



The issue of impartiality of voivodeship board members involved in the implementation of the European Union funds within the Multiannual Financial Framework 2021-27

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Abstract. The purpose of this paper is to consider the standard of impartiality promoted by the European Commission regarding the implementation of European Union funds and expressed in particular in identifying and excluding conflicts of interest in terms of the issue of its adequacy at the level of regional programmes in Poland. We attempted to answer the horizontal question of whether and what legal problems are raised by potential inadequacy in this respect and how they can be constructively counteracted. In our study we primarily used the dogmatic-legal method. The findings of our research show that in some situations, the “zealous” implementation of EU standards of impartiality may result in unexpected legal issues, such as in the situation related to the declarations of members of voivodeship boards who are managing authorities of regional programmes. The value of the study lies in its critical and at the same time constructive approach towards the issue of counteracting a possible conflict of interest through declarations of interest by members of voivodeship boards (as the managing institution of the regional programmes financed with EU funds) during the period of the real start of implementation of EU funds by Polish regions in the financial perspective 2021-27.

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As a result of audits carried out by the marshal's offices and the Ministry of Funds and Regional Development on the maintenance of the designation criteria in the managing authorities of the regional operational programmes, there can be (and are) indications that *the management and control system does not ensure an adequate level of prevention of conflict of interest in accordance with Article 61(1) of the Financial Regulation in the absence of a requirement for all persons involved in the implementation of EU funds to sign declarations of impartiality*. The latter include members of voivodship boards. Both the possible rightness and wrongness of such an approach imply certain legal consequences. In order not only to establish the *status quo*, but also to recommend constructively improved perspectives it is certainly worth considering the legal framework and practice.

Much has been written about conflict of interest, although – paradoxically – this does not make it any easier to understand and even less easy to deal with in practice (*see* Wnuk, 2015, p. 9; Makowski, 2014, p. 3; Wnuk, 2020). In international relations, due to its progressive development (especially within intensive cooperation of states affiliated to international organisations), the search for an optimal, universal treatment of the issue is ongoing. For example, according to the OECD, 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 (*see* OECD, 2003, pp. 24-25). The organisation distinguishes between:

- actual conflict of interest (between a public duty and a private interest of a public official that could improperly affect the performance of that official's public duties);
- apparent conflict of interest (where it may appear that a public official's private interest could improperly influence the performance of their public duties, but this is not in fact the case);
- potential conflict of interest (where a public officer has a private interest determining the existence of a conflict of interest if the officer were to engage in "conflicting" official duties in the future) (*see* OECD, 2003, pp. 24-25).

For the matter of interest, European Union law, which defines conflict of interest in a subject-oriented manner, is of key importance¹.

In the terms of the Public Procurement Directive, a conflict of interest arises in any situation where members of staff of a contracting authority, involved in the conduct of a procurement procedure or likely to influence its outcome, have, directly or indirectly, a financial, economic, or other personal interest which may be perceived as prejudicing their impartiality and independence in relation to the procurement procedure². The prudential approach implies an effect, so a conflict is identified here regardless of the real impact on decision-making.

In the subject matter of interest, i.e. in the implementation of EU funds, the construction of conflicts of interest included in the Financial Regulation (directly binding the EU Member States) is applicable. This source location has

¹ In EU primary law, the basis in the large sense is formed by Articles 83, 86, 287, 310(6) and 325 of the Treaty on the Functioning of the European Union (TFEU), and in secondary law, primarily: Regulation (EU, Euratom) 2018/1046 (so called 'Financial Regulation'); Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 16.12.2020 on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources. OJ L 433I, 22.12.2020, p. 28-46 (Part III and others, such as: Rules of Procedure of the European Parliament, Title II, Chapter 6, Articles 92, 93 and 94; Title V, Chapter 1, Article 129, Chapter 2, Article 134 and Chapter 4, Article 142; Annex V).

² Directive 2014/24/EU, article 24.

its consequences, due to which the obligation to prevent and manage conflicts of interest is not dependent on adoption of national implementing measures, although states may of course apply additional or more specific national rules (Szymański, 2021, p. 47)³.

The definition of conflict in Article 61(3) of the EU Financial Regulation states that a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor 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. As Marcin Szymanski rightly points out, this definition also emphasises that the mere risk of bias (a threat to the impartial and objective performance of the function) will be a conflict of interest. He stresses that the provisions of the EU Financial Regulation apply to the management of conflict of interest at national level, i.e. to all staff of national institutions involved in the implementation, monitoring and control of the EU budget, pointing out that the current EU Financial Regulation, unlike previous versions, extends the scope of application of conflict of interest regulations to all modes of management and to all actors, including national authorities at all levels. Complementarily, it deduces that measures taken by national authorities to prevent and detect conflicts of interest may, therefore, be subject to audits by independent national audit bodies, monitoring and audits by the EC, as well as ECA audits and OLAF investigations. The new rules explicitly require not only the prevention of, but also the response to, situations involving conflicts of interest, including those that ‘may objectively be perceived’ as conflicts of interest (Article 61(1) of the EU Financial Regulation *in fine*). An unresolved situation of objectively perceived conflict of interest therefore constitutes an irregularity (Szymański, 2021, p. 47-48).

The European Union has provided a definition of conflict of interest in its law, while in Polish law we encounter a deficit of precision in the lack of a legal definition, and the existing references in public procurement law or the Code of Civil Procedure⁴ (especially Article 24) do not seem satisfactory in this regard. The case-by-case nature of the grounds for excluding oneself from proceedings, and at the same time the grounds being too general and imprecise, raise quite a few difficulties of interpretation, to which practice unintentionally seems to have become “accustomed”. The European funds implementation process is (after all) no exception (exemptions etc.)⁵. This is a pity, as the possible consequences of a finding of conflict of interest are highly damaging and can drastically shape the image of institutions and public officials⁶. Attempts by EU institutions and agencies to model national practice are only partially helpful⁷. In particular, it is worth recalling here selected content (cited in footnote 10) of relevant European Commission guidelines.

According to the European Commission – the declaration of interests and, where applicable, the declaration of both present and past interests are useful tools to facilitate the detection and management of conflict-of-interest situations. Indeed, previous interests are relevant as long as the person still has duties/obligations arising from their previous position/employment (for a certain period of grace and abstention from duties that may interfere with those of their previous employment). Declarations of prior interests, according to the European Commission, may be limited to, for example, 5 years or the period during which the person continues to have commitments/obligations arising from previous positions/early employment. The Commission indicates that a declaration by the person concerned should be requested as early as possible (and updated as soon as the conflict-of-interest situation changes). This may relate, for example, to interests relevant to the management of procurement,

³ It is worth noting that the cited study was prepared by Marcin Szymański, affiliated as Deputy Director of the Department of Infrastructural Programmes of the Ministry of Funds and Regional Development (the Managing Authority of the Operational Programme Infrastructure and Environment), which calls for particular attention to be paid to the arguments presented.

⁴ Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego.

⁵ We also referred to this issue in Perkowski & Poździk (2023).

⁶ See e.g.: Annex to the Commission Decision of 14.5.2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement, C(2019) 3452 final.

⁷ Cf. in particular: “Commission Notice” (2021). In addition, see OLAF (n.d.).

decision-making and assisting in the preparation or provision of policy advice. According to the Commission, such declarations should include:

- clear reference to specific tasks and subject matter;
- the signatory's name, date of birth, position in the organisation and a detailed description of the functions performed;
- the date on which the declaration was signed.
- The Commission further adds that the statement should enable the signatory to make an official statement:
- whether that person has, or could be perceived to have, a conflict of interest with the implementation of the EU budget;
- whether there are circumstances (including interests) that could place the person in a position of conflict of interest in the near future, and
- that the person will promptly report any potential conflict of interest in the event of any circumstances that may lead to such a conclusion.

The Commission adds that an explanatory note for signatories may be attached to the declaration, providing clear guidance on the following aspects:

- the organisation's policy, including the purpose of the statement and the opportunity to review the statement to ensure its accuracy;
- legal requirements, including the clarification of certain issues related to the definition; For example, the statement should include an explanation of the relationships constituting family ties (*see* section 3.2.1);
- code of conduct, policies and procedures governing the management of conflicts of interest in the organisation;
- procedure for abstention and removal when a possible conflict of interest is identified. Where an employee discloses a possible conflict of interest, or where a third party reports a possible conflict of interest, the employee concerned should be required to abstain from dealing with the matter in question until a decision has been made by a supervisor or competent authority as to the existence of a conflict of interest (this may also include past cases);
- the procedure to be followed in the event of a change in the situation, in particular the question of when and how to report a conflict of interest that has arisen and to whom it should be reported;
- consequences of failing to disclose a conflict of interest, often known as 'abuse of trust' procedures. The person or entity authorised to implement these procedures must have adequate authority and appropriate accountability.

The Commission clarifies that if a conflict of interest arises after the original declaration was made, this does not mean that the original declaration made was false. Indeed, it may be the case that at the time the declaration was made, the circumstances giving rise to the conflict did not exist or were not known. There should therefore be an obligation:

- to disclose an existing situation as soon as the person concerned becomes aware of circumstances that may affect the impartial and objective performance of their duties;
- refrain from acting and refer the matter to a superior (or the relevant delegated authorising officer).

In the view of the European Commission, it is important that organisations establish clear and objective criteria for assessing declarations of interest and apply them consistently. As part of an effective verification to identify possible false declarations, all declarations should be properly recorded and retained by the body and should be subject to scrutiny (according to an appropriate methodology), in accordance with the applicable law, by comparison with other sources of information, for example to establish links between those involved in project selection and potential beneficiaries.

As regards sanctions and remedies for infringements committed by officials, beneficiaries and contractors, the Commission underlines that EU and national rules apply. Once a false declaration is detected, the authority, subject to the applicable legal framework, should apply appropriate investigative (including an examination of the impact of the declaration on the implementation of the EU budget) and corrective measures. The latter may include imposing disciplinary and criminal sanctions on the official who made the false declaration, cancelling and reassessing selection procedures, cancelling contracts/contracts, suspending payments, making financial corrections, and recovering funds. Undeclared conflicts of interest do not necessarily constitute prohibited acts. However, if conflicts of interest are not properly identified and managed, they may, depending on the applicable legal framework, become prohibited acts.

Of relevance to the title subject matter, there appear to be references in the European Commission's guidelines which indicate that a conflict of interest may arise even where the person concerned does not actually benefit from the situation – it is sufficient that the circumstances which arise threaten the impartial and objective performance of the functions entrusted to him or her. Such circumstances must, however, have a specific, identifiable, individual link to (or influence) specific aspects of the person's conduct, behaviour or relationships. The mere existence of a link to a person's beliefs, views, opinions or preferences is not normally sufficient to establish the existence of a personal interest, nor is it automatically regarded as a personal interest (although individual cases should be analysed on a case-by-case basis). However, those involved in the implementation of the budget should exercise their rights to freedom of expression and opinion and to political participation and civic activity, as well as the right to manage potential risks to their impartiality in the exercise of their functions and risks to the image and reputation of the institutions or bodies in which they work.

In its guidelines, the European Commission indicates examples of possible conflicts of interest, except in the case where the institution of the implementation system of EU programmes is headed by a political body elected by universal suffrage or selected in their wake. The implementation systems for Polish regional ESIF programmes, in accordance with Article 8(1) of the Act on the Principles of Implementation of Tasks Financed from European Funds⁸, are headed by the Voivodeship Board, and in the case of national programmes, by the Minister of Funds and Regional Development. Thus, the managing authorities are elected or shaped political bodies. In the absence of precise guidelines – the question arises as to whether there is a conflict of interest in such a case. It seems that the peculiarity of the status of politicians, elected in a relatively small (regional or local) community, where the relationship between voters and authorities is close and direct, does not create an automatic conflict of interest. Referring to the definitions of conflict of interest cited above, one should only consider the suspicion of a conflict of interest if one can link the behaviour/proceedings of a person (in relation to whom a conflict is alleged) to a situation affected by the conflict of interest. The mere communication of beliefs, views, opinions, preferences, or policy status cannot be considered 'automatically' as a conflict of interest.

As it has been already mentioned – in the guidelines, the Commission points out that, in principle, the right to freedom of expression and opinion, as well as the right to participate in political and social life, cannot be curtailed for the persons involved, and that the persons in charge are aware of their rights and obligations. Decisions taken by public authorities and function holders in the ESIF delivery system are general in nature. Politicians participate in the planning, decision-making, management, audit and control of the use of ESIF funds, but in order to analyse possible conflicts of interest in their context, they would have to have real discretion or give instructions to other persons entitled to take the decisions in question. When analysing the most sensitive stage in the management of ESIF funds, i.e., the selection of projects for co-financing, a person functionally involved in the MA (a member of the voivodeship board) would have to be able to exert a specific influence on persons assessing applications for co-

⁸ Ustawa z dnia 28 kwietnia 2022 r. o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021-2027.

financing. The Polish system of implementing the procedure of selection and evaluation of projects is carried out in accordance with Article 53 of the Implementation Act through project evaluation committees (composed of employees of the institution and experts). Further, Article 56 of the same Act indicates that the competent institution (most often the MA) approves the results of the evaluation made by an independent and expert project evaluation committee. The system of call for proposals and evaluation is structured in such a way that the political body can only approve the evaluation made by experts, who, after all, are evaluating projects, if there is no conflict of interest between them and all competing project proponents. The only examples of conflict of interest in relation to politicians included in the EC Communication are when: 1) a political camp may derive benefits for itself depending on the politician's actions, 2) when the politician's decision would lead to an increase in the value of the property. The guarantee of prevention of conflicts of interest is included in the sound management of ESIF funds and especially in the implementation of equal treatment/equal opportunities. The selection of projects for co-financing is made on the basis of objective, precise project selection criteria, which apply to particular areas, sectors. Article 43 of the Implementation Act indicates that only projects meeting the selection criteria may be selected for co-financing. The project selection criteria themselves, i.e. the conditions to be met by the project in accordance with Article 38 of the General Regulation, are approved by a resolution of the Monitoring Committee of a given programme.

When analysing the rules concerning a body such as the Monitoring Committee, it should be noted that already while setting up the Committee, the principle of partnership, representativeness of individual communities and balanced participation of individual partner groups should be followed. This principle is respected by striving for a balance in the distribution of votes between the four main groups of MC members, i.e.: representatives of institutions responsible for management and implementation of operational programmes; representatives of regional, local, municipal authorities; representatives of socio-economic partners; representatives of civil society (*see* Perkowski & Poździk, 2023).

On the basis of Articles 38 and 39 of the General Regulation, i.e. the rules of procedure of the MC, the internal rules of procedure of the MC and the rules concerning the prevention of any conflict of interest and the application of the principle of transparency shall be defined. MC members, their deputies and participants in the MC meeting are obliged to disclose potential conflicts of interest concerning them. They must exclude themselves from decision-making to the extent that this conflict may concern (*see* Perkowski & Poździk, 2023).

Returning to the topic of selecting projects for funding, it should be emphasised that project assessment is carried out by experts. A properly structured system is to guarantee the independence of expert assessment. In the absence of a hierarchical relationship between the entity preparing the grant application and the persons assessing it, and the existence of a clear separation of functions - there is no conflict of interest (*see* Perkowski & Poździk, 2023; cf. „Commission Notice”, 2021, p. 32). The decision of the Voivodeship Board or the Minister is not arbitrary. Therefore, rationally speaking – there are no grounds to consider the issue of conflict of interest of both the members of the voivodeship boards and the Minister of Funds and Regional Development.

Notwithstanding the above, Polish practitioners are, as it were, ‘out of habit’ to look for appropriate solutions for dealing with the issue of conflict of interest in the guidelines of institutions located ‘higher up’ in the implementation system. For example, the document *Procedura zwalczania nadużyć finansowych w ramach Programu Operacyjnego „Rybnictwo i Morze” 2014-2020* (Procedure for combating fraud within the Operational Programme ‘Fisheries and Sea’ 2014-2020) rightly indicates that the existence of a conflict of interest does not in itself have to be unlawful. However, it is against the law to take part in a process when a conflict of interest exists. Conversely, it is necessary to disclose any potential conflict of interest before the process in question is carried out and a decision is made, and to take appropriate precautionary measures. In the title context of this opinion, it is worth quoting the wording of this document, according to which: *"In exceptional cases, exclusion (...) may not be possible due to lack of resources (...) in certain areas. In such cases, the contracting authority should ensure that its decision is fully transparent, set precise limits to the contribution (of the person concerned - author's note) to the proceedings and ensure that the final decision is based on transparent and fair*

evidence." The document goes on to point out that the signing of the declaration of interest should take place as soon as a person joins the proceedings. This is an obligation that must be fulfilled immediately to protect the proceedings and the person concerned. The declaration of interest should include the definition of the conflict of interest and all the requirements of the code of conduct or ethics applicable to the process and related to the conflict of interest, as well as a reference to disciplinary, administrative, or criminal sanctions for making a false declaration. The declaration should allow the signatory to officially declare:

- whether, to their knowledge, they have an apparent, potential or actual conflict of interest in relation to the procurement procedure in question,
- whether, to their knowledge, there are circumstances that could place them in an apparent, potential or actual conflict of interest in the foreseeable future,
- and that they undertake to declare immediately any potential conflict of interest in the event of any circumstances that may lead to such a conclusion.

(...) The declaration of interest submitted shall be subject to verification by the immediate superior (...) making the declaration. The verification of the declaration shall include an analysis of the information provided therein for compliance with the scope of activities entrusted to and undertaken (by the person to whom the declaration relates - author's note). Where information is held which indicates the possibility of a conflict of interest, the regulations on the risk of a conflict of interest shall apply accordingly. The declarations made are subject to registration, in the unit responsible for the scope of the tasks in connection with the performance of which they were made (Ministerstwo Rolnictwa i Rozwoju Wsi, 2021) . In this vein, Anti-Fraud Strategy for the Regional Operational Programme of the Kuyavian-Pomeranian Voivodeship 2014-2020⁹ indicates that a conflict of interest means a situation where the impartial and objective performance of the function of a financial actor or other person, including a national authority at any level, involved in the implementation of the budget under direct, indirect and shared management, including the related preparatory actions, as well as audit or control, is compromised for reasons of family, emotional, political affinity or connection with any country, economic interest or any other direct or indirect personal interest¹⁰.

The currently presented solutions (Minister Funduszy i Polityki Regionalnej, n.d.), which refer to the Financial Regulation and European Commission guidelines, only indicate the obligations included therein (the resulting minimum standard), without solving the title dilemma, but perhaps that is why it would be appropriate to consider asking the Ministry of Funds and Regional Development, from the level of MA of regional programmes, to develop (in agreement with them and taking into account their specificity and the legal framework of their operation) "niche" guidelines (or appropriate amendments to the "general guidelines") regarding the conduct of members of voivodeship boards (as MAs) in terms of impartiality, possible conflicts of interest and the scope of their possible declarations of impartiality.

The need indicated above is urgent, as at this time, taking the standards quoted above literally/straightforwardly risks creating a clinch and paralysing the decision-making processes for implementing regional programmes. The European Commission places a great deal of emphasis on political considerations, so that, for example, if a project of a local authority in which persons from the same party are in power as the members of the voivodeship executive board, the entire board would have to be excluded under a strict approach. The implementation system dictates that members of voivodeship boards sign a lot of contracts/project agreements. How/why would they know whether a personalised potential conflict is contained in any of them? If they were to check this (and in turn, who else would do this if they only know everything about each other²), the system would functionally block itself and have an

⁹ Strategia zwalczania nadużyć finansowych w ramach Regionalnego Programu Operacyjnego Województwa Kujawsko-Pomorskiego na lata 2014-2020.

¹⁰ Here, it essentially replicates the formula of the EU Financial Regulation, also referring to the European Commission guidelines.

equally blocking effect on the ‘non-funding’ work of the members of the voivodeship boards. Alternatively, however, adopting a strict position that declarations of impartiality are submitted by all persons involved in the implementation of European funds, including members of the Voivodeship Board, it should be assumed that the verification of their declarations (based - above all - on the grounds of Article 24 of the Code of Administrative Proceedings¹¹) should be carried out by persons who verify declarations of assets (as appropriate). Thus, there would be no need to create an alternative procedure, but only to use the adopted national procedures accordingly (and not directly). As a consequence, the declarations of the Intermediary Authority / Implementing Authority management would be verified in the superior institution, i.e. MA/ Intermediary Authority. The indicated dependencies could also be used in case of adopting a less stringent option. However, since the system of management and control of implementation of ESIF funds includes institutions with adequate potential, organisational and legal possibilities to perform all verifications and controls (such as audit institutions), they should be used and actively included in the system of analyses of declarations of lack of conflict of interest of voivodeship managements, and not *per analogy use the* legal solutions provided for the implementation of own tasks of self-governments and funds of self-governmental budgets. What we have in mind here is the collection and verification of declarations of lack of conflict of interest of voivodeship board members by the audit institution, i.e. in accordance with Article 13 of the Implementation Act, the Head of the National Fiscal Administration (*Krajowa Administracja Skarbowa, KAS*). KAS has the knowledge and tools to realistically verify declarations of conflict of interest. At the same time, there is no dependence between the voivodeship boards and KAS that would negatively affect the process of verification of possible conflicts of interest.

It seems that a temporary solution (until the above mentioned ministerial guidelines are obtained) allowing for smooth implementation activities may be the declaration of members of voivodeship boards on impartiality towards the project(s) (by project one should understand a specifically named and identified undertaking of a given beneficiary), based on the principle: “In relation to project X, I act impartially, I am not aware of any possible conflict of interest on my part on the background of this project, in the case of disclosure/awareness of such - I will immediately exclude myself from the relevant activities in question, etc.” – will, as far as possible, ensure smooth operations. Of course, such a solution implies a “stronger” responsibility of the members of the voivodeship boards in case of a possible disclosure of a conflict of interest (conflict itself, but also a false declaration). Even more so, therefore, from the perspective of the institutions managing regional programmes, it is worth making efforts to obtain clear, rational ministerial guidelines taking into account the legal status of the voivodeship boards.

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