



Webinar on Conflict of Interests

Practical implementation of conflict-of-interests provisions in the applicable legal framework

8 June 2023 – 9h30 – 11h30

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Outline

- Introduction
- Article 61 Financial Regulation (“FR”) and the Guidance on avoidance and management of conflicts of interest (the “Col Guidance”)
- Questions
- Q&A

Introduction: Sharing knowledge

Follow up of:

- the presentation on the Col Guidance by DG BUDG that took place on 23 September 2020
- Technical meeting with Audit Authorities, on 25 September 2020 and 29 November 2021 EGESIF.

Purpose of today's webinar

- Provide an overview of the basic principles
- Address certain specific case studies

Why avoiding conflicts of interest?

- Protect **sound financial management** of EU funds
- Ensure **impartiality** of persons involved in the implementation of EU funds
- Preserve public **trust** in EU and national administrations

Legal Harmonisation

New Article 61 Financial Regulation 2018

- Rules extended to **shared management**,
- Reference to any “**other direct/indirect personal interest**” and
- Obligation to address situations “which may **objectively be perceived** as conflicts of interest”.

Supplemented by EU **sector specific rules** (shared management) and by **national rules**.

The guidance

- Promote a uniform interpretation and application of **Article 61 FR 2018** “**Conflict of interests**” rules in direct management, indirect management with external partners and shared management with Member States’ authorities.
- Provide practical examples, suggestions and recommendations for measures that could be put in place to avoid and manage conflict of interest situations.

*The guidance was adopted by the Commission on 7 April 2021 and published in the Official Journal of the European Union on 9 April 2021: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2021.121.01.0001.01.ENG

Definition of conflict of interest

“where the impartial and objective exercise of the functions ... is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any **other direct or indirect** personal interest.”

Who is concerned

“Financial actors and other persons, including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control”

- Involvement in budget implementation: importance of the functions and the proximity with decision making process.

Obligations in Article 61 FR (1)

- To **refrain** from action which may bring a person's interests into conflict with those of the Union;
- To **prevent** conflicts of interest from arising in the functions under a person's responsibility;
- To **address** situations which may objectively be perceived as a conflict of interest.
 - “**Perception**” comes from Public Procurement Directives
 - “**Objectively**” (added in Financial Regulation): verifiable (auditable) link between the functions and the interest at stake

Obligations in Article 61 FR (2)

Procedure if staff of EU or national authority is involved:

To **report** to the hierarchical superior (or to the relevant authorising officer by delegation) who must **confirm** in writing whether a conflict of interest exists. If this is the case, the national authority (or the appointing authority) must ensure that:

- ✓ the staff member ceases all activity in the matter;
- ✓ any further appropriate action is taken in accordance with the applicable law.

QUESTIONS

Who is covered by Col in Article 61 FR

Clarifications on similarities and differences between conflict of interest in case of civil servants and contractual staff

- Article 61 FR concerns ALL financial actors
- If no budget implementation, rules applicable to the staff (in the case of the EU)
- National rules may specify roles and responsibilities of financial actors
- National rules cannot be more lenient
- Contractors implementing funds may be concerned

Who is covered by Col in Article 61 FR (2)

Potential conflict of interest in the partnership structure (ex. In case where the legal representative of the partnership leader is the same as the legal representative of one of the partners)

- Article 3(2) of Code of conduct of partnership refers to representative of partners
- The need to have a previously set up organization may be a guarantee of independence
- Potential situations that may happen:
 - The leader has the responsibility to decide the allocation of funds to members
 - The group and the member have divergent interests
- All in all, this situation may be more related to 'professional conflicting of interest' (outside scope Art. 61 – but see Guidance point 4.1.4)

Who is covered by Col in Article 61 FR

(3)

The involvement of the same expert in several stages of a project (for example in the evaluation and verification of expenses/monitoring) is considered by the COM as a conflict of interest, in the situation where the direct hierarchical superiors are not the same?

- Each hierarchical superior decides in each stage
- Unless national rules allocates the responsibility to the first
- Competence must be respected
- Measures may be different depending on the stage

Who is covered by Col in Article 61 FR

(4)

Project Commission issues opinion about projects, but final decision is made by other institution (based on Project Commission's opinion). Professor X (member of the Commission) works in university "A", one of the project "B" partners. Professor takes opinion about project "B".

- situation of the professor may be objectively perceived as a situation of Col
- situation of conflict must be established case by case (enough elements)
- The situation must be disclosed by the person concerned.
- The situation must be addressed to the hierarchical superior
- Risks must be reported, and preventive measures adopted

Who is covered by Col in Article 61 FR (5)

- In the context of an engagement committee composed of between 5 and 8 voluntary members, giving an advisory (non-binding) opinion for the acquisition of an organisation's shareholding in a target company, is the interest significant enough to compromise the impartial exercise of functions when:
 - the vote of one of the members of the committee in which the employer is also a shareholder of the target undertaking at a rate of 1 %?
 - the vote of one of the other members, is also manager of a business incubator accompanying 150 companies each year, for a company hosted in the incubator?
 - A thorough examination of each case will be necessary in such situations
 - In abstract, both interests (General/Particular) seem to collide
 - However, the exact link must be determined and the interest at stake individualised
 - 1% or 1/150 might seem marginal, but under certain circumstances this may not be the case.
 - Appropriate way forward: declaration of the situation, abstention from voting.

Who is covered by Col in Article 61 FR (6)

Company A-private- has been selected in an open call, organized by the contracting agency (the contracting agency has delegation from managing authority). Company A has to build new school. National regulation requires organizing procurement procedure, when private entity receives ESI funds. Private procurement rules are difference PPD. Is Company A bound by Art. 61 FR?

- Article 61 of the Financial Regulation must be interpreted as broad as possible
- scope of PPD is different from Article 61 FR
- All persons responsible for implementing EU funds are subject to Article 61 FR

Who is covered by Col in Article 61 FR – monitoring committees

Rules of procedure included a general provision, according to which ‘it is not a conflict of interest to vote on decisions on projects selection criteria by persons appointed to the monitoring committee by entities that may be potential project applicants and to whom these criteria could be applied’

- Conclusion: non-compliant.
- Article 38 CPR – Rules MUST include prevention (not general exclusions)
- The situation may be objectively perceived as a Col
- Rule excludes, without check that this situation may be considered as Col
- Case by case assessment always necessary

Who is covered by Col in Article 61 FR – monitoring committees (2)

One of the members of a monitoring committee (meeting for the approval of selection criteria) is a representative a state-owned company which has a legal monopoly for the investment projects concerned by such programme. This representative will have the possibility to vote on the selection criteria for concrete projects where the state-owned company can be the only beneficiary.

- situation that may be objectively perceived as a conflict of interests
- Article 38 CPR – Rules MUST include preventive measures (e.g., notification to the hierarchical superior, abstention from voting)
- Possibility to participate in discussions to be assessed case-by-case (e.g. motivated decision of the chair)
- The situation must be real and not hypothetical. Case-by-case assessment
 - e.g. need to assess the role of the representative, a situation of monopole...

Who is covered by Col in Article 61 FR – monitoring committees (3)

Rules sent by one MS asking EC for opinion set out effective preventive measures in cases of potential conflict of interests' situation (real or perceived):

- disclosure to the chairperson of the managing committee
- abstention from decision-making process
- all members must submit a declaration on potential conflicts of interests
- a specific situation non-declared must be declared before a meeting in case an item of the agenda may amount as a risk of conflict of interest
- the managing authority may have an oversight role
 - There was a shortcoming: rules were not comprehensive and referred only to part of the activities of the monitoring committee.
 - There was no mention to e.g. preparation and assessment of calls for proposals, progress reports and monitoring and evaluation activities.
 - Rules must cover ALL situations.

The procedure in case of Col

Who is to take the decision on situations that may be perceived as a risks or actual Conflict of Interests, in cases involving a member of a body (national/EU level) with no hierarchical superior / no authorising officer such as a member of a regional/national government or a member of the Commission

- Guidance proposed (for politically exposed people) disclose personal interests (Point 3,2,4)
- Usually persons with no hierarchical superior are at political level
- In case of independent bodies, the person who appoints
- Some particular measures if no hierarchical relationship:
 - Declaration of personal income.
 - Declaration of family income and assets
 - Declaration of personal assets.
 - Public disclosure of the person's previous employment details, duties, roles and number of years in public and private entities.

Unaddressed Col - consequences

Can actions taken in the concurrence with a situation of conflict of interests (i.e., in contravention of the requirements of the FR) be considered valid?

- Unresolved conflict of interest is considered an irregularity
- Corrective measures necessary (corrections, recoveries, penalties...)
- Irregularities do not automatically annul a legal act (e.g., a contract)
- Legal acts may contain clauses to address irregularities

The 4 eyes principle

COM interpretation of the 4 eyes principle: do we require 2 experts for performing the same activity + the approval of the hierarchical superior or the principle is considered fulfilled by the expert's verification and the approval of the hierarchical superior?

- Two persons verify same operation
- Same parameters are assessed
- Deciding authority may have the possibility to adopt a different position

Data mining tools

Is the use of the ARACHNE in cases where the managing authority has put in place alternative and efficient measures to ensure the absence of conflicts of interest in the context of the selection and control of operations?

- Arachne is a tool that support that control functions of implementing bodies, flagging possible risks, including on conflict of interests
- Arachne is put at the disposal of Member States to detect risks (currently uised on a voluntary basis)
- Commission's proposal for an amendment of the FR, includes the compulsory use of Arachne

Other examples of best practice

Where to find other examples? Is there a practical guidance with more examples

- To be found in the Guidance
- To be found in ECA SR 6 on Col in cohesion and agricultural expending:
 - Information sessions in ministries
 - Joint anti-corruption training sessions by two managing authorities
 - Regular training for staff
- Discussions in other fora, e.g. CONT Committee EP hearing of the EP 23 May 2023
 - Use of data mining tools like MINERVA (ES) and PREVENT (RO)
- Other rules, e.g. EU rules on sensitive functions

Conclusion

- EU rules on conflicts of interest under the Financial Regulation apply directly and in addition to specific provisions under national law
- Compliance with EU rules on conflict of interest when Member States implement EU budget under shared management is the primary responsibility of programme authorities.

QUESTIONS

Thank you

BACKUP SLIDES

Applying the new rules: who does what in shared management?

Member States to act first:

- ✓ Establish and audit internal control systems incl. avoidance of conflicts of interest
- ✓ Take preventative measures (e.g. absence of conflicts of interest, assets disclosure)
- ✓ Establish whether a conflict of interest exists and apply mitigating measures

Applying the new rules: who does what in shared management?

Commission to:

- ✓ Monitor conformity of national systems with EU rules
- ✓ Audit Member State internal control systems (risk basis)
- ✓ Apply appropriate measures to protect the EU budget: suspension of payments, corrections if breaches of applicable law are identified (proportionality)

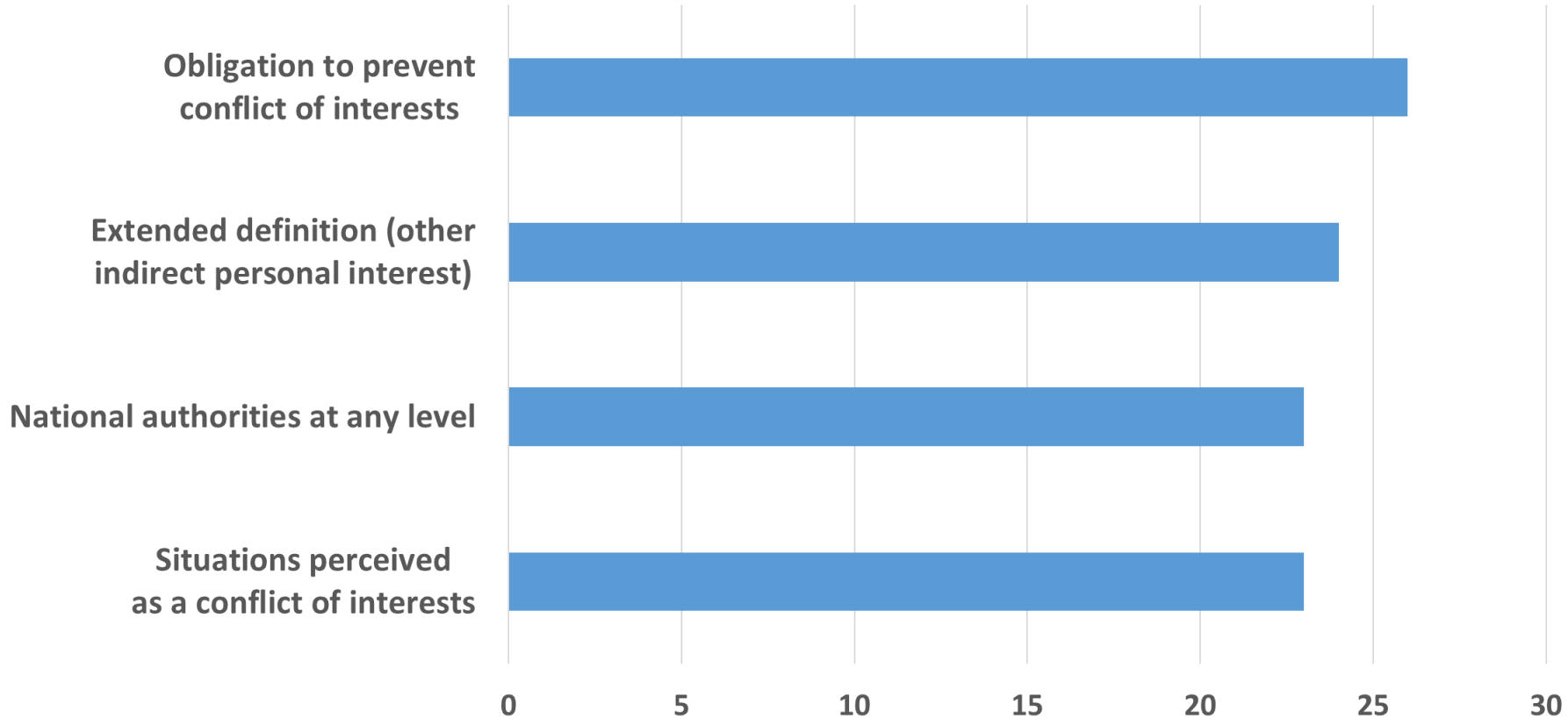
The Member States survey

- ✓ Based on the information provided by the Member States
- ✓ Specific preventive or corrective measures vary between Member States
- ✓ A very large majority of Member States declare that their national rules reflect the new requirements introduced by Article 61 of the 2018 Financial Regulation.

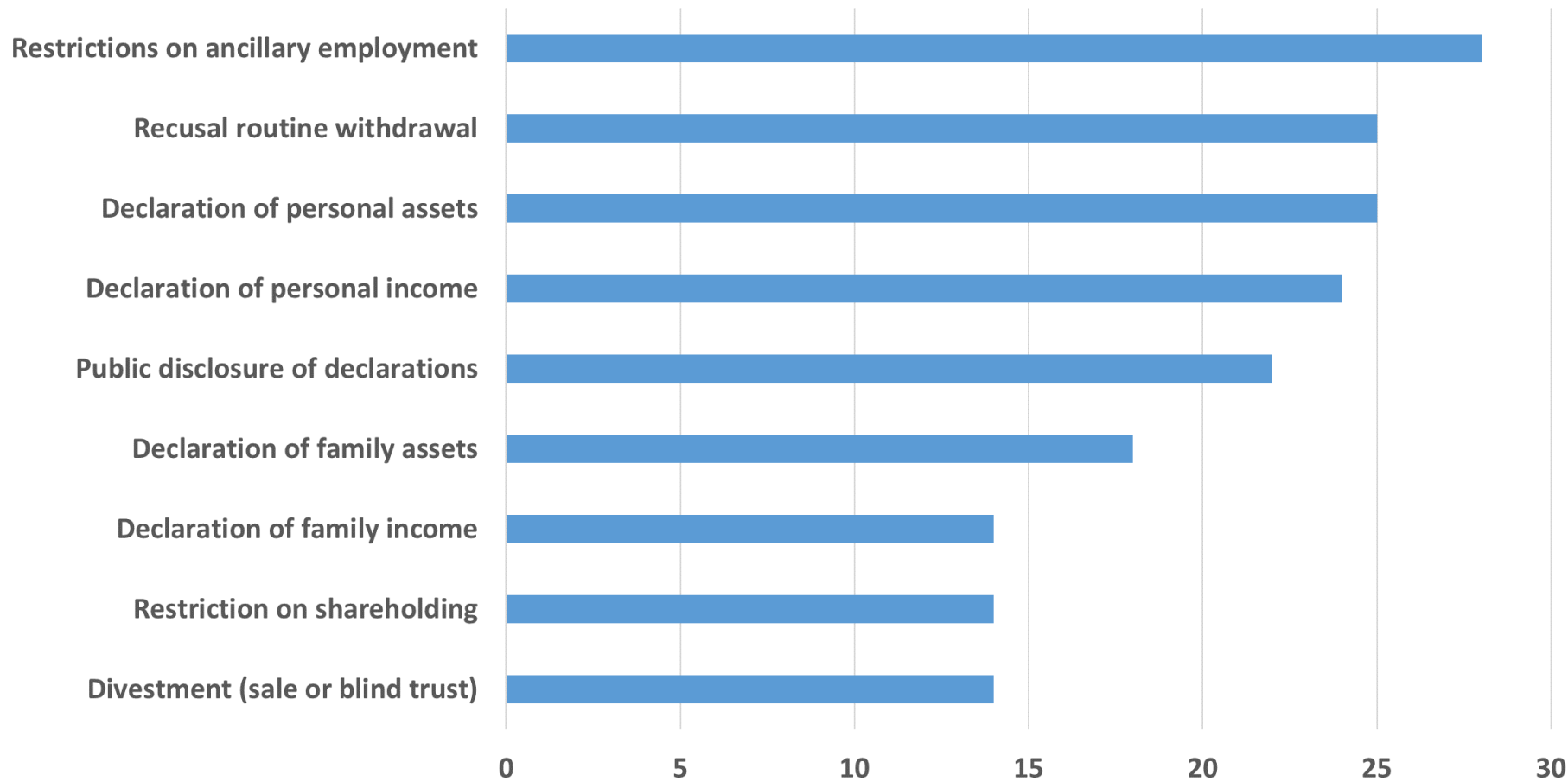
Most Common Practices

	Politicians	Civil servants
Restrictions on ancillary employment	28/28	28/28
Recusal and routine withdrawal	25/28	27/28
Declaration of personal income and assets	25/28	20/28

Self-assessment on conformity with new requirements



Mitigating measures members national/regional/local governments, parliaments



Mitigating measures staff national authorities

