



***fi-compass* Knowledge Hub**

Selection of financial intermediaries

Notes of workshop





The Knowledge Hub has been developed to meet the growing need amongst experienced practitioners for events and materials that provide a more in-depth look into topics affecting financial instruments. Its format utilises email exchanges to promote a longer term engagement between participants together with traditional face to face workshops to allow experienced practitioners to work together to explore the subject matter through peer to peer exchange and expert-led sessions.

In order to encourage openness between the parties the discussions are undertaken under the Chatham House Rule which states: 'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.'

In particular, the representatives of the European Commission, namely DG REGIO and DG GROW have participated in the Knowledge Hub to receive feedback from the Member States concerning the selection of financial intermediaries when implementing financial instruments. The participation of the representatives of DG REGIO and DG GROW should not be interpreted as an official endorsement of any of the suggestions that may be discussed and/or described during the Knowledge Hub.

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1. Introduction

The *fi-compass* Knowledge Hub – Selection took place between April – October 2020. Expert *fi-compass* practitioners came together with specialists from the European Commission, DG REGIO and DG GROW and *fi-compass* to consider a number of topics related to the selection of financial intermediaries when implementing financial instruments using EU shared management funds.

The discussions considered the general position at an EU level, relating to the Public Procurement Directive 2014/24/EU (the Directive). It was noted that practitioners would need to consider the specific circumstances in each Member State having regard to national legislation and market practices.

In total, three online discussions were held to discuss the following subjects:

- The appointment of financial intermediaries without the need to carry out a public procurement regulated by the Directive (the ‘non-public procurement approach’);
- The use of the flexibilities in the Directive to respond to urgent requirements, with reference to the recently published ‘Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis’ (the Guidance); and
- The use of the competitive procedure with negotiation and competitive dialogue procedures when implementing financial instruments.

This note captures the experiences shared between the participants and highlights topics of interest that may be of use to practitioners implementing financial instruments in the future. The note is not definitive guidance in relation to the selection of financial intermediaries for financial instruments. This account of the discussions does not constitute official endorsement of the points set out in this note.



2. Key notes

Some of the key points that were discussed during the sessions included:

Practitioners should consider the 'non-public procurement' approach when implementing straightforward guarantee financial instruments.

The decisions in the cases *Falk Pharma* (Case C-410/14) and *Tirkkonen* (Case C-9/17) describe circumstances when a process to appoint economic operators (such as financial intermediaries¹) would fall outside the Directive. Key criteria include the absence of public service obligations in any contract and/or a process to select intermediaries. Thus a simple guarantee financial instrument that is made available by the guarantor (e.g. NPBI) to all qualifying financial intermediaries can be designed in a way to allow it to be implemented quickly outside the scope of the public procurement rules.

Practitioners have used the accelerated procedures under the Directive to implement financial instruments to respond quickly to the COVID 19 outbreak.

Participants reported the use of a range of different selection procedures in order to move quickly to respond to the health crisis. The 'non-public procurement approach' explained above and negotiated procedure without prior publication of a notice have been used in some circumstances. However, in the majority of cases the accelerated procedures have been the preferred option, providing a quick route to market, whilst retaining the competitive element in the procurement process.

The amendment of contracts under Art 72 of the Directive is another important tool for practitioners to adapt financial instruments to meet changing circumstances.

In many cases, authorities wishing to amend existing financial instruments to respond to the COVID-19 crisis will be able to rely on Art 72(1)(c) which permits amendments to existing contracts in response to unforeseen circumstances. Looking ahead, the flexibility under Art 72(1)(a) (which allows subsequent variations to be made to funding agreements (without financial limit) to the extent it is envisaged at the outset), may also be an attractive option for managing authorities designing financial instruments to utilise funding from more than one programming period or several rounds of public/private sector fundraising.

Competitive procedure with negotiation or competitive dialogue will provide authorities with greater flexibility when launching financial instruments in new markets/sectors.

One of the common experiences amongst practitioners when introducing financial instruments into new markets or sectors is the lack of familiarity of potential financial intermediaries (e.g. banks, financial institutions and microcredit providers) with ERDF requirements and/or public procurement procedures. Thus the use of a competitive procedure with negotiation or competitive dialogue can play an important role in refining proposals prior to final offers being made.

¹ For the purpose of this note, the notion of 'financial intermediaries' covers also the banks disbursing the loans guaranteed with programme resources



The inclusion of a due diligence stage during a competitive procedure with negotiation or competitive dialogue can be an important step in identifying the most suitable financial intermediaries.

Another advantage of these procedures is the greater scope to undertake due diligence during the process both during the selection and/or award stages. Practitioners shared experience of using due diligence as part of the selection criteria, verifying aspects such as the track record of the proposed team. Due diligence during the award stage is also possible, where proposals, for example in relation to availability of co-financing can be investigated in greater detail. Key stages to a due diligence process shared during the session include desk top review, site visits, structured interviews and reliance on past audited reports.

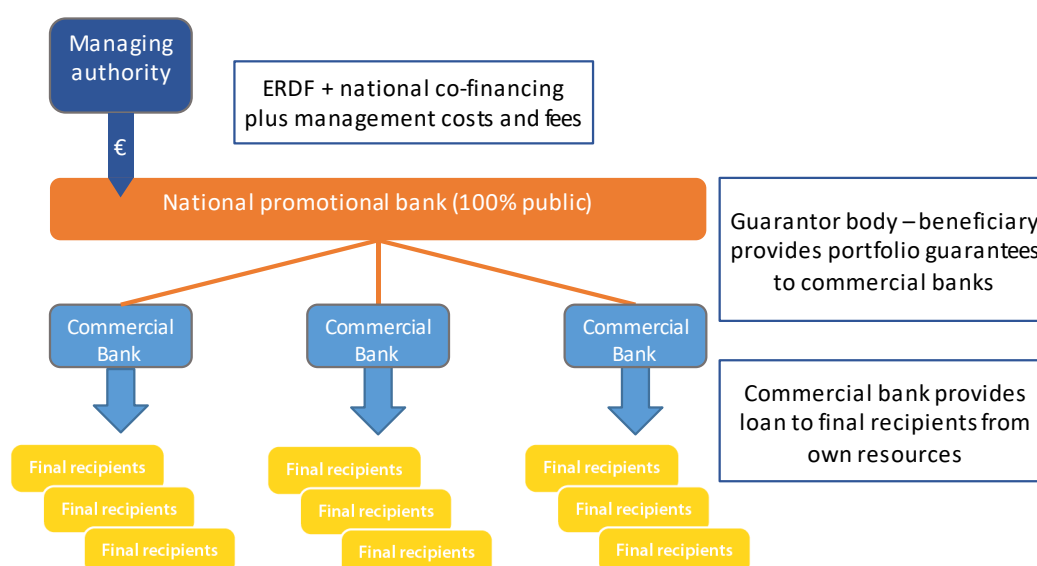


3. The non-public procurement approach

3.1 Portfolio and individual guarantee instruments

A typical scenario where a managing authority entrusts a National Promotional Bank or Institution (NPBI) to implement a first loss portfolio guarantee is shown in Figure 1 below and where the concerned guarantee is given or even sold to the commercial banks in order to facilitate and incentivise the granting of loans to final recipients in line with their normal lending procedures. In this situation the NPBI does not seem to perform a selection of the commercial banks in the meaning of the Directive or purchasing a clearly defined service. This is one of several possible scenarios where the non-public procurement approach could be used. Other circumstances include where the managing authority provides the guarantee directly. Financial instruments that offer individual guarantees to final recipients to support lending from a bank of their choice could also be suitable for this type of approach.

Figure 1 implementation of a first loss portfolio guarantee



Under the above model (as in figure 1), the NPBI may be entrusted through direct award in accordance with Article 12 of the Directive or under the conditions of the Omnibus Regulation². The discussion then focussed on the process required to be followed by the NPBI in relation to the appointment of the commercial banks to act as financial intermediaries, building up a portfolio of loans to eligible final recipients.

3.2 Application of the non-public procurement approach

The potential to implement a straightforward guarantee financial instrument where the commercial banks benefiting from the risk cover of the guarantee are selected outside the scope of the Directive follows the decisions of the European Court of Justice in the cases *Falk Pharma* (Case C-410/14) and *Tirkkonen* (Case C-9/17). Although not specifically related to financial instruments, the case law provides authority for the use of

² Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union



the non-public procurement approach to appointing financial intermediaries where certain specific conditions are satisfied.

The conditions for use of the non-public procurement approach relate to the form of contract entered into with the candidates and the process to appoint them and are as follows:

- the arrangement does not amount to a public contract as it does not involve a provision of services; and/or
- there is no selectivity between the qualified financial institutions

Thus, where the guarantee financial instrument is closely aligned to a standard market guarantee with obligations limited to those typically required for a commercial guarantee product, the NPBI has the option to use the non-public procurement approach when choosing the financial intermediaries which are to provide the loans (no public contract approach). Similarly, in the no-selectivity approach, the Directive will not apply where the guarantee is offered through an 'open call' for expression of interest, for financial institutions that meet predefined qualification criteria (such as a valid banking licence or equivalent or the criteria in Art 7 of the CDR³).

In such cases a financial instrument could be implemented quickly on the basis that all financial institutions that met the criteria would be entitled to benefit from the guarantee provided by the guarantor.

3.3 Practical considerations

Some of the practical considerations that were considered during the Knowledge Hub included:

- 1) Do both conditions (no public contract and no selectivity) need to be met for the non-public procurement approach to be adopted

No, only one of the two criteria need to be present, although in practice it is considered likely that in most cases both criteria will be satisfied. This is because the non-selectivity approach is likely to demand a simple commercially orientated guarantee type product to be successful. The more complex an authority's contractual requirements the more difficult it would be to carry out a non-selective procedure.

- 2) How do you meet ERDF regulatory requirements for the financial instruments without public service obligations?

The inclusion of conditions such as eligibility of final recipients and reporting obligations can be compatible with the non-public procurement approach as long as they are not linked to positive obligations that the financial intermediary must deliver and associated remedies.

The guarantee agreements with the commercial banks is not regulated by the CPR, however, the NPBI should have mirrored several of the CPR-prescribed requirements, mainly linked to the eligibility criteria for final recipients, in corresponding provisions in the guarantee agreements with the commercial banks so that NPBI can comply with its obligations as beneficiary, including information necessary for reporting purposes.

As long as the guarantee is available to all the commercial banks qualifying and willing to participate in the scheme and accepting to respect the eligibility and certain reporting requirements, the NPBI is not performing

³ [Commission Delegated Regulation \(EU\) No 480/2014 of 3 March 2014](#)



a selection in the meaning of the Directive and is not purchasing a service from the commercial banks, then the inclusion of conditions for example on the eligibility of the final recipients, is compatible with the non-public procurement approach.

3) How do you apportion a limited guarantee fund if all eligible applicants must receive a share?

A key principle of the non-public procurement route is the absence of selectivity and therefore all qualifying applicants must be appointed. However, an authority may limit the number of financial intermediaries in a number of ways that are non-selective such as: by specifying a closing date for applications; a maximum number of financial intermediaries to be appointed; or by linking the end of the call to the commitment of allocated funds, in the latter two cases on a 'first come first served' basis.

Similarly whilst it is not possible to vary the sums allocated based on a ranking of proposals, a formula that apportions the available resources between qualifying intermediaries based on an objective criteria (such as volumes of lending in previous periods) is possible. Regardless of the mechanism chosen, however, the criteria to determine the size of individual allocations must be objective and communicated to potential financial institutions in an open and transparent manner, such as within the call.

4) Could the approach be used for other types of financial instruments?

In practice, it is harder to imagine that the non-procurement approach could be used to implement loan and equity instruments. As equity and loan funds channel the programme resources down to final recipients, the role of the financial intermediary normally includes services linked to managing public resources).

Even if a loan or an equity instrument would meet the criteria of no public service obligations or selectivity, the eligibility of management cost and fees of relevant loan and equity funds would still be problematic. This is because of a tension between the need to avoid public service obligations and the requirements under the CPR⁴/CDR that financial instrument management fees are performance based. Therefore, in practice it is considered unlikely that under the current ESIF rules the non-public procurement approach will be suitable for the management of financial instruments for a fee (other than the payment of a straightforward guarantee fee).

5) What are the legal obligations of authorities using the non-public procurement approach?

The call for the expression of interest must respect the legal principles of open, transparent, proportionate and non-discriminatory procedures, avoiding conflicts of interest. The opportunity to benefit from the guarantee must be open to all potential financial institutions that satisfy the selection criteria and anti-avoidance rules prevent the authority from unreasonably limiting the conditions to favour a small group of potential financial institutions. The relevant national legislation and rules pertaining to contracts other than public contracts (commercial, civil law etc.) also apply in these scenarios.

3.4 Conclusions

The Knowledge Hub recognised that this approach can be an important tool for managing authorities, NPBIs and other bodies implementing financial instruments. In many cases, however, a public procurement procedure will be the better option for the implementation of a financial instrument. A well-designed procedure, undertaken in a timely way, can enable authorities to both identify the best financial

⁴ [Regulation \(EU\) No 1303/2013 of the European Parliament and of the Council of 17 December 2013](#)



intermediaries with the capacity to implement a large programme of investment and establish public service contracts with mechanisms to incentivise achievement of public policy goals.

On the other hand, in times of urgency and/or where applicants' compliance with the minimum criteria (including the requirements of the Commission Delegated Regulation) is considered sufficient and there is no need to ensure only the best players are included, the non-public procurement approach provides a viable alternative for authorities.

An example of how the approach has been recently used can be seen in the mini-case study⁵ published by *fi-compass* in relation to the Anti-Corona Guarantee implemented by Slovak Investment Holding. By following the non-procurement approach the NPBI in Slovakia was able to mobilise ERDF resources to support SMEs responding to the COVID-19 outbreak quickly and effectively with the first guarantee agreement signed less than three weeks after the publication of the call for expressions of interest.

⁵ [Factsheet – Responding to the COVID-19 crisis through financial instruments: SIH Anti-Corona Guarantee](#)



4. Responding quickly within the public procurement framework

4.1 Public procurement in emergency situations

The Knowledge Hub considered the range of flexibilities existing with the public procurement rules as described in the 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis'⁶ (the Guidance). In addition the scope for existing contracts to be amended to respond to the health crisis was also considered.

The Guidance was prepared in April 2020 to highlight the existing flexibilities under the procurement rules, to enable authorities to respond to the COVID-19 crisis. Although the Guidance was drafted with a focus on the healthcare sector (and related sectors directly impacted by the crisis such as ICT) it is of general application and thus can be applied to the set-up of financial instruments designed to mitigate the economic impact of the outbreak (for example) on SMEs in Member States.

The key flexibilities highlighted in the Guidance that are relevant to the implementation of financial instruments are the use of (1) the accelerated open and restricted procedures and (2) the negotiated procedure without prior publication of a notice. In each case the nature of the COVID-19 outbreak (which was unforeseeable and outside the control of the authority) created circumstances where the flexibilities may be applicable. However, it is necessary in every case to show that the crisis did in fact give rise to an urgent situation where the procurement time limits were impractical.

4.2 The use of accelerated procurement procedures

One of the main flexibilities offered by the Public Procurement Directive is related to the possibility for shortening the deadlines for open or restricted procedures, i.e. the so-called accelerated procedures. Table 1 shows the minimum accelerated deadlines for the different procedures.

⁶ 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' (2020/C 108 I/0)



Table 1 Minimum accelerated deadlines

Procedure	Minimum Regular deadlines	Minimum Accelerated deadlines
Open procedure	35 days (30 days with e-submission)	15 days
Restricted procedure (step 1: Request for participation)	30 days	15 days
Restricted procedure (step 2: Submission on tender)	30 days (25 days with e-submission)	10 days

It was recognised during the Knowledge Hub that these are minimum deadlines required by the Directive and that authorities should always consider the complexity of the contract and the ability of market actors to react in time, before deciding on the actual deadline for the public procurement procedure. It is also important that the use of accelerated procedures are always accompanied with a justification. When justifying the need to shorten the deadlines for return of tenders, authorities should ensure they also take into account the other steps of the procedure (such as the evaluation of submissions) to demonstrate why the regular deadlines are impractical.

When accelerated procedures are not sufficiently fast, the authorities could also consider the negotiated procedure without publication. However, this option shall be used with caution and be restricted to cases of extreme urgency brought about by unforeseeable events. The nature of the COVID-19 outbreak was acknowledged to be 'unforeseeable and not caused by the actions of the authority'. Thus the potential to use this option exists, it remains necessary for authorities to go on to demonstrate how as a result of the outbreak a particular financial instrument was required as a matter of extreme urgency.

4.3 The modification of existing funding agreements

The Knowledge Hub then considered the option offered by Article 72(1)(c) of the Directive to modify contracts during their term, in order to amend existing financial instruments. This option is available when:

- modification of the contract is needed due to unforeseeable events;
- subject matter of the contract remains virtually the same; and
- any increase in price is limited to 50% of the original value.

Critical to the application of Article 72(1)(c) of the Directive is the question of the subject matter of the contract. Authorities should consider first whether the nature of the amendment relates to the same subject matter or "overall nature of the contract". Managing authorities and NPBLs would need to consider each proposal on its facts and record its conclusions accordingly. Although impossible to be definitive in this note, increasing the scope of the contract to cover types of SMEs not previously covered, or changing the geographical scope would be harder to justify than keeping the same scope, but increasing the volume.

Where it is not clear that the subject matter of the modification is the same as the original contract (and the need for urgency is established), the use of the negotiated procedure without prior publication of a notice may be an alternative option to implement the new measure through existing financial intermediaries.



The condition which limits the increase to 50% of the original value of the contract is also a significant constraint. In the context of the Directive and the overall competition/procurement framework it is considered by some to be reasonably generous already. It is also relevant to note that the original value of the contract does not pertain to the overall volume of funds being channelled, but only to the fees and remunerations being paid to the financial intermediary.

The restriction of 50% applies per modification, meaning that there could be several modifications of 49.9%. However, it is very important to justify that a subsequent modification is genuinely a new modification, prompted by some new circumstances. Anti-avoidance provisions would prevent a single modification in substance being split into two or more for the purpose of avoiding the 50% ceiling.

The implications of Article 72 of the Directive were also considered in the context of the proposed revised Common Provisions Regulation⁷ which will allow ERDF and other shared management resources from more than one programming period to be contributed to a financial instrument (Art 52(1)). In this case the importance of Article 72(1)(a) of the Directive was highlighted as being applicable. It allows modification of contracts (without financial limit) to the extent it is envisaged at the outset. It states that agreements may be modified:

‘where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.’

Managing authorities and NPBI when implementing ESIF financial instruments that may receive contributions from more than one ESIF programme should ensure that the initial procurement documents and funding agreement contain clear provisions enabling such follow on investment. By specifying very clearly at the time of setting up the financial instrument, when and under what conditions the financial instrument may receive additional funding, the managing authority/NPBI will ensure that topping up financial instruments would meet the requirements of Article 72(1)(a) of the Directive and avoid the 50% limitation under Article 72(1)(c).

4.4 Conclusions

Overall, the Knowledge Hub discussions highlighted how a cautious approach was adopted in many Member States, with practitioners preferring to use the standard and accelerated procurement procedures, as well as the non-public procurement approach and amendments to existing financial instruments.

It was acknowledged that the use of the negotiated procedure without prior publication of a notice would require a higher level of justification than the accelerated procedure. This is due to the fact that the accelerated procedure is a full procurement procedure, albeit with shorter deadlines. Whereas the negotiated procedure without publication does not require the exposure of the contract award to any competition and represents an exception from the Directive and a derogation of the principles of public procurement. In some cases, the need to use the negotiated procedure without prior publication of a notice can be demonstrated effectively by reference to an urgent intervention that was needed to respond to the COVID-19 outbreak (which was,

⁷ [Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument COM/2018/375 final - 2018/0196 \(COD\)](#)



without doubt an unforeseen event). More often, however, the use of the accelerated procedure is likely to be sufficient to allow the authority to implement financial instruments to respond in a timely way.

Where authorities, properly justify the use of the negotiated procedure without publication, they are not obliged to apply any standard procedural steps of the Directive (such as market research, publication requirements, time limits, ensuring competition etc.). It was suggested, however, that the use of such principles would be still useful for ensuring quality and cost efficiency, if the urgency makes it possible.

Further, based on experience/consultations with national public procurement authorities, practitioners in many Member States highlighted other concerns regarding the use of the negotiated procedure without publication that make it difficult to follow for the implementation of financial instruments. In particular, it was recognised that the justification of the use of the procedure will need to be made in the future, when the urgent nature of the initial response to the COVID-19 may be less obvious to the auditors/tribunals considering the matter. It was also acknowledged that the Guidance was focused to a greater extent on the medical response, although it was agreed to have a wider scope and could extend to measures addressing the economic impact of the outbreak.

More generally, the Knowledge Hub recognised that the ability to modify contracts during their term, in line with Article 72, is one of the most useful possibilities within the Directive. This seemed to be the case especially in light of the significant amounts of new funds proposed by the Commission in its New MFF / Next Generation EU package, which in many cases will need to be implemented through the existing financial instruments.



5. Competitive procedure with negotiation and competitive dialogue

5.1 Applying competitive procedure with negotiation and competitive dialogue

The competitive procedure with negotiation and competitive dialogue are procedures set out in Articles 29 and 30 of the Directive respectively. The Directive promotes a 'toolbox approach' with a range of different procedures which must be transposed into national legislation (all except the negotiated procedure without publication which is optional). The procedures are designed to provide authorities with more flexibility to adopt the selection procedure best suited to their needs. The third Knowledge Hub discussion allowed practitioners to share their experience of the use of the competitive procedure with negotiation and competitive dialogue in relation to financial instruments.

One of the features of the competitive negotiation and competitive dialogue procedures is the need for authorities to satisfy certain preconditions for their use. In many cases, the novel nature of financial instruments, which are inherently targeting areas of market failure means that one or more of the preconditions set out in Article 26 of the Directive in present. The two conditions most likely to be relevant to financial instrument practitioners are:

- Article 26(4)(i) the needs of the contracting authority cannot be met without adaptation of readily available solutions; and
- Article 26(4)(iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them;

A common experience amongst practitioners is that the competitive procedure with negotiation and competitive dialogue can be useful when implementing financial instruments in new markets where potential financial intermediaries have little or no experience of EU regulations such as the requirements of the Directive and/or the CPR. In such cases, the flexibility of the procedures allow authorities to avoid the need to exclude operators at an early stage due to technical issues or a misunderstanding of the requirements.

Other examples of how a more flexible procurement procedure can benefit financial instruments include:

- Where the authority expects 'first time teams' of fund managers to be formed to bid for the opportunity. The competitive procedures allow the teams to come together over the course of the procurement process;
- Where products are targeting new sectors where risks are difficult to assess, such as microcredit, negotiation or dialogue can allow calibration of the risks in a competitive environment ensuring the resulting contract is well adapted to the authorities requirements; and
- As private co-investment is often initially committed 'in principle', a period of negotiation and dialogue allows the detailed terms for commitment of such resources to be agreed before the award, providing greater certainty for the authority that their requirements will be met.

Overall, it was recognised that in general, the implementation of financial instruments is a long term project and thus the outcome of any selection process can be a funding agreement that is designed to last for 10-20 years. Therefore, where either or both of the conditions under Article 26(4) of the Directive are met, the use of



a competitive procedure with negotiation or competitive dialogue under Articles 29 and 30 of the Directive will in many cases be justified to ensure the financial instruments are established on a sound basis.

5.2 The procedure in practice

The difference between the competitive procedure with negotiation and competitive dialogue procedures were compared. Experience was shared by practitioners of the use of both types of procedure, although on balance the competitive procedure with negotiation is considered to be more suitable procedure in the majority of cases related to financial instruments. It is also used more frequently in general. Table 2 compares the procedures.

Table 2 Comparison between competitive procedures with negotiation and competitive dialogue

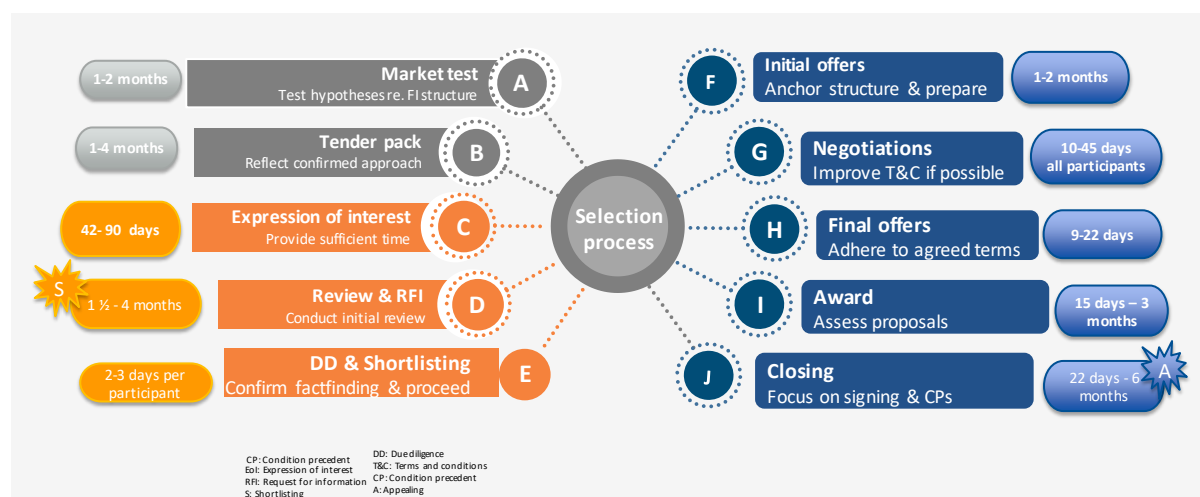
	Negotiation (art 29)	Dialogue (art 30)
Subject matter	Authority defines at outset the subject matter of contract	Subject matter not defined. No minimum requirements only outline needs and requirements
Award criteria	Published in contract notice and linked to minimum requirements	Published in contract notice related to outline needs and requirements
Initial procedure	Contract notice, call for competition, submission of initial tenders	Contract notice, call for competition, submission of initial proposals to include means of achieving authority's requirements
Acceptance of initial tenders	Initial tenders can be accepted by authority	Initial tenders cannot be accepted as they will not be precise enough
Negotiation/ dialogue	Can take place in stages and aimed at improving tenders. Minimum requirements and award criteria non-negotiable	All aspects of the proposals can be discussed. No minimum requirements means greater flexibility.
Final tenders	Submitted following the end of the negotiations	May be further refined after submission only to be clarified/optimised
Award	May reduce number of tenders during procedure and once sufficient quality met final tenders evaluated	Sole basis for the award: criterion of the best price-quality ratio in accordance with Article 67(2)

As experience in Member States of working with financial instruments grows, increasingly managing authorities and NPBI are in a position to define their minimum requirements sufficiently well to allow the competitive procedure with negotiation to be effectively used. Equally, as markets further mature and grow it may be the case that the need to use the two flexible procedures will also decrease in favour of the open and restricted procedures. Nevertheless at this stage in the development of financial instruments across the EU, the competitive procedure with negotiation and competitive dialogue will remain important tools for managing authorities and NPBI.



A typical procurement process under the competitive procedure with negotiation was shared during the Knowledge Hub discussion. Figure 2 shows the different steps and the time required for each stage.

Figure 2 the competitive procedure with negotiation in practice



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A key step in the process is the initial market test during which the authority conducts an initial engagements with the economic operators active in the sector that is the subject matter of the selection process. During this stage, using a structured engagement, where information is shared consistently the authority will typically test its initial proposals for the financial instruments and secure insight into the capacity of the market to meet their needs and requirements.

The review and shortlisting of initial proposals is a critical stage during which initial proposals are assessed and ranked using the selection/award criteria specified in the contract notice. Following an initial review a due diligence exercise may be carried out to confirm key aspects of proposals such as the composition of the proposed team, their experience and track record and governance and control procedures.

Following submission of initial tenders a period of negotiation is used to refine and improve the initial offers to better meet the authority's requirements. Key aspects considered during this phase can include:

- the alignment of the parties understanding on the detailed implementation proposals;
- The minimum requirements form a predefined scope which is not open to negotiation. Instead the negotiated phase considers improvements over and above the minimum requirements;
- The proposed terms & conditions are discussed (save for certain specified minimum requirements) with a view to finding the optimal balance of risks between the parties;
- Attempt to improve the initial offer in substantive terms; and
- In line with the principle that 'nothing is agreed until everything is agreed' the different aspects of the agreement (other than the minimum requirements) can be revisited where necessary to reflect the wider negotiations.

Typically practitioners will limit the negotiation phase to a specific and relatively short time period to ensure the discussions are focussed and progress can be made quickly. Following conclusion of the negotiation phase, final offers are made and evaluated prior to contract award. Each tenderer will submit its final tender based on the outcome of their own negotiation with the authority. Therefore whilst the minimum



requirements are consistently maintained across all the final tenders, the content and detailed terms of the offers submitted will vary between bidders and may be evaluated by the authority in accordance with the award criteria.

The management of information is a key consideration for authorities conducting competitive procedures with negotiation and competitive dialogue. In order to ensure equal treatment of tenderers, the authority must develop a structured way to share relevant information that it holds to ensure it is equally available to all parties. Similarly the confidentiality of the tenderers must be respected during the negotiation process with information barriers put in place to ensure that tenderers' proposals are not shared with others during the negotiation phase.

5.3 Due diligence

The opportunity to conduct detailed due diligence into proposals and respond to the findings in subsequent negotiations/dialogue is one of the important benefits of the competitive procedures with negotiation and competitive dialogue. During the Knowledge Hub examples were given of how due diligence is used both during the selection (shortlisting) and award stages. Both approaches are possible within the Directive and are often used to refine proposals in the competitive environment. Of course, this is possible only within the limits that the Directive allows and any due diligence planned for the procedure needs to conform to the rules of the Directive and the principles of public procurement, especially equal treatment.

Where it is proposed to conduct a due diligence exercise, the authority should include reference to this stage in its initial call for expression of interest. Details of how the exercise can also be set out in the authority's requirements. Typically the exercise is a structured enquiry into specific aspects of the submitted proposals. At the selection stage this will be a review of the track record and experience of the tenderer. At award stage the credibility of proposals in relation to co-investment, marketing and deal origination may be some of the things considered during a due diligence exercise. When used in the award stage, it is important to make sure that the method of evaluation is published from the start and defined in a clear way. Much like in any other public procurement procedure, any criteria used in the award stage may not be used in the selection stage (and vice-versa) and finally, award criteria always need to have a clear link to the subject matter. Typical features of a due diligence exercise are shown in Figure 3 below.

The exercise will typically commence with a desk top review of the proposals based on supporting information provided by the tenderers in response to a questionnaire. Open source material in the public domain may also be used during the desk top review to verify aspects of the proposals. This can be followed by fieldwork comprising of site visits to the offices and or reference sites of the tenderer, followed by structured interviews with the team at which any findings from earlier stages can be raised and clarified. Finally audited reports from previous periods carry substantial weight in relation to past performance.

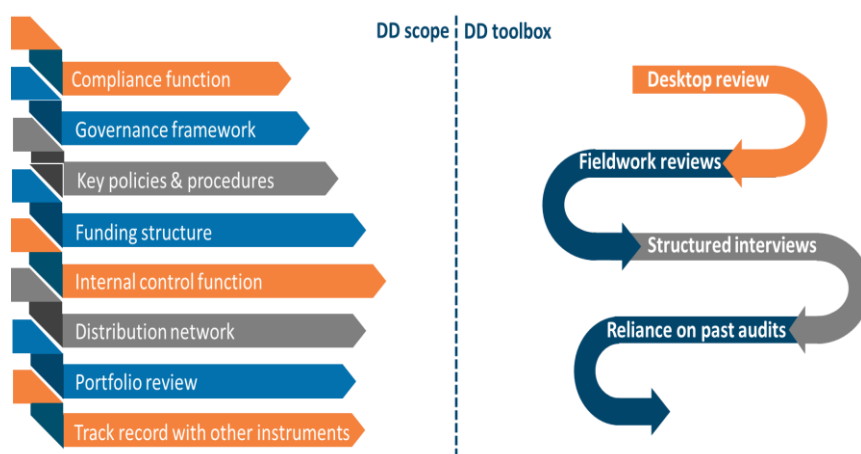


Figure 3 Typical features of a due diligence exercise

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An example of how due diligence is used by the European Investment Fund is set out in the *fi-compass* case study of La Financière Région Réunion⁸. In that case due diligence was used as part of the negotiation prior to the award of the contract. During the due diligence stage the ability of each bidder to act as a financial intermediary was considered in detail. This included:

- An assessment of their ability to implement the respective financial instrument in the region and generate quality deal-flow;
- The appropriateness of their investment / exit strategy;
- The experience and expertise of the dedicated team;
- Their 'track record' (which is evaluated in greater detail during the due diligence phase);
- Their commitment and investment capacity;
- Their experience with the implementation of similar instrument; and
- Ability to comply with reporting requirements.

The due diligence phase included both desk top review and an on-site visit.

5.4 Conclusions

The competitive procedure with negotiation (and to a lesser extent the competitive dialogue procedure) is likely to remain an important tool for managing authorities and NPBI who are implementing financial instruments in the 2021-2027 programming period.

It is expected that in the future financial instruments will be expanded from their current base, where the majority of activity is in support of SMEs to both scale up current activity through greater leverage of private sector resources and to broaden the reach of financial instruments into new sectors. The European Commission's focus on supporting a recovery following the COVID-19 crisis that delivers a sustainable long term transition to a green and digital economy will result in new opportunities for financial instruments. The Renovation Wave initiative is one example of an action that will require the support of financial instruments to use EU and other public resources to mobilise private sector investment in energy efficiency of buildings.

⁸ <https://www.fi-compass.eu/publication/case-studies/la-financiere-region-reunion-financial-instruments-support-smes-france>



The experience shared by practitioners shows how the competitive procedure with negotiation can be used to implement financial instruments at scale in areas where there is little activity at present. Financial instruments supporting energy efficiency through low cost loans could be one example where a competitive procedure through negotiation may be the best option to enable interested financial institutions to engage with authorities in identifying the best model for delivery of an integrated programme of long term investment. Using EU and public resources to foster the equity investment ecosystem in a country in order to support potential high growth digital enterprises is another example of 'new ground' where a more flexible procurement approach may be necessary.

Similarly the proposed CPR for the 2021-2027 period offers greater scope for the combination of grant in a single financial instrument operation. This is another tool that may play an important role in allowing financial instruments to reach new markets. However, financial institutions may be unfamiliar with grant giving procedures and this could potentially become a barrier to entry into the market. In such cases the option to use the competitive procedure with negotiation (or competitive dialogue) to find the most appropriate solution for delivery of this combination model may be helpful to the procuring authority.



6. Final comments – the toolbox approach

The experience of practitioners shared during the Knowledge Hub demonstrates how promoters of financial instruments within managing authorities have become adept at working within the public procurement framework. By taking full advantage of the different procedures and flexibilities within the rules, managing authorities have successfully established strong contractual arrangements with the most suitable organisations to implement financial instruments.

The 'toolbox approach' fostered by the Directive is intended to allow authorities to choose the appropriate procedure for each circumstance. In the context of financial instruments, in many places where the market is mature and the authorities needs and requirements are well known the open and restricted procedures will be the right choice. This Knowledge Hub has, however, enabled other 'tools in the toolbox' to be identified and considered in some detail.

The non-public procurement approach offers perhaps the simplest and quickest way to implement guarantee products where a non-selective process is appropriate. In situations where there is an urgent need to act, the Directive allows for acceleration of standard procedures and in the most urgent circumstances a competitive procedure may be undertaken without publication of a contract notice. However, care must be taken when adopting these flexibilities, ensuring decisions are made on appropriate grounds and recorded accordingly.

Finally, in other cases the complex and/or novel nature of a proposed financial instrument may mean that the competitive procedure with negotiation or competitive dialogue process is the most appropriate step to be taken.

By sharing best practice participants have enable key features of each of these options to be described with a view to providing help and support to promoters of financial instruments in the future. The examples presented in this note are intended to be used by practitioners for inspiration to enable issues to be identified and considered by practitioners and their professional advisers. The contents of this note reflect the discussions at the Knowledge Hub but are not intended to be a definitive statement of the legal or policy positions. The participation of the European Commission and EIB in the discussions should not be interpreted as an official endorsement of any of the suggestions that have been discussed and/or described during the Knowledge Hub and set out in this note.

