II

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COMMISSION NOTICE

Guidance for Member States on the selection of bodies implementing financial instruments

(2016/C 276/01)

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Reg. (EU) No 480/2014 ([2]) Commission Delegated Regulation (hereafter CDR)	Article 7 — Criteria for the selection of bodies implementing financial instruments
Regulation (EU) No 1305/2013	
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([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.

2. Background

Managing authorities willing to use financial instruments as a tool for achieving the objectives of the programme may either undertake implementation tasks directly, invest in the capital of a newly created or existing legal entity or entrust implementation tasks to other bodies ([1]). In the latter case, Article 38(4)(b) of the CPR provides for different possibilities for entrusting financial instruments implementation tasks. This note aims at providing clarifications about the possibilities of such an entrustment ([2]).

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, typically 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 intermediaries (both being referred to below as bodies implementing financial instruments). 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 after consultation of national authorities in charge of control of competition, 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

([1]) See Article 38(4)(a), (b) and (c) of the CPR.

([2]) Under Article 38(4)(a) of the CPR, as far as the conclusion of a public service contract is required for the selection of a body implementing financial instruments, the rules on selection of such entities as clarified in this note apply.

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 ([3]).

Furthermore, Article 7(1) and (2) of the CDR contains specific requirements applicable to the selection 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 the EIB and the EIF).

The selection of bodies implementing financial instruments does not necessarily coincide with the selection of the financial instrument operation ([4]).

The selection of the operation is done by the managing authority ([5]). Unlike the selection of the body implementing the financial instrument, selection of the operation is not subject to public procurement rules and principles, nor is it subject to the respect of Article 7 of the CDR.

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 bodies implementing funds of funds 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 ([6]) (*i.e.* the managing authority of the 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. In cases of in-house and inter-administrative cooperation, the date when the contracting authority definitively decided that no prior call for competition will be issued for the award of the public contract ([7]), is relevant to determine whether the conditions established by case law or the provisions of Directive 2014/24/EU apply (see below sections 3.5 and 3.6) ([8]).

18 April 2016 was the 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.

([3]) The obligation to follow an open, transparent, proportionate, non-discriminatory selection procedure avoiding conflicts of interest is respected when financial intermediaries are selected in accordance with public procurement rules and principles. When direct contract is possible with a financial intermediary, contracting authorities should check whether more than one entity with which direct contract is possible could provide the financial service in question. Where this is the case contracting authorities must carry out an open, transparent, proportionate, non-discriminatory selection process avoiding conflicts of interest amongst the entities concerned in accordance with Article 38(5) of the CPR. One way to ensure the respect of these requirements is, outside the procedural requirements of the Directive, to inform all entities concerned of the envisaged financial service contract and invite them to submit an offer that the contracting authority would evaluate.

([4]) Selection of the operation must be understood as the decision to make programme financial contribution to the financial instrument and not the subsequent investments from the financial instrument to final recipients.

([5]) Selection of the financial instrument operation for the ERDF/CF/ESF must be done by the managing authority according to 125(3)(a) of the CPR. For the EAFRD the selection of financial instrument operation must be done in accordance with Article 65(4), 66 and 49 of Regulation (EU) No 1305/2013.

([6]) A contracting authority is defined in Article 1(9) of Directive 2004/18/EC ('Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law) and in Article 2(1) of Directive 2014/24/EU ('contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law).

([7]) The relevant date for determining which Directive is applicable is the date when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (C.f. Case C-576/10 Commissions vs Netherlands paragraph 52).

([8]) The award decision must be evidenced but there is no legal requirement regarding the exact form such decision should take. The assessment of the criteria under Article 7 of the CDR does not constitute *per se* an award decision but the contracting authority's decision taken on the basis of the assessment can be taken as the date when the contracting authority definitively decided that no prior call for competition will be issued for the award of the public contract.

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 contracts in the context of both types of cooperation must respect the conditions established by case law (see sections 3.5.1 and 3.6.1 below).

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

3. Selection of bodies implementing financial instruments

3.1. *Selection in accordance with 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 bodies implementing financial instruments in accordance with public procurement rules and principles. These rules must also be respected by intermediate bodies ([9]) and bodies implementing fund of funds which are contracting authorities.

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 other related fundamental principles 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 in accordance with the provisions of 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 ([10]):

— EUR 135 000 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 209 000 for public supply and service contracts awarded by other types of contracting authorities.

In accordance with Article 7 of Directive 2004/18/EC and Article 4 of Directive 2014/24/EU the threshold applies to the estimated value of the services to be provided by the body implementing the financial instrument 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

The guidance for practitioners on the avoidance of the most common errors in public procurement ([11]) 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.

([9]) An intermediate body is defined in Article 2(18) of the CPR as 'any public or private body which acts under the responsibility of a managing or certifying authority, or which carries out duties on behalf of such an authority, in relation to beneficiaries implementing operations'. Intermediate bodies should be selected in compliance with applicable rules including those on public procurement and, where applicable, their exceptions. 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*'. This provision applies to the ERDF, the ESF, the Cohesion Fund and the EMFF. Article 66(2) of Regulation (EU) No 1305/2013 provides for the same possibility for EAFRD, laying down that the managing authority retains full responsibility for the efficiency and correctness of the management and implementation tasks delegated to another body and ensures that all necessary data and information is given to the intermediate body for execution of those tasks.

([10]) These thresholds are subject to a review every two years in accordance with Article 6 of Directive 2014/24/EU.

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

3.1.1.3. Choice of the procedure

Contracting authorities should decide on the most appropriate procurement procedure for the selection of bodies implementing financial instruments.

For particularly complex purchases specific procedures such as the competitive procedure with negotiation or the competitive dialogue (cf. Articles 28 to 31 of Directive 2004/18/EC and Article 26 of Directive 2014/24/EU)) are available in the Public Procurement Directives, allowing, under certain conditions, to accommodate the specific needs of the contracting authority.

According to Article 26(4)(a) of Directive 2014/24/EU, one or the other of those two procedures can be used, inter alia, in case the needs of the contracting authority cannot be met without adaptation of readily available solutions and in case the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attached to them. It is up to the contracting authority to assess whether such specific circumstances exist.

The Directive also provides for the possibility to use the same procedures in case a procurement procedure failed. According to Article 26(4)(b) of Directive 2014/24/EU a competitive procedure with negotiation or a competitive dialogue may, also be used in case only irregular or unacceptable tenders are submitted in response to an open or a restricted procedure. In such a situation when the procedure is used in relation to all tenderers which satisfy the criteria referred to in Articles 57 to 64 of Directive 2014/24/EU and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure, no publication of a contract notice is required.

3.1.1.4. Use of framework agreements

In order to avoid the need for contract modifications and to manage changes in the scope of tasks to be entrusted, for the future, contracting authorities may consider using a framework agreement ([12]).

Framework agreements provide some flexibility in the management of financial services contracts as they allow adjusting the volume of services to the needs of the contracting authorities and/or to the beneficiaries. Since it is not always easy to foresee the volume of demands coming from beneficiaries for financial instruments, use of a framework agreement may provide the flexibility needed to cover lower or higher volumes.

It must be reminded that contracting authorities are not obliged to award specific contracts following framework agreements for the whole amount forecasted. Therefore, if a framework agreement covers several types of financial instruments and a specific financial instrument is found not to be well designed or well adapted to the needs of final recipients, there is no obligation to sign any specific contract to implement such instrument.

Using the same conditions for different financial services entails the risk that price or quality conditions for one specific financial service (or instrument) are affected by those concerning other financial services even if there is no material link between both services (or instruments). For that reason, if use is made of framework agreements, it is recommended to use lots. This allows assessing the price and quality of each lot separately and on its own merits. Tenderers can adjust their tenders by compensating economic or quality conditions between lots in order to present best value for money tenders for several of these lots or to make an effort for one specific lot better adapted to their specific capacities.

Contracting authorities are advised to analyse before launching the tendering procedure the specific objectives of every financial service (or instrument) in relation to the scope of the final recipients targeted by the instrument in order to define the subject-matter of each contract. Flexibility of framework agreements allows contracting in case the financial instrument is successful in terms of demand as well as testing if a specific kind of financial instrument matches the needs of final recipients in a specific economic sector.

The estimated value of the framework agreement (which must be indicated in the contract notice), calculated as the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement, should be assessed having in mind the possibility to cover increases in the amount given for management to the body implementing the financial instrument.

([12]) C.f. Article 1(5) of Directive 2004/18/EC and Article 33 of Directive 2014/24/EU.

As regards the duration of the framework agreement, according to Article 33(1) of Directive 2014/24/EU, the term of a framework agreement must not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement. However as clarified in recital 62 of the Directive, 'while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer'.

3.1.1.5. Contract modifications

Contract modifications under Directive 2004/18/EC, pursuant to applicable case-law, are possible only if this information has been made 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. If this is the case, the contracting authority will have the possibility to avail itself of the same body implementing the financial instrument for the subsequent amendments to the initial contribution up to the indicative amount procured. If those conditions are not fulfilled and the contracting authority substantially amends a contract without procuring again, such amendment would entail a change in the initial tendering conditions contrary to the principle of transparency and equal treatment and thus constituting an irregularity.

Under Directive 2014/24/EU, modifications of contracts are possible without a new procurement procedure in particular in the following situations and provided the specific conditions laid down in Article 72 of the Directive are respected:

— where the modifications have been provided for in the initial procurement documents in clear and unequivocal review clauses stating the scope and nature of possible modifications or options as well as the conditions under which they may be used. The clauses must not provide for modifications or options that would alter the overall nature of the contract or the framework agreement. In order to cover the possibility that the programme contribution in the financial instrument is increased later on, the contracting authority should, when procuring the relevant financial services, estimate *ex ante* possible additional programme contributions and their impact on the estimated contract value.

— for additional services by the original contractor that have become necessary and that were not included in the initial procurement, where a change of contractor cannot be made for economic reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority. In accordance with Article 72, any increase in price must not exceed 50 % of the value of the original contract. In the case that several successive modifications are made, that limitation applies to the value of each modification. Such consecutive modifications must not be aimed at circumventing the Directive;

— where the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee, the modification does not alter the overall nature of the contract and the increase in price is not higher than 50 % of the value of the original contract or framework agreement (in case of several successive modifications the conditions indicated above apply);

— where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either: (i) an unequivocal review clause or option in conformity with the first point; (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directive; or (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71 of the Directive;

— where the modifications, irrespective of their value, are not substantial ([13]);

([13]) Under Article 72(4), 'A modification of a contract or a framework agreement during its term shall be considered to be substantial (…) where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:
(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
(c) the modification extends the scope of the contract or framework agreement considerably;
(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1'.

— where the value of the modification is below the thresholds of application of Directive 2014/24/EU and 10 % of the initial contract value for service contracts. In addition, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value must be assessed on the basis of the net cumulative value of the successive modifications (differing from above).

Conclusion:

Contracting 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, it is recommended that contracting authorities envisage the conclusion of framework agreements rather than proceeding by contract modifications.

3.1.2. *Below the thresholds of the Directive: selection in accordance with the principles of the Treaty*

Below the thresholds of the Public Procurement Directives, the selection of bodies implementing financial instruments must comply with the principles of the Treaty if the contract is of cross border interest.

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 equal treatment, non-discrimination, mutual recognition, transparency and proportionality.

The Commission, building on the ECJ case law, issued an interpretative communication entitled the 'Community law applicable to contract awards not or not fully subject to the provisions of the "Public Procurement" Directives' of 23 June 2006 ([14]) in which the requirements stemming from those principles are developed.

In accordance with the case law of 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 are 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.

Obligations stemming from the principles of the Treaty apply to contracts below the thresholds of the Directives which present a cross border interest. The existence of a certain cross border interest must be assessed 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 ([15]), the specifics of the sector concerned (size and structure of the market, commercial practices, etc.).

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 ([16]), 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 internal rules and procedures which, since the EIB is subject to the Treaty, must comply with the principles of the Treaty.

([14]) 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*.

([15]) 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 as having a certain cross border interest (Joined Cases C-147/06 and C-148/06, *SECAP SpA* (C-147/06) and Santorso Soc. coop. arl (C-148/06), *v Comune di Torino*, paragraph 31).

([16]) C.f. Article 175 TFEU.

In addition, in accordance with 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 3.7 below).

Conclusion:

Managing authorities, intermediate bodies and bodies implementing fund of funds which are contracting authorities may conclude directly with the EIB, *i.e.* without competitive process ([17]), 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 ([18]). 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 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 by providing 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 tasks by 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).

As a result of the special status of the EIF, mandates with regard to management of financial instruments between managing authorities and the EIF may be concluded directly.

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 internal rules and procedures which, since the EIF is subject to the Treaty, must comply with the principles of the Treaty.

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 3.7 below).

Conclusion:

Managing authorities, intermediate bodies and bodies implementing fund of funds which are contracting authorities may conclude directly with the EIF, *i.e.* without competitive process ([19]), 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 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 which designated that managing authority ([20]) is member of the international financial institution and the tasks entrusted fall within the statutory mission of the institution. This possibility is also open under the same conditions to intermediate bodies and bodies implementing funds of funds which are contracting authorities.

([17]) As provided for in Article 13(6) CDR, in the absence of a competitive process, the thresholds for management costs and fees provided in Article 13 apply.

([18]) Act amending the Protocol on the Statute of the European Investment Bank empowering the Board of Governors to establish a European Investment Fund (OJ L 173, 7.7.1994, p. 14).

([19]) As provided for in Article 13(6) CDR, in the absence of a competitive process, the thresholds for management costs and fees provided in Article 13 apply.

([20]) As far as ETC programmes are concerned, it is the Member State in which the managing authority is located.

When designating an international financial institution (except the EIB and the EIF), the managing authorities must check that the institution complies 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 may select financial intermediaries to implement financial instruments. Selection of financial intermediaries by the international financial institution will be carried out in accordance with the rules of the international financial institution.

In addition, in accordance with 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 3.7 below).

Conclusion:

Managing authorities may conclude directly with an international financial institution of which the Member State is member, *i.e.* without competitive process ([21]), 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 public authorities does not rule out the application of public 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.

In that context, a managing authority may consider entrusting the implementation of a financial instrument to an in-house entity ([22]). This is also a possibility for intermediate bodies and bodies implementing funds of funds which are contracting authorities, provided the conditions described below are respected.

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.

When designating an in-house entity, compliance with the conditions under Article 7 of the CDR must equally be ensured.

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 which is a contracting 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 contracting 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.

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 ([23]).

([21]) As provided for in Article 13(6) CDR, in the absence of a competitive process, the thresholds for management costs and fees provided in Article 13 apply.

([22]) Provided the conditions for in-house are fulfilled, it can allow for a direct award of a contract to financial institutions established in a Member State aiming at the achievement of public interest under the control of a public authority referred to in Article 38(4)(b)(ii) of the CPR and to bodies governed by public or private law referred to in Article 38(4)(b)(iii) of the CPR.

([23]) It is difficult to envisage a set up where a contracting authority would effectively control an in-house entity without even partially owning that entity.

Notion of contracting authority

The control must be exercised by contracting authorities in the meaning of Article 1(1) of Directive 2014/24/EU, as listed in Annex I of the Directive. The condition of effective control is therefore fulfilled in case for example a department of a Ministry wants to contract with an in-house entity of the State and an effective control is exercised by another department of the same Ministry through the participation in the governance structures of the in-house entity. However it is not met, for example, in the following situations:

— when a central Ministry wants to contract with an in-house entity of the State and an effective control is exercised by another central Ministry through the participation in the governance structures of the in-house entity.

— when a regional Ministry wants to contract with an in-house entity of the State and an effective control is exercised by a central Ministry through the participation in the governance structures of the in-house entity.

Similar control

According to settled case-law ([24]), there is 'similar control' where the entity in question is subject to control enabling the contracting authority to influence that entity's decisions. The contracting authority does not need to exercise its decisive influence in practice, it is sufficient that it has the possibility to exercise it.

The power exercised must be a power of decisive influence over both the strategic objectives and the significant decisions of that entity ([25]). 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 ([26]).

The condition of similar control is met where the contracting authority participates in the supervisory or management board of the entity (a promotional or development bank for example) and has the possibility to exercise a decisive influence over both the strategic objectives and significant decisions of that entity.

To assess whether the contracting authority can exercise decisive influence over both strategic objectives and significant decisions of the entity, the ECJ examines (i) whether there is private participation in the capital of the entity, (ii) the composition of its decision-making bodies, and (iii) the extent of the powers conferred on its governing council ([27]).

According to ECJ, participation of a private undertaking, even as a minority, in the capital of a company in which a contracting authority is also a participant, excludes the possibility that the contracting authority exercises over that company a control similar to that which it exercises over its own departments ([28]).

However, the fact that the granting contracting authority holds, alone or together with other contracting authorities, all of the share capital in an entity, tends to indicate – generally, but not conclusively – that that contracting authority exercises over that entity a control similar to that which it exercises over its own departments ([29]).

The fact that the entity's decision-making bodies are composed of representatives of the contracting authorities which own the entity shows that the entity is under the control of the contracting authorities, which are thus able to exert decisive influence over both the entity's strategic objectives and significant decisions.

It is necessary to check the extent of the powers conferred on its governing council to assess whether the entity is market-oriented and has such a degree of independence that it would render tenuous the control exercised by the contracting authorities affiliated to it.

The legal form of the company must be taken into account, due to the fact that certain forms of companies can pursue objectives independently of their shareholders.

If under its statutes the entity aims at pursuing the interests of its owners and does not pursue any interest distinct from that of the contracting affiliated authorities, this is an indication of control similar to that exercised over the contracting authority's own departments.

The control exercised by the contracting authorities, via the statutory bodies, over that entity's decisions may be regarded as enabling those authorities to exercise over that entity control similar to that exercised over their own departments.

([24]) Case C-107/98 *Teckal*.
([25]) 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.
([26]) 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.
([27]) Case C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, paragraph 29.
([28]) Case C-26/03 *Stadt Halle and RPL Lochau*, paragraph 49.
([29]) Case C-340/04 *Carbotermo and Consorzio Alisei, paragraph 37, and Case C-295/05 Asemfo* [2007] ECR I-2999, paragraph 57.

This control has to be effective ([30]). It is not enough that the control exercised consists essentially of the latitude conferred by company law on the majority of the shareholders, which results in limits on the contracting authority's power to influence the decisions of those companies ([31]).

Similar control can be exercised individually or jointly:

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 contracting 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 ([32]).

The Court recognised that in certain circumstances the condition relating to the control exercised by the contracting authority could be satisfied where such an authority held only 0,25 % of the capital in a public undertaking ([33]). Joint analogous control is possible even if the percentage of the shareholding is very low provided the rights attached to this shareholding are sufficient for the shareholders to exercise jointly an effective control ([34]).

When the managing authority, intermediate body or body implementing a fund of funds which is a contracting 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 entity must carry out the essential part of its activities for the controlling contracting authority or authorities, i.e. 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. The ECJ has not to date established a percentage that might constitute the essential part of an entity's activity ([35]).

In case the 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 contracting 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 tasks entrusted by the managing authority but where the essential part of the activity of that entity consists of tasks entrusted by the other authorities controlling it.

Conclusion:

The managing authority, intermediate body or body implementing a fund of funds which is a contracting authority may therefore, under the above-mentioned conditions, entrust tasks of implementation of financial instruments to a 100 % publicly 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 contracting 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*

In accordance with Article 12 of 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.

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

([31]) Case C-458/03 *Parking Brixen,* paragraph 69 and Case C-340/04 *Carbotermo,* paragraph 39. In the context of the case under 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 exercised 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.

([32]) See footnote 30.

([33]) Case C-295/05 *Asemfo*, paragraphs 56 to 61.

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

([35]) It can be however noted that the ECJ accepted a percentage of 90 % (see Case C-295/05, *Asemfo*, paragraph 63).

3.5.2.1. Condition concerning the ownership of the in-house entity

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.

A non-controlling and non-blocking private capital participation in conformity with the Treaties refers to a private participation resulting from a transparent and non-discriminatory procedure ([36]) in conformity with the Treaty principles.

It is not required that the contracting authority using the services of an in-house entity owns shares in this entity, provided that entity is 100 % publicly owned, it controls the in-house entity (section 3.5.2.2 below), and criteria of activity (section 3.5.2.3 below) are fulfilled ([37]).

3.5.2.2. Condition of control of contracting authorities over the in-house entity

The contracting authority must exercise a control over the legal person concerned which is similar to that which it exercises over its own departments. Codifying the criteria identified by case law, Article 12(1) of the Directive provides that 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. The indicators of decisive influence by the contracting authority over both strategic objectives and significant decisions of the entity referred to above in section 3.5.1.2 are therefore relevant.

Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority (Article 12(1)), or jointly, provided the conditions laid down in Article 12(3) of the Directive are met ([38]).

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 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 (see Article 12(2) of the Directive).

3.5.2.3. Condition of activity being carried out for the controlling contracting authorities

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. According to Article 12(5) of Directive 2014/24/EU, for the determination of the percentage of activities the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award must be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it must be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

([36]) C.f. Case C-64/08, *Engelmann*, paragraph 50 and Case C-25/14, UNIS, paragraph 39, reminding that although the obligation of transparency does not necessarily require there to be a call for tenders, it does require there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed.

([37]) It is difficult to envisage a set up where a contracting authority would effectively control an in-house entity without even partially owning that entity.

([38]) Under Article 12(3) of 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.

Member States are allowed to use either method. When the average total turnover method is used, turnover should take account of all activities of the entity (e.g. development/promotional bank), and out of it more than 80 %, must be generated by the tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority.

Whenever a managing authority or intermediate body designates an in-house entity as the body implementing a fund of funds and that entity is a contracting authority under the applicable Public Procurement Directive, it must respect public procurement rules and principles when selecting financial intermediaries. In addition, in accordance with Article 7(3) of the CDR, the selection must respect the specific requirements laid down in that provision (see section 3.7 below).

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:

A managing authority, intermediate body or body implementing a fund of funds which is a contracting authority may conclude contracts for the implementation of financial instruments directly with in-house entities provided the requirements under Article 12 of Directive 2014/24/EU are complied with. Selection of financial intermediaries by in-house entities must respect public procurement rules and principles if the in-house entities are themselves contracting authorities.

Example 1:

Region X owns 100 % of a regional development bank whose task, as defined by its Statutes, is to support economic development in the region.

Region X chairs the supervisory board of the bank, whose task is to give the strategic orientations of the activities of the bank and to vote on the budget, staffing and nominations of the managers of the bank.

The bank may freely take daily financing decisions, i.e. to disburse loans and guarantees to undertakings in the region which fall outside the scope of what is considered 'significant'. Significant decisions (such as decisions on lending strategies, staffing, budget) are subject to the decisive influence of the controlling contracting authority.

It results from those arrangements that Region X exercises on the bank a control which is similar to the one exercised on its own departments.

Region X wants to entrust the regional development bank with tasks of implementation of a financial instrument.

Since it effectively controls the bank which it fully owns and since the bank has no commercial activity other than the tasks carried out for Region X, there is an in-house relation between Region X and the bank which allows Region X to entrust tasks of implementation of the financial instrument to the bank provided the bank meets the requirements of Article 7 of the CDR.

Example 2:

Region X owns 1 %, of a national development bank whose task, defined by law, is to support economic development in the Member State.

Region X is Member of the supervisory board of the bank. The bank may freely take daily financing decisions, i.e. to disburse loans and guarantees to undertakings in the region which fall outside the scope of what is considered 'significant'. However, significant decisions (such as decisions on lending strategies, staffing, budget) are subject to the decisive influence of the controlling contracting authority. On the basis of the rights attached to its membership, Region X exercises on the bank a control which is similar to the one exercised on its own departments.

Next to the tasks carried out for Region X, the bank has commercial activities which represent 15 % of its average total turnover.

In June 2016 (under Directive 2014/24/EU) Region X wants to entrust the bank with tasks of implementation of a financial instrument. Since it does effectively control the bank (even if it owns only 1 %) and since the bank carries out more than 80 % of its activities in the performance of tasks entrusted to it by its owners ([39]) (as calculated on the basis of the average total turnover of the bank for the three years preceding the contract award), there is an in-house relation between Region X and the bank which allows Region X to entrust tasks of implementation of the financial instrument to the bank provided the bank meets the requirements of Article 7 of the CDR.

([39]) Assuming for the purpose of the example that the conditions of ownership of an in-house entity laid down in Directive 2014/24/EU and reminded above are fulfilled.

Example 3:

The State owns 100 % a development bank whose task is to support economic development in the Member State.

Ministry X is Member of the supervisory board of the bank. The bank may freely take daily financing decisions, i.e. to disburse loans and guarantees to undertakings in the region which fall outside the scope of what is considered 'significant'. However, significant decisions (such as decisions on lending strategies, staffing, budget) are subject to the decisive influence of the controlling contracting authority and consequently, Ministry X exercises on the bank a control which is similar to the one exercised on its own departments.

Next to the tasks carried out for Ministry X, the bank has commercial activities which represent 15 % of its average total turnover.

In June 2016 (under Directive 2014/24/EU) Ministry X wants to entrust the bank with tasks of implementation of a financial instrument. Since it does effectively control the bank and since the bank carries out more than 80 % of its activities in the performance of tasks entrusted to it by its owners ([40]) (as calculated on the basis of the average total turnover of the bank for the three years preceding the contract award), there is an in-house relation between Ministry X and the bank which allows Ministry X to entrust tasks of implementation of the financial instrument to the bank provided the bank meets the requirements of Article 7 of the CDR.

3.6. ***Inter-administrative cooperation*** ([41])

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.

In that context, a managing authority, intermediate body or body implementing a fund of funds which is a contracting authority may consider using inter-administrative cooperation to entrust tasks of implementation of a financial instrument provided the conditions for such cooperation are fulfilled ([42]).

Inter-administrative cooperation for the implementation of financial instruments may be implemented via a contract between the managing authority, intermediate body or body implementing a fund of funds which is a contracting authority and another contracting authority controlling a 100 % publicly owned entity able to implement financial instruments (i.e. an in-house entity). Alternatively a funding agreement can be concluded directly between the managing authority, intermediate body or body implementing a fund of funds which is a contracting authority and the contracting authority implementing the financial instrument. The contract/funding agreement should cover the modalities for the remuneration of the body implementing the financial instrument ([43]).

When using inter-administrative cooperation, a managing authority, intermediate body or body implementing a fund of funds which is a contracting authority must ensure the respect of the provisions of Article 7(1) and (2) of the CDR.

([40]) Assuming for the purpose of the example that the conditions of ownership of an in-house entity laid down in Directive 2014/24/EU and reminded above are fulfilled.

([41]) Provided the conditions for inter-administrative cooperation are fulfilled, it can allow for a direct award of a contract to financial institutions established in a Member State aiming at the achievement of public interest under the control of a public authority referred to in Article 38(4)(b)(ii) of the CPR and to bodies governed by public law referred to in Article 38(4)(b)(iii) of the CPR.

([42]) A Member State may also designate an intermediate body under inter-administrative cooperation. This intermediate body could then entrust tasks of implementation of a financial instrument via inter-administrative cooperation or to an in-house entity of the intermediate body.

([43]) In case a contract is concluded with the in-house entity, then the price could be paid to the body implementing the financial instrument either directly by the managing authority or indirectly via the public authority 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).

3.6.1. *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 ([44]) may be concluded between public authorities (inter-administrative cooperation) were outside the public procurement rules and were defined by case law.

Inter-administrative cooperation between public authorities to ensure that a public task that they all have to perform is carried out is allowed outside the scope of public procurement rules ([45]). Public procurement rules are not applicable in so far as:

— inter-administrative cooperation concerns exclusively public authorities, without the participation of a private party;

— the principle of equal treatment is respected, so that no private provider of services is placed in a position of advantage *vis-à-vis* competitors ([46]), and

— implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest which the authorities have to perform ([47]).

There is no case law on inter-administrative cooperation in relation to financial instruments. However examples in other fields can illustrate the position of the ECJ on whether cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.

The ECJ admitted that local authorities pursue the aim of ensuring that a public task is carried out if cooperating in the field of waste disposal for the implementation of the obligations laid down in the applicable EU legislation ([48]).

The ECJ also analysed the cooperation between a University and a publicly owned company governed by private law for the purchase of an IT system for higher education management. The ECJ concluded that such cooperation is not aimed at carrying out a public task which both the University and the company at stake have to perform, since the latter is not entrusted directly with the performance of a public service task ([49]).

Inter-administrative cooperation for the implementation of financial instruments requires that the cooperating authorities pursue their tasks in the public interest. This is the case if all activities of the contracting authority/entrusted entity are performed under public mandate entrusted by the law so that the implementation of the financial instrument allows the authorities to perform functions assigned to them by EU or national law, such as financing social measures or providing financing to specific types of SMEs or to promote economic development or research. The pursuit by a managing authority (intermediate body or body implementing a fund of funds which is a contracting authority) of the operational objectives and activities described in a programme (rather than support activities such as development of IT tools or renting of offices necessary to host the staff working on ESIF implementation) can be considered as tasks of public interest. If the same objectives and activities are pursued by other public authorities, their performance may give room for inter-administrative cooperation.

The cooperation between public authorities must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, which requires a case by case analysis.

The remuneration paid by the managing authority, intermediate body or body implementing a fund of funds which is a contracting authority for the implementation of the financial instrument to the body implementing the financial instrument must be equivalent to the one paid by the other public authorities using the services of the body implementing the financial instrument for the same types of financial products delivered to the same types of recipients, subject to the respect of the applicable regulatory provisions on management costs and fees (see in particular Articles 12 and 13 of the CDR).

([44]) There is no formal requirement under EU law applicable to the contract.
([45]) Case C-480/06, *Commission v Germany*, paragraphs 37 and 44 to 47 and Case C-159/11 *ASL Lecce*, paragraphs 35 to 37.
([46]) Where the public authorities cannot fulfil 100 % of the services by inter-administrative cooperation, and must award a contract to a private party for the remaining part, this must be done via public procurement procedure, where applicable, to ensure equal treatment.
([47]) Case C-480/06, *Commission v Germany*, paragraphs 44 to 47.
([48]) Case C-480/06, *Commission v Germany*, paragraph 37.
([49]) Case C-15/13 *Technische Universität Hamburg-Harburg, Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH*, paragraphs 16 and 35.

Conclusion:

Until Directive 2014/24/EU is transposed or until 18 April 2016, whatever is earlier, a managing authority, intermediate body or body implementing a fund of funds which is a contracting authority may, subject to compliance with the conditions laid down in case law, enter into inter-administrative cooperation agreements with a public authority 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*

Under 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. As indicated under Section 3.6.1, the pursuit by a managing authority, intermediate body or body implementing a fund of funds which is a contracting authority of the operational objectives and activities described in a programme (rather than support activities such as development of IT tools, renting of offices necessary to host the staff working on ESIF implementation) can be considered as tasks of public interest.

(ii) the implementation of that cooperation is governed solely by considerations relating to the public interest (see the implications explained above in section 3.6.1 in terms of remuneration).

(iii) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation. Consequently the limitation does not apply to the activity on the market outside the cooperation.

Under the last condition, which provides for a strict limitation of the activities on the market outside the cooperation, the participating contracting authorities must perform less than 20 % of the activities concerned by the cooperation on the open market.

If the parties of the inter-administrative cooperation do not engage in economic activities or any sort of competition with other market actors, the condition of Article 12(4) point (c) is met because no activity is carried out on an open market.

According to Article 12(5) of Directive 2014/24/EU, for the determination of the percentage of activities the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award must be taken into consideration. By definition this calculation does not cover activities newly carried out under the cooperation, i.e. not carried out by any of the participating contracting authority before the cooperation.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it is sufficient to show that the measurement of activity is credible, particularly by means of business projections.

The range of contractual arrangements described above in section 3.6.1 is also available ([50]),

Conclusion:

After transposition of Directive 2014/24/EU or after 18 April 2016, a managing authority, intermediate body or body implementing a fund of funds which is a contracting authority 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. The range of contractual arrangements described above in section 3.6.1 is also available.

([50]) i.e. direct contract between the managing authority, intermediate body or body implementing a fund of funds which is a contracting authority and another contracting authority controlling a 100 % publicly owned entity able to implement financial instruments (i.e. an in-house entity) and direct contract between the managing authority, intermediate body or body implementing a fund of funds which is a contracting authority and the contracting authority implementing the financial instrument.

Example:

The Ministry of Economy controls a 100 % publicly-owned development bank whose task as defined by law is the provision of loans and guarantees to SMEs to support innovation on the whole territory of the country.

Region Y implements a programme aiming at supporting innovation in the region. It does not control, neither individually nor jointly, the national development bank. Therefore no in-house relation exist between the two.

Inter-administrative cooperation might be possible if the conditions for such cooperation are met:

1. The contract establishing a cooperation concluded either between the Ministry of Economy and Region Y or between the development bank and Region Y must aim at ensuring that public services the Ministry and Region Y have to perform are provided with a view to achieving objectives they have in common. As far as Region Y is concerned it is enough that the support for innovation in the region is an objective targeted by the programme.

2. The implementation of the cooperation must be governed solely by considerations relating to the public interest. In particular, the remuneration of the service must be provided to the Region on the same terms as to the Ministry. If the financial products that the Region asks the bank to implement are already provided by the bank for the Ministry, the bank is charging the same costs and fees to the Region for the implementation of a financial instrument providing these products. If the financial products that the Region asks the bank to implement are not provided by the bank, the national development bank accepts to charge the same costs and fees to the Region than those it would charge for the Ministry.

3. The participating contracting authorities must perform on the open market less than 20 % of the activities concerned by the cooperation. The national development bank must not provide financing of the type concerned by the cooperation (i.e. type of financial product provided to a certain type of recipients in a certain sector, for example equity for innovation targeting start-ups) on the open market for more than 20 % of its average total turnover for the three years preceding the contract award.

Provided the national development bank meets the requirements of Article 7 of the CDR, Region Y can award a contract to that bank and sign the contract with the bank directly.

3.7. ***Requirements of Article 7 of the CDR***

Article 7 of the CDR sets out criteria to be applied by the managing authority when selecting 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) regardless of the amount of the contract and regardless of the selection procedure of the bodies concerned (open call, negotiated procedure, competitive procedure, direct award). The provisions of Article 7(3) of the CDR apply to the selection of financial intermediaries by the bodies implementing a fund of funds.

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

When tasks of implementation of financial instruments are entrusted to a third party in accordance with one of the procurement procedures provided for in the Public Procurement Directive, in view of Article 7 of the CDR it must introduce at least the selection, award criteria and elements for the terms of reference listed below in points 3.7.1 to 3.7.3. Outside this situation, i.e. in case of direct award of a contract the selection criteria referred to in Article 7 of the CDR need to be applied but not as selection criteria, award criteria and elements indicated in terms of reference.

3.7.1. *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.

3.7.1.1. 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).

3.7.1.2. 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.

3.7.1.3. 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 must 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).

3.7.1.4. The experience

In order to ensure the selection of the most appropriate bodies for an efficient implementation of the financial instruments, the managing authority must take due account of the experience of the body entrusted with the implementation of a financial instrument 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). This requirement should not prevent the designation of a newly created entity, upon evaluation of the experience of the team members. Evaluation of the experience of the team members will normally be an award criteria since it is relevant as regards the offer (to evaluate who will work on the provision of the services tendered) and not as regards the bidder.

3.7.2. *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 the lowest 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.

3.7.2.1. 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).

— 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 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 what types of services are to be rendered and what type of remuneration will be covered by the contract.

— 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 ([51]).

3.7.2.2. Ability to raise additional resources ([52])

In order to ensure the highest possible leverage effect for a given financial instrument, 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 to carry out additional investments.

3.7.2.3. Additionality of investment activity ([53])

In order to ensure the value added of the intervention of the 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 addition to the current activity of the body (Article 7(2)(e) of the CDR).

3.7.2.4. 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.

3.7.3. *Elements for the terms of reference*

It is recommended to insert in the terms of reference conditions the bidders must agree on. Insertion in the terms of reference is not the only way to guarantee their respect, but it ensures upstream that the potential tenderers are made aware of these conditions.

In order to ensure that the compliance of the procedures set up and implemented by the body entrusted with implementation of financial instrument(s) with applicable rules can be checked, 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 in the relevant funding agreement ([54]). In order to ensure the respect of Article 38(4) of the CPR, it is also recommended that the terms of reference indicate that the body implementing a financial instrument must not be established and must not maintain business relations with entities incorporated in territories whose jurisdictions do not cooperate with the Union in relation to the application of internationally agreed tax standards and must transpose such requirements in its contracts with the selected financial intermediaries.

4. **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')

([51]) C.f. guidance note on preferential remuneration EGESIF_15-0030-00.

([52]) The requirement that bidders demonstrate their ability to raise additional resources could alternatively be a selection criteria if the contracting authority would want to evaluate if the contractor raised additional resources in the past and not in relation to the financial instrument which management is tendered.

([53]) The requirement that bidders demonstrate the additionality of the investment activity could alternatively be a selection criteria if the contracting authority would want to evaluate if the contractor is able to provide for additional investment activity.

([54]) 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 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 following the application of public procurement rules and principles.

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 EGESIF_15-0030-00