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IPA ADRION

IPA ADRION PROGRAMME SHORT GUIDANCE ON CONFLICT OF INTEREST (C.O.I)

Introduction

Conflicts of interest in both the public and private sectors have become a major matter of public concern world-wide in government and the public sector. Conflict of interest (COI) situations have long been the focus of specific policy, grounded in legislation and mirrored in management approaches aiming at maintaining integrity and disinterested decision-making in government and public institutions.

While a conflict of interest is not *ipso facto* corruption, there is increasing recognition that conflicts between private interests and public duties of public officials, if inadequately managed, can result in corruption.

The proper objective of an effective conflict of interest policy is not simply the prohibition of all private-capacity interests on the part of public officials, but the necessity to ensure the integrity of regulations, official policy and administrative decisions.

IPA Adrion Programme acknowledges that a modern Conflict of Interest policy should seek to strike a balance, by

- identifying risks to the integrity of public organisations and public officials
- prohibiting unacceptable forms of conflict
- managing conflict situations appropriately
- making public organisations, and individual officials aware of the incidence of such conflicts
- ensuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations.

Through this document the IPA Adrion Programme intends to provide a comprehensive yet practical guidance for beneficiaries and people involved in the management of ESI funds on how to detect situations arising a possible conflict of interest, with the overall aim to raise awareness and strengthen knowledge regarding the procedures in place at Programme level.

The Managing Authority thus expects all the above actors to observe the following core principles to promote integrity in the performance of official duties and responsibilities.

Definition and legal grounding

What is a COI?

"A conflict of interests exists where the impartial and objective exercise of the functions of a financial actor[1] or other person, (...), is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest."

[1] Meaning all the subjects involved in budget implementation **under direct, indirect and shared management**, including acts preparatory thereto, audit or control

In short, a conflict of interest is a legal condition that occurs when, within a public administration, the performance of a specific activity is entrusted to an official who simultaneously holds personal or third-party interests, the satisfaction of which would necessarily imply a reduction in the fulfillment of the official interest.

What are the laws and norms ruling the COI at European level?

The **Financial Regulation (EU, Euratom) 2024/2509** introducing targeted adjustments (recast) to EU financial rules of the previous Regulation **2018/1046**, identifies at **article 61** the main elements of the COI (see definition above) thus emphasizing the preventive function of the related rules:

"*They* (the financial actors, ndr) *shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which* ***may objectively be perceived*** *as a conflict of interests."*

With reference to the practical application of these regulatory provisions, the Commission Communication - *Guidelines on the prevention and management of conflicts of interest under the Financial Regulation* - (2021/C 121/01) of 9 April 2021 provided useful guidance for Fund Management Authorities, with a dual purpose:

- to promote a uniform interpretation and application of the rules on the prevention of conflicts of interest for financial agents and staff of institutions involved in the implementation, monitoring, and
- to control the EU budget, and also to raise awareness among the Authorities and all others, including external partners, involved in the implementation of the EU budget.

The obligation to prevent COI is therefore self-executing and does not depend on national implementing measures being adopted, although national authorities may adopt supplementary and even more detailed/stricter measures.

What kind of situations does the COI refer to? What is its scope?

The COI definition does not only include the direct link between the person and the beneficiary of European Union funds, but also 'any other direct or **indirect personal interest**' of the financial agent. The expansion of the concept of **potential conflict** is further confirmed by the provision of paragraph 1 of the same article, which also includes among the situations covered by the regulation those that can objectively be perceived as involving a conflict of interest, requiring financial agents to adopt appropriate measures to resolve them.

Among the situations that are mostly common and that are relevant in matters of conflict of interest, the following are noteworthy:

1. Gifts, compensation, and other benefits, which prohibit employees from requesting or accepting gifts or other benefits as consideration for performing or having performed an act of their office (rather irrelevant, it is suggested to remove it);

2. Participation in associations and organizations, which entails communication from the employee regarding his/her possible membership or affiliation with associations and/or organizations that receive contributions or benefits, including non-economic ones, from the organization, whose

scope of operations or interest may interfere with the performance of activities within the employee's own organization;

3. Situations of financial interests which might overlap with the necessary impartiality required to the employee in carrying out his/her tasks, such as consultancy or collaboration relationships, direct or indirect, both currently and previously ongoing, as well as personal interests related to the private sphere (family, close friends).

Considering that the main purpose is the protection of the economic interests of the Union, the provisions of the COI discipline extends their scope to all entities, including National Authorities at all levels, in as much as they take part in the implementation of the EU budget, including the execution of preparatory acts, audit activities, and the carrying out of controls.

Identifying, managing and resolving a COI

How can we recognize a situation of COI?

First, it is important to highlight that a conflict of interest can arise even if the person gets no actual benefit from the situation, as it is enough for the circumstances to compromise the objective and impartial exercise of their duties. Such circumstances must, however, have a specific identifiable and individual connection with concrete aspects of the person's conduct, behavior, or relationships, or have an impact on such aspects (*Guidelines on the prevention and management of conflicts of interest under the Financial Regulation* - (2021/C 121/01)

NOTE: Mere link with beliefs, views, opinions or preferences **does not** usually or automatically constitute a personal interest.

BUT persons involved in budget implementation should consider the risks that may arise for their impartiality and the image and reputation of institutions

Therefore, depending on the circumstances, we can distinguish the following COI cases:

- **current (or concrete)**: when the causes are those specified by law, commonly applied in each Country because widely recognized. These are situations of conflicts of interest arising from:

- marital or cohabitation relationships;
- relationships of kinship or affinity up to the second degree;
- habitual social interactions;
- pending legal actions or serious enmity;
- significant credit or debt relationships;
- relationships of guardianship, curatorship, representation or agency;
- relationships of administration, management or leadership of associations, even if not officially recognized, committees, companies, or establishments.

- indirect (or potential): these situations of 'potential conflict' are not predefined and are identified with 'serious reasons of convenience' and appropriacy, referring to any position that could, even in principle, compromise the impartiality of the official. This is because personal interests, initially unrelated to the public administration, could potentially develop at a later stage and tend to interfere with the general public interest towards which the employee has specific duties and responsibilities.

- perceived (or apparent): note that the term 'perception' comes from the Public Procurement Directive 2014/24 (01/01/2016), whereas the Financial Regulation has specified that it's necessary that the links between functions and personal interest can be verified (*objectively*). An "apparent" conflict of interest occurs when a situation could be perceived as a conflict, even if there is no actual conflict, because a reasonable person could believe the decision-maker's primary interest might be compromised by a secondary one. This perceived conflict can still harm public trust, as seen in the context of the Public Procurement Directive 2014/24. Unlike a true conflict, an apparent conflict is based on how the situation looks to outsiders and is not a result of an actual secondary interest.

- structural: the conflicting situation is not limited to a specific type of acts or procedures but is extended and permanent; in other words, it is structural, in relation to the positions held and the functions assigned. In such a situation, impartiality in carrying out administrative activities is systematically undermined by personal or professional interests arising from the role assigned.

EXAMPLE OF PERSONAL INTEREST:

A Head of a Managing Authority/paying Agency:

1) might have a **direct personal (family) interest** in allocating EU funds to a project of the company of their spouse/partner;

2) might have an **indirect personal (family) interest**, in allocating EU Funds to a company that promised to create a new factory for which the company of the spouse/partner will most likely be the most significant subcontractor or owns the land that the company will have to buy to build the factory.

SITUATIONS WHICH MAY BE PERCEIVED AS A CONFLICT OF INTEREST

1. The person (or their partner) simultaneously carries out consultancy work, for either a consultancy or a third party providing services to the consultancy, on submitting applications for EU funding.

2. The person (or an immediate family member of the person) **directly or indirectly owns a company applying for EU funding.**

3. The person has a **personal friendship with the managers/owners of a company applying for EU funding**.

4. The person is a candidate (as a member of a political party) **for public office and their political party has a business relationship vis-à-vis a specific applicant for EU funding**.

5. **Prior to leaving their position in the public service, a person negotiates their future employment in a company applying for EU funding** (or affiliated or partner company, or another company with overlapping ownership compared to the one applying for EU Funding).

6. **The person recently worked in a management position in a company applying for EU funding and oversaw the particular sector of the company that is now requesting the funding.**

7. **If the person lives in a municipality that is applying for infrastructure funding, this should not necessarily and objectively be perceived as giving rise to a conflict of interest**. The larger the group to which the person belongs that would benefit from a measure – in this case, **the people of the municipality concerned – the more diluted the risk of conflict of interest generally becomes**. However, a case-by-case assessment remains necessary if, for example, the person was to benefit from the funding measure in a particular way, e.g. from public infrastructure increasing the real estate value of their neighborhood, the perception of a conflict of interest could exist/arise.

A particular case: the organisational COI (O.C.O.I)

What does "organizational conflict of interest" mean and what characterizes it?

"Organizational Conflict of Interest" means that because of other activities or relationships with other entities, the institution is unable to 1) render impartial assistance or advice to its Government, 2) cannot perform its own contract activities in an objective way, or 3) has an unfair competitive advantage compared to other entities.

Thus, OCOI focuses on the *institution* (and everyone within the institution) and potential or actual conflicts, whereas COI focuses on *individuals* only. Removing an individual from a project may resolve a potential COI issue, but not a potential OCOI issue.

In the framework of the Interreg Programmes, it is not seldom that members of the MC are also applicants or contact points for potential applicants.

In this case, a member of the MC might have a potential COI in the decision about projects funding, but most likely the only condition that can be encountered is that of a OCOI, meaning that the organisation, on behalf of which the MC member participates, has an interest in a particular project (e.g. because the organisation is partner, although a different department is acting as project partner). The MC member might have no personal interest in such a case.

Examples of OCOI:

- **biased ground rules**: occurs when a firm, while performing one government contract, influences the specifications, statement of work (SOW), in a way that favors itself. This creates a conflict of interest, as the firm may have an unfair advantage in the future competition because it has already shaped the "rules of the game" to its benefit;
- **impaired objectivity:** occurs when a contractor evaluates or assesses their own performance (e.g. a firm's work under one government contract could entail its evaluation itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals);
- **unequal access to information**: occurs when a firm, performing a government contract, gains access to non-public, competitively useful information that could give it an unfair advantage in a future competition for another government contract non-public

Raising awareness is important both for OCOI and COI, and once a case has been determined to exist, the competent Officer should provide an analysis with the purpose of

- avoiding, neutralizing, or mitigating the conflict
- proposing *ad hoc* contract clause

Recognizing a COI in a procurement procedure

OLAF practical Guidelines for managing the COI in public procurement

IPA Adrion Programme shares the principles stated in OLAF 2013 "Guidelines Identifying conflicts of interests in public procurement procedures for structural actions - *A practical guide for managers*", aimed at encouraging good practice among the beneficiaries/Partners States in their public procurement procedures, without prejudice to the respective national legislations.

Here below a list of red flags that may help to identify situations in which a conflict of interests could occur. Managing Authority recommends beneficiaries and in general every Istitution involved in the Programme to consider and observe the principle of avoidance of COI when approaching to a public procurement procedure.

RED FLAGS

- absence of a declaration of conflict of interest, where mandatory or requested;
- staff member of the contracting authority, just before joining it, worked for a firm that may bid in a tender to be prepared by the staff member;
- staff member of the contracting authority has immediate family working for a firm that may bid in a tender;
- amendment to the terms and conditions of the contract signed between the beneficiary and the contractor;
- relationships/acquaintance between the beneficiary and staff of the authority involved in budget implementation or between the final beneficiary and contractors;
- beneficiary and procured subcontractor share office space/premises/address, or similarity in company names indicates economic interdependence;
- evaluation committee members do not have the necessary technical expertise to evaluate the submitted bids and are steered by one individual;
- subjective elements are overrepresented in the criteria system or in the evaluation of a tender, — specifications are very similar to the winning bidder's product or services, especially if the specifications include a set of very specific requirements that very few bidders could meet;
- few applicants or fewer applicants than expected for a call for proposals/tenders;
- the same enterprise repeatedly wins successive contracts;
- poor execution of contract does not result in application of penalties or in the exclusion of the contractor/service provider from being awarded further contracts.

Managing COI in IPA Adrion Programme

Since IPA Adrion is a transnational Programme fostering cooperation among ERDF and IPA Partner Countries, it has to be acknowledged that authorities of one country have no power to control authorities from the other ones. That's why it's somehow necessary that the Programme relies on trust. Awareness raising and trust building are, next to some clear rules and instruments to identify a COI situation, the most important elements to avoid such cases occur.

Moreover, Interreg Programmes have to be considered as being based on “soft law”. Imposing strict rules and checks of individuals will work in practice only to a very limited extent, and basically cooperation across Member States or with Candidate and Third Countries should work with features taken from the diplomatic toolbox.

Nevertheless, a system of effective and efficient legal rules, although internal to each National legislation, safeguarding the impartiality of public officers is anyway fundamental. In the whole context related to IPA Adrion Programme, reliable procedures and instruments are set up at the level of each single Administration (having a role in the Programme or delegating the representative to the MC) to ensure the maximum level possible of impartiality, transparency and equal treatment among applicants/beneficiaries.