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This document is provisional, without prejudice to the on-going negotiations in the Trilogues between the European Parliament and the Council (in line with the principle that "nothing is agreed until everything is agreed"). This document is a draft that shall be adjusted following the expert meeting.

It does not prejudice the final nature of the basic act, nor the content of any delegated or implementing act that may be prepared by the Commission.
1. EMPOWERMENT

- Article 32(10) of the CPR sets out that:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 142 laying down additional specific rules on purchase of land and on combination of technical support with financial instruments."

- Article 33(5)bis of the CPR sets out that:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 142 laying down additional specific rules on the role, liabilities and responsibility of bodies implementing financial instruments, related selection criteria and products that may be delivered through financial instruments in accordance with the provisions under Article 32. The Commission shall notify the delegated acts, adopted in accordance with Article 142, simultaneously to the European Parliament and the Council within four months of the adoption of this Regulation."

- Article 34(5) of the CPR sets out that:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 142 concerning the management and control of financial instruments pursuant to Article 33(1)(b) of the CPR, including controls to be performed by managing and audit authorities, arrangements for keeping supporting documents, elements to be evidenced by supporting documents, and management and control and audit arrangements. The Commission shall notify the delegated acts, adopted in accordance with Article 142, simultaneously to the European Parliament and the Council within four months of the adoption of this Regulation."

- Article 35(3) of the CPR sets out that:

"The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 142, the rules for withdrawal of payments to financial instruments and consequent adjustments in respect of applications for payment."

- Article 36(4) of the CPR sets out that:

"The Commission shall be empowered to adopt delegated acts in accordance with Article 142 laying down the specific rules concerning the establishment of a system of capitalisation of annual instalments for interest rate subsidies and guarantee fee subsidies."

- Article 36(6) of the CPR sets out that:

"The Commission shall be empowered to adopt, by means of delegated acts in accordance with Article 142, the specific rules setting out the criteria for determining management costs and fees on the basis of performance and the applicable thresholds as well as rules for the reimbursement of capitalised management costs and fees for equity-based instruments and micro-credit."

This document is based on the preliminary agreement reached on Title IV of the CPR between the institutions on 2 July and endorsed by COREPER on 24 July, and is a provisional text, without prejudice to the on-going negotiations (in line with the principle that "nothing is agreed until everything is agreed").
2. MAIN OBJECTIVES AND SCOPE OF THE DELEGATED ACT

The delegated act is to provide non-essential supplementary elements that will ensure (i) a coherent framework for all stages of financial instruments implementation and (ii) continuity of guidance previously provided by the Commission. The delegated act reflects the principles agreed by the Coordination Committee of the Funds (COCOF) for the programming period 2007-2013 and established in the most recent COCOF Guidance Note on Financial Engineering Instruments (COCOF 10-0014-04). It also takes into consideration a set of recommendations made by the European Court of Auditors\(^1\), as well as the principles contained in the Financial Regulation.

3. MAIN ELEMENTS OF THE DELEGATED ACT

In line with the empowerments contained in the CPR, the delegated act will include the following elements:

3.1. Purchase of land (empowerment under Art 32(10) CPR)

1. Financial instruments financed by the ERDF, the Cohesion Fund and the EAFRD may support investments that include the purchase of land not built on and land built on for an amount of up to 10% of the total eligible expenditure incurred by the financial instrument for support provided to each individual final recipient.

2. Where financial instruments provide support to final recipients for activities falling under Article 7 (1) of the ERDF Regulation, the limit referred to in paragraph 1 shall be increased to 20%.

3. In exceptional and duly justified cases, higher percentages may be permitted for operations concerning environmental conservation.

3.2. Combination of technical support with financial instruments (empowerment under Article 32(10) CPR)

Grants for technical support may be combined with financial instruments in a single operation pursuant to Article 32(5) of the CPR only for the purpose of technical preparation of the prospective investment for the benefit of the final recipient to be supported from this operation.

3.3. Selection of bodies implementing financial instruments, and bodies that implement funds of funds (empowerment under Article 33(5)bis CPR)

1. Before the managing authority selects a body to implement a financial instrument, and a body to implement a fund of funds, in accordance with Articles 33(4)(a) and (b) of the CPR, it shall ensure that the following minimum requirements are fulfilled by that body:

   a) entitlement to carry out relevant implementation tasks under Union and national law;

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\(^1\) European Court of Auditors, Opinion 7/2011.
b) adequate economic and financial viability;

c) adequate capacity to implement the financial instrument, including organisational structure and governance framework providing the necessary assurance to the managing authority;

d) existence of an effective and efficient internal control system;

e) use of an accounting system providing accurate, complete and reliable information in a timely manner;

f) agreement to be audited by Member States audit authorities, the Commission and the European Court of Auditors, without prejudice to the provisions of Article 5(3).

2. When selecting bodies referred to in paragraph 1, managing authorities shall take due account of the nature of the financial instrument to be implemented, the prior experience of these bodies with the implementation of similar financial instruments, and funds of funds, the expertise and experience of proposed team members, and their operational and financial capacity. The selection shall be transparent and justified on objective grounds, shall not give rise to a conflict of interest and at least the following selection criteria shall be used:

a) a robust and credible methodology for identifying and appraising bodies implementing financial instruments or final recipients as applicable;

b) the level of management costs and fees for the implementation of the financial instrument and the methodology proposed for their calculation;

c) terms and conditions applied in relation to support provided to final recipients, including pricing;

d) the ability to raise resources for investments in final recipients additional to programme contributions;

e) for existing financial instruments, the ability to demonstrate additional activity in comparison to present activity and overall strategy in the sector;

f) in cases where bodies implementing the financial instrument, and bodies that implement funds of funds, allocate own financial resources to the financial instrument or share the risk, proposed measures on alignment of interest and to mitigate possible conflicts of interest.

3. When managing authorities entrust implementation tasks to the EIB through the direct award of a contract, the requirements referred to in paragraphs 1 and 2 are considered to be met.

4. When the body that implements the fund of funds, including the EIB, further entrusts the whole or part of the implementation tasks to the body implementing financial instruments, it shall ensure that the requirements referred to in paragraphs 1 and 2 are met in respect of these bodies.
3.4. Role, liabilities and responsibility of bodies implementing financial instruments and bodies that implement funds of funds (empowerment under Article 33(5)bis CPR)

1. The bodies implementing financial instruments, and bodies that implement funds of funds, shall act with the diligence of a professional manager and in good faith and shall ensure that:

a) final recipients receiving support from financial instruments are selected with due account of the nature of the financial instrument and the potential economic viability of investment projects to be financed. The selection shall be transparent and justified on objective grounds and shall not give rise to a conflict of interest;

b) final recipients are informed that funding is provided under ESI Funds co-financed programmes, in accordance with the requirements laid down in Article 105 and Annex VI of the CPR and Annex 5 of the CPR for the ERDF, ESF and the Cohesion Fund, Article 73(i) of RD Regulation for the EAFRD and Article 143 of the EMFF Regulation for the EMFF;

c) financial instruments provide support to final recipients and activities in a proportionate and least distortive manner.

d) preferential treatment of private investors or public investors operating under the market economy principle, as referred to in Articles 32(2)(c) and 38(1)(b) of the CPR, shall be proportionate to the risks taken by these investors and limited to the minimum necessary to attract such investors, which shall be ensured through financial design requirements and the procedural safeguards, such as a competitive or an independent assessment process of such preferential terms;

2. The bodies implementing financial instruments, and bodies that implement funds of funds, shall ensure that no claims can be made on ESI Funds beyond the amounts committed to the financial instrument.

Direct financial liability of the managing authority towards bodies implementing financial instruments, and bodies that implement funds of funds, or final recipients as well as any other debt or obligation of the financial instrument shall not exceed the amounts committed to the financial instrument in accordance with the relevant funding agreements.

3. In case of irregularities, the bodies implementing financial instruments, and bodies that implement funds of funds, shall be liable for reimbursement of the amounts of programme contributions affected by irregularities, together with interest and any other gains generated by these contributions. Reimbursements in excess of the programme contributions shall be used in accordance with the provisions of Article 38(1) of CPR.

3.5. Specific rules regarding certain products that may be delivered through financial instruments (empowerment under Article 33(5)bis CPR)

Financial instruments providing guarantees shall respect the following conditions:

a) an appropriate multiplier ratio shall be achieved between the amounts established to cover expected and unexpected losses from loans or other risk-sharing instruments and
the corresponding new loans or other risk-sharing instruments issued and disbursed which are covered by these guarantees;

b) the multiplier ratio shall be established through a prudent ex-ante risk assessment for the specific guarantee product to be offered, in addition to the ex-ante assessment in accordance with Article 32(2) of the CPR, taking into account the specific market conditions, the investment strategy of the financial instrument, and the principles of economy and efficiency. Such ex-ante risk assessment may be reviewed where it is justified by subsequent market conditions;

c) the programme contribution committed to honour guarantees shall reflect such an ex-ante risk assessment;

d) if the bodies implementing financial instruments, or the entities benefitting from the guarantees have not at least issued and disbursed the planned amount of new loans or other risk-sharing instruments to final recipients that would justify the full use of the guarantees, the eligible expenditure shall be reduced by taking into account the proportion between planned and effectively disbursed loans or support that is provided by other risk-sharing instruments.

3.6. Management and control of financial instruments (empowerment under Art 34(5) CPR)

1. For operations involving support from programmes to financial instruments referred to in Article 33(1)(b) of the CPR, managing authorities shall ensure that:

(a) both during the appraisal and selection process of the operation and during the set-up and implementation of the financial instrument, the operation complies with applicable Union and national law, the relevant programme and the relevant funding agreement;

(b) expenditure declared to the Commission as eligible is evidenced by adequate supporting documents;

(c) funding agreements contain provisions concerning audit requirements and audit trail in accordance with point 1(e) of Annex X to the CPR;

(d) management verifications for financial instruments implemented by bodies referred to in Article 33(4)(a), (b)(ii), (b)(iii) and (c) of the CPR are carried out on the operations throughout the programming period and during the set-up and implementation of the financial instruments in accordance with Article 114(4) of the CPR;

(e) an adequate audit trail is established for reporting and audit purposes in accordance with the relevant provisions of the CPR and applicable delegated and implementing acts;

(f) supporting documents for expenditure declared as programme contributions shall be:

   (i) retained at the level of the operation by the managing authority, the body implementing the financial instrument, or the body that implements the fund of funds where the financial instrument is implemented through a fund of funds, in order to provide evidence on the use of the funds for the purposes
intended, compliance with applicable Union and national law and compliance with criteria and conditionality attached to the funding provided under the relevant programmes;

(ii) kept for the duration of a two year period from 31 December following the submission of the accounts in which the final expenditure of the completed operation is included and

(iii) available to allow verification of the legality and regularity of the expenditure declared to the Commission;

(g) supporting documentary evidence allowing verification of the compliance with Union and national law and of the funding conditions shall include, *inter alia*, as appropriate:

(i) documents on the establishment of the financial instrument;

(ii) documents identifying the capital contributed from each programme and each priority axis to the financial instrument, the expenditure which is eligible under the programmes and the interest and other gains generated by support from the ESI Funds and use of resources attributable to the ESI Funds in accordance with Articles 37 and 38 of the CPR;

(iii) documents on the functioning of financial instruments, including monitoring, reporting and verification;

(iv) documents demonstrating compliance with Articles 37, 38 and 39 of the CPR;

(v) documents concerning exits of programme contributions from financial instruments and the winding-up of financial instruments;

(vi) documents on the management costs and fees;

(vii) application forms submitted by final recipients with supporting documents, including business plans and previous annual accounts (where available), checklists and reports of the bodies implementing the financial instrument, and the bodies that implement the funds of funds;

(viii) declarations made in connection with *de minimis* aid, if applicable;

(xi) agreements signed in relation to the support provided by the financial instrument (including equity, loans, guarantees or other forms of investments provided to final recipients);

(x) evidence that the support provided through financial instruments was used for its intended purpose;

(xi) records of the financial flows between the managing authorities and the financial instruments, and within the financial instrument between bodies implementing financial instruments, and bodies implementing funds of funds, and between the bodies implementing financial instruments and the final recipients, and in the case of guarantees proof that underlying loans were disbursed;
(xii) separate records or accounting codes for co-financed expenditure down to the level of individual support provided to the final recipients, allowing the distinction of expenditure eligible under the operation and ineligible expenditure which may be covered from other sources of funding;

2. For operations involving support from programmes to financial instruments under the ERDF, the Cohesion Fund and the ESF, the audit authorities shall ensure that financial instruments implemented by bodies referred to in Articles 33(4)(a), (b)(ii), (b)(iii) and (c) of the CPR are audited throughout the programming period until closure both in the framework of systems audits and audits of operations in accordance with Article 116(1) of the CPR

3. Where operations are implemented through financial instruments implemented by the EIB and receiving support under the ERDF, the ESF and the Cohesion Fund:

(a) the managing authority shall mandate a firm operating under a common framework as established by the Commission to carry out on-the-spot verifications to verify that the co-financed products and services have been delivered and that the expenditure declared by the beneficiaries has been paid or committed in the case of guarantees and that it complies with applicable Union and national law, the operational programme and the conditions for support of the operation in the meaning of Article 114(4)(a) and (b) of the CPR;

(b) the audit authority shall mandate a firm operating under a common framework as established by the Commission to carry out audits on the operation or the management and control systems relating to those instruments to ensure that audits are carried out on an appropriate sample of transactions on the basis of declared expenditure.

The audit authority shall draw up its audit opinion on the basis of the information provided by the mandated firm.

4. In the absence of a common framework established by the Commission, the managing authority shall submit its proposed methodology for carrying out on-the-spot verifications and the audit authority shall submit its proposed methodology for audits for the prior agreement by the Commission.

3.7. Withdrawal of payments to financial instruments and consequent adjustments in respect of applications for payment (empowerment under Article 35(3) CPR)

For financial instruments pursuant to Article 33(1)(a), 33(4)(a) and (b) of the CPR, Member States and managing authorities may only withdraw contributions from programmes to financial instruments if:

(a) such contributions were not already included in a request for payment as referred to in Article 35 of the CPR, or

(b) for the ERDF, the ESF and the Cohesion Fund, the next declaration of expenditure is modified to withdraw or replace the expenditure in question.
3.8. Capitalisation of annual instalments for interest rate subsidies and guarantee fee subsidies (empowerment under Art 36(4) CPR)

1. Capitalised interest rate subsidies or guarantee fee subsidies referred to in Article 36(1)(c) of the CPR shall be calculated at the end of the eligibility period as the total of discounted payment obligations for the purposes and periods laid down in that Article, and in accordance with the provisions of the relevant funding agreements.

2. Any residual resources left in the escrow account after the period referred to in Article 36(1)(c) of the CPR, or as a result of unexpected winding-up of the financial instrument before the end of this period, shall be used in accordance with Article 39 of the CPR.

3.9. Criteria for determining management costs and fees on the basis of performance and applicable thresholds (empowerment under Article 36(5) CPR)

1. The criteria for calculating eligible management costs and fees as referred to in Article 36(6) of the CPR shall take into account:

   (a) the performance of the financial instrument,

   (b) the quality of support provided to final recipients and

   (c) the contribution of the financial instrument to the objectives and outputs of the programme.

The monitoring committee shall be informed on the proposed criteria and receive reports on an annual basis on the management costs and fees effectively paid in the preceding calendar year.

2. In respect of bodies that implement funds of funds, the total management costs and fees, to be reimbursed as eligible expenditure at closure in accordance with Article 36(1)(d) of the CPR, shall not exceed the sum of:

   (a) For the first 12 months after the signature of the funding agreement [1%] and after [0.5%] per annum of programme contributions paid to the fund of funds, calculated pro-rata temporis from the moment of effective payment to the fund of funds until the end of the eligibility period, the repayment to the managing authority or the date of winding up, whichever is earlier; and

   (b) [0.5%] per annum of programme contributions paid by the fund of funds to bodies implementing financial instruments, calculated pro-rata temporis from the moment of effective payment by the fund of funds until the repayment to the fund of funds, the end of the eligibility period or the date of winding up, whichever is earlier.

3. In respect of bodies implementing financial instruments, the total management costs and fees, to be reimbursed as eligible expenditure at closure in accordance with Articles 36(1)(d) of the CPR, shall not exceed the sum of:

   (a) A base remuneration which shall be calculated as follows,

      (i) for financial instruments providing equity, for the first two years after the signature of the funding agreement, up to [2%] and after up to [0.5%] per annum of programme contributions committed by the managing authority, or
by the fund of funds, under the relevant funding agreement to bodies implementing financial instruments, calculated *pro-rata temporis* from the moment of signature of the relevant funding agreement until the end of the eligibility period, the repayment of the contributions to the managing authority, or to the fund of funds, or the date of winding up, whichever is earlier;

(ii) for financial instruments in all other cases, up to [0.5%] per annum of programme contributions paid to bodies implementing financial instruments, calculated *pro-rata temporis* from the moment of effective payment to the financial instrument until the end of the eligibility period, the repayment to the managing authority, or to the fund of funds, or the date of winding up, whichever is earlier; and

(b) Performance-based remuneration which shall be calculated as follows:

(i) for financial instruments providing equity, up to [2.5%] per annum of the programme contributions paid to final recipients in the form of equity in the meaning of Article 36(1)(a) of the CPR and from resources re-invested which are attributable to programme contributions, which are still to be paid back to the financial instrument, calculated *pro-rata temporis* from the moment of payment to the final recipient until the repayment of the investment, the end of the recovery procedure in the case of write-offs or the end of the eligibility period, whichever is earlier;

(ii) for financial instruments providing loans, up to [1%] per annum of the programme contributions paid to final recipients in the form of loans in the meaning of Article 36(1)(a) of the CPR and from resources re-invested which are attributable to programme contributions, which are still to be paid back to the financial instrument, calculated *pro-rata temporis* from the moment of payment to the final recipient until the repayment of the investment, the end of the recovery procedure in the case of defaults or the end of the eligibility period, whichever is earlier;

(iii) for financial instruments providing guarantees, up to [1.25%] per annum of the programme contributions committed for outstanding guarantee contracts in the meaning of Article 36(1)(b) of the CPR and committed from resources attributable to programme contributions, calculated *pro-rata temporis* from the moment of commitment until maturity of the guarantee contract, the end of the recovery procedure in the case of defaults or the end of the eligibility period whichever is earlier;

(iv) for financial instruments providing micro-credit or loans to natural persons, up to [1.25%] per annum of the programme contributions paid to final recipients in the form of micro-credit or loans in the meaning of Article 36(1)(a) of the CPR and from resources re-invested which are attributable to programme contributions, which are still to be paid back to the financial instrument, calculated *pro-rata temporis* from the moment of payment to the final recipient, until the repayment of the investment, the end of the recovery procedure in the case of defaults or the end of the eligibility period whichever is earlier;
(v) for financial instruments providing complementary grants, interest rate subsidies or guarantee fee subsidies for the benefit of final recipients, up to [0.5%] of the grant amount constituting eligible expenditure in the meaning of Article 36(1)(a).

3.bis In case the majority of the capital invested in bodies implementing financial instruments providing equity is provided by private investors operating in circumstances corresponding to the market economy investor principle, irrespective of the legal nature and ownership structure of these investors, and the programme contribution is provided *pari passu* with the private investors, the management costs and fees shall align with market conform terms and shall not exceed those payable by the private investors.

4. Notwithstanding paragraphs 2, 3 and 3bis, the aggregate amount of management costs and fees to be reimbursed over the eligibility period referred to in Article 55(2) of the CPR shall not exceed:

(a) for bodies implementing funds of funds, [6%] of the total amount of programme contributions paid to the fund of funds;

(b) for bodies implementing financial instruments providing equity, [15%] of the total amount of programme contributions paid to the financial instrument;

(c) for bodies implementing financial instruments providing loans, [7%] of the total amount of programme contributions paid to the financial instrument;

(d) for bodies implementing financial instruments providing guarantees, [8%] of the total amount of programme contributions paid to the financial instrument;

(e) for bodies implementing financial instruments providing micro-credit or loans to natural persons, [8%] of the total amount of programme contributions paid to the financial instrument;

(f) for bodies implementing financial instruments providing complementary grants, interest rate subsidies or guarantee fee subsidies for the benefit of final recipients, [6%] of the total amount of programme contributions paid to the financial instrument.

5. The ceilings referred to in paragraphs 2, 3 and 4 may be exceeded when, respectively, the body implementing the financial instrument, or the body that implements the fund of funds, has been selected through a competitive tender in accordance with applicable rules and that the competitive tender proves the need for a higher percentage.

3.10. **Rules for the reimbursement of capitalised management costs and fees for equity-based instruments and micro-credit** (empowerment under Article 36(6) CPR)

1. Capitalised management costs or fees to be reimbursed as eligible expenditure shall be calculated at the end of the eligibility period as the total of discounted management costs and fees to be paid after the eligibility period for the purposes and periods laid down in Article 36(2) of the CPR, and in accordance with the provisions of the relevant funding agreements.
2. Management costs and fees to be paid after the eligibility period shall not exceed an amount which is to be calculated as follows:

(i) for financial instruments providing micro-credit, 1% per annum of the programme contributions paid to final recipients in the form of loans in the meaning of Article 36(1)(a) of the CPR and still to be paid back to the financial instrument, calculated pro-rata temporis from the end of the eligibility period until the repayment of the investment, the end of the recovery procedure in the case of defaults or the period referred to in Article 36(2) of the CPR whichever is earlier,

(ii) for financial instruments providing equity, 1.5% per annum of the programme contributions paid to final recipients in the form of equity in the meaning of Article 36(1)(a) of the CPR and still to be paid back to the financial instrument, calculated pro-rata temporis from the end of the eligibility period until the repayment of the investment, the end of the recovery procedure in the case of defaults or the period referred to in Article 36(2) of the CPR whichever is earlier.

3. Any residual resources left in the escrow account after the period referred to under Article 36(2) of the CPR, or as a result of unexpected winding-up of the financial instrument before the end of this period, shall be used in accordance with Article 39 of the CPR.