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| | | MS | | |
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| 1 | 2 | BG | Is there a possibility for a Fund manager to entrust some of the tasks in regard of the implementation of FI directly to IFIs? Particularly when specific need is identified that could best be approached in collaboration with an institution such us EIB Group, EBRD and IBRD, a direct contracting would facilitate the process. The IFIs specific competences and know-how in the management of financial instruments should be taken into account in regard of their limitation to participate in PPPs.<br><br>Is it possible this question to be clarified in the Guidance? | Provided a body implementing a fund of funds is a contracting authority it has the possibility to directly contract with EIB EIF as explained in sections 3.2 and 3.3 of the guidance note.<br>Contracting authorities (including Fund of Funds managers) may entrust tasks of implementation of financial instruments to IFIs under the conditions explained in Section 3.4 of the guidance note. |
| 2 | | FR | Les autorités françaises s'interrogent sur la suppression de la partie relative aux fonds de co-investissement dans la note présentée fin février à l'EGESIF. Cette possibilité ouvrait une souplesse dans les procédures de sélection, pour les autorités de gestion concernées. Les autorités françaises demandent à la Commission de justifier cette suppression.<br><br>Les autorités françaises souhaitent, également, savoir si une autorité de gestion d'un programme respecte les exigences de sélection d'un organisme gestionnaire d'instrument financier ou chargé de la mise en œuvre de fonds de fonds, visées à l'article 38 §4 et §5 du règlement 1303/2013 en procédant à la sélection des organismes via :<br>• une procédure ouverte (type appel à manifestation d'intérêt - AMI),<br>• transparente (publication de cet AMI au journal officiel de l'Union européenne - JOUE),<br>• non discriminatoire (avec des critères de sélection objectifs publiés dans le cadre de l'AMI). | La partie relative au co-investissement a été supprimée dans la mesure où il ne semble pas y avoir place, dans le cadre de la mise en œuvre d'instruments financiers envisagés à l'article 38(4)(b) du CPR, pour ce cas de figure envisagé initialement. En effet, dans ce contexte il est avant tout nécessaire de choisir un gestionnaire d'instruments financiers. Il parait donc artificiel de considérer que le co-investissement pourrait prévaloir.<br>Par conséquent réintroduire dans la note la partie qui a été supprimée présenterait le risque d'ouvrir de fausses pistes. C'est pourquoi la version finale de la note ne mentionne pas le co-investissement.<br><br>Lorsque qu'un organisme chargé de mettre en œuvre un fond de fonds sélectionne des intermédiaires financiers, il doit le faire, en vertu de l'article 38.5 du CPR, selon une |

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| | | | | procédure ouverte transparente proportionnée et non discriminatoire et prévenant les conflits d'intérêts.<br>Lorsque qu'un organisme chargé de mettre en œuvre un fond de fonds est un pouvoir adjudicateur, la sélection des intermédiaires financiers par cet organisme est soumise aux règles sur les marchés publics à moins que cet organisme fasse usage des situations, mises en évidence dans la note de guidance, qui ne tombent pas dans le champ des règles marchés publics. Dans ce contexte il convient de souligner qu'une procédure d'appel à manifestation d'intérêt n'est pas assimilable à une procédure de marchés publics.<br>Lorsque qu'un organisme chargé de mettre en œuvre un fond de fonds n'est pas un pouvoir adjudicateur, il n'est pas soumis aux règles marchés publics mais il doit néanmoins sélectionner les intermédiaires financiers selon une procédure ouverte transparente proportionnée et non discriminatoire et prévenant les conflits d'intérêts. Dans ce cas, hors du champ d'application des directives marchés publics une procédure d'appel à manifestation d'intérêt répond aux exigences d'ouverture et de transparence requises par l'article 38.5 du CPR. Une telle procédure doit néanmoins être proportionnée, non discriminatoire et prévenir les conflits d'intérêts afin de se conformer entièrement à |

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| | | | | cette disposition. |
| 3 | 3.5.2.1 | HR | Comment 1<br>Section 3.5.2.1. Condition concerning the ownership of the in-house entity<br><br>The guidance note affirms that, since ECJ case-law has assessed only cases where there was ownership (see footnote 23), one should assume that direct ownership by the contract authority who wishes to apply the Teckal exception under Article 12.3 (joint control) is a necessary condition, although such ownership could be limited to one share.<br>However, under section 3.5.2.1, last para, it is acknowledged that:<br>"It is not required that the contracting authority using the services of an in-house entity owns shares in this entity, provided the in-house entity is 100% publicly owned and the other criteria indicated below are fulfilled. It is however difficult to envisage a set up where a contracting authority would effectively control an in-house entity without even partially owning that entity".<br>Recommendation 1: Croatia proposes that the last sentence from the paragraph is deleted from the final version of the guidance.<br><br>Recommendation 2: Croatia proposes that the EC includes an example where capital of the national promotional bank consists of one share which is owned by the state (government), which means that no single ministry owns or partially owns the national promotional bank. | The revised version of the guidance note is reformulated on this point (see section 3.5 on in-house, in particular 3.5.1.1 and 3.5.1.2 and 3.5.2.1 and 3.5.2.2). However it is maintained that 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 (see footnotes 30 and 44).<br><br>An additional example of a fully state owned in-house entity was introduced. The number of shares owned in case of single shareholder is not really relevant<br><br>As far as minor shareholding is concerned Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa), Administración del Estado* is of relevance. The Spanish Autonomous Communities, each with one share, hold 1% of the capital of Tragsa. The ECJ judged that |

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| | | | | Tragsa is an in-house entity of the autonomous communities. This is subject to the condition that even with one share the owner is able to exert and effective control over the in-house entity.<br><br>To conclude on the existence of an in-house relation all in-house criteria must be fulfilled. |
| 4 | 3.6.2 | HR | Comment 2<br>Section 3.6.2. Conditions for inter-administrative cooperation after transposition of the Directive 2014/24/EU or after 18 April 2016<br>In the example at page 23 one reads the following: "As regards the third condition for inter-administrative cooperation, the national development bank does not provide financing of the type concerned by the cooperation (i.e. type of product concerned for the sector concerned, for example equity for innovation) on the open market for more than 20% of its average total turnover for the three years preceding the contract award".<br>As recognised in the guidance document, there is no ECJ case law on inter-administrative cooperation in relation to financial instruments.<br>However, in a document published by DG market the following interpretation is provided:<br>"Business on the market outside the cooperation has to be strictly limited: the participating contracting authorities must perform less than 20% of the activities concerned by the cooperation on the open market (i.e. outside the cooperation)".<br>http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-05-public-public_en.pdf<br>Croatia asks that the third condition is better explained, particularly as regards the "open market" concept. | The guidance note was revised on this point to address HR comments. In particular, the explanation already provided by DG GROW and according to which the participating contracting authorities must perform less than 20% of the activities concerned by the cooperation on the open market was added in the guidance note, as well as an indication that the 20 % limitation does not apply to the activity on the market outside the |

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| | | | | cooperation.<br><br>Commission services consider that in the field of financial instrument the type of instrument provided to a certain type of recipients in a certain sector may be considered to as the activity covered by the cooperation. .<br><br>See also reply to question 6 below. |
| 5 | 3.5 | HU | Chapter 3.5, In-house award<br>Paragraph 3<br>As also articulated at the meeting, we propose to complement the sentence as follows:<br>„In that context, a managing authority or a body implementing fund of funds may consider entrusting the implementation of a financial instrument to an in-house entity."<br><br>Paragraph 6<br>Also with reference to our intervention at the EGESIF, we propose to insert the following sentence for clarification:<br>„When designating an in-house entity, the managing authorities, bodies implementing fund of funds or | The revised version of the guidance note is complemented on this point. A body implementing a fund of fund may consider entrusting the implementation of a financial instrument to an in-house entity when that body is a contracting authority. If the body implementing a fund of fund is not a contracting authority the entrustment of a financial instrument by that body is not subject to public procurement rules. It must however select financial intermediaries on the basis of open, transparent, proportionate and non-discriminatory procedures, in accordance with Article 38.5 of the CPR. See also reply to question 2 above.<br><br>The guidance note was modified slightly on this point because The CPR does not envisage a derogation to the application of Article 38 (5) |

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| | | | intermediate bodies must ensure compliance with provisions of Article 7(1) and (2) of the CDR. The conditions set out in Article 38(5) of the CPR are considered to be fulfilled in case of in-house designation." | when an entity with whom direct contracting is allowed is chosen as financial intermediary. When an entity with whom direct contract is allowed is chosen by a body implementing a fund of funds as financial intermediary, the provisions of Article 38 (5) require that the body implementing a fund of funds check whether other entities with whom direct contract is possible could provide the financial service in question. Where this is the case, the body implementing the fund of funds 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 (See footnote 6). |
| 6 | | HU | Chapter 3.6.2<br>In what form shall the objectives common to the parties of an inter-administrative cooperation be agreed under Article 12(4) of Directive 2014/24/EU? | There does not need to be an explicit agreement between the entities carrying out an inter-administrative cooperation on the fact that they have common objectives.<br>However the implementation of that cooperation must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest |

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| | | | | which the entities have to perform.<br><br>The contract establishing or implementing the cooperation between the participating contracting authorities must have the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common. No specific form is required for that contract. The guidance clarifies that 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. |
| | | | Please provide an interpretation of Article 12(4) point (c) of Directive 2014/24/EU in the context of cohesion | |

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| | | | policy. Specifically, is this provision relevant if none of the parties of the inter-administrative cooperation engage in economic activities or any sort of competition with other market actors? | It is not possible to provide a general conclusion concerning Article 12(4) point (c) of Directive 2014/24/EU in the context of cohesion policy.<br>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.<br>See also reply to question 4. |
| 7 | 2 | LV | Please confirm our understanding that this statement<br>"The selection of bodies implementing financial instruments must not be confused with the selection of the financial instrument operation."<br>is to ensure responsibility of MA and of Monitoring committee to decide on the level of operations (i.e., type of financial instrument to be used) is not put forth to the bodies implementing financial instruments. Thus, the selected bodies are obliged to perform implementation of specific financial instrument only according to predefined design. As MA is the one to decide on the most appropriate implementing structure taking into consideration the findings of the ex-ante assessment required under Article 37(2) of the CPR consequently this does not preclude situation when the selected body performs both - role of Fond of Funds and actual implementation of specific financial instrument. | The drafting has been slightly revised to indicate that the two events do not necessarily coincide. The purpose of this sentence was to distinguish between the selection of the operation which falls within the scope of the managing authority's tasks under article 125(3)) but is not subject to public procurement rules, from the selection of the body implementing the financial instrument which is subject to public procurement rules except for situations falling outside the scope of these rules as highlighted in the guidance note.<br>It is correct that it is the responsibility of MA to select the operation (which means it takes the decision to make programme financial contribution to the financial instrument, not the subsequent investments from the financial |

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| | | | | instrument to final recipients) taking into consideration the findings of the ex-ante assessment required under Article 37(2) of the CPR.<br><br>When the operation takes the form of a programme contribution to a fund of funds, it is possible for the body implementing the fund of funds to implement also a specific financial instrument.<br>If the body implementing a fund of funds is a body that can be entrusted directly as explained in the guidance note, the design of the operation may already foresee that that body will be the body implementing the fund of funds and possibly as well one or more specific financial instruments within that fund of funds.<br>If the managing authority does not consider concluding a contract for the implementation of a fund of funds with an entity to whom direct award of a contract is allowed, then a public procurement procedure shall indicate whether the services that the contracting authority wants to buy are the implementation of a fund of funds or both the implementation of a fund of fund and the implementation of a specific financial instrument.<br>There is no timing prescribed in the CPR for the selection of the operation and the selection of the beneficiary. Selection of the |

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| | | | | body implementing the fund of funds may therefore take place before or after the selection of the operation. In case it is selected before it can be expected that the design of the operation will mention the body implementing the fund of funds and its responsibilities and involvement in implementing specific financial instruments. If the FoF operation is selected before the body implementing the FoF the operation does not necessarily need to indicate that the body implementing the FoF will also be requested to implement a specific financial instrument. This can be an option in the context of a call for tenders, the contracting authority deciding to implement the option or not depending on the bids submitted. |
| 8 | | LV | " In case of in-house and inter-administrative cooperation, the date of the award decision, or, where no award decision is adopted, the date when the fulfilment of Article 7 of the CDR criteria was positively assessed, 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). "<br><br>In Q&A document accompanying "guidance for MS on Art.42(1) (d) CRP- Eligible management costs and fees" answer Nr.36 states that the Commission does not preclude exact form in which formal decision selecting the body for actual implementation should be taken (inter alia not setting any limitations regarding timing and sequence for adoption of documents concerning further implementation of Financial instruments).<br><br>Therefore, in case of Latvia, according to Article 37 of CPR ALTUM's (national development institution) involvement in implementation of FIs is justified in ex-ante assessment "SME Access to finance ex-ante Assessment for Latvia" (has been approved by monitoring committee 30.04.2015.)- and as of this particular date we consider the formal decision selecting body for implementation of FoF and some specific financial | The date of the award of the service contract to an entity with which direct award is allowed is necessary for two main reasons:<br>- to identify the rules applicable to In-house and inter-administrative cooperation when the body implementing the financial instrument falls under one of the two situations. These rules are close but not similar under Directive 2014/24/EU and, prior to the application of the Directive, under Case law.<br>- to identify, according to the note on management costs and fees, the starting date for eligible preparatory costs. |

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| | | | instruments is taken. Meanwhile, ALTUM evaluation to prove its compliance with Article 7 of Commission Reg.480/2014 (CDR) is ongoing and will cover both roles of ALTUM- tasks as FoF and actual implementation of some FIs. The evaluation will be finalized before the signing of FoF funding agreement.<br><br>According to this guidance, please clarify whether the date of "in-house or inter-administrative cooperation award decision" and the date of "formal decision selecting the body for actual implementation" should be the same date; and Commission in both cases does not set any requirements regarding the form of award/decision? | The date of the in-house or inter-administrative cooperation award decision is prior to the date of the signature of the funding agreement. According to Case law the date of the award decision is 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).<br><br>The revised version of the guidance note is adjusted to refer to Case law conditions and to indicate that 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<br><br>The note indicates that there is no requirement concerning the format the award decision should take. |

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| | | | In our case, in-house or inter-administrative cooperation award decision would set formal framework for institutional relations but would not change the body which will be acting as FoF and whose involvement in implementation of FIs is already justified in ex-ante assessment "SME Access to finance ex-ante Assessment for Latvia" and approved by monitoring committee. Nevertheless, if Commission's opinion is that both these dates should be the same- we will have to change the date as of which management costs and fees incurred for preparatory work may be included in the eligible expenditure. | On that basis the MA should identify the date when it decided definitively not to go for a prior call for competition for the award of the contract concerning the implementation of the financial instrument and take this date as the starting date for eligible preparatory costs. |
| 9 | | LT | „The selection of bodies implementing financial instruments must not be confused with the selection of the financial instrument operation.<br><br>The selection of the operation is done by the managing authority on the basis of the selection criteria defined by the monitoring committee. 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."<br>Please provide an example/clarify, how these processes should be arranged separately having in mind that the scope and specific features of the planned operation are proposed by fund of funds manager/financial intermediary and directly related to it. It is specified in the definition of the beneficiary in CPR that "beneficiary" means a public or private body and, for the purposes of the EAFRD Regulation and of the EMFF Regulation only, a natural person, responsible for initiating or both initiating and implementing operations; and in the context of State aid schemes, as defined in point 13 of this Article, the body which receives the aid; and in the context of financial instruments under Title IV of Part Two of this Regulation, it means the body that implements the financial instrument or the fund of funds as appropriate.<br>Please amend the provision as follows: „The selection of bodies implementing financial instruments must not be confused with the selection of the financial instrument operation although the selection procedures may be implemented together or separately". | In order to make clear that the selection of the operation was not subject to public procurement rules, the distinction between selection of the operation and selection of the beneficiary was clarified in the note.<br><br>The operation is defined as " the decision to make programme financial contribution to the financial instrument and not the subsequent investments from the financial instrument to final recipients ".<br><br>According to Article 125(3)(a) of the CPR selection of the operation is the responsibility of the managing authority or of the intermediate body acting on its behalf.<br><br>In the context of financial instruments the managing authority is deciding about the financial contribution from the programme to the financial instrument.<br><br>Selection of the operation may coincide with the selection of the beneficiary when the |

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| | | | | beneficiary is an entity to whom direct award is allowed. But the selection of the beneficiary following a public procurement procedure is not necessarily concomitant to that of the selection of the operation (the wording of the guidance note is adjusted to lift any ambiguity in this respect, the sentence quoted being possibly misleading).<br><br>See also replies to questions 7 and 17. |
| 10 | | | 3 Selection of bodies implementing financial instruments<br>We would like to stress out once again that selection of body to implement FI should be supplemented with the exclusive right option as this option is stipulated in the Directive 2014/24/EC.<br>Possibility to apply the exclusive right is clarified in the Commission Staff Working Paper Concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation') (dated on 4.10.2011, SEC(2011) 1169) (hereinafter – Working Paper).<br>In the Working Paper it is stated, that "the term "exclusive rights" could refer to quite different phenomena ranging from reserving a whole economic sector to public authorities to the exclusive assignment of one specific task to one specific undertaking. However, not every exclusive right justifies the exemption of the award of a public service contract. Article 18 stipulates that the respective exclusive right needs to be granted by a law, regulation or administrative provision which is published and compatible with the Treaty (the Treaty on the Functioning of the European Union). Furthermore, Article 18 only concerns rights granted to particular public sector bodies to provide certain services, on an exclusive basis, to the public sector."<br>Accordingly, in order to apply the above mentioned exception the main criteria that have to be evaluated and fulfilled are as follows:<br>1. The exclusive right is given by one contracting authority to another contracting authority;<br>2. The exclusive right has to be based on a legal act;<br>3. The exclusive right must be compatible with the Treaty.<br>The most sensitive question in this case is a compatibility with the relevant rules of the Treaty, in particular Articles 49 and 56 of the Treaty and the rules and principles that flow from these articles. These rules and | The Commission services cannot see room for exclusive rights conferral by a law compatible with the treaty in the field of implementation of financial instruments and LT did not come up with arguments demonstrating compliance |

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| | | | principles include non-discrimination, transparency, proportionality, mutual recognition and the protection of the rights of individuals. Considering the jurisprudence regarding the exclusive rights that are compatible with the Treaty, the exclusive rights are linked with the services of general economic interest.<br>As also stipulated in Article 1(4) of the Directive 2014/24/EC, the Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organized and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 Treaty.<br>According to that, we would like to draw Commission services attention to the fact that the evaluation of aforementioned criteria and principles depends on each Member State legal basis and national legal acts which are in force. Moreover, granting of the exclusive rights is under responsibility of each Member State and in each case Member State itself has to decide and ensure that the exclusive rights granted under respective legal acts are compatible with the Treaty.<br>Therefore we ask Commission services in the Guidance for Member States on the selection of bodies implementing FIs, including funds of funds, include all the options stipulated in Directive 2014/24/EC and the selection of those options reserve for the Member States. | of such a law with the treaty.<br><br>The Commission services do not consider that the exclusive rights option would be a route that MS could explore in order to select a body implementing financial instruments.<br>However it is correct that it is up to MS to evaluate whether the conditions for granting exclusive rights are fulfilled.<br>In case of different conclusion of an audit body as to the fulfilment of the conditions for exclusive right conferral, a financial correction may be necessary.<br>See Case C-280/06 Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia vs Administración General del Estado. |
| 11 | 3.6 | LV | Please could you clarify whether under Article 38 paragraph 4 point b) (ii) of CPR it is allowed following entrustment to invest in the capital of FoF (in our case- in capital of ALTUM)? Furthermore, may FoF further invest ESI Funds resources in the capital of other legal Entity (fixed capital) that will provide actual implementation of FI (intermediaries) or should it be contributed in other form, e.g.- as liabilities (obligation) to support financial instruments? | This question is related to the guidance note on implementation options of FIs and it will be replied in this context. |
| 12 | | LV | Does the Commission set any requirements regarding the form for Inter-administrative cooperation contract? Do we understand correctly that the date of this contract would not necessarily be also the date of inter-administrative cooperation award decision (please, see comment on pg.5)? | There is no EU law requirement concerning the form of the contract for inter-administrative cooperation. The contract must be concluded on the basis of the national rules.<br>The financial service contract resulting from the inter-administrative cooperation does not |

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| | | | | necessarily need to be signed on the date when the conditions for inter-administrative cooperation are assessed.<br>The decision to award the service contract in the context of inter-administrative cooperation precedes the signature of the funding agreement with the contracting authority implementing the financial instrument.<br>See also reply to question 8. |
| 13 | | LV | ", or directly via the conclusion of a funding agreement between the managing authority and another public entity implementing the financial instrument."<br>Please could you explain more regarding the possibility of direct conclusion of a funding agreement?<br><br>Do you consider 100% publicly owned body as a public entity in the meaning of this statement (could national development institution which is 100% publicly owned and acting within public remit be considered as public | The guidance refers in section 3.6 to different implementing modalities for inter-administrative cooperation.<br>The first is a contract between the managing authority and another contracting authority controlling a 100% publicly owned entity able to implement financial instruments. In this triangular relation the contractual relation would be between the managing authority and a contracting authority controlling an in-house entity able to implement financial instrument<br>The second is a contract between the managing authority and the entity owned in house by another contracting authority. The managing authority would conclude directly a funding agreement with a contracting authority implementing the in-house entity.<br>See for instance Case C-480/06, Commission v Germany.<br>The conditions for inter-administrative cooperation prior to application of Directive |

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| | | | entity)? | 2014/24/EU were established by case law by reference to public authorities.<br>Article 12.4 of Directive 2014/24/EU now refers to contracting authorities. The guidance note was adjusted accordingly. |
| | | | Central Finance and Contracting Agency of Latvia (CFCA) on behalf of MA will sign the funding agreement. The mandate to sign mentioned agreement is definite in public law. CFCA is designated as an Intermediate Body – Cooperation Institution, providing practical acquisition of the EU funds and is state administration institution subordinated to the Ministry of Finance.<br>Via direct conclusion of the funding agreement- would there be a specific role for the shareholder/subordinated institution of this particular public entity able to implement financial instruments? | On the basis of the information provided the Commission services understand that a funding agreement would be signed between CFCA (assuming it is a wholly public intermediate body) and ALTUM (assuming it is a 100% publicly owned national development institution acting within public remit). This could be envisaged under inter-administrative cooperation provided the other conditions for inter-administrative cooperation are fulfilled, i.e. that no private provider of services is placed in a position of advantage vis-à-vis competitors[1], and that 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[2] (which |

[1] Where the public entities 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.

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

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| | | | | requires that CFCA and ALTUM have such objectives in common). Due to the tasks of the CFCA which is a Central Finance and Contracting Agency of Latvia, this is a priori not the case.<br><br>In case of direct conclusion of a funding agreement between CFCA and ALTUM under inter-administrative cooperation, it is not required that CFCA would have control over ALTUM via a participation in its governance bodies. |
| 14 | 3.6 example | LV | Could you confirm that there is no role or specific functions envisaged for the Ministry of Economy in this case (no agreements needed between MA (Region) and Ministry of Economy)? Is this setting valid for both cases before and after transposition of Directive 2014/24/EU or after18 April 2016? | In case of direct agreement between the MA and the entity implementing the financial instrument (ALTUM), no agreement between the MA and the ministry of Economy is needed nor in case of direct contract between CFCA and ALTUM.<br>The possibility for such a direct contract to fall under inter-administrative cooperation is subject to the fulfilment of the inter-administrative cooperation conditions. |
| 15 | 3.8.2.2 | LV | Article 7 CDR: ability of the selected body to raise additional resources<br><br>Whilst we completely agree that mentioned aspect is indeed orientated towards determining the most economically advantageous tender, at the same time it should be stressed that practical difficulties may occur when using this criterion. Mentioned difficulties arise from following:<br>1. The obligation of contracting authority to evaluate only aspects which are related to the subject matter of the contract; | 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. |

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| | | | 2. The obligation of contracting authority use only such award elements, which can be objectively verified.<br><br>Against this background we see potential risks related to evidence which should be required from the tenderer in order to prove the compliance with mentioned criterion. It would probably be pointless to ask only for tenderers own statement regarding its ability. However, pirma facie there are no other, more suitable means of evidence. Considering the past abilities to attract the investments it must be stated that, likewise regarding the investment products, the past performance does not guarantee similar success in the future. In addition, such requirement might be interpreted as related to qualification requirements rather then award criterion, thus creating serious legal risks.<br>In the light of above mentioned considerations we kindly ask you to clarify (by, perhaps, stating examples) the possible complaint and effective means of evidence for ability to raise the additional resources that contracting authority could require from the tenderers during procurement procedures. | However in relation to the financial instrument which the managing authority is setting up it is expected that the criteria is applied as an award criteria in order to evaluate the different offers.<br>A commitment from the bidder to invest into the financial instrument its own resources or resources of a third party with whom a firm commitment was signed could be envisaged. |
| 16 | Title | PL | 1. The title of the guidance note suggests, that fund of funds is a subtype of a body implementing financial instruments – this statement is not in line with the CPR, which makes clear distinction between these 2 categories of entities (see the definition of a beneficiary - art 2(9) CPR) and hence can be misleading with regard to the objective scope of certain provisions of the guidance note. Therefore the phrase “including” should be replaced with “and”. | This is corrected. |
| 17 | 2 | PL | 2. Please clarify the following statement:<br>The selection of the operation is done by the managing authority on the basis of the selection criteria defined by the monitoring committee. 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 on the basis of the methodology and criteria used for the selection of operations examined and approved by the monitoring committee in accordance with Article 110 (2) of the CPR. For the EAFRD the selection of financial instrument operation shall be done in accordance with Article 65(4), 66 and 49 of Regulation (EU) No 1305/2013. 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.<br>Please confirm that the first sentence "The selection of bodies implementing financial instruments must not be confused with the selection of the financial instrument operation" concerns only bodies implementing financial instruments in the meaning of article 2(9) CPR. | Yes this is the case.<br>The note was reformulated on this point.<br>The purpose of this paragraph is only to clarify that 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 |

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| | | | It should be clarified how the requirements concerning the selection of a beneficiary by a public procurement procedure (as set out in the guidance note) correspond with the provisions of article 110(2) CPR which gives the Monitoring Committee exclusive right to examine and approve the methodology and criteria used for selection of operations.<br><br>When the operation is implemented without establishing the fund of funds, it is impossible to separate the process of selection of a body implementing financial instrument from the process selection of a beneficiary – it stems from article 2(9) CPR in connection with article 2(10) CPR.<br><br>Moreover it should be clarified how the requirements concerning the selection of a beneficiary by a public procurement procedure (as set out in the guidance note) correspond with the provisions of article 110(2) CPR which gives the Monitoring Committee exclusive right to examine and approve the methodology and criteria used for selection of operations.<br>If the above-cited provision concerns the fund of funds, it is still impossible to separate the process of selection of an operation and the process of selection of a fund of funds (i.e. a body implementing financial instruments in the broader meaning). | According to article 110(2) of the CPR the Monitoring Committee shall examine and approve the methodology and criteria used for selection of operations.<br><br>However the selection of bodies implementing financial instruments must not be confused with the selection of the financial instrument operation (the decision to make programme financial contribution to the financial instrument).<br>See also reply to question 7, 9 and 32<br><br>Article 2 (10) of the CPR indicates that in the context of financial instruments the beneficiary is the body that implements the financial instrument or the fund of funds as appropriate. Therefore when the project is implemented without establishing a fund of Funds the beneficiary is the body implementing the financial instrument.<br><br>It is possible to have the operation selected (this being the decision to make programme |

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| | | | | financial contribution to the financial instrument) and a separate process of selection of the body implementing the Fund of Funds. In order to avoid ambiguities and cover all possible scenario, the guidance was reviewed and indicates that "The selection of bodies implementing financial instruments does not necessarily coincide with the selection of the financial instrument operation". |
| 18 | | PL | 3. In Q&A table - point 45, page 24 the Commission points out that: for the implementation of the tool under Article 38 (4)(b) of the CPR there is no exception to the application of public procurement law,<br>and on page 25: It is not possible to conclude from the terminology used in Article 38(4)(b) of the CPR that public procurement rules do not apply.<br>However in relation to EIB (and other international financial institutions) the guidance note states that: Selection of financial intermediaries by the international financial institution will be carried out in accordance with the rules of the international financial institution.<br>Article 38(4)(b) CPR concerns both EIB and international financial institutions. This means that Q&A table is not in line with the provisions of the guidance note as regards this issue. If application of public procurement procedures is obligatory for all categories of entities listed in article 38(4)(b) CPR, the interpretation from Q&A table should be consistently applied to EIB and international financial institutions on par with the third category of entities referred to in article 38(4)(b) CPR.<br>The Commission should delete the provisions granting the EIB and international financial institutions privileged position.<br>It should be also noted, that article 38(4)(b)(ii) CPR allows for entrustment of implementation tasks to "international financial institutions in which a Member State is a shareholder, or financial institutions established in a Member State aiming at the achievement of public interest under the control of a public authority". However in section 3.4 of the guidance note, the Commission refers only to the first category of entities and in section 3.6, footnote 40, it is clearly stated that entrustment to institutions at national level falls within the scope of public procurement procedures. The construction of the article 38(4)(b)(ii) CPR suggests that these two categories of entities should be treated in the same way. | Article 38 of the CPR does not create derogations to the application of public procurement law.<br>The possibility for direct award of financial service contracts to EIB EIF and IFI in which a Member State is a shareholder does not stem from the CPR but from the Treaty as regards EIB EIF, and from the member ship of Member States in international financial institutions as regards these institutions.<br><br>Because the possibility of direct award to these entities does not stem for the CPR, the fact that "IFI in which a Member State is a shareholder" and "financial institutions established in a Member State aiming at the achievement of public interest under the control of a public authority" are both mentioned in Article 38(4)(b) (ii), do not entail possibilities for Member State to directly award financial service contracts to financial |

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| | | | | institutions established in a Member State aiming at the achievement of public interest under the control of a public authority.<br><br>Direct award of a financial service contract to financial institutions established in a Member State aiming at the achievement of public interest under the control of a public authority is subject to public procurement rules, and is possible under these rules only in case the conditions for in-house and inter-administrative cooperation are met.<br><br>Both the Guidance and the Q&A are correct in this respect. |
| 19 | | PL | 4. In Q&A table - point 57 the Commission points out that: under Article 38 (4)(b) the main objective of the managing authority is always to purchase a service.<br>This interpretation goes beyond the cited provisions of the CPR and cannot apply to all financial instruments envisaged to be implemented in a Member state. A financial instrument which requires co-investment at the level of 20 or 50% cannot be treated as purchase of service – Commission's interpretation limits the scope of functions and tasks performed by financial intermediaries in such FIs. | As already explained, there does not seem be room, in the framework of the implementation of financial instruments under Article 38 (4) (b) of the CPR, for co-investment. In this context it primarily necessary to choose a body implementing financial instruments. It would be artificial to consider that co-investment could prevail.<br>Consequently reintroducing in the note the part which was deleted would present the risk of opening of wrong tracks. That is why the final version of the note does not mention the co-investment.<br>See also reply to question 2 above. |

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| 20 | | PT | Following the presentation of the Investment Strategy of the Social Innovation Fund (SIF) at the last Monitoring Committee meeting, which also approved the selection criteria for SIF operations, the relevant Management Authority (MA) intends to entrust the management of SIF's top layer (the Fund of Funds - FoF) using an inter-administrative cooperation procedure.<br><br>Provided it fulfils all other legal EU and national regulation applicable, does the FoF award decision require per se any special legal set-up (eg. Decree Law)? Or, should national regulation allow alternative awarding set-ups, can it be done directly by the MA through a written notification/communication to the selected FoF manager? And should this be the case, is there a template / example the EC could share with MS for this particular purpose?<br><br>Additionally, can it be merged with the following step in the process (the assessment and potential approval of the FoF operation, on the basis of the selection criteria defined by the monitoring committee), in a single procedure? Or is it necessary to clearly separate both moments? | As explained in footnote 9 and 10 of the revised version of the guidance note, according to case law, the date of the award decision is 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.<br>The award decision must be evidenced but there is no legal requirement regarding the exact form such decision should take.<br>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<br><br>Award decision could also be at the time of selection of the operation but PT authorities must be aware of the consequences of the contract award date as reminded in reply to question 8.<br><br>See also reply to questions 6, 12 and 13 |

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| 21 | 3 | SI | As it may require some additional clarification we would appreciate receiving EC services reply on the question of correlation between the ownership of the ESI funds (or the way the debt at the level of the bodies implementing FIs is treated/accounted) that are allocated to the i) entrusted entity which would act as a fund of funds, or ii) to the manager of the FIs, and the way of nomination/entrustment (ie. through public procurement, IH, IAC)? How is ownership of the ESI funds (or the debt) treated in terms of accounting and budget/public finances in case of public procurement or designation/award (through IH, IAC ...) to a public or private entity? | The selection procedure of the body implementing the financial instrument has no impact on the accounting of the Funds used by the selected entity.<br>Accountancy of the transactions carried out by the Financial instrument is done according to accounting standards.<br>Under Article 38 (4) (a) where the managing authority invests in the capital of existing or newly created legal entities dedicated to implementing financial instruments consistent with the objectives of the respective ESI Funds, which will undertake implementation tasks the programme contribution transferred will appear in the financial assets of the managing authority and in the equity of the legal entity.<br><br>Under Article 38 (4) (b), the bodies to which the implementation tasks have been entrusted should manage the programme contribution through fiduciary accounts or a separate block of finance as indicated in Article 38(6) CPR. These bodies act for the managing authority's benefit in line with the funding agreement and the programme resources are represented in their financial statements as "off-balance sheet" assets. |
| 22 | 3.5.1.1 | SI | Please, clarify the requirement of MA ownership. What does it mean to have one or more shares in the FoF? If | Section 3.5.1.1 is about the first condition for |

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| | | | we take the example of the Slovene Enterprise Fund, which is 100% owned by the Republic of Slovenia, represented by Government, MA is part of Government, but MA doesn't have a share in SEF. - Please, can you explain if it is possible to select the Development Bank directly (its sole shareholder is the state, but at the same time carry out part of the tasks on the behalf and for the account of the state and part of the tasks for its own account; the state is also involved in Steering committee)? In this case a part (that deals with structural funds) of the development bank would be isolated (special account or special entity?). | in-house.<br><br>The question of in-house is not about ownership of the fund of fund but of the entity that will be able to manage a fund of funds.<br><br>The question is however understood to be about the relation between the MA, an IB and an in-house entity that would be selected as a body implementing a financial instrument.<br><br>The guidance refers to the conditions for in-house relations that were identified by Case law. It explains inter alia that the in-house entity must be 100% publicly owned and that the MA or IB must exert over that entity a control similar to the one it exerts over its own departments.<br><br>The note was reformulated to explain that even though the Court never identified a condition of ownership by the contracting authority willing to use the in-house entity the Court only concluded on the existence of an effective control on the basis of cases where the contracting authority owned fully or partially the in-house entity. The note quotes (Cf Section 3.5.1.1 footnote 28) as an example a case where a very minor shareholding was considered to be sufficient for the control (jointly exercised with other shareholders |

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| | | | | control) to be effective (Case C-295/05, ASEMFO).<br><br>If the MA wants to make use of the Slovene development bank, it needs to assess whether:<br>- the Slovene development bank is 100% public. This condition seems to be fulfilled.<br>- the MA is effectively controlling the bank (individually or jointly).<br>- the bank exercises the essential part of its activities (before Directive 2014/24/EU,) or more than 80% of its activities, for the contracting authorities controlling it.<br><br>If one of these three conditions is not met the Slovene authorities are invited to check whether the conditions for inter-administrative cooperation are met. |
| 23 | 3.5.1.2 | SI | Does the condition of 'similar control' means the participation in Steering committee by MA. Is there enough participation with just one member or requires a certain percentage of the membership control? | The participation of the MA in governance structures of the bank must allow the MA to exercise an effective control on it. This does not depend on the number of Members of the MA in the steering committee of the Fund but on the capacity of the MA to exercise an effective control i.e. to exert a decisive influence over both strategic objectives and significant decisions of the controlled legal person be that with a single Member of the MA in the steering committee of the Bank or with the participation of one or more |

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| | | | | members in other governance structures of the Bank. |
| 24 | 3.5.2.2 | SI | Please provide explanation at which point is meeting of the condition of similar control being assessed – ie. for a certain period prior to the award, at the time of the award ... In addition, please clarify or confirm that the "control" condition is not limited to the implementation of financial instrument and/or fund of funds at the entity concerned but rather to business operations of the entrusted entity as a whole – in general | Control of the contracting authority (ies) over the in-house entity must be effective at the moment of award of the contract, but not necessarily prior to the award.<br><br>The control over the activities carried out by the in-house entity is a control over the entity beyond the implementation of a financial instrument. |
| 25 | 3.5.2.3 | SI | Please provide further clarification (if applicable also by means of amendment) of the wording herein as it derives from EC services reply to questions no. 9 that the "... in-house entity must carry out more than 80% of its activities for the public entities which are exercising an effective control over it ..." (ie. the control is not limited to the controlling c/a). May it therefore be understood that this condition does not apply exclusively to the controlling c/a but rather to (all) public entities effectively holding the control over the entrusted legal person.<br><br>In addition, would you in principle consider eligible for the IH award a situation whereby the in-house entity is 100% publicly owned, controlling c/a exercises majority control over the controlled l/p (in terms of number of supervisory board members) and the latter carries out 100% public mandate (mandated to it under the law). | Under Article 12(4) of directive 2014/24/EU, the in-house entity must carry out more than 80% of the activities covered by the cooperation for the contracting authority(ies) exercising an effective control over it.<br>Several contracting authorities may exert jointly an effective control over an in-house entity. The activity criteria is to be calculated in relation to all controlling contracting authorities and not only in relation to the contracting authority willing to entrust the in-house entity with the implementation of a financial instrument.<br><br>The situation described could be an in-house situation provided the controlling contracting authorities exercise an effective control over the in-house entity. This requires a decisive influence over both strategic objectives and |

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| | | | | significant decisions of the controlled legal person regardless of the numbers of supervisory board members on the total, be that via the participation in the supervisory board or via the participation in other governance structures. The effective control can be exercised jointly with other contracting authorities provided the contracting authority willing to contract with an in-house body exercises an effective control.<br>Activity must not only be carried out under public mandate but must be entrusted to it by the controlling contracting authorities. It is to the Slovene authorities to check if this condition is fulfilled in this case.<br><br>If the Fund of Funds is a contracting authority which entrusts tasks of implementation of a financial instrument to a financial intermediary which is 100% public, then the FoF can directly award a contract to that financial intermediary under inter-administrative cooperation provided the conditions for inter-administrative cooperation are met. The revised version of the guidance note is completed on this point. |
| | | | In the case that we have a FoF and the financial intermediary is under 100% competence MEDT, we believe the public procurement process for the selection of a financial intermediary is not required. Is this understood correctly? | |
| 26 | 3.6.1 | SI | Please clarify that performing functions assigned to authorities by EU or national law is includes performance of tasks in the area of EU Cohesion Policy/gap analysis, if so stipulated by the law | One of the conditions for inter-administrative cooperation is that the implementation of the cooperation is governed solely by considerations relating to the public interest |

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| | | | | (see the implications explained above in section 3.6.1 in terms of remuneration).<br><br>As indicated under Section 3.6.1 of the guidance, this is the case if the implementation of the financial instrument aims at allowing the participating contracting authorities to perform functions assigned to them by EU or national law.<br><br>The guidance also explains that the pursuit by a managing 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 and that if the same objectives and activities is pursued by another participating contracting authority, their performance may give room for inter-administrative cooperation. |
| | | | Please clarify (and/or amend accordingly) to whom this refers – i.e. also to the entities in function of pursuing public interest within their legal public mandates | The revised version of the guidance note is clarified on this point: it is referring to contracting authorities in an inter- |

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| | | | | administrative cooperation. |
| 27 | | SI | The participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.<br><br>As it remains rather unclear which activities/cooperation is/are concerned in the context of FIs, we suggest further clarifying and/or directly amending the wording of the condition or clarification hereunder so as to provide understanding that this limitation relates or is limited to the (newly) established cooperation means and volumes for exercising of FIs and/or FOF and not to the areas in which these entities otherwise operate (even though they would be the same in terms of areas and/or instruments, but not (ESI) funds). Is in this case performance of activities in the area of market gaps (ex ante) considered to be out of the "open market" limitation?<br><br>In addition, if all activities of the contracting authority/entrusted entity are performed under public mandate entrusted by the law, may this be considered as performance out of the "open market" limitation? | Business on the market outside the cooperation is limited: the participating contracting authorities must perform less than 20% of the activities concerned by the cooperation on the open market (i.e. outside the cooperation)<br><br>This limitation does not only apply to the newly established cooperation means and volumes in FIs and/or FOF, but also the areas and/or instruments which these entities already operate. This can be understood from Article 12 (5) according to which 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 shall be taken into consideration".<br><br>As indicated in reply to question 4, Commission services consider that in the field of financial instrument an activity covered by |

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| | | | | the cooperation refers to to the type of financial product provided to a certain type of recipients in a certain sector.<br><br>If all activities of the contracting authority/entrusted entity are performed under public mandate entrusted by the law, the condition that objectives in the public interest are pursued will certainly be met. However still it remains to be checked that the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation. Since the percentage is fixed by reference to the activities performed by the participating contracting authorities, it requires that each of the contracting authority on its own does not pursue the activity concerned by the cooperation so that the sum of these activities does not represent overall more than 20 % outside the cooperation. |
| 28 | 3.7 | SI | Please clarify in which case is public procurement relevant? We understand that we have to follow public procurement only in the case from Article 38, point 4 c of the CPR, when IB implements FI directly. | The designation of any intermediate body providing services for a managing or certifying authority is subject to the respect of public procurement law including their exceptions (cf situations falling outside the scope of application of PP rules as highlighted in the guidance note).<br>The note was reformulated to make clear that designation of intermediate bodies for implementing financial instruments does not |

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| | | | | fall outside the scope of public procurement law. Selection of intermediate bodies is also subject to the respect of public procurement law. The possibilities of using in-house entities or inter-administrative cooperation in case of designation of intermediate bodies are explained in footnotes 28 and 50. |
| 29 | | SI | Please clarify why you don't use the definition for IB from Article 2 of the CPR?<br>'intermediate body' means 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 that were referred to in Section 3.7 (now in footnotes 28 and 50) are intermediate bodies in the meaning of Article 2(18) of the CPR. |
| 30 | 3.7 example | SI | Can you confirm that this example can be used in our situation: Ministry of infrastructure or Ministry of environment designated MoEDT as an intermediary body. MoEDT has an institution that fulfills all the conditions for FoF (an can be chosen directly). What is the role of the MA in this particular case? From the case presented it is not clear whether the Ministry of finance is at the same time also MA or intermediary body.<br>Can the Ministry of Environment sign the agreement with the bank directly in the case that both ministries are part of The Government and The Government represents the Republic of Slovenia as a legal person. | In the example given in the note the Ministry of environment is the managing authority. It designates the Ministry of finance as intermediate body thus delegating to that Ministry tasks of implementation of a FI. Since the Ministry of finance has an in house relation with a development bank, it can make use of this development bank to implement the financial instrument. The MA has no relation with the development bank but concludes a written agreement with the Ministry of Finances covering the tasks entrusted, in accordance with Article 123(6) CPR. The Ministry of finance is not managing authority but in accordance with Article 2(18) of the CPR, an intermediate body "which acts under the responsibility of a managing or certifying |

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| | | | | authority, or which carries out duties on behalf of such an authority, in relation to beneficiaries implementing operations".<br>Under this set up where it is not envisaged that the Ministry of environment signs the contract with the bank directly. However under inter-administrative cooperation this could be the case.<br><br>Assuming that the designation of MoEDT by the Slovenian authorities has been done in conformity with applicable law (see reply to question 30 above) it is possible that the MoEDT is designated by the managing authority as intermediate body implementing a fund of funds provided it fulfils the selection requirements set out in Article 7 CDR.<br><br>It is up to the national authorities to assess the fulfilment of the in-house conditions in relation to the individual entities concerned.<br><br>If designation of MoEDT as intermediate body does not offer an appropriate solution and if the in-house conditions are not met, the Slovenian authorities should check whether in their specific case the conditions for inter-administrative cooperation are met. |
| 31 | 2 | SK | We kindly ask that the following sentence from the Section 2 including the footnote is deleted from the guidance as it is i) outside of the scope of the guidance and ii) confusing: „The selection of the operation is | See also reply to question 7, 9 and 17. |

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| | | | done by the managing authority on the basis of the selection criteria defined by the monitoring committee.“ The remainder of this part of the text on the selection of operation should be either deleted or rephrased.<br><br>Although the monitoring committee sets the selection criteria for selecting operations, neither the committee, nor the managing authority should interfere into the selection of operations by the body implementing financial instruments. Managing authority defines the criteria, performance indicators, investment strategy, eligibility etc. but must not interfere in the day to day operational decisions of the fund of funds and certainly not interfere in the projects to be supported through financial instruments.<br><br>Please refer also to the requirements set in:<br>Implementing Regulation 964/2014, Article 4 (2): In the case of a fund of funds, the managing authority shall exercise only its supervisory role at the level of the fund of funds without interfering in individual decisions by the fund of funds.<br>Delegated Regulation 480/2014, Article 6 (1): The bodies implementing financial instruments shall perform their obligations in accordance with applicable law and act with the degree of professional care, efficiency, transparency and diligence expected from a professional body experienced in implementing financial instruments. | It is clarified in footnote 8 in the revised version of the guidance note that selection of the operation must be understood as the programme contribution into the Financial instrument and not the subsequent investments from the Financial instrument in final recipients. |
| 32 | 3.1.1.4 | SK | 2. In article 3.1.1.4. there is wording „financial engineering instruments“ in the 2nd paragraph of this Article, we suppose there should be only „financial instruments“ wording. | This is corrected in the revised version of the guidance. |
| 33 | 3.6 | SK | 3. For the sake of clarity, in the section 3.6, the public authority should be changed to public entity at the end of the second sentence in the second paragraph as we understand that the Managing Authority can possibly cooperate not only with bodies which are public authorities, but also with public entities (as specified in the fourth pararaph of this section). For the same reason, the term authorities should also be changed to public entities in the section 3.6.1, on the page 22, in the second paragraph. | The sentence commented by the SK authorities is a quotation of recital 31 of Directive 2014/24/EU.<br>Before Directive 2014/24/EU, case law defined the conditions for inter-administrative cooperation by reference to public authorities. Under Directive 2014/24/EU the possibility for inter-administrative cooperation is offered to |

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| | | | Furthermore, can you confirm that a 100 % publicly owned body, which has no private capital and is owned by a public entity, is considered to be a public entity itself? If not, the term 100 % publicly owned body should be added in the section 3.6, fourth paragraph as follows: „or directly via the conclusion of a funding agreement between the managing authority and another public entity or 100 % publicly owned body implementing the financial instruments.“ | contracting authorities, i.e. by reference to the EU law notion of contracting authority as defined in the Directive.<br>The revised version of the guidance is adjusted accordingly.<br><br>Therefore Inter-administrative cooperation before the application of Directive 2014/24/EU is possible with a 100 % publicly owned public entity provided that entity is considered to be a public authority under national law. Under Directive 2014/24/EU inter-administrative cooperation is possible with a 100 % publicly owned public entity provided that entity is considered to be a contracting authority in the meaning of the Directive. |
| 34 | | SK | 4. General comments:<br>we would strongly encourage the EC services to elaborate additional guideline on financial correction (similar as the Guideline for determining financial corrections to be made to expenditure co-financed by the EU ... EGESIF_14-0015-02 which is valid for 2007 – 2013 period) valid for financial instruments 2014 – 2020, as we feel it is very closely linked with present guideline on selection. As we have impression from the discussions on last EGESIF meeting, that some conditions determining the set-up of implementation arrangements for financial instruments are not very clear (e.g. how to assess if there is execution of similar control – see art. 3.5.1.2. of present guideline on selection) we need to know if there are any financial consequences arising from improper set-up. | Such guidelines might be prepared at a later stage.<br><br>The conditions of similar control have been spelt out in the revised version of the guidance note taking into account Case law and the provisions of the directive. See also reply to question 31. |
| 35 | | SK | we support the requirement of our Czech colleagues, made orally on the last EGESIF meeting, for elaboration of „Questions and Answers“document regarding the implementation of the financial instrument for 2014 – 2020 period, which would explain on more practical level the rules for implementation based on the Member States questions (not adding additional guidance, as was interpreted on the EGESIF meeting). | |

**Annex 2:**

**Comments from the Member States on the Commission – Guidance on Selection of Bodies implementing financial instruments, including Fund of Funds following the EGESIF meeting of 21 October 2015**

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| 36 | 3.5<br>3.6 | UK | UK COMMENTS/CLARIFICATION – Concerning ERDF England FIs<br><br>We note that it was not possible to finalise the wording of the "Guidance for Member States on the selection of bodies implementing FIs including fund of funds" (EGESIF 15-0033) at the EGESIF meeting last week. The UK is concerned that this may affect the development of financial instruments in the English 2014-2020 ERDF programme. It creates uncertainty at a time when we need clarity about how potential applicants can design their funds and start delivery in a timely way.<br>Given this, the ERDF England Managing Authority has set out its three proposed models for implementing FIs in the English ERDF Programme. The MA has designed these models based upon the wording in the previous versions of the selection guidance and is therefore confident that they are fully compliant with the legal requirements at this time. The UK urges the Commission to finalise the guidance as soon as possible and not to introduce any wording which would render these models non-compliant.<br><br>The first model is an in-house award to a subsidiary of the British Business Bank (BBB) which falls under 3.5.2 of the current guidance as Directive 2014/24/EU has been adopted in England. The British Business Bank is wholly owned by the Department for Business, Innovation and Skills (BIS). Both the BBB and BIS are contracting authorities, so the MA would be able to entrust either to deliver the fund through the BBB subsidiary. The three requirements of ownership of the in-house entity, condition of control by public authorities and the activity being carried out for the public authorities are met under this structure.<br><br>The second model is very similar except the contracting authority is a different public body, for example a council. Again, they are a contracting authority and they would deliver the activity through a subsidiary. Again, each of the headline conditions of 3.5.2 is met under this structure.<br><br>The third model is inter-administrative cooperation (3.6) based on the idea of two or three councils entering into an agreement to deliver the FI through an intermediary. The contract between them will ensure that the arrangement meets the requirements set out at 3.6.2 (I),(II) and (III). | It is to the UK authorities to asses that the conditions for in-house are met. On the basis of the information provided in the first model presented in the question, and provided that BBB subsidiary is 100% public, nothing indicates that it would not be the case.<br><br>On the basis of the information provided in the second model presented in the question it is not possible to conclude that the in-house conditions are met because there does not appear to be an effective control over the subsidiary of BBB from the contracting authority (for instance the council).<br><br>It is to the UK authorities to asses that the conditions for inter-administrative cooperation are met. On the basis of the information provided in the question it is unclear how the beneficiary would be selected and if the |

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| | | | We note that the inter-administrative cooperation model could also allow for the MA to be a party to the cooperation agreement, but there are currently no plans to adopt this approach in the English programme. | councils would make use of an existing intermediary (and if yes how would that intermediary be selected), or would create one. |
| 37 | 3.8 | UK | More widely, we welcome the recent changes, in particular those at 3.6 and 3.7, which explain that it would not be necessary to designate an organisation as an IB for the purposes of implementing an FI unless they genuinely took on powers delegated by the MA. This is an important point for us, because under the above models the recipients of funding would be delivering specific projects rather than exercising IB roles such as selection or monitoring. Could you please confirm our understanding of this point in the Q&A accompanying the guidance?<br>The UK authorities look forward to the finalisation of the guidance and to confirmation in the Q&A document of our understanding in relation to the point on IBs. | Your understanding is confirmed.<br>It is not necessary to designate an organisation as an IB for the purposes of implementing an FI unless they genuinely took on powers delegated by the MA.<br><br>See also reply to question 30. |