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European Structural and Investment Funds

Guidance for Member States on Article 38(4) CPR - Implementation options for financial instruments by or under the responsibility of the managing authority

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1. REGULATORY REFERENCES AND TEXT

Regulation	Articles
Regulation (EU) No 1303/2013[1] **Common Provisions Regulation** *(hereafter CPR)*	Article 38(1)(b) – **Financial instruments** (*hereafter* FI) managed by or under the responsibility of the **Managing Authority** (*hereafter* MA) Article 38(4) – Implementation options of the financial instruments managed by or under the responsibility of the MA Articles 38(5) to (8) – Set-up and functioning of the financial instruments managed by or under the responsibility of the MA Article 123(6) and (7) – Designation of an **intermediate body** (*hereafter* IB)
Regulation (EU) No 1305/2013[2] **EAFRD Regulation**	Article 65 – Responsibilities of **Member States** (*hereafter* MS) Article 66(2) – Designation of an IB
Regulation (EU) No 1306/2013[3] **EAFRD Control Regulation**	Article 7 - Accreditation and withdrawal of accreditation of paying agencies Article 9 – Certification bodies
Regulation (EU) No 480/2014[4] **Commission Delegated Regulation** *(hereafter CDR)*	Article 7 – Criteria for the selection of bodies implementing financial instruments Articles 12, 13 and 14 – Management costs and fees
Regulation (EU) No 821/2014[5] **Commission Implementing Regulation** *(hereafter CIR)*	Article 1 - Transfer and management of programme contributions Article 2 – Model for reporting on financial instruments

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

[2] Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005.

[3] Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008.

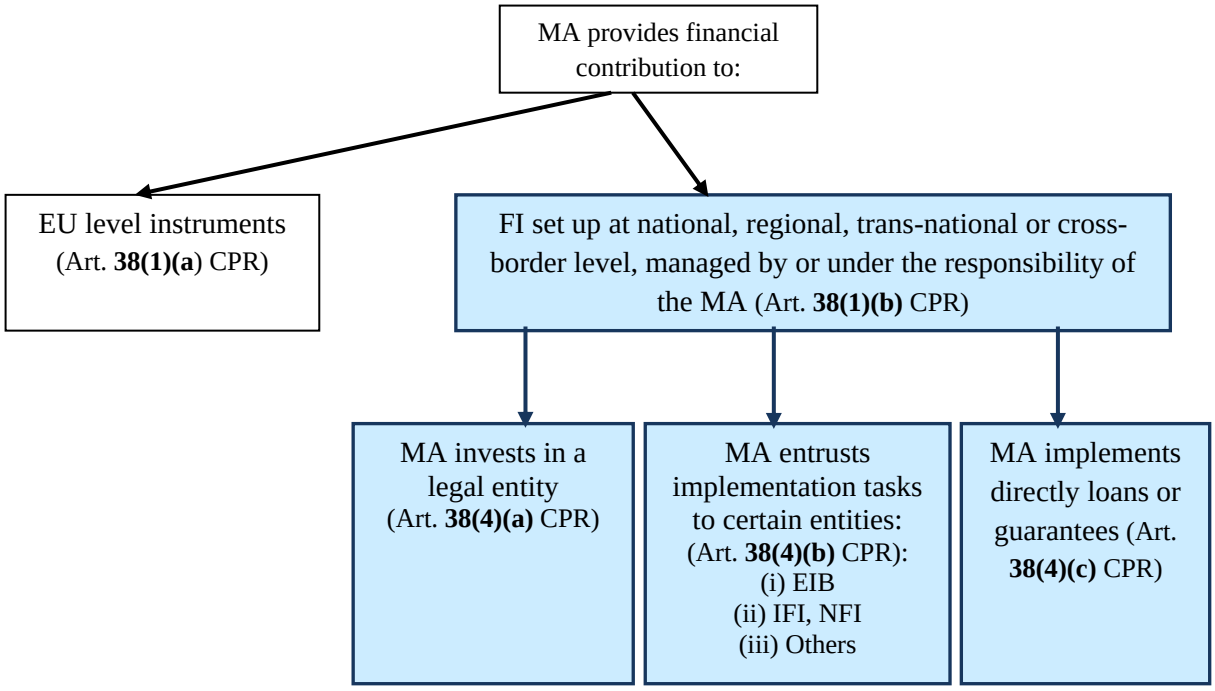
[4] Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural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

[5] Commission Implementing Regulation (EU) No 821/2014 of 28 July 2014 laying down rules for the application of Regulation (EU) No 1303/2013 of the European Parliament and of the Council as regards detailed arrangements for the transfer and management of programme contributions, the reporting on financial instruments, technical characteristics of information and communication measures for operations and the system to record and store data (OJ L 223, 29.7.2014, p. 7).

2. BACKGROUND

2.1. Scope

In the 2014-2020 legal framework, the MA has the possibility to choose between several implementation options for the set-up of the FI, as appropriate:



The purpose of the present guidance note is to clarify how to apply the implementation options for the management of financial instruments under Article 38(1)(b) CPR.

Among those, the entrustment of FI management to bodies such as the EIB, the IFIs or other public or private entities, referred to under Article 38(4)(b) CPR, has been the most widely used in the 2007-2013 programming period. Several guidance notes[6] have already clarified the main changes in the 2014-2020 programming period for this implementation option.

This guidance note presents an overview of the main aspects related to all the implementation options under Article 38(4) CPR, mainly focusing on the implementation options under Article 38(4)(a) and (c) thereof.

In all options under Article 38(4) CPR, instead of the MA, the IB may, if a Member State designates it pursuant to Article 123(6) or (7) CPR or Article 66(2) EAFRD[7], carry out certain tasks of the MA or manage part of a programme. The IB must then implement the necessary actions as foreseen in the written arrangements/agreement including inter alia selection of operations, including financial instruments operations. The IB, based on the results of the ex-ante assessment, will decide on the implementation option for FIs in accordance with Article 38:

- If the implementation option under Article 38(4)(a) CPR is chosen, the IB will invest in the capital of an existing or newly created legal entity and this entity will become the beneficiary.

6 http://ec.europa.eu/regional_policy/en/information/legislation/guidance/

7 In the entire document, the reference to MA may be understood as a reference to the IB if a designation was made in line with the Article 123(6) or (7) CPR or Article 66(2) of the EAFRD.

- If the option under Article 38(4)(b) CPR is chosen then the IB will entrust implementation to one of the bodies under that Article. Subsequently this body will become the beneficiary.

- If the implementation option under Article 38(4)(c) CPR is chosen, then the IB will implement loans or guarantees directly and will become the beneficiary.

In all other cases where the Member State has not designated an IB to carry out certain tasks of the MA pursuant to Article 123(6) or (7) CPR or Article 66(2) EAFRD and the MA wants nevertheless to entrust a body with implementation tasks to implement a financial instrument, the MA must do so in accordance with Article 38(4)(b) CPR applying the relevant selection procedure.

The Member States may set up financial instruments at national, regional, transnational or cross-border level. Based on the ex-ante assessment, they may aim at optimizing the size of the ESI Funds financial instruments and at the possibility of combining contributions from more than one programme to benefit, wherever possible, from economies of scale in the cost of operating the financial instruments.

Under the implementation options of Article 38(4)(a) and (b) CPR, the body implementing financial instruments can implement them either through a fund of funds or by acting directly as a financial intermediary. A fund of funds will entrust the implementation of FIs to financial intermediaries. The financial intermediary thus deploys the financial products (such as loans, guarantees and equity) for concrete investments in final recipients. In an implementation structure in which no fund of funds is foreseen, the MA will invest in a legal entity or entrust implementation to an entity which acts as a financial intermediary.

2.2. Difference in scope compared to the 2007-2013 period

	2007-2013	**2014-2020**
Art. 38(4)(a) CPR: FI through investment in legal entities	Article 43(2) of the amended (25.6.2010) implementing Regulation (EC) No 1828/2006 [8]: a Financial Engineering Instrument (FEI) receiving financing from Structural Funds programmes can be set up as "*independent legal entities governed by agreements between the co-financing partners or shareholders*". For the EAFRD, Article 51(2) of Regulation (EC) No 1974/2006 [9] defines that "*the funds shall be set up as independent legal entities governed by agreements between the shareholders*".	Article 38(4)(a) CPR stipulates that the MA could "invest in the capital of existing or newly created legal entities".
Art. 38(4)(b) CPR: FI implemented	Article 43(2) of the amended implementing Regulation (EC) No 1828/2006: FEI can be set as a separate block of finance in the	Article 38(4)(b) provides the basis for the entrustment of implementation of the FIs to

[8] Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ L 371, 27.12.2006, p. 1).

[9] Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 368, 23.12.2006, p. 15).

by EIB, International Financial Institutions (IFI), etc. or a body governed by public or private law	financial institutions. Appropriate implementation rules have to be respected, mainly by keeping separate accounts ensuring the adequate audit trail of the resources contributed to the FEI. For the EAFRD, Article 51(2) of Regulation (EC) No 1974/2006 defines that the funds can also be set up as separate block of finance within an existing financial institution. In this case, the fund is subject to specific implementation rules, in particular relating to keeping separate accounts distinguishing the new resources invested in the fund, including those coming from the EAFRD.	financial institutions, such as the EIB, other IFIs in which a Member State is a shareholder or bodies governed by public or private law. In addition to the separate block of finance set up within the implementing institution/body, Article 38(6) CPR gives the possibility to open fiduciary accounts in the name of the bodies referred to above and on behalf of the MA.
Art. 38(4)(c) CPR: FI implemented directly by the MA	Article 43a(1)(b) of Council Regulation (EC) No 1083/2006 (as amended by Regulation (EU) No 1310/2011[10]) provides for credit lines managed by the MA through IBs which are financial institutions. Credit lines under Article 43a(1)(b) CPR are classified as repayable assistance and are not financial engineering instruments under 2007-2013 framework. No such possibilities for credit lines (repayable assistance) existed under the EAFRD legislation.	MA can directly implement a financial instrument consisting solely of loans or guarantees.

3. IMPLEMENTATION OPTION 38(4)(a): FI AS INVESTMENT IN LEGAL ENTITIES

3.1. Aim

The main aim of this implementation option, allowing the MA to invest in the capital of existing or newly created legal entity, is to allow for direct programme contributions to financial instruments that operate as independent legal entities, such as autonomous funds with legal personality, special purpose vehicles (such as SICAVs, etc.), as vehicles to carry out investments consistent with the objectives of the CPR and the priorities of the contributing programmes.

The investment of ESI Funds programme resources in the capital of such entities implies taking up a share in the capital of the legal entity with all associated rights (e.g. voting rights, to receive dividends) and obligations (e.g. proportionate liability up to the amount of the subscribed capital in case of losses of the legal entity) of a shareholder. The invested ESI Funds programme resources become part of the capital of the legal entity.

[10] Regulation (EU) No 1310/2011 of the European Parliament and of the Council of 13 December 2011 amending Council Regulation (EC) No 1083/2006 as regards repayable assistance, financial engineering and certain provisions related to the statement of expenditure (OJ L 337, 20.12.2011, p. 1).

3.2. Main concepts

a) Equity investment

As defined in Article 2(m) of the Financial Regulation (EC, Euratom) No 966/2012[11], "equity investment means the provision of capital to a firm, invested directly or indirectly in return for total or partial ownership of that firm and where the equity investor may assume some management control of the firm and may share the firm's profits".

b) Legal entities

There is no definition of the legal entity in the CPR. Therefore, the definition of legal entity existing in the national law will apply. Generally speaking, the legal person created and recognised as a legal entity under national law, Union law or international law, has a legal personality and may, acting in its own name, exercise rights and be subject to obligations.

Some considerations have to be taken into account by the MA when analysing the results of the ex-ante assessment and deciding to invest in the capital of a legal entity:

- The legal entity, receiving the ESI Funds programme resources, is a beneficiary as defined in Article 2(10) CPR.

- The legal form of the legal entity has to be a public or private body with limited liabilities (e.g. joint stock company or limited liabilities company) in order to limit the legal obligations of the MAs to the amount of the subscribed share capital of this legal entity as required under Article 6(2) CDR.

3.3. Implementation modalities

Articles 38(4)(a) and 42 CPR provide for certain conditions for a MA to make a direct investment of ESI Funds programme resources in the capital of an existing or newly created legal entity, namely:

- This form of support, its amount and purpose must be in line with the findings and conclusions of the ex-ante assessment, comply with State aid rules and target investments and recipients in line with the provisions of the ESI funds regulations, national eligibility rules and programme provisions.
- The ESI Funds programme resources should contribute to setting-up new entities or contribute to expanding the activities of already existing entities, which must be dedicated to implementing financial instruments consistent with the objectives of the ESI Funds. For example, the MA can invest in the capital of a legal entity already implementing financial instruments financed by national or private sources to support research and innovation for companies which are in expansion phase. These financial instruments already implemented by the legal entity are in line with the objectives of the ESI Funds.
- The support from ESI Funds programme resources is limited to the amounts necessary to implement new investments. Consequently, the support from ESI Funds programme resources must not serve to simply recapitalise existing legal entities. The new or additional investment activity could be measured with accounting and/or management control tools showing, for example, an

[11] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1);
see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0966&from=EN

increase of the turnover or deployment of new financial products on existing/new markets. The ESI Funds programme resources must not be used to provide constitutive share capital to legal entities that have not been set up as dedicated to implementing financial instruments consistent with objectives of the respective ESI Funds.

- The amount of programme contribution eligible at closure will be, as provided for under Article 42 CPR, the capital corresponding to the invested ESI Funds programme resources fully used to deliver support to final recipients in the form of equity or quasi-equity investments, loans or guarantees and not used as capital reserves to cover already existing activities of the legal entity.

Management of the legal entity

There are different possible governance arrangements for the set-up and functioning of the legal entity, for example as an investment company with a board of directors and the investors as shareholders, or as a contractual agreement between the investors and a management company. Based on the governance set-up, the fund manager may or may not be part of the legal entity in which the ESI Funds programme investment in the capital was done. The legal entity may:

- have internal management arrangements to implement the financial instrument by itself, i.e. the function of the fund manager is fulfilled by the legal entity itself, or
- be managed by another entity, the fund manager which represents the legal entity.

In both cases, it is the legal entity in which the MA invests which is the beneficiary of the ESI Funds, as defined in Article 2(10) CPR.

The amount to be transferred to the legal entity must correspond to the amount necessary to implement new investments in accordance with Article 37 CPR and the appropriate amount of estimated management costs and fees. At closure, management costs and fees are considered eligible, if in line with the provisions of Article 42(1)(d), 42(2), 42(5) CPR and the relevant provisions of the CDR. The eligibility and other rules on the criteria for determining performance-based management costs and fees or their thresholds are explained in the EC guidance note on eligible management costs and fees[12].

Application of public procurement law

Financial services for the implementation of financial instruments (such as fund management services) fall within the scope of the Public Procurement Directive 2014/24/EU.

Based on past experience and the legal framework in place for the set-up and implementation of the ESIF FI, the investment of ESI Funds programme resources in the legal entity is separable from the possible provision of financial services by that legal entity to the MA (i.e. the provision of fund management financial services).

In that case, the MA must select the provider of such services (i.e. the fund manager and/or financial intermediary) by applying Directive 2014/24/EU. Namely, in the case of objective separability, the MA can decide whether to award a separate contract for such services and then it has to apply the Directive for that contract, or it can decide to award a single contract for both, in which case it again has to apply the Directive irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

[12] https://www.fi-compass.eu/sites/default/files/publications/GN_Management_costs_fees.pdf

For more details, please see the EC Guidance Note on the selection of bodies implementing FI, including funds of funds[13].

4. IMPLEMENTATION OPTION 38(4)(C): FI IMPLEMENTED DIRECTLY BY THE MANAGING AUTHORITY

4.1. Aim

This option has been introduced only under the new programming period 2014-2020 and may be interesting where there is a limited number of interventions - not enough to justify the establishment of a stand-alone fund or where the MA (or a designated IB) has the competence and the legal basis to successfully implement loans and guarantees (e.g. the IB is a regional financial institution).

This implementation option may not be possible in all Member States, and is subject to national law allowing explicitly (or at least not prohibiting explicitly) an MA/IB to issue loans and guarantees.

4.2. Main concepts

Under Article 38(4)(c), the operation is constituted by the programme contribution made by the MA (or by an IB) in line with the strategy document for investments in final recipients in the form of loans or guarantees.

4.3. Implementation modalities under Article 38(4)(c) CPR

4.3.1. Implementation of loans and guarantees instruments directly

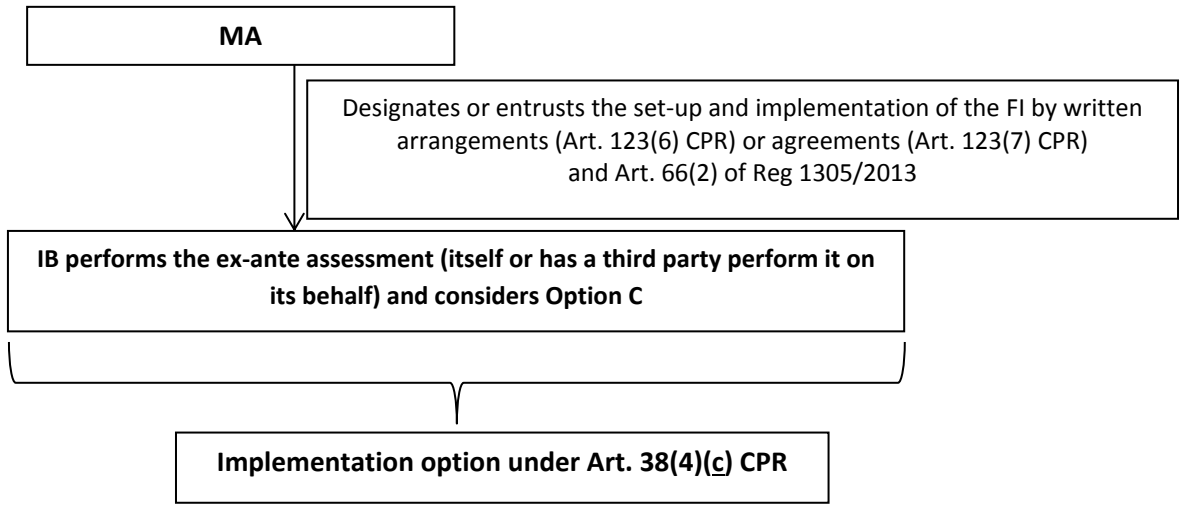
Implementation tasks in financial instruments under Article 38(4)(c) can be carried out:

1. by the MA, or
2. by an IB if the MA designated an IB in accordance with Article 123(6) CPR or Article 66(2) EAFRD to carry out tasks related to FIs under the responsibility of the MA, or
3. by the IB if the MA entrusted the management of part of an operational programme (containing FI operations) to this IB ("global grant") in accordance with Article 123(7) CPR or Article 66(2) EAFRD.

[13] Commission Notice "Guidance for Member States on the selection of bodies implementing financial instruments – C(2016) 4615, 22.7.2016.

When the implementation tasks are carried out by the MA, the MA is responsible for performing the ex-ante assessment, directly or indirectly on its own behalf, which must contain all the elements stipulated under Article 37(2) CPR.

If an IB is designated by the MA to carry out the tasks related to a FI or to manage part of the programme (containing FI operations), then this IB performs the tasks of the MA under the responsibility of the latter in relation to FI, including performing ex-ante assessment directly or indirectly on its own behalf. A schematic presentation of this implementation modality is presented below:



The delegation of tasks or entrustment of management of part of a programme containing the relevant financial instruments operations to an IB is based on a written arrangement or agreement under Article 123 CPR for the ERDF/CF/ESF Funds and Article 65 of Regulation (EU) No 1305/2013 for EAFRD and is not based on a Funding Agreement as is the case under all other implementation options.

The MA (IB) should have the adequate market and financial knowledge to be able to run such a financial instrument, demonstrate due diligence in the selection of final recipients and pay attention to specific conditions, e.g. on payments.

4.3.2 Beneficiary

Where the MA applies this implementation option it is the 'beneficiary' in the meaning of Article 2(10) CPR. However, the functions of the MA and of the beneficiary are distinct and can only be performed by the same body provided that there is an appropriate segregation of functions, as required by Article 125(7) CPR for the ERDF/CF/ESF/EMFF, and Article 65(3) of Regulation (EU) No 1305/2013 and Article 7 of Regulation (EU) No 1306/2013 for the EAFRD.

Where the MA designates an IB to carry out the tasks related to FI and that IB, based on the results of ex-ante assessment, decides to implement FIs according to Article 38(4)(c) CPR, then the IB is the beneficiary in the meaning of Article 2(10) CPR. The MA remains responsible for the tasks delegated to the IB, and in its supervisory capacity must obtain assurance that the tasks are carried out properly.

4.3.3 Strategy Document

According to Article 38(8) CPR, when the implementation option of Article 38(4)(c) CPR has been chosen, the terms and conditions for contribution from the programme to a financial instrument have to be set out in a Strategy Document.

In accordance with Point 2 of Annex IV CPR, the Strategy Document has to contain at least the following elements:

- the investment strategy or policy of the financial instrument, general terms and conditions of envisaged loans or guarantees, target final recipients and actions to be supported;
- a business plan or equivalent document for the financial instrument to be implemented, including the expected leverage effect referred to in Article 37(2) CPR;
- the re-use of resources attributable to the support of the ESI Funds in accordance with Articles 44 and 45 CPR;
- monitoring and reporting of the implementation of the financial instrument to ensure compliance with Article 46 CPR.

The Strategy Document has to be examined by the Monitoring Committee. The role of the Monitoring Committee in this case is not only "to be informed" (as it is required for ex-ante assessment) but "to examine" the Strategy Document. It is therefore important that the content and the quality of the Strategy Document allow for an informed discussion within the Monitoring Committee.

4.4. Relevant considerations on financing investments through FIs under Article 38(4)(c) CPR

The following should be considered when proposing FI (loans and guarantees) under Article 38(4)(c) CPR:

1. *Selection of final recipients*

Selection of final recipients must be transparent and justified on objective grounds in accordance with Article 6(1)(a) CDR and the investment to be selected must be expected to be financially viable, in accordance with Article 37(2) CPR. It is recommended that in the Strategy Document the procedures for selection of final recipients is presented and examined by the Monitoring Committee.

2. *Leverage*

The leverage effect of Union funds equals the amount of finance given to eligible final recipients divided by the amount of the Union contribution[14]. Regarding loans managed directly by the MA, the leverage, if any, may be limited to the national co-financing of ESI Funds. However, if the IB is a financing institution, it can provide its own additional funding to reinforce the programme support.

3. *Advantages*

FI under Article 38(4)(c) CPR are relatively easy to be set up. There is no formal establishment of a fund of funds and there are no financial intermediaries.

[14] Article 223 of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

These FI can be cost efficient and the financial management is simple as there are no tranche payments to the fund. In addition, there is no risk of "parking" money as the expenditure that can be declared to the Commission according to Article 41(3) CPR is based on payments made by the MA/IB for investments in final recipients.

4. *Risks*

In most cases, the MA/IB is a public body which will invest solely public funds. There may be for some cases an increased risk of not market-driven selection of projects and final recipients (regarding the economic and financial viability of the latter).

It is recommended that the capacity of the MA/IB to implement a FI operation should be addressed in the ex-ante assessment, where a thorough appraisal of the administrative capacity of the MA/IB should be made, including the technical skills, organisational structure and governance framework of the MA/IB that would allow such MA/IB to act with the degree of professional care, efficiency, transparency and diligence expected from a professional body experienced in implementing FIs in accordance with Article 6(1) CDR as well as how the latter would ensure "transparent and justified on objective grounds selection of final recipients which will not give rise to a conflict of interest" in line with Article 6(1)(a) CDR and Article 37(2)(e) CPR.

5. SPECIFIC POINTS TO LOOK OUT IN IMPLEMENTATION OPTIONS UNDER ARTICLE 38(4) CPR

Articles	Implementation option under Article 38(4)(a) CPR	Implementation option under Article 38(4)(b) CPR	Implementation option under Article 38(4)(c) CPR
Equity account or Art. 38(4)(6) CPR Fiduciary accounts or separate block of finance	The invested ESI Funds programme resources are part of the capital of the legal entity (an equity account "on balance sheet" with all the associated rights and obligations).	The MA has to select a body which will open a fiduciary account (or set up a separate block of finance within its accounts) to manage the funds in line with the funding agreement, acting as a fund of funds or a financial intermediary depending on the chosen implementation structure. The ESI Funds will thus constitute an account "off balance sheet[15]" for this body. The management of the programme contribution must be done in line with the principles of economy, efficiency and effectiveness. The adequate level of liquidity should be maintained and the appropriate prudential rules have to be respected.	The financial instrument consisting only of loans or guarantees is set up in the accounts of the MA.
Selection of bodies implementing FI	The selection of bodies implementing FIs must comply with the existing relevant national and EU rules, in particular on public procurement [16] and State aid, if applicable, and fulfil the minimum requirements as indicated in the Article 7 CDR.		If an IB is to be used, then the IB must be selected in compliance with applicable rules including those on public procurement and, where applicable, their exceptions.

[15] The presentation in the financial statements of the assets belonging to individual clients (e.g. MAs) but managed by the financial institution can be reported "off-balance sheet" in line with the national or international reporting standards (e.g. IFRS 10, IFRS 11, IFRS 12). This accounting presentation in the financial statements of the body implementing FI has no implication on the application of the existing legal provisions, like the existence of the interest or other gains generated on ESI Funds.

[16] See EC "Guidance Note on the selection of bodies implementing FIs, including funds of funds" http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:276:TOC

Articles	Implementation option under Article 38(4)(a) CPR	Implementation option under Article 38(4)(b) CPR	Implementation option under Article 38(4)(c) CPR
Art. 37(1) to (3) CPR Ex-ante assessment	For a programme contribution to any financial instrument under Article 38(4) an ex-ante assessment containing all the elements under Article 37(2) is required. The ex-ante assessment should also justify the choice of the implementation option (e.g. the possibility to raise more private resources, to take advantage of a certain experience of the legal entity, etc.). The potential for economies of scale should be also addressed in the context of the ex-ante assessment when looking at the implementation arrangement within the meaning of Article 38 CPR.		
Art. 38(4) 2nd subparagraph CPR Tax compliance issues	Article 140(4) of the Financial Regulation and Article 38(4) second paragraph CPR specifies that the bodies implementing financial instruments must be compliant with applicable law, including prevention of money laundering, fight against terrorism and tax fraud. The bodies implementing financial instruments cannot be established and cannot maintain business relations with entities incorporated in territories, the jurisdictions of which do not cooperate with the Union in relation to the application of internationally agreed tax standards. The managing authorities must transpose all the above mentioned requirements in their contracts with the selected financial intermediaries. The management and control system in place must ensure the compliance of the tax treatment with national law as provided for in the guidance note on management verifications (EGESIF 14/0012/02). It is recommended that Member States give special attention to the alignment of structures of financial instruments with the policy set out in the Commission Communication on the anti-tax avoidance package of January 2016[17].		
Art. 41 CPR Payments	The rules of phasing, as referred to in Article 41 CPR[18], must be respected. The use of accounts such as "capital subscribed, non-called up", "capital subscribed, called, unpaid" or "paid-in capital" could contribute to ensure a clear audit trail of the payments related to the investment in the capital.		Interim payment and payment of the final balance applications are based on the payments disbursed to the final recipients (or to the benefit of final recipients) and on the resources committed for guarantee contracts. There is neither reimbursement (like for grants) nor phasing of payments (like for the FI under the other implementation options). Appendix 1 of Annex VI and Appendix 6 of Annex VII CIR No 1011/2014[19] are not applicable under this implementation option.

[17] http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm

[18] See EC Guidance Note "Requests for payment" - https://www.fi-compass.eu/sites/default/files/publications/EC_Guidance-Member-States-Request-for-payment.pdf

[19] Commission Implementing Regulation (EU) No 1011/2014 of 22 September 2014 laying down detailed rules for implementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council as regards the models for submission of certain information to the Commission and the detailed rules concerning the exchanges of information between beneficiaries and managing authorities, certifying authorities, audit authorities and intermediate bodies (OJ L 286, 30.9.2014, p. 1).

Articles	Implementation option under Article 38(4)(a) CPR	Implementation option under Article 38(4)(b) CPR	Implementation option under Article 38(4)(c) CPR
Art. 42 CPR Eligible expenditure	All the provisions of Article 42 CPR are applicable. The programme contributions are eligible at closure based on the payments to (or to the benefit of) final recipients, or resources committed for guarantee contracts and/or reimbursement/payment of management costs and fees[20]. Escrow accounts can be set-up exclusively for the purposes and under the conditions defined under Article 42(2) and (3) CPR.		All categories defined under Article 42 CPR can be considered as eligible expenditure at closure, <u>except</u> the following ones (resulting from Article 41(2) CPR): - capitalised interest rate subsidies or guarantee fee subsidies in accordance with Article 42(1)(c) CPR because these are not covered by this implementation option; - management costs and fees in accordance with Article 42(1)(d) CPR and capitalised management costs and fees under Article 42(2) CPR because these can be charged only by the bodies implementing financial instruments covered by the other implementation options; - payments for investments in final recipients paid into an escrow account in line with Article 42(3) as this type of investment is not allowed under this implementation option. If the management of the FI creates costs in the MA, or such costs are charged by the IB to the MA, they may be covered: - from the ESI Funds programme technical assistance envelope. In this case the management costs will be part of a different operation. Even if the thresholds for eligible management costs and fees under Article 13 CDR do not apply, it is recommended that these thresholds are not exceeded under this implementation option in line with the sound financial management principle. - from resources, attributable to ESI Funds, paid back in accordance with Article 44 CPR. As defined in Article 42(5) CPR, the management fees represent "an agreed price for services rendered". Under this implementation option, as the MA/IB implements itself the financial instrument, there is no service rendered by a third party, therefore no management fees should be charged.

Articles	Implementation option under Article 38(4)(a) CPR	Implementation option under Article 38(4)(b) CPR	Implementation option under Article 38(4)(c) CPR
Art. 43 CPR Interest and other gains	The use of other gains attributable to support from ESI Funds, including possible dividends paid to the MA following the investment in the capital before investments in final recipients, should follow the rules indicated in Article 43 CPR[21].		Not applicable, as there is no flow of ESI Funds programme resources which can generate interest or other gains.
Art. 44 and 45 CPR Re-use of resources before and after the end of the eligibility period	The resources paid back from investments or from release of resources committed for guarantee contracts must be used in accordance with Article 44 and 45 CPR. It is recommended that Member States take appropriate measures to maintain the revolving nature of the funds during the required eight-year period after the end of the eligibility period. These measures should be clearly explained in the funding agreements signed by the MAs or in the strategy documents in case of direct implementation. A verification of the adequacy of this provision falls within the scope of regular audit work of the audit authorities.		
Art. 46 CPR Reporting	The FI have to be reported in line with Article 46 CPR as an Annex to the annual implementation report. The MA should foresee in the funding agreement that all the necessary elements are reported in due time by the body implementing the FI. In case of direct implementation, the Strategy Document should include all the necessary elements to ensure a monitoring and reporting of FI that is in line with the Article 46 CPR.		
Art. 40(5) CPR and Art. 9 CDR Management and control system	The management and control of FI have to take into account Article 40(5) CPR and Article 9 CDR in order to allow the MA and the audit authority (paying agency in the case of EAFRD) to perform their corresponding tasks and responsibilities in line with Articles 125 and 127 CPR (respectively Articles 65 and 66 of Regulation (EU) No 1305/2013 and Article 7 of Regulation (EU) No 1306/2013 for the EAFRD).		

[20] See details in EC Guidance Note on eligibility of expenditure and EC guidance on "Eligible management costs and fees" https://www.fi-compass.eu/sites/default/files/publications/GN_Management_costs_fees.pdf

[21] For further details, please see EC "Guidance for Member States on Article 43 CPR – interest generated by ESIF support paid to FI" https://www.fi-compass.eu/sites/default/files/publications/GN-Interest-and-other-gains-generated-from-ESIF.pdf

Articles	Implementation option under Article 38(4)(a) CPR	Implementation option under Article 38(4)(b) CPR	Implementation option under Article 38(4)(c) CPR
Art. 1 and 2 CIR	The arrangements for the transfer and management of programme contributions and reporting as detailed in Article 1 and 2 CIR have to be respected by the bodies implementing the FI. A clear separation of the ESI Funds from other resources used in the FI has to be ensured. The adequate accounting and audit trail of the ESI Funds by programme and by priority axis or measure has to be ensured down to the level of final recipient[22].		
Art. 38(7) and Annex IV of the CPR Funding agreements, mainly articles (j), (k) & (m)	The MA should in particular analyse and define carefully in the funding agreement, depending also on the applicable national legislation, the following aspects: - the conditions for partial or total withdrawals of the programme contribution to the FI during the eligibility period (e.g. for implementation option under Article 38(4)(a) CPR: conditions for selling the shares to the other shareholders or to liquidate the legal company); - the use of resources returned after the end of the eligibility period and the exit policy, assuming there is not a complete loss of resources[23], in accordance with Article 45 CPR; - the provisions for the winding-up of the financial instrument (e.g. liquidation of the legal company) or provisions that no winding-up is foreseen (like an "Evergreen fund").		Not applicable – for the strategy document, please refer to point 4.3.3 above.

[22] Cf. Article 9(1)(e)(xii) of Delegated Regulation (EC) No 480/2014.
[23] E.g. first loss piece in a guarantee instrument.