firm guidance on:

- the organisation's policy, including the purpose of the declaration;
- the legal requirements of any regulations, including clarifications of certain issues deriving from the definition: family, emotional life etc. (for example, the relationships constituting family membership may vary between Member States and this needs to be set out within the cultural context (2nd or 3rd degree for example));

- the code of conduct governing management of conflicts of interests in the organisation;
- the consequences of non-disclosure of a conflict of interests;
- the procedure in the event of a change in the situation and especially when, how and to whom to declare any conflict of interests that arises.

The note should give some examples of conflict of interests' situations.

A model declaration is set out in Annex 1. It is based on a model used by the European Commission but might need to be amended to meet national requirements.⁵¹

2.4. Explaining the role of the declaration of absence of conflict of interests to staff

It should be made clear to staff that the declaration of absence of conflict of interests is a tool to prevent conflicts of interests, meant to:

- raise awareness of the risk of conflicts of interests among employees;
- point to areas of risks to be considered in management supervision;
- protect employees from being accused of non-disclosure of a conflict of interests at a later stage;
- protect the procurement procedure and co-financed project from irregularities and therefore safeguard the financial interests of the EU and the Member States.

It is of paramount importance that all staff of the managing authorities and beneficiaries running procurement procedures are made aware of possible and potential conflict of interests situations, their implications, how to act in such cases and what the potential sanctions are.

The occurrence of a conflict of interests is not necessarily illegal in itself. It is, however, irregular to take part in a procedure while being aware of a conflict of interests. It is

⁵¹ The information presented in this practical guide is without prejudice to the national law and should be regarded as guidelines and best practices.

therefore necessary to disclose any potential conflict of interests before taking any part in the procurement procedure and to take appropriate preventive measures.

General staff training material or dedicated online training modules should include a specific chapter on the issue. It should cover conflicts of interests in general, as conflicts of interests can occur in other fields such as recruitment procedures. It should be an opportunity to explain the role of the declaration of absence of conflict of interests to staff.

Continuous training would maintain and increase awareness and thus keep staff aware all the time of possible new situations of conflict of interest. Nonetheless, management should set up specific and effective mechanisms to monitor and to detect any breaches of conflict of interests rules and to apply sanctions accordingly. Management needs to establish a clear chain of responsibility together with effective control mechanisms.

2.5. Following up and updating the declaration of absence of conflict of interests

Conflicts of interests change over time. It could be the case that at the beginning of the procurement process, one of the procurement officials did not have any conflict of interests, either actual or potential or apparent. However, during the process, circumstances change and for instance, he/she or a family member may have been hired by one of the potential bidders. Because the situation changes, it is crucial that adequate declarations of absence of conflict of interests are followed up and updated.

If an employee obtains new information during the procedure (e.g. about economic operators proposed as subcontractors in a bid) or there is a change in circumstances (e.g. entry into a legal or de facto relationship that did not exist at the start of the procedure), he/she must declare the apparent/potential/actual conflict of interests to his/her superior immediately. The model may or may not be used. The employee must be excluded from further proceedings and — if necessary and possible — any relevant stages of the procedure that he/she participated in need to be repeated.

The organisation would be well advised to keep a register of declarations of conflict of interests for the relevant procurement procedure.

3- Checking the declaration of absence of conflict of interests against other sources of information

The declaration of absence of conflict of interests needs to be checked. Making the declaration may give the contracting authorities a false impression of assurance and the person who filed it a false sense of release. It is important that people know that their declarations may be checked, as this should have a disincentive effect.

The checks performed will depend on the managing authority and/or contracting authority's capacity and resources. They should be proportionate, achieving a balance between the need for checking, and the need to keep matters simple and reduce the administrative burden on beneficiaries taking into account the value of the procurement being or not subject to public procurement rules.

3.1 When?

Conflicts of interests can influence **any phase of the decision-making process** in procurement procedures.

The contracting authority should consider performing two types of **checks**:

- for prevention: to detect apparent/potential/actual conflicts of interests
- for sanction/remedy: to detect conflicts of interests, to sanction the person concerned and to remedy any wrong caused by the conflict of interests.

For these reasons, they need to set up internal mechanisms that allow **a permanent and periodical** assessment of the situations in which staff are involved in the decision-making process. They should have **built-in mechanisms**, such as:

- periodical completion of questionnaires to assess whether staff are alert to and can identify situations of apparent/potential/actual conflict of interests, in order to raise awareness and ensure the system is 'clean';
- checklists for officials involved in decision-making to fill in before they make a decision; these lists allow them to better assess any situation of apparent/potential/actual conflict of interests.

These should be complemented by '**ex post**' **mechanisms** to check whether there have actually been any conflicts of interests.

Ex post mechanisms should focus on the declaration of absence of conflict of interests, which should be examined in the light of other information:

- outside information (i.e. information about a potential conflict of interests provided by outsiders who have no connection with the situation that generated the conflict of interests)
- checks performed on certain situations showing a high risk of conflict of interests, based on internal risk analysis or red flags (see Section 4)
- random checks.

3.2 How?

When identifying people who might have a conflict of interests, the following categories should be considered:

- staff members of the contracting authority, staff of procurement service providers and of other service providers who are directly involved in conducting the procurement procedure;
- the chair of the contracting authority and members of the authority's decision-making bodies who, without necessarily being directly involved in the procurement procedure, may nevertheless influence the outcome.

Types of **ex post** checks for conflict of interest situations may consist in:

➤ **checks by the management authority/payment agency:**

- standard/regular checks performed when examining the beneficiary's request for payment (which also comprises evidence of the public procurement procedure), by means of checklists (which should list separately all the conflict of interests situations referred to in EU and national law);
- specific checks triggered by outside information on a potential conflict of interests or red flags;
- specific checks triggered by specific information or elements found in the course of other incidental/indirect checks;

- planned checks, included in the annual control programme based on risk analysis;
- random checks.

Risk-scoring using ARACHNE

Managing authorities could consider using ARACHNE, a specific data mining tool offered by the Commission to identify projects which might be at risk of conflict of interests. ARACHNE is a risk-scoring tool which can make project selection and management checks more efficient, and further strengthen fraud identification, prevention and detection.

➤ **checks performed by the beneficiary's internal control staff**

- specific checks following outside information;
- specific checks following an official report as a result of other incidental/indirect checks performed;
- planned checks included in the annual control programme based on risk analysis, and random checks.

In addition to checks based on checklists, other checks should be based on the official's **declaration of absence of conflict of interests, taking into consideration data and information from:**

- the *organisation itself*: correlating personal data,

- *other organisations*: correlating information obtained from national database on the identity of persons, databases on economic operators (like company registers), the tax administration's database, etc...

Without prejudice to national legislation, interinstitutional cooperation protocols may be concluded with other institutions to get access to more information.

- *open data sources* (including background checks using the internet) which can offer information about the official's connections and personal circumstances that could give rise to or point to a conflict of interests.

Examples of sources of information

- the Commercial Register and the Trade Register;
- Internet database providing information on the relationships between individual companies and their statutory representatives and managing directors;
- an in-house database maintained to collect information about recipients of non-repayable financial contributions, and contractors (ITMS or a one-off database set up for specific purposes);
- published media information.

Any manager facing a potential conflict of interests situation involving a staff member should favour a 'soft' approach where appropriate and discuss the issue openly with the person concerned. The aim of this discussion is to find out if there is a risk of conflict of interests that would jeopardise the procedure and/or the official's situation. If so, the manager must decide on the most appropriate measures to safeguard both the interests of the organisation and those of the official.

If a manager has gathered sufficient proof of deliberate misconduct by the official he/she might report the case directly to the relevant authorities and take appropriate action to safeguard the public procurement procedure (see section 3.4 for further steps).

3.3 Use of information from whistleblowers and the media

Whistleblowers and the media are sensitive to the existence of personal connections between various players involved in public procurement procedures and can provide consistent information about situations that might affect the decision-making process of the contracting authorities.

Information obtained from whistleblowers and the media is not evidence *per se*. If the authorities (particularly managing authorities, or management/control bodies in contracting authorities) receive this kind of information they should immediately use the means at their disposal to check whether the information can be confirmed and could

have an impact on the procedure. They should use all data sources at their disposal to check whether the information is correct.

Depending on the seriousness of the situation, they might immediately inform the judicial or relevant authorities.

From an investigation point of view, whistleblowers and media information should be considered **sources of notification** for opening internal/external checks.

In order to make it easier for whistleblowers and the media to inform the authorities about a potential conflict of interests, the managing authorities or other competent authorities could introduce or use free phone or internet-based fraud notification systems or other channels.

3.4 What to do if a conflict of interests is seriously suspected

The authority may have the power to carry out administrative checks or investigations. If it does not, it must send the information to the appropriate authorities without delay.

If checks fail to substantiate the information, the authority can close the case, but may use the information to correlate it with other data and perform risk analysis aimed at identifying sensitive areas.

If the results of the checks confirm the initial information and the conflict of interests has administrative kind, in line with national law the authority may:

- take disciplinary or administrative action/sanction against the official concerned,
- cancel the contract/act affected by the conflict of interests and repeat the part of the public procurement procedure in question,
- correlate its findings with other data and use them to perform risk analysis
- make public what has happened, in order to ensure that decisions are transparent and to prevent and deter any potential similar occurrences.

If the conflict of interests is of criminal nature, the authority should, in addition to the measures set out above, in line with national law:

- inform the prosecutor in order to launch criminal proceedings
- monitor the administrative aspects of the case
- correlate its findings with other data and use it to perform an internal risk analysis

4- Red flags

4.1. What are red flags and how are they used?

A red flag is an indicator of possible fraud or corruption. It is an element or a set of elements that are unusual by nature or vary from the normal activity. It is a signal that something is out of the ordinary and needs to be examined further.

A variety of red flags may appear in public procurements. They can show anomalies in

- bidding documents, e.g. bids from supposedly different bidders that are faxed from the same telephone number;
- financial records, e.g. invoices paid in amounts that exceed the contract value;
- the behaviour of project staff, e.g. putting pressure on the evaluation committee to select a given contractor.

The presence of red flags should make staff and managers more vigilant: they should take the necessary action to confirm or deny that there is a risk of conflict of interests. It is extremely important to react to them. It is the responsibility, first, of the contracting authorities, and, secondly, of the managing authorities, to remove any doubts that the red flag has raised.

The existence of a red flag does not mean that fraud has occurred or may occur, but that the situation needs to be checked and monitored with due diligence.

4.2. Red flags in public procurement procedure

This section discusses typical cases of suspected fraud concerning conflicts of interests in different phases of the procedure with examples of what happens in practice.

Some of these red flags may appear commonplace; they can apply to lots of situations, not just conflicts of interests. It is important to keep in mind that the red flags are indicators aiming at carrying out first level checks to waive the doubts or confirm the likelihood of occurrence of a fraud or irregularity. The following red flags should lead to checks dedicated to waive or confirm the possibility of occurrence of a conflict of interests.

4.2.1. Preparation and launch of the procedure

The issue of conflicts of interests must be raised right from the preparation stage of the procedure. When the tender documents are being drafted, the contracting authority may need some outside studies or request opinions from outside sources. To some extent, they may base the documents for the tender procedure on reports drafted by outside experts. The contracting authority must also decide on the type of procedure and draft contract notices, contract documents, specifications and a draft contract.

The contracting authority should take the necessary measures to prevent conflicts of interests right from the very first stage of preparation of the documents.

Risks linked to a conflict of interests

Someone who takes part in drafting the documents may directly or indirectly try to influence the tender procedure to allow, say, a relative, friend, or commercial or financial partner, to take part.

Red flags

- The person in charge of drafting the tender documents / a senior official insists on hiring an outside firm to help draft the documents although it is not necessary.
- Two or more preparatory studies are requested on the same subject from external firms and someone puts pressure on staff to use one of these studies in drafting the tender documents.
- The person in charge of drafting the documents organises the procedure in such a way that there is no time to revise the documents carefully before the tender procedure is launched.

- Two or more contracts for identical items are issued over a short period of time for no apparent reason, resulting in a less competitive procurement method being used.
- A negotiated procedure is chosen, even though an open procedure is possible.
- There are unjustified selection or award criteria that favour a particular firm or bid.
- The rules on providing goods or services are too strict, allowing only one firm to bid.
- An employee of the contracting authority has relatives who work for a firm which may bid.
- An employee of the contracting authority worked for a firm which may bid, just before joining the contracting authority.

Example: One of the tenderers takes part in the preparation procedure and gains some additional information before the procedure is launched. This denies other bidders a fair chance of winning the tender, and is a conflict of interests.

Risks linked to a conflict of interests

Information on the tendering procedure may be leaked.

Red flags

- Unusual behavior of an employee insisting on getting information on the tendering procedure although he is not in charge of this procedure.
- An employee of the contracting authority has relatives who work for a firm which may bid.
- An employee of the contracting authority worked for a firm which may bid, just before joining the contracting authority.

Example: A member of staff takes part in drafting or correcting the public procurement documents, then resigns and joins a company which submits a bid soon afterwards.

SUGGESTIONS:

- Review bidding documents for red flags.
- Ensure that audit rights and contractual remedies are included, as appropriate.

4.2.2. The call procedure, the evaluation of the tenders and the final decision

After the deadline for the receipt of tenders, the contracting authority checks the tenders submitted for compliance and evaluates them. Where appropriate, the contracting authority asks tenderers to remedy deficiencies or supply specific information or further explanation. The contracting entity decides which final tenders are valid, based on the criteria given in the notice. The evaluation committee makes a written assessment and recommendation. The decision to award the contract is taken by the decision-maker appointed within the contracting authority.

Risks linked to a conflict of interests

The bids received may be tampered with to conceal a bidder's failure to meet the deadline or to provide all the documentation required.

A member of the evaluation committee may try to mislead or put pressure on the other members to influence the final decision, for example by giving a wrong interpretation of the rules.

Red flags

- The official documents and/or certificates of receipt of the documents have obviously been changed (e.g. crossing-out).
- The evaluation committee members do not have the necessary technical expertise to evaluate the submitted bids and are dominated by one individual.
- Subjective elements are overrepresented in the criteria system.
- Some obligatory information from the winning bidder is missing.

- Some information provided by the winning bidder relates to contracting authority staff (e.g. an employee's address)
- The winning bidder's address is incomplete, e.g. there is only a PO box address, no telephone number, and no street address (might be shell companies).
- The 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.
- Few of the companies that bought the bidding documents submit bids, especially if more than half of them drop out.
- Unknown companies with no track record win the contract.

SUGGESTIONS:

- Ensure that committee members are selected in accordance with the established project implementation manual.
- Ensure the project procurement officer is available to the evaluation committee to answer any procedural questions.
- Confirm that the evaluation committee has the necessary technical expertise to evaluate the bids.
- Check that committee members sign a declaration stating that they do not have a conflict of interests in performing their duty, such as any current or past affiliation with any of the bidders.

4.2.3. Performance, amendment and modification of public contracts

Any contract awarded under a public procurement procedure must be implemented in full accordance with the requirements laid down in the call for tender and the technical specifications and within the time frame set in the call. Parties may be authorised to amend part of the contract slightly, if they are able to prove that the amendment was not originally foreseeable and ensure reasonable sustaining and economic balance.

Risks linked to a conflict of interests
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The contract is not drafted according to the rules and/or the technical specifications and tender documents.

The contract is poorly executed.

The contract is poorly monitored.

False certificates are accepted.

Red flags

- Standard contract clauses (audit, remedies, damages, etc.) are changed.
- The methodology and work plan are not attached to the contract.
- The name and legal status of the firm is changed and the desk officer in charge does not question this.
- Numerous or questionable change orders for a specific contractor are made, and approved by the same project official.
- In international projects, there is a long, unexplained delay between the announcement of the winning bidder and the signing of a contract (this may indicate that the contractor is refusing to pay or is negotiating on a demand for a bribe).
- Substantial changes are made to technical specifications or to the Terms of Reference.
- The quantity of items to be delivered is reduced, without a commensurate reduction in payment.
- Labour hours are increased, with no corresponding increases in the materials used.
- The contract is missing or the documentation supporting a purchase is inadequate.

- A contracting employee's behaviour when dealing with the file is unusual: he/she is reluctant to answer management questions about unexplained delays and missing documents.
- There are many administrative reviews and cancelled procurement procedures.
- There are any changes to the quality, quantity or specification of goods and services in the contract that deviate from the bidding document (terms of reference, technical specifications, etc.)

SUGGESTIONS:

- Evaluate any requests for change order, check their legitimacy and ask for supporting documents, as appropriate, before agreeing to the change order.
- On monitoring missions to high-risk projects, ask clients to inform the bank of any change orders issued to any of the signed contracts, for any amount.
- Use supervision missions by the task team to check that key goods, works, and services outputs actually exist. Reviews can confirm that the progress of the work is consistent with the completion certificates issued, that supporting documentation is adequate, that officers are correctly certifying that goods and services have been received on time.
- Require independent annual technical, financial, and procurement audits of high-risk projects.
- Include site visits by technical experts in supervision missions.
- Introduce contract management training for project officials.
- As part of a procurement and financial management review, specifically check the supervision of contract management — payment listings by contract or contractor, checks for duplicate payment, and certification of goods and services received.
- Introduce strict complaints-handling procedures and publicise them.

Annex 1: Model declaration of absence of conflict of interests

Title of contract:

Reference: (Call for tenders No):

I, the undersigned, having been appointed to the opening board / appointed to the evaluation committee / given the responsibility of assessing (exclusion) and (selection) criteria / appointed to monitor the operations / authorised to amend part of the contract for the abovementioned public contract, declare I am aware of Article 57 of the Financial Regulation, which states that:

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.

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 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,⁵² emotional life, political or national affinity, economic interest⁵³ or any other shared interest with a recipient.⁵⁴

[Insert national ruleswhich state that: (if/as applicable)]

⁵² XX degree family relationship, marriage or registered civil partnership.

⁵³ Contractual relationship or paid or unpaid consultancy currently applicable.

⁵⁴ Including voluntary work, member of a board or directive council.

I hereby declare that, to my knowledge, I have no conflict of interests with regard to the operators who have [applied to participate in this procurement procedure] [submitted a tender for this procurement], whether as individuals or members of a consortium, or the subcontractors proposed.

To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, which might call into question my independence in the eyes of any party.

I confirm that if I discover or should it become apparent during the course of the selection / criteria / [opening] evaluation process / performance of or amendment to the contract that such a conflict exists or has arisen, I will declare it immediately to the board / committee and if a conflict of interests is found, I will cease to take part in the evaluation process and all related activities.

I also confirm that I will keep all matters entrusted to me confidential. I will not disclose any confidential information that is revealed to me or that I have discovered. I will not make any adverse use of the information given to me. Specifically, I agree to hold in trust and confidence any information or documents disclosed to me or discovered by me or prepared by me in the course of or as a result of the evaluation and I agree that it will be used only for the purposes of this evaluation and will not be disclosed to any third party. I also agree not to retain copies of any written information supplied.

Signed (date and place):

Name:

Function

Annex 2: Examples

Case No 1

The Romanian Department for the fight against fraud (DLAF) was informed by the Ministry of Regional Development and Tourism of a potential conflict of interests in an ERDF-financed project.

The project beneficiary was a county council, and the financing contract concluded in 2009 was for the rehabilitation and modernisation of 50 km of county roads.

Following a national public procurement procedure, conducted under national law on the award of the public procurement contracts, public works concession contracts and services concession contracts, the beneficiary awarded the EUR 10 million works contract to contractor S.

Once work began, S asked the beneficiary to agree to replacing the ballast supplier initially appointed, with another company, F, citing economic reasons, and obtaining the project supervisor's approval for the change.

Shortly after that, S asked the beneficiary to also allow the construction material used to be change from stone quarry to stone ballast and provided testing reports for this construction material, which was also to be supplied by F. The approval of the designer and the project supervisor had been obtained in advance.

The county council drafted the following documents regarding these two changes:

- reports signed by the project coordinator, approved and signed by the president of the county council;
- an addendum to the works contract, signed by the president of the county council, stipulating the new supplier for the construction materials.
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The DLAF's investigations revealed that F was owned by two people, each holding 50 % of the shares, one of whom was the son-in-law of the president of the county council, the beneficiary of the project.

The DLAF concluded that **there was a conflict of interests because the documents accepting F as the supplier for the construction materials had been signed by the president of the county council, who had a first-degree affinity relationship with one of the joint owners of F.**

Case No 2

The Romanian DLAF was informed by the Ministry of Regional Development and Tourism, of some illegal issues in a project financed through the PHARE 2000 economic and social cohesion programme.

The project beneficiary was an economic operator, Z, and the financing contract was concluded to support the certification of the quality management system of 12 small and medium-sized construction companies.

In order to award the certification services contract under national public procurement law, the beneficiary appointed an evaluation committee consisting of five members, who signed declarations of confidentiality and impartiality.

DLAF found that one of the members of the evaluation committee was an auditor who had concluded cooperation agreements with the winning tenderer.

This breached several provisions of the applicable Practical Guide, Applicant's Guide and an annex to the Grant Agreement, because **one member of the evaluation committee awarding the contract had a conflict of interests by being in a contractual relationship with one of the tenderers.**

Case No 3

The Romanian DLAF was informed by the Ministry of Regional Development and Tourism of some indications of fraud in a project financed through a regional operational programme, Priority Axis 2, with the aim of modernising part of a county road, the beneficiary being a county council.

The design services contract was awarded through a public procurement procedure under the *national law regarding the award of the public procurement contracts, public works concession contracts and services concession contracts*. The qualifying criterion was the 'most economically advantageous tender'.

The winning tenderer, P undertook not to subcontract any part of the contract, but shortly it was concluded he subcontracted parts of it to A.

Two public officers who served as members of the evaluation committee for the procurement procedure were employed by A – the winning tenderer's subcontractor.

The Management Authority withheld payment for the services provided by A because of the conflict of interest situation between the evaluation committee members and the subcontractor.

The DLAF considered this was a **conflict of interests** under national law. **The fact that the two public servants of the county council had taken part in the decision to award the service contract to P had been of indirect material benefit to the company that employed them, A.**

Case No 4

The Romanian DLAF was informed by an intermediate body for the sectoral operational programme Human Resources Development of a potential conflict of interests in a project financed through Priority Axis 3. The project aimed to introduce a set of innovative techniques and methods to improve entrepreneurial capacity among entrepreneurs and providing support for small and medium-sized enterprises from two regions.

The beneficiary was a university whose legal representative was the rector, Mr C.

For the project's information activities, the university, as the employer, concluded an individual work contract with Mr C, as the employee.

As the rector of the university, Mr C then appointed the implementation team for the project, of which he was also part.

By signing the individual work contract, on one hand as rector and legal representative of the employer and, on the other hand as an employee and member of the project implementation team, Mr C effectively signed a contract with himself and thereby obtained a direct material advantage, i.e. the promise of an extra salary, for himself.

Under the University Charter (which implements the National Education Law), the university is a public interest institution and the rector is its executive manager. The DLAF therefore considered there were grounds for prosecution for a criminal offence under national law.