EGESIF_15-0033-00
13/10/2015

EUROPEAN COMMISSION

European Structural and Investment Funds

Guidance for Member States on

The selection of bodies implementing FIs, including funds of funds

DISCLAIMER: *This is a document prepared by the Commission services. On the basis of the applicable EU law, it provides technical guidance to colleagues and other bodies involved in the monitoring, control or implementation of the European Structural and Investment Funds (except for the European Agricultural Fund for Rural Development (EAFRD)) on how to interpret and apply the EU rules in this area. The aim of this document is to provide Commission's services explanations and interpretations of the said rules in order to facilitate the programmes' implementation and to encourage good practice(s). This guidance note is without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission.*

Table of Contents

1. REGULATORY REFERENCES AND TEXT

Regulation	Articles
Reg. (EU) N° 1303/2013[1] Common Provisions Regulation *(hereafter CPR)*	Article 37 (1) – Financial instruments Article 38 (4) & (5) – Implementation of the financial instruments
Reg. (EU) N° 480/2014[2] Commission Delegated Regulation *(hereafter CDR)*	Article 7 – Criteria for the selection of bodies implementing financial instruments

2. BACKGROUND

Managing authorities or intermediate bodies willing to use financial instruments as a tool for achieving the objectives of the programme may either undertake implementation tasks directly, or choose fund managers. In the latter case, they may choose entities dedicated to implementing financial instruments under Article 38(4)(a) of the CPR[3] or bodies entrusted with financial instruments implementation tasks under Article 38(4)(b) of the CPR.

Financial instruments may be implemented through a structure with or without a fund of funds. In case financial instruments are implemented through a structure including a fund of funds, two levels of bodies will be selected: the body implementing the fund of funds and bodies implementing the specific financial instruments product(s), i.e. financial

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

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

[3] According to Article 38(4)(a) of the CPR, when supporting financial instruments referred to in point (b) of paragraph 1 the managing authority may " invest in the capital of existing or newly created legal entities, including those financed from other ESI Funds, dedicated to implementing financial instruments consistent with the objectives of the respective ESI Funds, which will undertake implementation tasks."

intermediaries. The managing authority decides on the most appropriate implementing structure taking into consideration the findings of the ex-ante assessment required under Article 37(2) of the CPR.

The CPR identifies several types of entities to whom tasks of implementation of financial instruments may be entrusted by managing authorities without specifying the procedures that need to be followed for such an entrustment.

However, Article 37(1) of the CPR recalls the general principles that managing authorities must comply with, including when selecting bodies implementing financial instruments: they must comply with applicable law, in particular on State aid and public procurement and they are therefore responsible for ensuring, if necessary following consultation of national control authorities, that all applicable rules in relation to the selection of bodies implementing financial instruments are respected. According to Article 38(4) of the CPR, the bodies implementing financial instruments must ensure compliance with applicable law (*inter alia*, public procurement). Article 38(5) of the CPR echoing the principles of the Treaty on the Functioning of the European Union (TFEU), also states that the selection of financial intermediaries must be made on the basis of open, transparent, proportionate and non-discriminatory procedures, avoiding conflicts of interest.

Furthermore, Article 7(1) and (2) of the CDR contain specific requirements applicable to the selection process of bodies implementing financial instruments, (with the exception of the EIB and the EIF), and Article 7(3) to the selection procedure of financial intermediaries by bodies implementing funds of funds (including by the EIB and the EIF).

Subject to a number of situations which fall outside public procurement rules and are explained below, services performed by bodies implementing financial instruments set up under the ESIF regulatory framework fall within the scope of public procurement rules and principles. Therefore, the selection of such entities (whether fund of funds managers or financial intermediaries) must comply with applicable law.

The identification of the applicable Public Procurement Directive (Directive 2004/18/EC or Directive 2014/24/EU) depends on the date when the selection procedure is launched by the contracting authority (*i.e.* the managing authority of the operational programme purchasing services of an entity for the implementation of a financial instrument) or on the date of the decision to use a negotiated procedure without a prior call for competition to award the contract as well as on the date of transposition of Directive 2014/24/EU.

18 April 2016 is the ultimate deadline for transposing Directive 2014/24/EU into national law. Transposition measures adopted before that date must be applied by contracting authorities. After that date, even in the absence of transposition by Member States, contracting authorities must apply the provisions of Directive 2014/24/EU. From 18 April 2016 all provisions of the Directive, including those on in-house and inter-administrative cooperation must be fully respected.

Building on case law of the European Court of Justice (ECJ), Directive 2014/24/EU specifically addresses the entrustment of tasks to public entities owned and controlled by a contracting authority (vertical cooperation, or "in-house") as well as inter-administrative cooperation (horizontal cooperation). Until the date of transposition of Directive 2014/24/ EU, the award of contract in the context of both types of cooperation must respect the conditions established by case law (see below sections 3.5.1 and 3.6.1).

It should be noted that the possible identification of bodies implementing financial instruments in ESIF programmes does not exempt from applying public procurement rules and principles when selecting such bodies.

3. SELECTION OF BODIES IMPLEMENTING FINANCIAL INSTRUMENTS

3.1. Selection according to public procurement rules and principles

Outside the situations described below and outside the case where managing authorities decide to implement directly a financial instrument under Article 38(4)(c) of the CPR, they must select fund managers and financial intermediaries according to public procurement rules and principles.

The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU, and in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. For public contracts above a certain value, national procurement procedures are coordinated so as to ensure that those principles are given practical effect and public procurement is opened up to competition. For such public contracts, Public Procurement Directives (Directive 2004/18/EC or 2014/24/EU) apply.

3.1.1. Selection according to the provisions of the Directive 2004/18/EC or Directive 2014/24/EU

3.1.1.1. Threshold

For service contracts, Article 7 of Directive 2004/18/EC and Article 4 of Directive 2014/24/EU refer to two thresholds above which the relevant Directive applies:

- EUR 134 000 for public service contracts awarded by contracting authorities which are listed as central government authorities in Annex IV of Directive 2004/18/EC, and Annex I of Directive 2014/24/EU;
- EUR 207 000 for public supply and service contracts awarded by other types of contracting authorities.

According to Articles 7 of Directive 2004/18/EC and 4 of Directive 2014/24/EU the threshold applies to the estimated value of the services to be provided by the fund manager or the financial intermediary net of value-added tax (VAT). The basis for calculating the estimated contract value is, for banking and other financial services, the

fees, commissions payable, interests and other forms of remuneration (Article 9(8) of Directive 2004/18/EU, Article 5(13) Directive 2014/24/EU).

3.1.1.2. Guidance on public procurement procedures and contract modifications

The guidance for practitioners on the avoidance of the most common errors in public procurement[4] could be usefully referred to by contracting authorities even if it covers procurements under Directive 2004/18/EC. It contains reminders on specific points that require particular attention, such as the scoping of the tender, the choice of the appropriate selection procedure, the definition of appropriate exclusion, selection and award criteria (avoiding confusion between them), the need to respect the applicable deadlines to give to tenderers sufficient time for the preparation and submission of an offer and the need to properly document the evaluation of the offers on the basis of the criteria announced.

As regards the scope of the tender, in order to cover the possibility that the programme contribution in the financial instrument is increased later on, the managing authority should consider either using a Framework contract, or estimating possible additional programme contributions and its impact on the estimated contract value when procuring the relevant financial services. If this information is available in the tender notice for all potential bidders and if the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, the managing authority will have the possibility to avail itself of the same fund manager or financial intermediary for the subsequent amendments to the initial contribution up to the indicative amount procured. Outside these two cases if a Managing authority does not procure again, a substantial amendment of the contract would be liable to entail a change in the initial tendering conditions which would be considered as being against the principle of transparency and equal treatment and thus constitute an irregularity.

Directive 2014/24/EU, in its Article 72, lays down the new rules on modifications, which provide some additional flexibility.

Conclusion: Managing authorities willing to increase the amount of programme contributions to financial instruments implemented by bodies already selected (under the 2007-2013 programming period for instance) must carefully check whether the conditions for such a contract modification are met.

In addition, in order to anticipate possible subsequent programme contribution increases for the future, Managing authorities are recommended to envisage the conclusion of Framework contracts rather than proceeding by contract modifications.

[4] Publication Office - ISBN 978-92-79-50323-8 - not yet communicated to Member States in its final version.

3.1.2. Below the thresholds of the Directive selection according to the principles of the Treaty

Below the thresholds of the public procurement Directives, the selection of bodies entrusted with the task of implementation of financial instruments must comply with the principles of the Treaty if the contract is of cross border interest. This applies to both the selection of fund managers (including funds of funds) and financial intermediaries.

The principles of the Treaty to be respected are those of free movement of goods, freedom of establishment and freedom to provide services, as well as of the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition and transparency.

The Commission, building on the ECJ case law, issued an interpretative communication on the "Community law applicable to contract awards not or not fully subject to the provisions of the "Public Procurement" Directives" of 23 June 2006[5] in which the requirements coming from these principles are developed.

According to the ECJ, the principles of equal treatment and of non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition. The obligation of transparency requires that economic operators located in another Member State have access to appropriate information regarding the contract before it is awarded, so that, if they so wish, they would be in a position to express their interest in obtaining that contract.

This requires publication of a sufficiently accessible advertisement prior to the award of the contract. This advertisement should be published by the contracting entity in order to open the contract award to competition. The contracting entities are responsible for deciding the most appropriate medium for advertising their contracts.

This obligation stemming from the principles of the Treaty is compulsory only for contracts below the thresholds of the Directive which present a cross border interest. The existence of a certain cross border interest must be estimated by individual contracting entities based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, the importance of its estimated value, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract[6], the specifics of the sector concerned (size and structure of the market, commercial practices, etc.).

[5] The interpretation of the Commission has been confirmed by the General Court in a judgment of 20 May 2010 in Case T-258/06 *Federal Republic of Germany v. European Commission*.

[6] Case C-278/14 *SC Enterprise Focused Solutions SRL v Spitalul Județean de Urgență Alba Iulia*, paragraph 20. Proximity to the border may still lead to consider low value contracts having a certain cross border interest (Joined Cases C-147/06 and C-148/06, *SECAP SpA* (C-147/06), *v Comune di Torino*, paragraph 31)

3.1.3. Specific case of services inseparable from co-investment fallings outside the scope of public procurement Directives

In certain circumstances, the managing authorities in Member States are looking for a co-investor which at the same time will be in charge of the implementation of the financial instrument.

- If the private co-investment and the fund management task can be clearly separated, then the fund management part only is subject to public procurement rules and principles.

- In the case of mixed contracts, where the different parts which constitute the contract are objectively not separable, the applicable rules should be determined with respect to the main subject of the contract. Contracting authorities should determine whether the different parts are separable or not based on the relevant case-law of the ECJ. As indicated in recital 11 of Directive 2014/24/EU, the intentions of the contracting authority to regard the various aspects making up a mixed contract as indivisible should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract.

    - Where co-investment is the main subject matter of a contract, then the selection of the co-investor in charge of the accessory activity of implementation of the financial instrument, falls outside the scope of application of the public procurement Directives. In this case, the selection of such body must be done in conformity with the principles of the Treaty.

    - Where implementation of the financial instrument is the main subject matter of the contract,, then the whole operation is subject to public procurement rules.

Even if this situation is theoretically possible, it is difficult to envisage that the purpose of a contract would be both co-investment and provision of financial services with the financial service being ancillary to the co-investment activity. The analysis should not be done by managing authorities with the aim to circumvent the application of public procurement rules. In case of doubt managing authorities are therefore recommended to procure the financial service.

Conclusion of Section 3.1: When selecting an entity in charge of implementing financial instruments, including a fund of funds, the managing authorities must comply, in addition to the public procurement rules and principles, with provisions of Article 7(1) and (2) of the CDR.

In addition, according to Article 7(3) of the CDR, when the entity in charge of the implementation of a fund of funds further entrusts implementation tasks to financial intermediaries, the selection must respect the specific requirements laid down in that provision (see section 3.8 below) and, when such an entity is a contracting authority in

the meaning of the applicable public procurement Directive it must respect public procurement rules and principles.

3.2. Designation of the EIB

The EIB is one of the bodies identified in the CPR to whom tasks of implementation of financial instruments may be entrusted by managing authorities (Article 38(4)(b)(i) of the CPR).

As the relation between Member States and the EIB is ruled by primary law, access to the EIB's statutory activities cannot be subject to procedural rules and conditions extraneous to the provisions governing the EIB's activities under primary EU law. This means that the provisions of the directives on public procurement (which are secondary law) do not apply to mandates with regard to management of financial instruments concluded between Managing Authorities and the EIB. Therefore, such contracts may be concluded directly with the EIB.

Where a contract is directly awarded by a managing authority to the EIB for the implementation of a fund of funds, the EIB will select financial intermediaries to implement financial instruments on the basis of its own rules laid down in the EIB Guide to Procurement[7] which, since the EIB is subject to the Treaty rules, must comply with the principles of the Treaty.

In addition, according to Article 7(3) of the CDR, when the EIB further entrusts implementation tasks to financial intermediaries, the selection must also respect the specific requirements laid down in that provision (see section 3.8 below).

Conclusion: Managing authorities may conclude directly with the EIB, *i.e.* without competitive process, mandates with regard to the implementation of financial instruments.

3.3. Designation of the EIF

The EIF was established in 1994 by the Board of Governors of the EIB (representing the Member States), based on an act of primary EU law[8]. The Act added an Article 30 to the Statute of the EIB, annexed to the Treaty, empowering the Board to establish the EIF and its statutes. Pursuant to that Article (since replaced by a general article on the establishment of EIB subsidiaries, the current Article 28 of Protocol (No. 5) on the

[7] "*Accordingly, in full respect of the tasks and activities assigned to it by the Treaty establishing the European Community, the Bank acts in principle in accordance with Community law on public procurement, in particular Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [...]. Even though the Directive is not applicable as such to the Bank, it provides an appropriate reference of establishing the Bank's procedures*".

http://www.eib.org/attachments/strategies/eib_guide_for_procurement_services_en.pdf

[8] Act amending the Protocol on the Statute of the European Investment Bank empowering the Board of Governors to establish a European Investment Fund, OJ C L 173, 7.7.1994, p. 1.

Statute of the EIB), the EIF has legal personality and a financial autonomy similar to that of the EIB.

According to Article 2 of its Statute, the task of the EIF is to contribute to the pursuit of the objectives of the European Union through giving guarantees and taking participations in enterprises. In addition, the EIF may engage in other activities connected with or resulting from those tasks.

As for the EIB, the position of the EIF is characterised by a close link with the European Union as regards its objectives. The EIF intends to contribute towards the Union's objectives and task with carrying out activities in pursuit of the Union's goals.

Article 2(23) of the CPR defines the "EIB", for the purpose of the CPR, as comprising the EIB, the EIF and any (other) subsidiary of the EIB. The EIF is therefore also identified in the CPR among the bodies to whom tasks of implementation of financial instruments may be entrusted by managing authorities (Article 38(4)(b)(i) of the CPR).

Where a contract is directly awarded by a managing authority to the EIF for the implementation of a fund of funds, the EIF will select financial intermediaries to implement financial instruments on the basis of its own rules laid down in the "EIF Guide for Procurement - Guide for the procurement of services, supplies and works by the EIF for its own account"[9].

In addition, according to Article 7(3) of the CDR, when the EIF further entrusts implementation tasks to financial intermediaries, the selection must respect the specific requirements laid down in that provision (see section 3.8 below).

Conclusion: Managing authorities may conclude directly with the EIF, *i.e.* without competitive process, mandates with regard to the implementation of financial instruments.

3.4. Designation of an International Financial Institution

Managing authorities may consider entrusting the implementation of a financial instrument to an international financial institution, as envisaged in Article 38(4)(b)(ii) of the CPR.

The CPR does not contain a definition of international financial institution. International financial institutions may be defined as financial institutions set up by at least two countries by intergovernmental agreements to provide financial support for economic and

9 *"[...] the Fund acts in principle in accordance with Community law on public procurement, in particular Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts […]." which is also applicable "every time that the Fund is involved in the procurement irrespective of whether it pays or not for the value of the relevant services, supplies or works, unless the Fund has satisfied itself that in the procurement of the said services, supplies or works an acceptable level of fair competition is guaranteed."*

http://www.eif.org/news_centre/publications/2009_EIF_Guide_for_Procurement.htm

social development activities. Their owners or shareholders are generally national governments but may also be other international institutions and/or other organisations.

Entrustment of tasks for the implementation of a financial instrument to an international financial institution may be done directly by a managing authority, provided that the Member State is member of the international financial institution and the tasks entrusted fall within the statutory mission of the institution.

When designating an international financial institution (except the EIB and the EIF), the managing authorities must check that the institution comply with the selection criteria listed in Article 7(1) and (2) of the CDR.

Following the entrustment of tasks of implementation of a fund of funds to an international financial institution by a managing authority, the international financial institution will select financial intermediaries to implement financial instruments. Selection of financial intermediaries by the international financial institution will be carried out according to the rules of the international financial institution.

In addition, according to Article 7(3) of the CDR, when the international financial institution further entrusts implementation tasks to financial intermediaries, the selection must respect the specific requirements laid down in that provision (see section 3.8 below).

Conclusion: Managing authorities may conclude directly with an international financial institution of which the Member State is Member, *i.e.* without competitive process, mandates with regard to management of financial instruments, provided the tasks entrusted fall within the statutory mission of the institution.

3.5. In-house award

The sole fact that both parties to an agreement are themselves public authorities, does not rule out the application of procurement rules.

However, the application of public procurement rules must not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of in-house services.

Prior to the adoption of Directive 2014/24/EU, the conditions for concluding contracts directly with entities owned and controlled by a contracting authority ("in-house entities") were defined by case law.

The conditions under which such a direct award is possible have subsequently been defined and enlarged by Directive 2014/24/EU. The fulfilment of these conditions must be carefully assessed on a case by case basis, even for legal persons established by public contracting authorities.

When designating an in-house entity, the managing authorities must comply with provisions of Article 7(1) and (2) of the CDR. Whenever in-house entities are contracting authorities in the meaning of the Directive, where a public managing authority designates

an in-house entity as a fund of funds, that entity must respect public procurement rules and principles when selecting financial intermediaries. In addition, according to Article 7(3) of the CDR, the selection must respect the specific requirements laid down in that provision (see section 3.8 below).

3.5.1. Conditions for award to in-house entities until Directive 2014/24/EU is transposed or until 18 April 2016 whatever is earlier

In accordance with case law, if a public authority decides not to perform the tasks conferred on it in the public interest by using its own administrative, technical and other resources, it may directly award the implementation of such tasks to other entities when (i) they are 100% publicly owned, (ii) it exercises over the entities concerned a control which is similar to that which it exercises over its own departments and (iii) those entities carry out the essential part of their activities for the controlling public authority or authorities.

3.5.1.1. Condition of full public ownership

As regards the first criteria, 100% public ownership of the entity is required. However no exclusive ownership is required.

Therefore a public managing authority does not need to be the sole shareholder of the entity. The condition of ownership is met if a public managing authority owns one or more shares in a 100 % public entity owned by several public entities.

3.5.1.2. Condition concerning the similar control

The contracting authority must exercise over the entity concerned a control which is similar to that which it exercises over its own departments. This control can be exercised individually or jointly.

According to settled case-law[10], there is 'similar control' where the entity in question is subject to control enabling the contracting authority to influence that entity's decisions. The power exercised must be a power of decisive influence over both the strategic objectives and the significant decisions of that entity[11]. In other words, the contracting authority must be able to exercise a structural and functional control over that entity. This does not necessarily require a daily operational control[12].

This control has to be effective[13]. It is not enough that the control exercised consists essentially of the latitude conferred by company law on the majority of the shareholders,

10 Case C-107/98 *Teckal.*

11 Case C-458/03 Parking *Brixen*, paragraphs 63-70, Case C-340/04 *Carbotermo*, paragraph 38, Case C-324/07 *Coditel Brabant*, paragraph 28; and Case C-573/07 *Sea*, paragraph 65.

12 Case C-182/11 and C 183/11 *Econord SpA v Comune di Cagno, Comune di Varese, Comune di Solbiate Comune di Varese*, paragraph 27

13 Case C-324/07 *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, paragraph 54

which results in limits on the contracting authority's power to influence the decisions of those companies[14].

It is not essential that the control be exercised individually: joint analogous control is admitted. According to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them. Decisions can be taken by a majority, as the case may be[15].

The Court recognised that in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking[16]. Joint analogous control is possible even if the percentage of the shareholding is very low provided the right attached to this shareholding is sufficient for the shareholders to exercise jointly an effective control[17].

When a public managing authority participates in the decision making body of an entity collectively owned and controlled by several public owners, it is necessary to assess whether there is a joint analogous control over the entity.

3.5.1.3. Condition relating to the essential part of the activities of the entity being carried out for the controlling public authority or authorities.

The in house entity must carry out the essential part of its activities for the controlling public authority or authorities.

In case a public managing authority is not the sole owner and controller of the entity, the condition that the entity carries out the essential part of its activities for the controlling public authority or authorities is met even if at the moment of the award of the contract the in-house entity is not specifically carrying out any activity directly for public managing authority but where the essential part of the activity of that entity is carried out for the other authorities controlling the entity.

Conclusion: A public managing authority may therefore, under the above-mentioned conditions, entrust tasks of implementation of financial instruments to a 100% publicly

[14] Case C-458/03 *Parking Brixen*, paragraph 69, Case C-340/04 *Carbotermo*, paragraph 39. , In the context of the latter case under its examination, the ECJ considered that the control is not similar to the one exercised by a contracting authority over its own departments when the statutes of a company do not reserve to the contracting authority any control or specific voting powers for restricting the freedom of action conferred on a Board of Directors which is given the broadest possible powers for the ordinary and extraordinary management of the company and when influence of the contracting authority over the in-house entity is through a holding company since the intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company.

[15] Case C-324/07 *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, paragraph 54

[16] Case C-295/05 *Asemfo*, paragraphs 56 to 61

[17] Case C-182/11 *Econord SpA v Comune di Cagno*, paragraph 33.

owned entity (for instance a development bank) over which it exercises a control which is similar to that which it exercises over its own departments provided this entity carries out the essential part of its activities for the controlling public authority or authorities. Selection of financial intermediaries by in-house entities must respect public procurement rules and principles provided that the in-house entities are themselves contracting authorities.

3.5.2. Conditions for award to in-house entities after transposition of Directive 2014/24/EU (Article 12 of Directive 2014/24/EU) or after 18 April 2016

According to Directive 2014/24/EU, a contracting authority may conclude a public contract with a controlled legal person provided that three following cumulative conditions are met.

Firstly, the contracting authority must exercise a control over the legal person concerned which is similar to that which it exercises over its own departments. A contracting authority is deemed to exercise such control where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority, or jointly, provided the conditions laid down in Article 12(3) of the Directive are met[18].

Secondly, the controlled legal person must carry out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

Thirdly, there must be no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person. Except in cases of joint control, direct award of public contracts is also possible where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being

[18] Under the conditions defined in Article 12(3) Directive 2014/24/EU joint control requires the following conditions to be fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

Financial institutions in a Member State aiming at the achievement of public interest under the control of a public authority referred to under Article 38(4)(b)(ii) of the CPR can be entrusted with tasks of implementation of financial instruments when the above mentioned conditions are met.

Conclusion: Public managing Authorities may conclude directly with in-house entities within the meaning of Article 12 of Directive 2014/24/EU contracts with regard to management of financial instruments. Selection of financial intermediaries by in-house entities must respect public procurement rules and principles provided that the in-house entities are themselves contracting authorities.

3.6. Inter-administrative cooperation

Again, the sole fact that both parties to an agreement are themselves public authorities does not rule out the application of procurement rules.

However, the application of public procurement rules must not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities. Having in mind the need to avoid distortion of competition in relation to private economic operators, further clarification on inter-administrative cooperation was brought by Directive 2014/24/EU.

When entering into an inter-administrative cooperation, public managing authorities must comply with provisions of Article 7(1) and (2) of the CDR. In addition, according to Article 7(3) of the CDR, when the body designated to implement the financial instrument(s) entrusts implementation tasks to financial intermediaries, the selection must respect the specific requirements laid down in that provision (see section 3.8 below).

3.6.1. Conditions for inter-administrative cooperation until Directive 2014/24/EU is transposed or until 18 April 2016 whatever is earlier

Prior to the adoption of Directive 2014/24/EU, the conditions under which contracts concluded between entities in the public sector (inter-administrative cooperation) were outside the public procurement rules were defined by case law.

Inter-administrative cooperation between public entities to ensure that a public task that they all have to perform is carried out is allowed outside the scope of public procurement rules[19]. Public procurement rules are not applicable in so far as inter-administrative

[19] Case C-480/06, *Commission v Germany*, paragraphs 37 and 44 to 47 and *Case* C-159/11 *ASL Lecce*, paragraphs 35 to 37.

cooperation (i) concerns exclusively public entities, without the participation of a private party, (ii) no private provider of services is placed in a position of advantage *vis-à-vis* competitors and (iii) implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest which the entities have to perform[20].

As regards the condition that the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, the case-law admitted that local authorities pursue the aim of ensuring that a public task is carried out, for instance if cooperating in the field of waste disposal in the implementation of the obligations laid down in EU Directive on waste[21.]

The ECJ considered that the cooperation for the purchase by a University of an IT system for higher education management is not aimed at carrying out a public task which both a University and a publicly owned company governed by private law, having the object to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role have to perform[22].

Inter-administrative cooperation for the implementation of financial instruments would require the demonstration that the cooperating authorities pursue their tasks in the public interest. This is the case if the implementation of the financial instrument aims at allowing the public authorities cooperating to perform functions assigned to them by EU or national law. This is the case of tasks of general interest as, for example, financing social measures or specific types of SMEs or providing financings to promote economic development or research. The pursuit by a managing authority of objectives and activities described in an operational programme can be considered as tasks of public interest. If pursued by other public authorities, they may give room for inter-administrative cooperation. However it is not enough that such an objective is pursued, it must also be demonstrated that the cooperation between public authorities is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, which requires a case by case analysis.

Inter-administrative cooperation for the implementation of financial instruments would require the conclusion of a contract between a public managing authority and another administrative body, in-house entity or another public entity. The contract should cover the elements of the funding agreement, including the modalities for the remuneration of the entity implementing the financial instrument.

The remuneration paid by the public managing authority for the implementation of the financial instrument to the entity implementing the financial instrument shall be

[20] See Case C-480/06, *Commission v Germany*, paragraphs 44 to 47.

[21] Case C-480/06, *Commission v Germany*, paragraph 37

[22] Case C-12/13 *Technische Universität Hamburg-Harburg, Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH*, paragraph 35

equivalent to the one paid by the other public entities using the services of the entity implementing the financial instrument for the same types of financial products delivered to the same types of recipients in full respect of the applicable regulatory provisions on management costs and fees[23].

Conclusion: Until Directive 2014/24/EU is transposed or until 18 April 2016 whatever is earlier, public managing authorities may, subject to compliance with the conditions laid down in case law, be able to enter into inter-administrative cooperation agreements with other contracting authorities that could be entrusted with the task of implementing financial instruments.

3.6.2. Conditions for Inter-administrative cooperation after transposition of Directive 2014/24/EU or after 18 April 2016

According to Article 12(4) of Directive 2014/24/EU, a contract concluded exclusively between two or more contracting authorities falls outside the scope of the Directive where three conditions are fulfilled:

(i) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(ii) the implementation of that cooperation is governed solely by considerations relating to the public interest;

(iii) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

According to Article 12(5) of Directive 2014/24/EU, the percentage of activities performed on an open market can be calculated by reference to the average total turnover of the body carrying out the cooperation (legal entity or contracting authority if the cooperation does not involve a legal entity separate from the contracting authorities) for the three years preceding the contract award. Alternatively an activity based measure, such as the costs incurred by the relevant person or contracting authority with respect to services, supplies and works may be used.

Conclusion: After transposition of Directive 2014/24/EU or after 18 April 2016, public managing authorities may be able to enter into inter-administrative cooperation agreements complying with the conditions laid down in the Directive with other contracting authorities that could be entrusted with the task of implementing financial instruments.

[23] In case a contract is concluded with the administration, then the price could be paid to the body implementing the financial instrument either directly by the managing authority or indirectly via the administration cooperating with the managing authority. In Case C-480/06 (*Commission v Germany)* Stadtreinigung Hamburg reserved a capacity of 120 000 tonnes per annum for four *Landkreise* for a price calculated using the same formula for each of the parties concerned. That price was paid to the facility's operator, the other party to the contract with Stadtreinigung Hamburg, through the intermediary of the latter (See paragraph 5).

3.7. Designation as intermediate body

Article 123(6) of the CPR allows Member States to "*designate one or more intermediate bodies to carry out certain tasks of the managing or the certifying authority under the responsibility of that authority*" applicable to the Funds (the structural Funds (ERDF and ESF) and the Cohesion Fund) and the EMFF. Article 66(2) of Regulation (EU) No 1305/2013 provides for the same possibility for EAFRD.

The intermediate body should also be selected in compliance with applicable rules including those rules on public procurement[24]. Article 123(6) requires the signature of written arrangements between the managing authority and the intermediate body, including reporting modalities ensuring that the Managing authority is able to exert a proper control over the activities of the intermediate body.

In case of designation of an intermediate body, the intermediate body could be entrusted with the tasks of selection of the body implementing the financial instruments. The intermediate body could select another administrative body, an in-house entity or a public or private entity selected in compliance with the rules on public procurement.

A managing authority may entrust tasks of implementation of a financial instrument to a public body owning and controlling an in-house body for the entrustment of tasks of implementation of financial instruments to this in-house body (a development bank for instance).

The managing authority would then designate the public body owning the in house entity as intermediate body.

This can be done even if the conditions for inter-administrative cooperation explained above in section 3.6 are not fulfilled.

3.8. Requirements of Article 7 of the CDR

Article 7 of the CDR sets out criteria to be applied by the managing authority when selecting the bodies implementing financial instruments. The rules of Article 7(1) and (2) apply to the selection of bodies implementing financial instruments (with the exception of the selection of EIB and the EIF) for all types of procedures, regardless of the amount of the contract. The provisions of Article 7(3) of the CDR apply to the selection of financial intermediaries by the bodies implementing fund of funds.

Reminding the principles of transparency and non-discrimination laid down in the Treaty, Article 7(2) CDR recalls that the selection process must be transparent and justified on objective grounds and not give rise to conflicts of interest.

[24] In case the contracts conclude between the Managing authority and the intermediate body does not have any pecuniary interest then it is not a public contract within the meaning of the public procurement directives. It falls outside the scope of the Directives but remains subject to the respect of the Treaty principles.

When an entity entrusts tasks of implementation of financial instruments to a third party, in view of Article 7 of the CDR it must introduce at least the following selection and award criteria in the meaning of the public procurement Directives.

3.8.1. Selection criteria

The criteria defined in Article 7(1)(a) to (f) and Article 7(2) first paragraph of the CDR are linked to the **legal, financial, economic and organisational capacity of the body** to be entrusted with implementation tasks of the financial instrument. The following minimum set of selection criteria must therefore be applied.

3.8.1.1. The legal capacity

The **legal capacity** of the body entrusted needs to be checked to ensure that the body selected is allowed to carry out the tasks of implementation of the financial instrument under national and EU law. The selection procedure must therefore check the entitlement of the body entrusted to carry out the relevant implementation tasks under Union and national law (Article 7(1)(a) of the CDR).

3.8.1.2. the economic and financial capacity

The body entrusted with financial instruments implementation tasks must have the **economic and financial capacity** to carry out the work. Therefore the selection procedure needs to ensure that the economic and financial viability of the body entrusted is adequate (Article 7(1)(b) of the CDR). Adequacy should be checked by reference to the type of tasks that will be entrusted to the body and their implementing modalities including their duration.

3.8.1.3. The organisational capacity

The body entrusted with financial instruments implementation tasks must have the **organisational capacity** to implement a financial instrument in the context of the implementation of a programme, *i.e.*:

- an adequate capacity to implement the financial instrument, including organisational structure and governance framework providing the necessary assurance to the managing authority (Article 7(1)(c) of the CDR). The managing authority has to evaluate how well the system put in place in the body to which implementation tasks are to be entrusted, is directed and controlled. The system put in place should cover the aspects like: planning, setting-up, communication, monitoring of the progress against the objectives, risk management and business controls.

- an effective and efficient internal control system (Article 7(1)(d) of the CDR). An effective and efficient internal control system should ensure that the body entrusted with implementation of financial instrument(s) has in place an adequate control environment and respects the procedures in place for the execution, measurement, follow up and mitigation of risks.

- the use of an accounting system providing accurate, complete and reliable information in a timely manner (Article 7(1)(e) of the CDR).

3.8.1.4. The experience

In order to ensure the selection of the most appropriate bodies for an efficient implementation of the financial instruments, one of the criteria to be applied when selecting the body entrusted with the implementation of a financial instrument is **the experience** of the body with the implementation of similar financial instruments (not necessarily with EU funds) in general, as well as the expertise and experience of the proposed team members in particular (Article 7(2) of the CDR)[25].

3.8.2. Award criteria

The second set of criteria defined in Article 7(2)(a) to (f) of the CDR is linked to the **subject-matter of the contract** on the implementation of the financial instrument. The minimum set of award criteria listed below must therefore be applied. The use of price only or cost only (i.e. in the context of financial instruments management fees or management costs only) methodology to evaluate the offers submitted by bodies implementing financial instruments would not allow managing authorities to apply the full minimum set of evaluation criteria. As a consequence managing authorities selecting bodies implementing financial instruments must apply the most economically advantageous methodology to evaluate the offers.

3.8.2.1. Investment methodology

The managing authority has to evaluate the offers on the basis of the investment methodology proposed in the bidders' offers in respect of the selection of financial intermediaries or final recipients, as applicable, the terms and conditions applied in relation to support provided to final recipients, including pricing, and, where the body implementing the financial instrument allocates its own financial resources to the financial instrument or shares the risk, on the proposed measures to align interests and to mitigate possible conflicts of interests.

- robustness and credibility of the methodology for identifying and appraising financial intermediaries or final recipients as applicable (Article 7(2)(a) of the CDR). The credibility of this methodology may be reinforced by the fact that it already exists and it is effectively functioning in the financial institutions participating in the tender.

- terms and conditions applied in relation to support provided to final recipients, including pricing (Article 7(2)(c) of the CDR). Pricing should cover the range of prices for different types of services and additional

[25] Alternatively criteria relating to experience could be divided between selection and award criteria, experience of the body with the implementation of similar financial instruments being a selection criteria, and the expertise and experience of the proposed team members being an award criteria, if the conditions indicated in paragraphs 31 to 34 of Case C-601/13, *Ambisig* or Article 67(2)(b) of Directive 2014/24/EU are fulfilled.

advantages offered compared to a standard commercial transaction (e.g. reduction of collaterals, facilities in reimbursement in case of repayment difficulties, the possibility or not to provide technical and/or financial advice in specific fields for complex projects, etc.). Where the price is not pre-determined by the provider for a given type of service, the method for calculating the price, or a sufficiently detailed estimate, should be foreseen and communicated.

The terms and conditions could take the form of a simple step-by-step guide helping the final recipients to understand how they should present their requests for investments may be envisaged.

- in cases where the body implementing the financial instrument allocates its own financial resources to the financial instrument or shares the risk, proposed measures to align interests and to mitigate possible conflicts of interest (Article 7(2)(f) of the CDR). A measure to effectively align interests between the investors would be the establishment of an appropriate profit and risk sharing structure for the financial resources invested by the body[26].

3.8.2.2. Ability to raise additional resources

In order to ensure that the highest possible leverage effect for a given financial instrument is achieved, one of the criteria to be applied when selecting the body entrusted with implementation of a financial instrument is its ability to raise resources for investments in final recipients additional to programme contributions (Article 7(2)(d) of the CDR). The offers must therefore be evaluated on the basis of the capacity of the body raise additional resources for investment in final recipients.

3.8.2.3. Additionality of investment activity

In order to ensure the value added of the intervention of ESI Funds, one of the criteria to be applied when selecting the body entrusted with implementation of a financial instrument is its ability to demonstrate that implementation of the financial instrument will not substitute the current activity of the body (Article 7(2)(e) of the CDR).

3.8.2.4. Level of management costs and fees

One of the criteria to be applied when selecting the offer of the body implementing a financial instrument is the level of the management costs and fees which constitute the "price" of the services provided to the managing authority. The methodology proposed for their calculation must be taken into consideration. Both the level of management costs and fees and the methodology for their calculation, must comply with the relevant requirements for performance-oriented remuneration of Article 42 of the CPR and Articles 12, 13 and 14 of the CDR[27].

[26] See guidance note XX on preferential remuneration.

[27] Please also see guidance note XX.

3.8.3. Element to be included in the terms of reference

In order for the Commission to check that the procedures set up and implemented by the body entrusted with implementation of financial instrument(s) are in line with these conditions aiming at protecting EU Funds, the body should **agree to be audited** by Member State audit bodies, the Commission and the European Court of Auditors (Article 7(1)(f) of the CDR). In order to ensure that the body agrees to be audited it is recommended that this condition is indicated in the terms of reference of the call, and indicated in the relevant funding agreement[28].

4. RELEVANT PRACTICE AND EXAMPLES

5. REFERENCE, LINKS

SEC(2011) 1169 final COMMISSION STAFF WORKING PAPER concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')

http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf

Directive 2004/18/EC

Directive 2014/24/EU

Guidance note on preferential remuneration

[28] It should be noted that as regards the EIB (i.e. EIB and EIF according to Article 2(23) of the CPR), according to Article 9(3) of the CDR the managing authority must mandate a firm which must operate under a common framework established by the Commission to carry out on audits. As regards bodies implementing financial instruments other than the EIB, the audit authorities may either carry out the audits directly or mandate external firms. In the latter case they will need to select these firms themselves following the application of public procurements rules and principles since the common framework put in place by the Commission will be specific to the EIB only.